

# KEEPING CURRENT

July 12, 2024

## Summary judgment granted to dismiss defamation claim (*Martel v. Ottawa (City)*)

By Stephen Thiele

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

### Stephen Thiele

Partner  
416.865.6651  
sthiele@grllp.com

Summary judgment is a powerful procedural tool that, among other things, permits a defendant to bring a motion to dismiss an action at an early stage of proceedings on the grounds that there is no genuine issue requiring a trial.

As seen in [Martel v. Ottawa \(City\), 2024 ONSC 3738 \(CanLII\)](#), summary judgment, in an appropriate case, will be available in a defamation action.

In this case, the plaintiff sued the City of Ottawa (the “**City**”) and one of its employees as a result of comments made about him in two reports produced by the City in connection with a construction project.

The City had entered into a contract with the plaintiff's employer, A Co, for the retrofitting of plate settler units at a water treatment plant. At the same time, the City entered into a contract with an engineering firm to act as the designer, contract administrator, and construction engineer on the construction project.

While the plaintiff was assigned by A Co to be the senior construction superintendent on the project, the City

assigned the individual defendant to be the Project Manager on the project.

Under the contract between the City and A Co, the City was obligated to prepare an interim evaluation report regarding A Co's performance. This evaluation report classified A Co's work as not satisfactory. A Co was allowed to respond to the interim report, and the final version of the report was shared with A Co through a private software program, VPM system, used by the City. The court found that through the VPM system, the final report was only available to A Co.

Subsequently, the City held a telephone meeting with A Co, in which the plaintiff participated, and issued a Notice of Non-Performance (the “**NNP**”) in which the individual defendant identified seven issues as evidence of unsatisfactory performance. The City asked that A Co remove the plaintiff from his existing role on the project and assign another person to fulfill the plaintiff's role.

A few days after receiving the NNP, A Co terminated the plaintiff's employment. Termination of the plaintiff's employment had not been requested by the City.

The plaintiff alleged the interim evaluation report personally attacked his integrity, competence and dedication to his work and that it was “crafted with lies and misrepresentations” of events related to the project and its management.

With respect to the NNP, the plaintiff labelled it a “character assassination” and that it was designed to destroy his career and to effectively blacklist him from any company doing business with the City.

The plaintiff also contended that the NNP was issued in retaliation for a complaint he had made to the Ministry of Labour Health and Safety Inspector about the project.

The defendants relied on the defences of truth/justification and qualified privilege in their statement of defence, but only relied on the defence of qualified privilege on their summary judgment motion.

The defence of qualified privilege is one of several defences to a defamation action, and attaches to an occasion upon which a communication is made.

As explained by the Supreme Court of Canada in [\*Botiuk v. Toronto Free Press Publications Ltd.\*, 1995 CanLII 60 \(SCC\)](#), an occasion is privileged where the person who makes a communication has an interest or a duty, legal or social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.

The defence of qualified privilege can be defeated by malice.

The plaintiff contended that the impugned comments about him in the report and the NNP were malicious and tied to a personal vendetta against by representatives of the engineering firm. As well, the plaintiff noted that the report failed to identify what he was supposed to do in his role and what he failed to do.

The court determined that both the report and

the NNP were protected by the defence of qualified privilege because they were published on an occasion of privilege and there was an absence of malice.

The court found that there were multiple bases for concluding that the report and NNP were published on an occasion to which privilege attached.

First, the contractual context protected the comments made by the defendants. Under the common law, qualified privilege arises in a contractual context where one party may be under an obligation to furnish information to another.

In this case, the City and A Co had agreed to participate in the VPM program, the agreement required the City and A Co to engage in frequent communications and timely share concerns. As well, the preparation of the report and its sharing on the VPM system were part of the agreement, and it was in A Co's interest to receive the communications.

Second, the communications fell within the category of business to business communications, which also was recognized as a privileged occasion. The City and A Co were in a commercial and business relationship, and this gave rise to a social duty on the part of the City to make the communications.

Third, the common law recognized the importance of privilege in the context of construction projects. In a leading text on the law of defamation, *Brown on Defamation*, citing [\*LEC Engineering Ltd. v. Sam & Angel Holdings Ltd.\*, 1999 CanLII 6428 \(BCSC\)](#), the authors state

Communications between various persons having an interest in a construction project are generally privileged...Where representatives of the contractor and owner of a building under construction meet in the presence of the consultant under



the contract, the owner is privileged to express its views on why additional payments should not be made on the work that was performed.

Lastly, complaints made to an employer about an employee are also recognized as an occasion privilege. The complaints about the plaintiff were made only to A Co and were restricted to his performance as the senior construction superintendent on the project.

On each of these occasions, A Co had an interest in receiving the report and NNP.

With respect to malice, the plaintiff was unable to meet his burden of proof that the defendants were motivated by malice. The expressions about the plaintiff contained in the report and NNP were made in the City's interests. There was no evidence that the defendants acted with any ulterior motive that conflicted with the interest or duty created by the occasion and the defendants did not exceed the scope of the occasion. The court found that the evidence did not support a finding that the engineering firm pursued a vendetta against the plaintiff.

As a result, the court concluded that it was proportional, expedient and cost-effective to grant summary judgment and dismiss the plaintiff's action. The motion judge was able to consider the evidence, the matters that were in issue and the respective position of the parties to reach a fair and just determination on the record before the court.

The key takeaway from this decision is that a defendant should carefully consider whether a defamation action can be dismissed on a summary judgment motion. Although a court might be reluctant to dismiss a defamation action on a summary judgment motion, there is no absolute rule that precludes the use of this valuable pre-trial disposition procedure in a defamation case.

## 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](mailto:sthiele@grllp.com).

*(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)*