

Presumptive costs award under anti-SLAPP law granted against Maxime Bernier

Anti-SLAPP Legislation | Courts of Justice Act | Litigation | Litigation & Dispute Resolution

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Defamation actions that involve matters of public interest can be risky because under section 137.1 of the *Courts of Justice Act* (“CJA”) a defendant can move to get the action dismissed at an early stage and, if successful, get full indemnity costs. Full indemnification of legal costs is not the standard costs award in civil proceedings. Usually, the scale of costs awarded to a successful party is partial indemnity costs, which represents about 60% of the legal fees incurred by the successful party.

In *Bernier v. Kinsella*, 2022 ONSC 1601, the defendant, a well-known political commentator, successfully obtained the dismissal of a defamation action brought against him by the plaintiff leader of the People’s Party of Canada. Accordingly, under section 137.1(7) of the CJA he sought full indemnity costs.

Section 137.1(7) of the CJA provides as follows:

If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

This is significant statutory presumption, particularly when juxtaposed to section 137.1(8) of the CJA which states that if a section 137.1 motion is unsuccessful, the responding party is presumptively not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

As explained by the motion judge, the rationale behind the presumptive costs award under section 137.1(7) of the CJA is to deter the use of defamation actions to limit freedom of speech on issues of public importance.

The motion judge found that the plaintiff’s action was brought to punish the defendant and for an extraneous purpose. In an affidavit sworn on the motion, the plaintiff made significant allegations against a rival political party – the Conservative Party of Canada (the “CPC”) – and characterized the defendant’s alleged defamatory communications as part of a “dirty tricks” campaign promoted by the CPC.

Although the defendant had used “intemperate school yard language” in his alleged defamatory statements against the plaintiff and subsequently gloated online about his successful anti-SLAPP motion, the motion judge found that this was not enough to deviate from the presumptive costs award under section 137.1(7). The motion judge noted that based on the Supreme Court of Canada decision in *Simpson v. Mair*, 2008 SCC 40 (also, *WIC Radio v. Simpson*), an expression of opinion, however exaggerated, is protected by the law. In a free country people have “as much right to express outrageous and ridiculous opinions as moderate ones.”

With respect to opinions expressed on social mediums, such as Twitter, it has recently been stated in *Mondal v. Evans-Bitten*, 2022 ONSC 809 that the opinions published on these kinds of mediums are intended to greatly amplify everything said. These mediums are “rhetorical environment[s] in which offhand comments are often stated in a serious tone which may be disorienting and even fear-inducing to those unaccustomed to the school-like atmosphere.”

The plaintiff argued that the court should deviate from a presumptive costs award because his case was novel and that the Supreme Court of Canada had altered the law on the issue of damages in a defamation action. In his view, *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 stood for the proposition that damages are presumed in a defamation action.

The motion judge disagreed. Although [section 137.1\(4\)\(b\)](#) did not require that damages need to be proven, the plaintiff still had to show that he suffered “harm” and that the harm suffered as a result of the alleged defamatory expression was sufficiently serious that it outweighed the public interest in protecting that expression.

The court concluded that given the plaintiff’s collateral purpose, a full indemnification award was justified.

The court found that the hourly rate (\$475 an hour) for the defendant’s lawyer was fair. However, some time was reduced for the time spent preparing an affidavit used to support the motion.

The plaintiff was held responsible for costs in the amount of \$132,585.36, inclusive of disbursements and HST.

This case again serves as a warning to plaintiffs about the potential cost consequences that can be imposed under [section 137.1\(7\) of the CJA](#). But more importantly, this case demonstrates that cases involving school-yard accusations in the political arena have, with very few exceptions, no place in the court system. The two combatants in this case, in particular, were high-profile veterans of the political arena who each had access to the media and social media platforms to raise their respective allegations and to defend themselves in a political war of words.

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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