

KEEPING CURRENT

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Former Chamber of Commerce employee's defamation action allowed to continue

By Stephen Thiele

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Although [section 137.1](#) of the *Courts of Justice Act* (the "CJA"), the "anti-SLAPP provision", has become a powerful tool to dismiss defamation actions at an early stage, there is certainly no guarantee that its use will always be successful even if the defendant can establish that the issues in the action involve a matter of public interest.

In *Kirkland v. Nagy, 2023 ONSC 871*, the court dismissed a [section 137.1](#) motion to dismiss the plaintiff's defamation action in circumstances where she had been terminated from her job as the Executive Director of a local Chamber of Commerce in a small community.

Beginning in May 2021, the defendants, who were local business owners and entrepreneurs, had written letters about the plaintiff's job performance and had called for her termination. The letters were sent to the Chamber and its board members and to members of other Chambers of Commerce.

Among other things, the letters accused the plaintiff of using "schoolyard

bullying tactics", and "displaying a lack of professionalism, eloquence, dignity, and unbiased behaviour necessary to execute the position of Executive Director". The letters also stated that she was "meddlesome" and "gossipy", and that the plaintiff "...pits business owners against each other creating false narratives, causing vendettas that will take time and care to repair."

Overall, the defendants accused the plaintiff of unprofessional conduct and questioned her integrity. The plaintiff then sued the defendants for defamation.

The defendants brought a motion to dismiss the action under [section 137.1](#), contending that the plaintiff's claim related to a matter of public interest and that it lacked substantial merit. They argued that the plaintiff's dismissal was unrelated to the letters. Further, the defendants relied upon the defences of qualified privilege and fair comment, which they submitted were valid defences in the circumstances. Lastly, the defendants submitted that there were significant public benefits in allowing them to express their opinions about the

plaintiff and matters regarding the operation of the local Chamber.

The plaintiff challenged the defendants' contention that there was a public interest involved in the case. She also contended that her claim had merit and that the defendants' defences were not valid because there was malice.

Malice defeats the defences of qualified privilege and fair comment.

Lastly, the plaintiff argued that she suffered both monetary and non-monetary harm because of the comments made in the letters and that this outweighed any public interest in protecting the defendants' expressions.

Although the motion judge expressed some reluctance that there was a public interest in the plaintiff's action, the defendants were able to meet the low threshold that applied to whether a claim involved a matter of public interest because the plaintiff's former role as the Executive Director of the Chamber in the local community was highly visible and she was arguably as a public figure.

The motion judge noted that the public interest threshold did not require the entire community to have an interest in a dispute.

Since the defendants were able to meet their threshold burden that the plaintiff's action involved a matter of the public interest, the burden shifted to the plaintiff to establish that her claim had substantial merit and that the defendants had no valid defences, and that allowing her action to proceed outweighed the public interest in protecting the defendants' comments.

The motion judge found that the plaintiff's claim had substantial merit because she met the three elements to prove a claim in defamation: (i) the

words referred to the plaintiff; (ii) the words were published to third parties; and (iii) the words tended to lower the plaintiff's reputation in the eyes of the reasonable person.

With respect to the third element of the test, the alleged defamatory words in the letters accused her of being a bully, a liar, a vindictive person, a gossip, a meddler, and an aggressor. There was also an allegation that she flaunted her breasts in public. All of these things tended to lower the plaintiff's reputation in the public.

The defence of qualified privilege was not valid for the purposes of the motion because some of the recipients of the letters were not the plaintiff's employer. The other Chambers who received the letter had no oversight of the local Chamber for which the plaintiff worked.

As well, the motion judge accepted that there were grounds that the letters were motivated by ill-will towards the plaintiff. A Facebook post by one of the defendants had accused the plaintiff of interfering in and sabotaging the business of a Town Councillor for her own personal gain.

Similarly, the defence of fair comment for the purposes of the motion was not a valid defence. The alleged defamatory comments attacked the plaintiff's personal character and lacked sufficient factual foundation to allow a reader to reach their own conclusions about the conduct of the plaintiff. As well, the motion judge found that the alleged comments could be interpreted as expressions of fact.

Lastly, the motion judge found that under [section 137.1\(4\)\(b\)](#) of the [CJA](#) the plaintiff met the burden of showing that there was harm caused by the letters. The harm was both monetary harm and reputational in nature.

In a defamation action, a plaintiff is not required



to prove general damages. General damages are determined “at-large”. For the purposes of a motion under [section 137.1](#), those damages do not yet need to be monetized.

Meanwhile, reputational harm is, as recognized by the Supreme Court of Canada in [1704604 Ontario Ltd. v. Pointes Protection Association, 2020 SCC 22](#) at [paragraph 69](#), “...one of the most valuable assets a person or business can possess.”

Here, the defendants attacked the plaintiff’s personal character. Accordingly, the motion judge inferred that there was a likelihood of significant reputational harm.

In contrast, the motion judge concluded that the defendants’ expressions were not worthy of protection. In reaching this conclusion, the judge considered the following factors:

- The motive of the defendants for the expression of opinions;
- The poisonous nature of the expressions of opinions;
- The history of the plaintiff’s use of litigation or threat of litigation to silence her critics;
- The financial power imbalance between the parties;
- Whether the plaintiff’s action was motivated by a punitive or retributory purpose; and
- Whether the plaintiff suffered minimal or nominal damages.

As stated above, the letters may have been motivated by a dispute with a Town Councillor. Further, (i) the defendants admitted that their

comments about the plaintiff were not kind; (ii) there was no evidence that the plaintiff had used litigation or the threat of litigation to silence critics; (iii) there was a financial power imbalance between the plaintiff, whose salary as Executive Director was \$41,000 and the defendants who were business owners and entrepreneurs; (iv) there was no evidence that the plaintiff’s action had an ulterior purpose; and (v) the damages might be significant.

This case demonstrates that [section 137.1](#) of the [CJA](#) will not provide a silver bullet to all actions. Although a defendant’s burden to establish that a claim involves a public interest is low, a plaintiff’s action will still have a good chance of surviving where the comments made by a defendant are unworthy of protection. In these circumstances, a plaintiff should be able to meet the substantial merits threshold, to demonstrate that a defendant has no valid defence, and to satisfy the court that allowing the action to proceed will outweigh the public interest in protecting a defendant’s expression. In this case, the motion judge specifically noted in the s. [137.1\(4\)\(b\)](#) analysis that the comments made by the defendants deserved little protection. Whether the plaintiff’s action against the defendants will succeed remains to be seen. However, she will, at least, be able to prosecute it.

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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