Decision in anti-SLAPP case shows care needs to be taken in how people express themselves: lawyer

By Ian Burns

Ontario's top court has ruled against a prominent Italian-language newspaper which published articles viewed by some as attacking the LGBTQ2S+ community, rejecting arguments that a lower court judge had been wrong in failing to look at whether actions taken against the newspaper in response to the articles amounted to media censorship.

The *Corriere Canadese* newspaper and its publisher Joe Volpe had been critical of several trustees of the Toronto Catholic District School Board (TCDSB) who he believed undermined Roman Catholic teaching on sexuality and gender. These policies included measures intended to deal with instances of bullying of students who identified as LGBTQ2S+, such as the proclamation of Pride Month, the raising of the Pride Flag outside TCDSB schools and the board office during Pride Month and the revision of the TCDSB Code of Conduct to include "gender identity, gender expression, family status and marital status" as protected characteristics.

In criticizing the policies of the board, former Liberal MP and cabinet minister Volpe engaged in what the court described as "personal attacks" on the trustees who championed them and used "highly pejorative language" to object to the TCDSB providing a link on its website to a resource website which itself linked to sexually explicit material. As a result, two Toronto city councillors pushed a motion which called for the City to stop advertising in *Corriere Canadese* , which led to Volpe and the newspaper to sue for defamation and other causes of action.

The respondents in the case, which included the two councillors as well as several TCDSB trustees, moved successfully to have the action dismissed under s. 137.1 of the *Courts of Justice Act*, which is aimed at preventing strategic lawsuits against public participation, or SLAPPs — lawsuits where powerful players use litigation to try and get critics to stop speaking out against them (*Volpe v. Wong-Tam*, 2022 ONSC 3106).

And that decision has now been upheld by the Ontario Court of Appeal. Justice Bradley Miller wrote that he disagreed with arguments made by Volpe and the newspaper that the lower court judge incorrectly characterized the expression as arising from a matter of public interest because he failed to address their argument the substance of the actions against them was to censor or suppress the expression of the media — and censorship of the media is not in the public interest.

"This argument is misconceived. The text of s. 137.1(3) references expression that relates to a matter of public interest, not what is in the public interest," he wrote. "Although the concept of public interest is normative — requiring the application of evaluative criteria — the question to be addressed at this stage is primarily descriptive: the section directs a judge to identify the subject matter of the expression and determine whether it relates to a matter of public interest.

The motion judge is not to evaluate whether the expression in question makes a positive contribution to the community."

Justice Miller also wrote he did not agree with the argument that the motion judge misunderstood the articles.

"There was undoubtedly disagreement between the appellants and the respondent trustees about what Catholic doctrine requires or permits in an educational setting. But as the motion judge found, that debate is merely the context in which the appellants published the specific statements that the respondents claim justify their remarks," he wrote. "When the appellants made statements connecting persons who identify as LGBTQ2S+ with pedophilia and moral depravity, they could not then complain when other parties called them homophobic, and chose not to do business with them on that basis. Appealing to the bona fide nature of the larger debate does not immunize specific statements from scrutiny."

Justice Miller also sided against constitutional arguments made by Volpe and the newspaper that the notice of motion introduced at Toronto City Council breached their rights to freedom of expression under s. 2(b) of the Charter, and their speech could not be accurately characterized as discriminatory because it was an articulation of Roman Catholic doctrine — which is protected by s. 93 of the *Constitution Act, 1867*.

"The appellants have thus failed to satisfy their burden of establishing that any Charter right is in issue in this litigation. The City of Toronto is not a defendant [and] there is no government entity against whom the appellants seek relief," he wrote. "Section 93 entrenches the rights of Roman Catholic separate school supporters to Roman Catholic separate schools that hold and teach Roman Catholic doctrine, and to have their children receive a Roman Catholic education based on that doctrine. The rights protected by s. 93 are not engaged by the matters in dispute between the parties."

Justice Miller then dismissed the appeal, in a decision issued Oct. 18. He was joined by Associate Chief Justice J. Michal Fairburn and Justice James C. MacPherson in his ruling (*Volpe v. Wong-Tam*, 2023 ONCA 680).

Lawyer Paul Slansky, who represented Volpe and *Corriere Canadese*, called the ruling "fundamentally flawed" and said he had received instructions to seek leave to appeal to the Supreme Court.

"The anti-SLAPP legislation is supposed to protect expression and prevent abuse, using lawsuits to suppress expression that is in furtherance of the public debate," he said. "And here, it's being turned on its head to suppress a legitimate lawsuit being conducted by the press in furtherance of their obligations. As they're being attacked for the content of their expression as an institutional strategy by politicians."

Slansky said the speech in question isn't about criticizing the LGBTQ2S+ community, but rather the fact that Volpe and the newspaper didn't support having links on the board's website to oversexualized material.

Kevin McGivney, Borden Ladner Gervais LLP

“Also, there is no doubt that this is governmental — this is a motion by the Toronto City councillors before City Council trying to change City Council policy. And so, the Charter definitely applies to this,” he said. “And for the government to say we’re going to preclude advertising in press entities if we don’t like the content of what they say in their articles, that is a form of censorship and punishment of the press.”

Kevin McGivney of Borden Ladner Gervais LLP, who represented the two councillors that brought the motion at Toronto City Council, said the decision points out that there can be legitimate debate, but care needs to be taken in terms of how people express themselves.

“If they cross over into using language that’s legitimately commented upon as being discriminatory, then they may not be entitled to bring a lawsuit,” he said. “If the foundation for a lawsuit is an expression that relates to a matter of public interest, then I think you might want to really think twice as to whether you want to bring a claim [under s. 137.1 of the Act]. The whole point of the section is to allow for legitimate public debate discourse without fear of lawsuits, and I think this is a decision that simply points that out.”

Howard Winkler of Winkler Law, said the motion decision, as modified by the Court of Appeal, gets the current state of the law with respect to the anti-SLAPP legislation right.

“It reflects a classic situation where freedom of expression on a matter of public interest takes precedent over the right of one to protect their reputation, even when there is evidence of actual harm suffered by the plaintiff,” he said. “This decision is perfectly aligned with the stated objectives of the anti-SLAPP legislation.”

It is noteworthy that the court dismissed the action even where the Court of Appeal found — contrary to the motion judge — that actual harm had been suffered by the plaintiff, said Winkler.

“The lesson to plaintiffs is that it will not be enough in the weighing of interests to show evidence of some harm,” he said. “A plaintiff will have to show sufficiently serious harm to overcome the public interest expression.”

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