

Plaintiffs who started debate on matters of public interest have defamation claim dismissed

Courts of Justice Act | Defamation | Litigation | Litigation & Dispute Resolution

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Vigorous and passionate debate over matters of public interest are the lifeblood of democracy because it is often through those debates that society is able to positively move forward and the best policies are adopted. But sometimes those passionate debates descend into a war of words, with either or both sides unleashing a tirade of comments that are personal in nature and that are designed to harm the reputation of an individual involved in the debate. At the same time, parties who are unable to accept criticism during the public debate seek to silence their critics in many ways, including the commencement of expensive court proceedings. However, for a party who starts the public debate, a court might have little sympathy to permit an action for damages to continue.

This was the result in *Schwartz & Red Lake Outfitters v. Collette*, 2020 ONSC 6580, where the court dismissed the bulk of the plaintiffs' defamation action in circumstances where the plaintiffs had ignited a public debate over access to the Woodland Caribou Provincial Park, parts of which are a UNESCO World Heritage Site because of its significant environmental and cultural importance.

The plaintiffs were an outfitting business and the individual owner thereof. In a radio interview, the owner contended that access to various parts of the park should be granted to motorized vehicles. A CBC News story followed. The defendant disagreed with the plaintiffs' view and following the news story began to post comments online about those views and about the individual plaintiff. The defendant posted not only on the CBC News site, but on other sites as well.

The plaintiffs did not shy away from the debate and even sent a personal message over Facebook to the defendant's wife threatening legal action for the defendant's comments and behaviour. The individual plaintiff alleged that the defendant had slandered his name in public, spread gossip and lies and that the defendant was "being an ass and shit disturber".

The individual plaintiff claimed the defendant had harassed him every time he went into town by insulting him, stopping his car in the middle of the road to scream at him, and screaming profanities at him while the owner was at his business premises.

In response, the defendant contended that all of his comments were tied to the public debate that the plaintiffs had ignited with their comments about the Provincial Park. Accordingly, the defendant brought a motion under s. 137.1 of the *Courts of Justice Act* to dismiss the plaintiffs' proceeding.

The plaintiffs opposed the motion on the basis that the defendant's statements were malicious, untrue and designed to portray them in a negative manner and to further a personal vendetta that the defendant held against them.

In dismissing the bulk of the plaintiffs' claim, with further submissions requested on a couple of points, the court was required to engage in a step-by-step analysis of the test under s. 137.1 of the *Courts of Justice Act* to determine whether a matter of public interest was involved, whether the plaintiffs' claim had substantial merit, whether the defendant had no valid defence, and ultimately, whether the public interest in permitting the plaintiffs' action to continue outweighed the public interest in protecting the defendant's freedom of expression. The fact that the plaintiffs had started the public debate and inserted themselves into it at various points was a factor that weighed against them.

With respect to the defendant's burden to demonstrate that the plaintiffs' claim involved expressions on a matter of public interest, there was no dispute that there were multiple expressions in issue and that those expressions, in general, related to matters of public interest. While the plaintiffs contended that the

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expressions should each be considered separately in order to assess the public interest threshold, the court noted that it was appropriate to consider the expressions, which involved online postings, globally and that there should be no qualitative assessment of them.

The court found that the expressions related to the plaintiffs' advocacy to get the park's rules changed for the use of motor vehicles, and that this position had resulted in media coverage and had fostered public debate. As a result, the defendant met the burden of establishing that his expressions involved a matter of public interest.

This finding shifted the burden to the plaintiffs to demonstrate that their claim had substantial merit, that the defendant had no valid defences, and that the public interest in permitting the action to proceed outweighed the public interest in protecting the defendant's freedom of speech.

For some comments, the court found that they were not defamatory in nature and therefore the substantial merit hurdle was not met in relation thereto. However, other comments were defamatory in nature and thus survived the substantial merits threshold.

With respect to the validity of defences, the defendant relied on the defence of fair comment for those comments that survived the substantial merit test. While the court found that the fair comment defence applied to one of those comments, it did not apply to another statement asserting that the individual plaintiff was banned from the park. This finding required the court to engage in the third stage of analysis, which involved the weighing exercise and a consideration of the plaintiffs' action in starting the public debate.

Based on the Supreme Court of Canada's decision in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 (para. 68), under the weighing exercise a plaintiff is required to demonstrate some harm or damage and to show that the moving party's expression was the cause of the harm claimed. While the harm could be monetary or non-monetary and there was no threshold level that needed to be met, this did not mean that a plaintiff's pleading or bald assertions of harm should be taken at face value. There had to be some evidence of harm.

The magnitude of harm was also important in assessing whether the harm was sufficiently serious that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the expression.

Although one of the defendant's expressions survived the substantial merit and no valid defence hurdles, and therefore harm could be presumed (including reputational damage), the court found that there was no actual evidence of harm and no causal link between the impugned expression and the plaintiffs' alleged actual harm. Accordingly, the plaintiffs' position was weak.

On the other side of the equation, the court explained that the quality of the expression needed to be assessed and in doing so the Supreme Court of Canada had directed judges to look to "the core values underlying freedom of expression, such as the search for truth, participation in political decision making, and diversity in the forms of self-fulfillment and human flourishing" (paras. 75-77, *Pointes*). The public interest in protecting freedom of expression was highest where these core values were at issue.

The court noted that in this weighing exercise the following factors should be considered: (1) any history of the plaintiff using litigation or the threat of litigation to silence critics; (2) any financial power imbalance that favours the plaintiff; (3) any punitive or retributory purpose animating the plaintiff's bringing of the claim; and (4) whether the damages suffered by the plaintiff were minimal or nominal.

This list, derived from *Bent v. Platnick*, 2020 SCC 23, however, is not exhaustive, and as noted at paragraph 80 of *Pointes* also includes the following other non-exhaustive factors:

- a. the importance of the expression;
- b. the history of the litigation between the parties;
- c. the broader or collateral effects on other expressions on matters of public interest;
- d. the potential chilling effect on future expressions;
- e. the defendant's history of advocacy or activism in the public interest;
- f. the proportionality between the resources used to bring the suit and the harm caused or damages award expected; and
- g. the possibility that the express or claim might provoke hostility against an identifiably vulnerable or protected group.

Based on all of these factors, the court concluded that the proceeding was being used strategically to silence a vocal adversary. The defendant had become a thorn in the side of the plaintiffs, and the plaintiffs wanted to stifle his further participation in the public debates about the park.

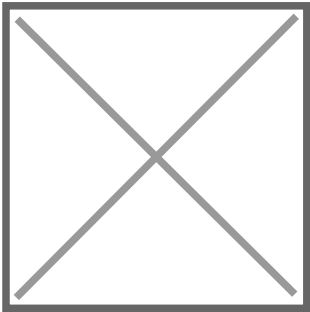
Despite having made the foregoing finding, the court expressly noted at paragraph 122 that the defendant had not injected the plaintiffs into the debate on a public issue, but that it was the plaintiffs who had placed themselves at the heart of the debate and that they continued to do so with a video and other postings that discussed their views and their difficult relationship with park officials. Accordingly, while only one of many factors considered by the court in the balancing exercise, this fact was likely significant in tilting the balance in favour of the defendant under the weighing exercise.

This case is significant because it provides a good analysis of how the test under s. 137.1 works, particularly the public interest test under s. 137.1(4)(b) of the *Courts of Justice Act*. Moreover though, it is especially useful as a precedent in cases where a plaintiff takes the first step in commencing the debate on a matter that is or becomes a public issue. Most cases in this area of law usually involve the defendant making gratuitous comments about a plaintiff without the plaintiff having said a word, and thus this case stands out because of this distinguishing feature. It potentially teaches the lesson in the law of defamation that persons who start a public war of words or who are willing to step into the public arena to take political stands on issues, should think twice before commencing a defamation action to silence an adversary. Plaintiffs who start a war should not expect a court to have sympathy if an adversary responds unkindly. A PDF version is available to download [here](#).

If you require any litigation assistance, our **Dispute Resolution Group** lawyers are available to assist you. Please contact **Stephen Thiele** at 416.865.6651.

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