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Richmond Hill Councillor's lawsuit is SLAPPED

By Stephen Thiele

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An action that arises out of an expression on a matter of public interest is vulnerable to a motion for dismissal under [section 137.1](#) of the *Courts of Justice Act* (the "CJA"). Actions against elected officials appear to be particularly vulnerable to this anti-SLAPP provision. Recently, a number of claims brought against politicians have been dismissed under this provision. However, politicians are not necessarily only defendants in actions involving an expression on a matter of public interest. They can also be plaintiffs.

As shown in *Cilevitz v. Bergman*, 2022 ONSC 4478 (not yet on CanLII), the fact that a politician is a plaintiff does not make them any less vulnerable to a successful motion under [section 137.1](#).

The plaintiff in this case is a Richmond Hill City Councillor. She commenced two actions against, among others, Richmond Hill residents who had either posted negative comments about her online or spoke negatively about her at a public council meeting.

The Councillor alleged that all of the impugned comments about her were defamatory and that the comments made at the public meeting caused her to receive a 90-day suspension of pay following a finding by Richmond Hill's Integrity Commissioner that she had breached the Members' Code of Conduct. A resident, who was a cancer patient, had complained to the Integrity Commissioner that the Councillor had harassed her. The Integrity Commissioner found that the Councillor engaged in conduct that was "bullying in tone" and was "intended to intimidate" a member of the public. As well, the Integrity Commissioner found that the Councillor had threatened legal action against the resident from a position of authority as a public figure.

The defendants contended that their respective comments were protected by the defences of justification, qualified privilege and fair comment. A defendant who had not made any public comments but had written to the Councillor to say "This is just the beginning. More to

come. You don't deserve to represent ward 5..." also argued that the Councillor's action was untenable at law. The Councillor alleged that this defendant was involved in a conspiracy to defame her.

[Section 137.1](#) of the [CJA](#) permits the early dismissal of an action that involves an expression on a matter of public interest. The section contains a shifting burden of proof which first requires the moving party defendant to establish that the expression(s) at issue involve a matter of public interest. If this burden is met, the onus shifts to the responding plaintiff to show that his or her action satisfies both a "merits-based" hurdle and a "public interest" hurdle.

The "merits-based" hurdle requires the plaintiff to show that his or her claim is tenable and supported by evidence that is reasonably capable of belief, and that there are grounds to believe that the defences relied upon by the moving party defendant have no real prospect of success.

The "public interest" hurdle requires the plaintiff to show that the harm that has been suffered or is likely to be suffered as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

In this case, the Councillor conceded that the impugned expressions related to a matter of public interest. Accordingly, she bore the burden of satisfying both the merits-based and public interest hurdles. She was unable to do so.

In the first action against B, the court found that the Councillor was either unable to establish that her claims had substantial merit or that B's

defences to her claims did not have a reasonable prospect of success.

More specifically, the Councillor contended that five impugned comments about her were defamatory. The court held that with respect to three of the comments, the Councillor was unable to satisfy the court that the defence of justification was not legally tenable or supported by evidence that was reasonable capable of belief such that it could be said that the defence did not have a real prospect of success.

The defence of justification is a complete defence, which does not require a defendant to prove the truth of each and every word stated or published: see [Sidorsky v. CFCN Communications Ltd.](#), 1994 CanLII 9042 at [paragraph 185](#).

With respect to a fourth comment, the court found that even if the impugned comment included the Councillor, she was unable to establish that the defence of fair comment did not have a real prospect of success.

The defence of fair comment applies where the words complained of are:

- on a matter of public interest;
- based on fact;
- recognizable as comment (including inferences of fact); and
- the comment is one that a person could honestly believe based on the proved facts.

The fair comment defence can be defeated if the plaintiff can prove malice.

With respect to a fifth comment, the court found that the Councillor's claim lacked substantial merit because the statement was not about her,



and that, in any event, the Councillor was unable to show that the defence of fair comment did not have a reasonable prospect of success. The Councillor alleged that B's use of the phrase "corrupt scum" in the statement, "Let[']s get rid of the corrupt scum and block uninformed people like this from obtaining control of your tax dollars", referred to her. The court stated that this was B's opinion and that it was an opinion based on the evidence, which B could honestly hold.

The Councillor was unable to satisfy the public interest hurdle because she had demonstrated very little, if any, personal or financial harm as a result of B's comments. Despite B's comments, which were made prior to the 2018 municipal election, the Councillor won re-election. In contrast, the court stated that there was "...a strong public interest in protecting expression about a candidate's suitability for public office." In the second action, defendant MP had made the following statement at the public council meeting:

After speaking with the York Regional Police about several instances, they in fact told me that they believe the person who was responsible for sending me the messages was actually Karen Cilevitz herself. Yes, that is what the York Regional Police told me.

While the Councillor argued that MP's *belief* that the statement was true was not the same as saying that the statement *was* true and therefore there was no evidence of the statement's truth, the court disagreed. MP had not been cross-examined. The Councillor provided no contrary evidence regarding what the police had said to MP. Accordingly, the Councillor was unable to establish that MP's justification defence did not have a real

prospect of success.

The court also held that the Councillor was unable to establish that MP's qualified privilege defence did not have a real prospect of success. MP was an anti-bullying advocate and a Richmond Hill resident. She had an interest in expressing her views. The Members of Council had a corresponding interest in hearing her views.

With respect to other statements made by other defendants at the public meeting, the Councillor was also unable to establish that the defences raised by those defendants did not have a reasonable prospect of success.

In any event, the Councillor failed to meet the public interest hurdle. The court explained that there was a strong interest in protecting the rights of citizens to participate in democracy. Meanwhile, the Councillor was unable to show that she suffered harm because of the public statements made by the defendants. Although her pay had been suspended for 90 days, the court found, among other reasons, that it was highly doubtful that the defendants' statements caused the suspension in pay.

The court said at paragraph 57:

The Integrity Commissioner's report was damning enough, and several councillors and a number of other citizens also spoke of the need for Council to take her bullying seriously.

The resolution which suspended the Councillor's pay referenced that the Integrity Commissioner found that the Councillor had bullied and intimidated a resident with stage 4 cancer and that the complaint had received extensive media coverage such that Richmond Hill was portrayed in a negative light.

With respect to the defendant in the second action who was alleged to have conspired with the other defendants, there was no evidence of a conspiracy. Although the Councillor argued that the evidence of the conspiracy could be obtained on discovery, the court held that a conspiracy claim could not be founded on speculation. The claim was therefore not legally tenable. In any event, the conspiracy claim had to be dismissed because the claims against the other defendants were dismissed.

This case demonstrates that politicians, like anyone else, must carefully consider bringing actions that involve expressions on a matter of public interest. Indeed, where the expressions at issue are made in the public arena, a politician might be particularly vulnerable to having a claim for damages dismissed under [section 137.1](#) because a court will be inclined to protect the rights of citizens to participate in democracy. Moreover, as shown by the court's last comments in this case, the Councillor may now be vulnerable to a damages award under [section 137.1\(9\)](#). This section gives a judge the authority to award damages to a moving party if the responding party's action was brought in bad faith. It remains to be seen whether the defendants in this action will allege that the Councillor's claim was brought in bad faith.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **Stephen Thiele** in our dispute resolution group at 416.865.6651 or via email at sthiele@grllp.com.

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