CITATION: Rainbow Alliance Dryden et al. v. Webster, 2023 ONSC 7050
COURT FILE NO.: CV-22-96-00
DATE: 2023-12-14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
Rainbow Alliance Dryden and Caitlin Hartlen	*D. Judson and P. Howie*, for the Plaintiffs
Plaintiffs	
- and -	
Brian Webster	*Self rep*, for the Defendant
Defendant	
Egale Canada	*D. Girlando*, *N. Kolos* and *L. Malatesta,* for Egale Canada
Intervener	
	HEARD: June 12, 2023 and September 12, 2023, at Thunder Bay, Ontario

Madam Justice T. J. Nieckarz

Decision On Motion

Overview:

[1] The Defendant, Mr. Webster ("Webster") brings this motion under s. 137.1 of the *Courts of Justice Act,* R.S.O. 1990, c. C.43 (the "*CJA*"). He seeks to have the Plaintiffs' defamation action against him dismissed as "strategic litigation against public participation" ("SLAPP").

[2] The action was commenced because of comments made by Webster on September 17, 2022, on a Facebook page called "Real Thunder Bay Courthouse – Inside Edition" (the "Courthouse Page"). The Plaintiff, Caitlin Hartlen ("Hartlen") is a drag performer and the other Plaintiff, Rainbow Alliance Dryden ("RAD"), organized an event that Hartlen participated in. Both Plaintiffs were part of the subject matter that Webster commented on.

[3] The Plaintiffs allege that Webster publicly and falsely accused them of predatory behaviour. They argue that Webster's invective is not public interest speech, but rather a hateful and defamatory attack that was designed to provoke hostility against an identifiably vulnerable group that is protected under s.15 of the *Canadian Charter of Rights and Freedoms*. They submit that his expression warrants the Court's condemnation, not its protection. They seek to have the motion dismissed with costs.

[4] The intervener, Egale Canada ("Egale") supports the position of the Plaintiffs, providing the social and historical context to support the Plaintiffs' position that Webster's speech should not be shielded by s. 137.1 of the *CJA*. Egale argues that s. 137.1 was not intended to shield those that perpetuate harmful anti-2SLGBTQI tropes and make unfounded accusations against 2SLGBTQI individuals based on myths and stereotypes that members of this community are sexual offenders and child abusers.

[5] For the reasons set out below, the motion is denied. The action shall proceed.

Factual Background:

[6] This action was commenced by Hartlen and RAD on December 7, 2022. The Plaintiffs each claim general damages in the amount of $75,000, aggravated and punitive damages of $20,000, and special damages in an undetermined amount. The cause of action is defamation.

[7] RAD is a not-for-profit corporation based in the City of Dryden that provides pride and 2SLGBTQI inclusion programming, events, and community organizations focused on diversity, equity, and inclusion as it pertains to sexual orientation, gender identity, and gender expression.

[8] Hartlen is an individual living in the City of Dryden who performs as a drag king under the names "Jack Doff" (adult audiences) or "Jack D." (all ages audiences). Hartlen describes a drag king as a performance artist that dresses in masculine drag and personifies male gender stereotypes. Hartlen is employed as a communications assistant for a child protection agency, is active in the 2SLGBTQI community, hosts and produces a podcast on 2SLGBTQI issues, and is the Chair of the Board of RAD.

[9] Webster is an individual who administers the Facebook Courthouse Page. This page describes itself as a "Media/news company" and is publicly available on the internet even by persons who do not have Facebook. It is not affiliated with, or controlled by, any news or media organization. It appears to be a platform for Webster's reporting of, and opinions on, various issues.

[10] RAD, along with various community partners, organized a series of drag events that were to take place on September 17th and 18th, 2022. Hartlen was to be a performer at one of the adult-only drag show.

[11] On September 14th, 2022, Hartlen was interviewed on CBC Radio's *Superior Morning* about the drag events planned for the upcoming weekend. The interview was broadcast to listeners across the region. After the broadcast, a person called the Ontario Provincial Police alleging that RAD's event at the library was an effort to "groom children". The police took steps to investigate the complaint. RAD organizers and supporters of the event in the community were angry and distressed by the police investigation of the complaint.

[12] On September 16th, 2022, the CBC published a news article on its website written by journalist Jon Thompson entitled, "Dryden, Ont., was all set to host a weekend drag event. Then police responded to an unfounded prank call".

[13] The CBC article described the events surrounding the complaint made to the police about the planned drag events. These events consisted of an adult drag show, an all-ages drag brunch, and an all-ages drag story-time at the local public library. In addition to being a performer, Hartlen was involved in the planning of the events. She was named in a photograph that was included with the article. The photograph featured a number of drag performers, with no one else identified by name, including one performer who was holding a child.

[14] On September 17, 2022, the Courthouse Page published a post containing images of the September 16, 2022, CBC article. The post included the photograph that appeared in the CBC article, along with Hartlen's name.

[15] The allegations of defamation arise from the following text that accompanied the Courthouse Page's images of the September 16th, 2022, CBC article:

> TAXPAYER FUNDED CBC REPORTER JON THOMPSON HAS AN AGENDA TO PROMOTE

ASK YOURSELF WHY THESE PEOPLE NEED TO PERFORM FOR CHILDREN?

GROOMERS. That's the agenda. Just look at the face of the one child in the photo. Tells you all you need to know.

Your tax dollars pay Jon Thompson to promote this stuff.

#DefundCBC

(Note: this was a subsequently amended, and final version of the alleged defamatory publication).

[16] Hartlen alleges that the Courthouse Page post states, or strongly implies, that she is a "groomer" because she is one of "these people" in the picture who was going to be performing. She says this is particularly harmful given her employment with a child protection agency. RAD alleges that the inference is that it is organizing events for sexual predators.

[17] As of October 5, 2022, the Courthouse Page had more than 4,400 "likes" and 6,500 "followers". Its content is publicly viewable to Facebook users, and is accessible on the internet to anyone without a Facebook account.

[18] The post by Webster generated a number of comments from Facebook users of the following nature:

a. "It's a mental illness that's been allowed and enabled for far too long…WHY do these deranged people insist on 'reading for children'….Fuck off with your bs you fucking pedophiles."

b. "Can we buy tags to hunt these animals??" and the same user also remarked that public drag events are a good opportunity for drag artists to be "exposed" so that society could "take care of them", calling for people to "get your wrist rocket out & start shooting them some hard food".

c. "It is all about G[r]ooming our Children".

d. "Guardians of the Paedophile!"

e. Another commented with an image of a document entitled "LGBTQ+ THE DARK AGENDA" that equates LGBTQ2 people with pedophilia and bestiality.

There were other such comments, which Webster is alleged by the Plaintiffs to have positively reinforced by reacting with "likes" or laughing-face emojis.

[19] The Plaintiffs also allege that in the days following the publication of the Courthouse Page post, a number of posters appeared around the Dryden area suggesting that RAD's drag events were not appropriate for children. Some of these posters contained statements referring to pedophilia. Additionally, the Plaintiffs fear the yet unknown harm to reputation, or risk for reprisals or discrimination.

[20] The Plaintiffs have tendered affidavit evidence from Dr. Corinne Mason and Dr. Cameron Crookston to assist the Court in understanding the contemporary usage and historical background of the "groomer" slur, and to establish that it is used to suggest that 2SLGBTQI individuals are associated with sexually predatory behaviour. The Plaintiffs urge me to consider this evidence as expert evidence, as these matters are beyond the Court's knowledge and expertise. I agree. Both proposed experts are highly qualified and this evidence addresses matters that are beyond the Court's knowledge and expertise. Their evidence has been received as expert evidence to assist with the historical and social context for the "groomer" slur and stereotypes faced by members of the 2SLGBTQI community.

[21] Webster defends the action on the basis of s. 137.1, and also fair comment. Mr. Webster states that this action is a gag proceeding meant to stifle his expression on matters of public interest.

The Intervener:

[22] Egale Canada sought intervener status, and I granted it on May 11, 2023, for reasons that may be found at *Rainbow Alliance Dryden et al. v. Webster*, 2023 ONSC 2855. Egale has provided

argument with respect to the historic and current marginalization of the 2SGLBTQI community, and the impact of allegations of "grooming" against community members. Egale has relied largely on the evidence of the Plaintiffs, including the expert evidence. Egale argues that this perspective is particularly relevant when considering whether there are grounds to believe that a defence of fair comment has "no real prospect of success" under s. 137.1 of the *CJA,* and when conducting the weighing exercise between harm suffered by a plaintiff and the public's interest in protecting a defendant's expression that is required as part of the s. 137.1 analysis.

[23] Egale states that stigma and prejudice against 2SLGBTQI people are often perpetuated in the form of anti-2SLGBTQI speech that spreads or reinforces misinformation, myths and stereotypes. An age-old trope portrays 2SLGBTQI individuals as dangerous sexual offenders, pedophiles and child molesters who ought to be feared and hated.

[24] In *Hansman v. Neufeld,* 2023 SCC 14 [*Hansman*], at paras. 84-86 and 89, the Supreme Court of Canada recently recognized that transgender and other gender non-conforming individuals have a regrettably long history of disadvantage and marginalization in our society. They face harmful stereotypes, and "courts and tribunals have also recognized that 'despite some gains, transgender people remain among the most marginalized in our society' and continue to live their lives facing "disadvantage, prejudice, stereotyping, and vulnerability."

[25] Egale further states that drag is a central aspect of 2SLGBTQI identity and cultural expression. Historically, it has been instrumental in increasing the visibility of 2SLGBTQI people, particularly gender diverse or gender non-conforming people. Drag Story Time is viewed as a way to offer children representations that normalize gender and sexually diverse families, and is

important in countering unfounded, but enduring, stereotypes that portray 2SLGBTQI individiuals and their culture as dangerous and harmful to children.

Analysis:

Legal Framework:

[26] Section 137.1 of the *CJA* sets out the framework for what has become known as 'anti-SLAPP' motions.

[27] Section 137.1(3) requires a judge to dismiss a proceeding against a 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.

[28] An "expression" is defined in section 137.1(2) as "any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity."

[29] Section 137.1(4) provides that a proceeding should not be dismissed under subsection (3) if the responding party satisfies the judge as to the following merits-based and public interest aspects of the analysis:

> (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.

[30] The purposes of the anti-SLAPP provisions are:

> **137.1(1)** The purposes of this section and sections 137.2 to 137.5 are,
>
> (a) to encourage individuals to express themselves on matters of public interest;
>
> (b) to promote broad participation in debates on matters of public interest;
>
> (c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and
>
> (d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[31] The rationale for the anti-SLAPP legislation was described by Doherty J.A., in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 *("Pointes Protection ONCA"),* at para. 2, as to prevent litigation from being used as a weapon to silence, intimidate and punish those who have spoken out on matters of public interest.

[32] Anti-SLAPP provisions allow the Court to "screen out lawsuits that unduly limit expression on matters of public interest": *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22 (*"Pointes Protection SCC"),* at para. 62. It is intended to protect the public interest in freedom of expression by preventing the silencing of persons who are speaking on matters that have significance beyond themselves: *Mondal v. Kirkconnell,* 2023 ONCA 523 [*Mondal*], at para. 29, and *Grist v. TruGrp Inc.,* 2021 ONCA 309, at para. 17.

[33] As the Supreme Court of Canada stated at paras. 1 and 2 of *Pointes Protection SCC:*

> Freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society. This case is about what happens when individuals and organizations use litigation as a tool to quell

> such expression, which, in turn, quells participation and engagement in matters of public interest.
>
> Strategic lawsuits against public participation ("SLAPPs") are a phenomenon used to describe exactly what the acronym refers to: lawsuits initiated against individuals or organizations that speak out or take a position on an issue of public interest. SLAPPs are generally initiated by plaintiffs who engage the court process and use litigation not as a direct tool to vindicate a *bona fide* claim, but as an indirect tool to limit the expression of others. In a SLAPP, the claim is merely a façade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs.

[34] Anti-SLAPP provisions are, however, "not a 'carte blanche' to defame". Freedom of expression does not confer a licence to ruin reputations or make unjustified assaults on a person's reputation. A court hearing an anti-SLAPP motion must ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it: *Pointes Protection SCC,* at para. 46; *Park Lawn Corporation v. Kahu Capital Partners Ltd.,* 2023 ONCA 129 [*"Park Lawn"*], at para. 33; *Mondal,* at para. 31.

[35] The Court is tasked with considering the delicate equilibrium between two fundamental values: freedom of expression and the protection of reputation: *Pointes Protection SCC,* at paras. 16 and 46, and *Bent v. Platnick,* 2020 SCC 23 [*Bent*], at para. 2.

[36] A s. 137.1 motion is not intended to adjudicate the proceeding. It is not a "trial in a box", nor it is an occasion for a "deep dive" into the evidence: *Mondal,* at para. 30; *Park Lawn*, para. 38. As noted by the Supreme Court in *Pointes Protection SCC* at para. 18, the anti-SLAPP provision:

> [P]laces an initial burden on the moving party – the defendant in a lawsuit – to satisfy the judge that the proceeding arises from an expression relating to a matter of public interest. Once that showing is made, the burden shifts to the responding party – the plaintiff – to

> satisfy the motion judge that there are grounds to believe the proceeding has substantial merit and the moving party has no valid defence, and that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.

Discussion:

<u>Does the expression relate to a matter of public interest?</u>

[37] The first part of the analysis requires me to determine whether the proceeding arises from an expression made by Webster that relates to a matter of public interest. If it does, then the proceeding is to be dismissed unless it can be saved by the merit-based analysis and weighing exercise required by s. 137.1(4).

[38] There is no dispute that the expression was made by Webster. The parties disagree as to whether it relates to a matter of public interest.

[39] Webster urges me to find that the expression does. He argues that he was expressing his opinion about the CBC article, the issues raised by it, and their approach to the news story. He was doing nothing more than expressing an opinion about the author of the article, and content of a taxpayer funded news story. The opinion he expressed related to the use of tax dollars, current events, and the CBC's promotion of drag performers to children. He did nothing more than comment on the CBC outlet and their journalism. Particularly given that numerous politicians and citizens are calling for the CBC to be defunded by taxpayers, this was all public interest speech.

[40] The Plaintiffs argue that the Defendant has failed to meet his burden under s. 137.1(3) to establish that the action arises from an expression that relates to a matter of public interest. The Plaintiffs allege that the post is hate speech in which there is no public interest. They further argue that Webster is attempting to embed this hate speech is a legitimate public interest issue, being the

defunding of the CBC. But this is not what the expression is really about. The alleged defamatory post was not a commentary on the use of tax dollars, but rather it relates to the motivations and conduct of the organizers of, and participants in, a community event. The Plaintiffs argue that Webster's choice of words – "groomers"; "ask yourself why these people need to perform for children" – falsely associates the Plaintiffs' 2SLGBTQI identities with pedophilia, and implies that they are dangerous to children. These are not matters of public interest.

[41] The term "public interest" is not defined in s. 137.1. The Supreme Court in *Pointes Protection SCC,* at paras. 26-27 held that the term should be given a broad and liberal interpretation. The expression should be assessed as a whole, with a determination of whether an expression relates to a matter of public interest being made objectively, having regard to the context in which the expression was made: *Pointes Protection ONCA*, at paras. 60-65.

[42] At this stage of the inquiry the Court is not to engage in a qualitative assessment of the expression. It is "not legally relevant whether the expression is desirable or deleterious, valuable or vexatious, or whether it helps or hampers the public interest": *Pointes Protection SCC*, at para. 28. An expression may be defamatory in tort, yet still relate to a matter of public interest for the purposes of s. 137.1(3): *Bent,* at para. 84.

[43] The Court must ask 'what is the expression really about?' To qualify as an expression relating to a matter of public interest, the expression must concern an issue "about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.": *Grant v. Torstar,* 2009 SCC 61 [*Torstar*], at para. 105.

[44] Applying these principles, when I ask 'what is the expression really about?', I cannot find that the expression at issue related to a matter of public interest.

[45] In *Paramount v. Johnston,* 2018 ONSC 3711, 142 O.R. (3d) 356 [*Paramount*], at para. 45, Nakatsuru J., stated that uttering something in the context of a public interest discussion does not make the expression a matter of public interest within the meaning of s. 137.1. In my view, that is exactly what happened here.

[46] In this case, the proceeding does not arise from any comments made by Webster about the CBC or about the propriety of the CBC journalist reporting on drag story time events. The proceeding arises from that portion of the expression that states grooming is the reason that drag performers "need" to perform for children.

[47] As the Plaintiffs' evidence confirms, the term "groomer" refers to someone who manipulatively develops a relationship or connection with a child to exploit and abuse them. It is a slur that is used to allege that drag performers sexualize children and aim to recruit them into the 2SLGBTQI community. I agree with the Plaintiffs that perpetuating such stereotypes and myths about members of the 2SLGBTQI community is not public interest speech. It is not a matter about which the community has a genuine interest or genuine stake in knowing.

[48] Had Webster merely pointed to the CBC article and questionned whether the taxpayer funded CBC should be promoting drag storytime events, or expressed his opinion that it should not, I would be inclined to find that this constituted public interest expression. Similarly, if the post merely questioned the propriety of drag storytime for children, or expressed his opinion that drag storytime is not appropriate for children, I may have been inclined to find that the matter was social commentary and public interest speech. However, the Defendant's comments went well

beyond that, perpetuating hurtful myths and stereotypes about vulnerable members in our society. Webster's argument that he was accusing the CBC of grooming has no merit based on a plain reading of the post. I agree with the Plaintiffs that the post does not represent speech that s. 137.1 intended to protect.

[49] I also reject the Defendant's argument that Egale's involvement in this proceeding demonstrates the public interest nature of the expression. Egale's involvement and interest in this proceeding is to ensure the ability of 2SLGBTQI individuals to defend their reputations when they are defamed by age-old tropes that cast them as dangerous sex offenders and child abusers.

[50] As the Defendant has not satisfied the onus on him of demonstrating that the expression is public interest speech, the motion cannot succeed.

<u>The Merits-Based Hurdle (s. 137.1(4)(a)):</u>

[51] Given my conclusion that the Defendant has not met his onus with regard to s. 137.1(3), it is not necessary for me to continue with the analysis. If I am incorrect, and if I had found that the expression constituted public interest expression, I would have found that the Plaintiffs discharged their onus with regard to s. 137.1(4).

[52] The first part of the test in s. 137.1(4)(a) requires the Plaintiffs to demonstrate whether there are grounds to believe the proceeding has substantial merit and the Defendant has no valid defence. The bar should not be set too high at this merits-based hurdle of the analysis. What is required is an overall assessment of the prospect of success of the underlying claim: *Mondal,* at paras. 44, 50-51. The court must determine if the claim is "legally tenable and supported by evidence that is reasonably capable of belief.": *Pointes Protection SCC,* at para. 49.

[53] The purpose of s. 137.1(4) is to ensure that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it

Is there "substantial merit"?

[54] As referenced in *Bent,* defamation requires that three criteria be met:

a. The words complained of were published, meaning that they were communicated to at least one person other than the plaintiffs;

b. The words complained of referred to the plaintiffs; and

c. The impugned words were defamatory, in the sense that they would tend to lower the plaintiffs' reputation in the eyes of a reasonable person.

[55] Here, there are reasonable grounds to believe that the tort of defamation can be made out:

a. The words complained of were made available to the followers of the Courthouse Page, and to anyone with an internet connection. The various comments made by followers of the page show that the post was viewed.

b. The term "these people" arguably could apply to the individuals in the photograph, particularly given the comments about the child in the photograph. The action is more tenuous with respect to RAD, as the comments seem more directed at the individuals in the photograph, which does not reference the organization. Having said this, the CBC article that talks about RAD is included with the post, and keeping in mind the threshold on a s. 137.1(4) determination, there is a connection between the comments and RAD in the post.

The bigger issue and/or concern is the the Defendant's argument that at the time of the alleged defamatory comments, RAD was an unincorporation association that lacked capacity to sue. RAD did not become a corporate entity until after around the time the action was commenced. Webster argues that RAD lacks standing to continue with this proceeding given that it was not incorporated at the time the comments were made. RAD has simply argued that this issue should be be assessed at the merits-based stage of the anti-SLAPP analysis, but provides no authority for that statement. It strikes me that whether a plaintiff has standing is an issue to be determined at the merits stage, but in the absence of any meaningful argument or authorities on this issue, I make no findings in this regard. Had I been inclined to find that the expression was public interest speech, I would have sought additional submissions on this issue. Furthermore, even if I were inclined to find there was reasonable grounds to believe the action lacked merit because of standing concerns with respect to RAD, Hartlen still has the ability to maintain the action personally.

c. Based on the record before me, there is reason to believe that the expression is defamatory. It is reasonable to conclude that the suggestion that Hartlen and other drag performers are "groomers", merely because of their sexual or performance identity, is defamatory. The implication is that the drag performers are manipulating children for pedophilic and abusive purposes. The hateful comments accompanying the defamatory post demonstrates that this is how the readers interpreted the expression. Courts have consistently found that smearing someone as a "pedophile" is likely to cause serious harm to a person's reputation. In *Bagwalla v. Ronin et al., and Ronin v. Ronin et al.,* 2017 ONSC 6693, at para. 23 and 28, the Divisional Court upheld a motion judge's finding that "…identifying a person as a sexual predator and sexual groomer only serves to lower the estimation of that person in the minds of right-thinking persons", and that "[t]hese are heinous allegations." Given Hartlen's work for a child protection agency, such allegations have the potential to be even more damaging.

Is there a valid defence?

[56] Webster defends the expression on the basis of "fair comment".

[57] "Fair comment" is a defence to a defamation claim that is available if the words complained of are expressions of opinion rather than fact: *Mondal,* at para. 48.

[58] The Supreme Court of Canada set out a four-part test for fair comment in *WIC Radio Ltd. v. Simpson,* 2008 SCC 40, [2008] 2 S.C.R. 420 [*WIC Radio*], at para. 28, as cited in *Mondal,* at para. 48, as follows:

1. The comment must be on a matter of public interest;
2. The comment must be based on fact;
3. The comment can include inferences of fact, but must be recognizable as comment; and
4. The comment must satisfy the objective test: could any person honestly express the opinion on the proved facts?

[59] Even if these four criteria are satisfied, a fair comment defence is defeated if the Plaintiffs prove that the Defendant was "subjectively actuated by express malice": *Mondal,* at para. 49, citing *WIC Radio,* at para. 45.

[60] On an anti-SLAPP motion, "the onus is on the plaintiff to show grounds to believe that the defendant cannot establish one or more of [the] elements [of the fair comment defence] and thus the defence has no real prospect of success: *Hansman,* at para. 97. The Plaintiffs and Egale argue that in this case, there are grounds to believe that *none* of the elements of fair comment would be established.

[61] I agree that there are grounds to believe that the defence of fair comment is not available for unfounded accusations that a group of 2SLGBTQI individuals are "groomers". With respect to the specific elements of fair comment, I find:

a. There are grounds to believe that rhetoric based on hurtful, and hateful myths and stereotypes will not be found to relate to a matter of public interest. In *Hudspeth v. Whatcott,* 2017 ONSC 1708 [*Hudspeth*], at para. 183, Perell J., citing *Saskatchwan (Human Rights Commission) v. Whatcott, supra,* noted that hate speech is by its nature not in the public interest as it actually interferes with public discourse and debate. Perell J., further noted that the anti-SLAPP provisions of the *CJA* do not protect hateful or malicious attempts to inflict harm under the guise of free debate of matters of public interest. Nakatsuru J., in *Paramount,* in the context of the first part of the anti-SLAPP analysis, determined that it is not necessary to make a finding of hate speech, and that it is sufficient to conclude that the expression is not worthy of protection in order for find it is not public interest speech. There are reasons to believe, based on the expression made and the caselaw, that the expression will be found to be hate speech or at the very least, an expression not worthy of protection and therefore not related to a matter of public interest.

b. There appears to be no factual basis for the allegation that Hartlen and the other performers are "groomers". As such, there are grounds to believe that the answer to the objective test, "could any person honestly express that opinion on the proved facts?" will be "no".

c. There are grounds to find that the Defendant's statements are not recognizable as an opinion, but rather as statements of fact. The post poses a question: Why do the drag performers need to perform for children? The Defendant's response purports to assert an objective truth, being that they have an agenda that is to "groom" the children. I agree with

the Plaintiffs and Egale that there is a good argument that the allegation of grooming was not a "debatable assertion[s] as to a state of mind" (see *Hansman,* at para. 111), but rather a statement of fact that is more analagous with the findings in *Lascaris v. B'nai Brith Canada,* 2019 ONCA 163, 144 O.R. (3d) 211, *Bondfield Construction Company Ltd. v. Globe and Mail Inc.,* 2019 ONCA 166, *Pan v. Gao,* 2020 BCCA 58, and *Galloway v. A.B.,* 2021 BCSC 2344.

d. I also agree with the Plaintiffs and Egale that there is reason to believe that the Defendant will not satisfy the requirement of an objective honest belief, or in other words, that even if the expression could be found to be opinion, it is not one that could be expressed based on proven facts. To make such an allegation without knowing anything about those individuals targeted by the accusation, based solely on them being a member of an identifiable group, is very unlikely to satisfy the objective honest belief requirement.

e. Malice defeats an otherwise valid fair commence defence. It can be established by reckless disregard for the truth: *Hansman,* at para. 115; and *Bent,* at para. 136. The more serious the allegation, the more weight a court should give to a defendant's disregard for the truth before making the statement: *Bent,* at para 136, quoting P.A. Downard, *The Law of Libel in Canada* (4th ed. 2018) at 9.74. There are grounds on which a trial judge could find that a person is acting with a reckless disregard for the truth, and therefore malice, in accusing a group of 2SLGBTQI individuals of having an agenda to "groom" children despite knowing little or nothing about these individuals.

<u>Does the public interest in allowing the proceeding to continue outweigh the public interest in protecting the expression? [s. 137.1(4)(b)]</u>

[62] I also find that the public interest in allowing the proceeding to continue outweighs the public interest in protecting the expression.

[63] In reaching this conclusion, I am mindful of the significant public interest in protecting freedom of expression. Freedom of expression has been recognized as an extraordinarily important freedom. It is of crucial importance to a democratic society. See: *Hudspeth,* at para. 119, which cites numerous Supreme Court of Canada decisions in support of this conclusion. It is not to be interfered with lightly.

[64] Despite this, it has been recognized that freedom of expression is not unfettered. In *Halton Hills (Town) v. Kerouac,* [2006] O.J. No. 1473 (Ont. S.C.), at para. 26, Corbett J., explains:

> 26. Must free speech be entirely unfettered to be truly free? No: freedom of speech, like all other freedoms, is constrained to recognize other important rights. Laws against hate speech limit free speech to protect people from persecution on the basis of a group affiliation: *Criminal Code,* ss. 318-319*; R. v. Keegstra,* [1990] 3 S.C.R. 697. The law of defamation limits free speech to protect people from untrue and damaging statement made about them […].

[65] Along with rights come responsibilities, especially when one is recognized by a number of individuals or "followers" as a local media source. Not exposing another individual to hatred, contempt or ridicule by making allegations that have no basis in fact, and are founded solely on the fact that the individual is a member of a vulnerable, *Charter*-protected group, is such a responsibility. I simply cannot find any public interest in protecting a harmful trope that associates 2SLGBTQI people with sexual predation against children. On the other hand, there is considerable public interest in allowing individuals who are the victims of such conduct to publicly defend their reputation in a court of law.

[66] For the foregoing reasons, had the motion not been dismissed pursuant to s. 137.1(3), I would have dismissed it under s. 137.1(4). This action does not have the hallmarks of a "gag" proceeding, but rather a legitimate defence of reputation against serious allegations.

<u>Order:</u>

[67] In light of the foregoing the Defendant's motion is dismissed. The proceeding shall continue.

[68] Pursuant to s. 137.1(8), if an anti-SLAPP motion is not successful and a proceeding is not dismissed, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. The statutory presumption is against an order for costs. If the Plaintiffs seek costs despite the presumption:

a. They shall deliver their costs submissions, limited to 5 pages, double-spaced, not including necessary attachments (such as Bill of Costs and caselaw) no later than January 15, 2024, failing which they shall be deemed to have accepted the statutory presumption.

b. The Defendant shall deliver his response to the Plaintiffs' costs submissions, also limited to 5 pages, double-spaced, not including necessary attachments, no later than February 15th, 2024.

c. Any reply submissions shall be delivered no later than February 29th, 2024, and shall be limited to 2 pages double-spaced.

The Hon. Madam Justice T. Nieckarz

Released: December 14, 2023

CITATION: Rainbow Alliance Dryden et al. v. Webster, 2023 ONSC 7050
COURT FILE NO.: CV-22-96-00
DATE: 2023-12-14

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

Rainbow Alliance Dryden and Caitlin Hartlen

Plaintiffs

- and –

Brian Webster

Defendant

DECISION ON MOTION

Nieckarz J.

Released: December 14, 2023

/cjj