

# ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



## CANADIAN UNION OF POSTAL WORKERS v B'NAI BRITH CANADA, 2021 ONCA 529

Court of Appeal for Ontario, Tulloch, Nordheimer and Jamal JJA, 23 July 2021

An appeal from a decision to deny the application for an anti-SLAPP motion in relation to a defamation claim by a union against a charity.

**Key words: Defamation, Canada, Ontario, Anti-SLAPP Motion, Balancing Freedom of Speech**

1. Justice Jamal gave the judgment for the Court of Appeal.
2. The Canadian Union of Postal Workers (CUPW) is a public sector union that has supported the Boycott, Divestment and Sanctions (BDS) movement, based on its view that Palestinians are mistreated in the occupied territories. It also cooperates with postal worker unions in other countries, including the Palestinian Postal Service Workers Union (PPSWU).
3. B'nai Brith is a charitable organisation that has served as a primary grassroots voice for the Canadian Jewish community since 1875. It regularly participates in public debate on topics that impact the Canadian Jewish community and the broader public. The CEO of B'nai Brith and two employees of B'nai Brith were authors of press releases about CUPW that CUPW alleged were defamatory.
4. A union member of CUPW complained to B'nai Brith about CUPW's support for the BDS movement, which B'nai Brith views as a propaganda campaign to delegitimise the state of Israel. B'nai Brith discovered that CUPW had worked on a joint project with PPSWU and found a Facebook page maintained by a person in a leadership role with PPSWU containing postings in Arabic praising individuals involved in terrorist activity against Israel. B'nai Brith also found postings on the PPSWU page appearing to be pro-Palestinian, which B'nai Brith interpreted as implicitly calling for the destruction of the state of Israel.

5. B'nai Brith published two press releases (at [ 7]):

“Canadian Postal Workers Align with Pro-Terrorism Palestinian Union”, stated that PPSWU glorified terrorism on its Facebook page and alleged that “CUPW leadership has aligned itself with the path of violence and extremism”. The second press release, published on August 2, 2018, stated that “CUPW’s radical leadership has refused to respond to our questions on why it would partner with a terror-supporting organisation” and alleged that CUPW’s union dues “may be used to support a foreign organisation that wants to see [CUPW’s Jewish and Israeli members] murdered”.

6. CUPW sued for defamation.
7. B'nai Brith applied to the Court for an anti-SLAPP motion<sup>1</sup>.
8. Subsections 137.1(3) and (4) of the Courts of Justice Act provide the following test for an anti-SLAPP motion:
  - (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
  - (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
    - (a) there are grounds to believe that,
      - (i) the proceeding has substantial merit, and
      - (ii) the moving party has no valid defence in the proceeding; and
    - (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.
9. The primary Court dismissed the anti-SLAPP motion. The litigation was not of questionable merit or utility brought to stifle public debate on matters of public interest, but a legitimate defamation action brought in circumstances where the CUPW should have the right to pursue a remedy.
10. B'nai Brith appealed the decision on the basis that the Court erred in concluding that there were "grounds to believe" that the appellants had "no valid defence in the proceeding" under s. 137.1(4)(a)(ii), and by failing to undertake the balancing required under s. 137.1(4)(b).
11. *No valid defence*

The Court of Appeal found that the primary Court had a basis in the record to find grounds to believe that B'nai Brith's defences would fail. The primary Court was entitled to find that there was evidence that B'nai Brith acted on assumptions without exercising due diligence, and that this could be fatal to their defences of responsible communication and fair comment. The primary Court was also entitled to find that there was evidence of malice that would undermine the B'nai Brith's defences.
12. *Balancing*

The balancing under s. 137.1(4)(b) "asks the court to consider if the harm potentially suffered by the plaintiff is trivial or not and if it is serious to consider whether it is in the public interest to deny the plaintiff a remedy in the name of freedom of speech."
13. The Court of Appeal found that the primary Court decided that the harm potentially suffered by CUPW because of the appellants' alleged defamation was serious. Words suggesting that a union is using its membership dues improperly, supports terrorism and is motivated by racism would easily meet the test of language tending to diminish the reputation of the union in the minds of reasonable people.

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<sup>1</sup> A strategic lawsuit against public participation (SLAPP) is intended to intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition.

14. Further the Court of Appeal also noted that the primary Court considered whether, in the name of freedom of speech, it was in the public interest to deny CUPW the ability to pursue a remedy. It decided that a legitimate defamation action could be brought in circumstances where the union should have the right to pursue a remedy.
15. B'nai Brith argued that the litigation had a "chilling effect" because they had not published on the subject since being served with the statement of claim. The Court rejected this as B'nai Brith did not remove the impugned press releases from its website after it was sued, and there was evidence that an employee wrote an article about CUPW after B'nai Brith was served with the Notice of Libel.
16. The Court of Appeal dismissed the appeal by B'nai Brith.

## IMPLICATIONS



A strategic lawsuit against public participation (SLAPP) is intended to intimidate, and silence critics by burdening them with the cost of a legal defence until they abandon their criticism or opposition.

In the typical SLAPP, the plaintiff does not normally expect to win the lawsuit. The plaintiff's goals are accomplished if the defendant succumbs to fear, intimidation, mounting legal costs, or simple exhaustion and abandons the criticism. In some cases, repeated frivolous litigation against a defendant may raise the cost of directors' and officers' liability insurance for that party, interfering with an organisation's ability to operate. A SLAPP may also intimidate others from participating in the debate. SLAPPs bring about freedom of speech concerns due to their chilling effect.

To protect freedom of speech some jurisdictions have passed anti-SLAPP laws (often called SLAPP-back laws). These laws function by allowing a defendant to file a motion to strike and/or dismiss on the grounds that the case involves protected speech on a matter of public concern. The plaintiff then bears the burden of showing a probability that they will prevail. If the plaintiffs fail to meet their burden, their claim is dismissed and the plaintiffs may be required to pay a penalty for bringing the case.

SLAPP suits do occur in Australia. In 2005 Gunns, a woodchip company, (*Gunns Limited v Marr & Ors* (2005) VSC 251) began proceedings against 20 individuals and organisations, including then Senator Bob Brown, for over \$7.8 million.

In the Australian Capital Territory, the [Protection of Public Participation Act 2008](#) protects conduct intended to influence public opinion, or promote or further action in relation to an issue of public interest. A party starting or maintaining a proceeding against a defendant for an improper purpose may be ordered to pay a financial penalty to the Territory.

## VIEW THE CASE



This case may be viewed at <https://www.canlii.org/en/on/onca/doc/2021/2021onca529/2021onca529.html>

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