

KEEPING CURRENT

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Court blasts school board chairman for undemocratic attempt to curtail freedom of expression (*Burjoski v. Waterloo Region District School Board*)

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Anti-SLAPP motions continue to reflect the conflicts that may arise over the freedom of the public to express opinions on highly contentious issues.

In *Burjoski v. Waterloo Region District School Board*, 2023 ONSC 6528 [not yet on CanLII], a defamation action being pursued by a retired school teacher against her former school board employer and its chairman, survived an anti-SLAPP motion.

In January 2022, the plaintiff gave a presentation to the school board expressing her concern over the age-appropriateness of certain books involving transsexual and transgender themes in school libraries. The plaintiff's concern was that gender dysphoria was a serious issue and she expressed concern that the books could put pressure on children to start thinking sexually before they were ready to do so. She discussed two books, one of which involved a character who concluded he was asexual before he reached puberty. The plaintiff expressed doubt that gender affirmation surgery was appropriate for everyone who

presented with "emotional and social distress". She did not deny the right to exist of trans persons nor did she make remarks that were disrespectful of them.

The plaintiff was interrupted four minutes into her presentation to the board and was told she was in breach of the *Human Rights Code*. She was removed from the meeting.

After the presentation, the school board chairman gave interviews to the media in which he described the plaintiff's comments as "transphobic", "disrespectful" and "escalating". He stated that her comments would cause transgender persons to be attacked and that the board had a responsibility to "not allow hate" into its meetings. The school board made a public posting stating that it would not post the livestream of the meeting as there was a concern over a *Human Rights Code* violation.

The plaintiff subsequently sued the school board and the chairman for defamation and intentional infliction of emotional suffering. In response, the

school board and chairman brought an anti-SLAPP motion seeking to dismiss the action under [section 137.1](#) of the Ontario [Courts of Justice Act](#). This legislation was designed to discourage the use of litigation as a means of unduly limiting expressions on matters of public interest. Here, the defendants argued that their statements concerning the plaintiff's presentation were matters of public interest and that her action against them was a strategic lawsuit to limit their expression.

The court was able to review the plaintiff's actual words, since the presentation was recorded, and embarked on the following analysis for an anti-SLAPP motion, which we have previously discussed in [Defamation action against employee who spoke out about workplace racism dismissed \(Williams v. Vac Developments Ltd.\)](#) and [Realtor's action for invasion of privacy and conspiracy dismissed under Anti-SLAPP law \(Riopelle v. Riopelle\)](#):

- a. Do the defendant's expressions relate to a matter of public interest?
- b. If so, can the plaintiff establish that there are grounds to believe that:
 - a. The plaintiff's claims have substantial merit, and
 - b. The defendants have no valid defence in the proceeding, and
- c. The harm alleged to have been suffered by the plaintiff is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the defendants; expression?

For the first step, the court held that the chairman of a school board silencing a member of the public was a matter of public interest.

There was also no doubt that the comments of the chairman were also expressions on matters of public interest.

The court held, however, that the plaintiff's claims had substantial merit. The chairman and the school board accused the plaintiff of breaching the *Human Rights Code*, questioning the right of transgender persons to exist, and engaging in hate speech. In the court's view, the defendants' comments were defamatory since the plaintiff did not do any of those things.

The court then considered the defences raised by the defendants.

The defence of fair comment raised by defendants required them to prove that the statements at issue had a basis in true facts and concerned matters of public interest. Here, however, the plaintiff did not actually say the things she was accused of. Further, members of the public could not check for themselves to see if the comments about the plaintiff's presentation were accurate since the recording of the meeting was removed from the school board's website by the defendants.

The defendants also raised the defence of qualified privilege which applies when the person making the impugned comment has a duty to make it to the person who hears it. The chairman argued he was speaking on behalf of the school board, and had a duty to act as spokesman for the board, which could give rise to the defence.

A showing of malice can defeat a valid defence of fair comment and qualified privilege. Malice is proven by showing that a defendant made the statement knowing it was false, with reckless indifference as to its truth, to injure the plaintiff out of spite or animosity, or for some other improper purpose (see *WIC Radio Ltd. v. Simpson*, [2008 SCC 40](#)).



In the motion judge's view, it was evident that the chairman acted with malice, or at least a reckless disregard for the truth. He made "an embarrassingly erroneous and arbitrary decision to silence a legitimate expression of opinion". It was plausible that he tried to justify his actions by publicly "assassinating the plaintiff's character." In addition, the chairman did not make the impugned comments to defend a disadvantaged group – he was defending himself.

Since it appeared that the plaintiff would be to prove malice, there were no reasonable grounds to believe that the defendants would have a valid defence of fair comment or qualified privilege.

Finally, the court held that the harm that the plaintiff alleged she had suffered was serious enough to permit this action to continue, as it outweighed the public interest in protecting the defendants' expressions. The plaintiff suffered serious damage to the reputation that she had spent decades establishing. She also described the emotional distress caused by the comments which led to her experiencing physical harm.

In the result, the court held that the plaintiff's claim for defamation had substantial merit and that there were no reasonable grounds to believe the defendants had a valid defence to her action.

Of note, it was not the plaintiff but the defendants who were trying to discourage open discussion on such matters. The purpose of the anti-SLAPP legislation is to encourage broad participation in debates on matters of public interest. The motion judge described the circumstances at issue in scathing terms:

I find it regrettable that the defendant who is trying to shut down debate is an arm of the government. Regard for the historical and present plight of the transgendered [...] does not

negate section 2(b) of the Charter. What happened here should not happen in a democratic society.

Under [section 137.1\(8\) of the Courts of Justice Act](#), a successful defendant on an anti-SLAPP motion is entitled to full indemnity costs. A successful plaintiff is not ordinarily entitled to costs unless the judge determines such an award to be appropriate. Here, the motion judge held the plaintiff should receive partial indemnity costs of \$30,000 as her action was allowed to proceed.

While it is yet to be determined whether the plaintiff will ultimately succeed in her action for damages, the decision highlights the potential consequences of mischaracterizing comments on volatile issues such as themes of transgenderism. The decision offers a cogent example of the court's approach to assessing an anti-SLAPP motion that attempts to shut down an action which originated from the stifling of free expression.

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