

# LEGAL AND TACTICAL GUIDE



**Palestine Legal  
Resources Canada  
(PLRC)**

**POTENTIAL LAWSUITS BY OR AGAINST YOU | SEPTEMBER 2020**



**Just Peace Advocates  
Mouvement Pour Une Paix Juste**

# POTENTIAL LAWSUITS BY OR AGAINST YOU

Civil lawsuits may be brought by individuals or entities (i.e., the plaintiffs). They may seek either money (i.e., monetary damages) or a court order requiring the party being sued (i.e., the defendant) to take (or stop) certain actions to remedy wrongdoing.

## DEFAMATION

Defamation is a tort that provides a civil law remedy for a person whose reputation has been damaged by false statements made by a defendant. The false statements can be spoken or written.

In the common law provinces, a case for defamation is made out and the defendant is presumptively liable in damages if the plaintiff can prove:

- i. That the words in issue are defamatory in the sense that they lower the plaintiff's reputation in the eyes of a reasonable person;
- ii. The words in issue refer to the plaintiff; and
- iii. The words in issue were communicated/published by the defendant to at least one third party.<sup>33</sup>

The court may also take into consideration "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented."<sup>34</sup> When all three elements are made out, there is a presumption that the words in issue are false and that they caused the plaintiff

harm. Proof of malice or fault is not necessary in order to establish defamation.

The legal threshold for establishing defamation is low. Most of the nuanced and complicated issues in defamation actions relate to whether one of a list of defences may apply.<sup>35</sup> There are a number of recognized defences to a defamation action, including "truth" or "justification", "immunity" or "absolute privilege", "qualified privilege", "responsible communication in mass media" or "responsible journalism", "reportage" or "reporting on matters of public interest", "fair comment", "consent" and, those found in provincial and territorial legislation, such "statutory limitations" found in *Ontario's Libel and Slander Act*.<sup>36</sup>

Like all lawsuits, defamation suits can be difficult. They target speech, are hard to prove, and often involve extensive discovery, meaning that parties have to provide the other side with personal records, which is very expensive and often intrusive into personal or organizational affairs.

## SLAPP LITIGATION

Strategic Lawsuits Against Public Participation (SLAPPS) are lawsuits which are typically brought without merit with the objective of intimidating and silencing individuals or organizations, who often have significantly less financial means than those bringing the lawsuit. SLAPPS arise within the context of existing defamation suits.

In 2015, Ontario enacted the *Protection of Public Participation Act, 2015*, which in turn introduced ss. 137.1 to 137.5 to the *Courts of Justice Act (CJA)* to provide an expedited, summary mechanism for defendants of SLAPP suits to seek to have those actions dismissed in a faster and less expensive manner.<sup>37</sup>

<sup>33</sup> *Grant v Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, at para 28.

<sup>34</sup> *Botiuk v Toronto Free Press Publications Ltd.*, [1995] 3 SCR 3, at para 62.

<sup>35</sup> Law Commission of Ontario, "Defamation Law in the Internet Age: Final Report" (Toronto: March 2020) at 18-19.

<sup>36</sup> RSO 1990, c L 12

<sup>37</sup> Courts of Justice Act, RSO 1990, c C43

In Ontario, s. 137.1 of the *CJA* allows for the defendant to move for an order to dismiss the proceeding at any time after it has started. To do so, the defendant being sued for defamation must satisfy the judge that the matter arises from a statement/comment they made that relates to the public interest. The onus then shifts to the plaintiff to show that 1) the original defamation claim has substantial merit and 2) the defendant has no valid defence in the proceeding. The defendant must show that the harm to their reputation is serious enough that it outweighs the public interest in protecting freedom of expression – otherwise the lawsuit cannot proceed pursuant to the anti-SLAPP legislation. The overall analysis involves a balancing exercise between freedom of expression, reputational harm, and the public interest.

Quebec was the first Canadian province to enact anti-SLAPP legislation, which was incorporated into its *Code of Civil Procedure*.<sup>38</sup> British Columbia’s anti-SLAPP legislation, which came into force in 2019, is called the *Protection of Public Participation Act*, and was modelled after the Ontario Act.<sup>39</sup>

This type of legislation is important because the fear of getting sued can cause “libel chill”. In addition, defamation suits are extremely expensive and time consuming. Under such legislation, a successful claimant typically has their legal costs covered by the opposing party and may be entitled to additional damages if the court finds the suit was brought in bad faith.<sup>40</sup>

<sup>38</sup> See Code of Civil Procedure, CQLR c C-25.01, at Division II, ss 51-55; Bill 9, *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, online: <http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=2009C12A.PDF>.

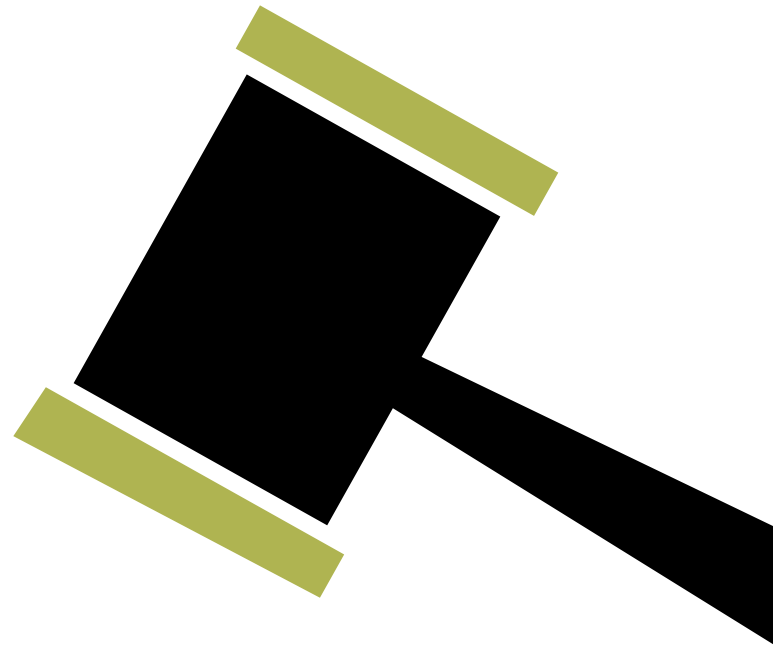
<sup>39</sup> SBC 2019, c 3.

<sup>40</sup> Isabel Ruitenbeek, “Could BC’s New Anti-SLAPP Law Help #MeToo Survivors?”, *The Tyee* (7 May 2019).

## COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43

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. 2015, c. 23, s. 3.



# ANTI-SLAPP MOTION CASE STUDY: *LASCARIS V B'NAI BRITH CANADA*, 2019 ONCA 163

The appellant, Mr. Lascaris, appealed from an order of a motion judge of the Ontario Superior Court of Justice that dismissed his action pursuant to s. 137.1 of the *Courts of Justice Act* on the basis that it was a Strategic Litigation Against Public Participation (“SLAPP”) action.<sup>41</sup>

The appellant is a lawyer, human rights advocate, and the former Justice Critic in the Green Party of Canada’s shadow cabinet who advanced a resolution calling on the Green Party to support the use of peaceful Boycott, Divestment and Sanctions (“BDS”) to bring an end to Israel’s occupation of Palestinian territories. The respondent, B’nai Brith Canada, is an independent, charitable organization involved in human rights and advocacy initiatives that describes itself as a voice for the Canadian Jewish community.

In June 2016, the respondent began a campaign against the appellant, the Green Party, and others related to the BDS resolution, stating that the resolution was anti-Semitic. In addition, in relation to prior Facebook postings of the appellant’s, the respondent published an article entitled “Green Party Justice Critic Advocates

on Behalf of Terrorists”. The appellant subsequently found a Twitter posting on the respondent’s account stating: “[the appellant] resorts to supporting #terrorists in his desperation to delegitimize the State of #Israel”. It contained a link to the previous article, which accused the appellant of being an “advocate on behalf of terrorists”.

Following the Twitter posting, the appellant served a defamation claim on the respondent regarding the publications pursuant to Ontario’s *Libel and Slander Act*. B’nai Brith did not retract, remove, correct, or edit its publications. Rather, it brought a motion to dismiss the action under s. 137.1 of the *Courts of Justice Act*. The motion judge granted the motion and dismissed the action.

The Court of Appeal held that the motion judge erred in this finding and overturned the decision, finding for Mr. Lascaris.

The court considered the defences of fair comment and qualified privilege and concluded that the appellant had met his burden under the legislation.

Writing for the Court, Nordheimer J. also observed that this action had none of the recognized indicia of a SLAPP lawsuit because here, there was no history of the appellant using litigation or the threat of litigation to silence critics; any financial or power imbalance appeared to favour the respondent; there was no evidence that the appellant had a punitive or retributory purpose for bringing the defamation lawsuit; and the potential damages to the plaintiff were significant.

In assessing the balance of harm, the court held that it clearly favoured the appellant, holding that “accusing any person of supporting terrorists is about as serious and damaging an allegation as can be made in these times” (para 40). The Court went on to note that of added significance was the fact that Mr. Lascaris is a lawyer and his reputation is central to his ability to carry on his profession.

The matter was set aside and the appellant was awarded legal costs in the amount of \$15,000, and the ability to continue his defamation claim.

<sup>41</sup> *Lascaris v B’nai Brith Canada*, 2018 ONSC 3068

# ANTI-SLAPP

## *LASCARIS V B'NAI BRITH CANADA*

# ANTI-SLAPP MOTION CASE STUDY: *CUPW V B'NAI BRITH CANADA ET AL, 2020 ONSC 323*

The moving party, B'nai Brith Canada, brought a motion pursuant to s. 137.1 of the *Courts of Justice Act* to dismiss the respondent, the Canadian Union of Postal Workers' (CUPW), defamation claim as Strategic Litigation Against Public Participation (SLAPP), or in other words an anti-SLAPP motion. B'nai Brith contended that the defamation action brought against the defendants by CUPW was an illegitimate attempt to suppress freedom of expression on a matter of public interest and the action should be stayed or dismissed.

CUPW, as part of its ongoing work, regularly works with similar unions in foreign jurisdictions, including participating in an international capacity building project with the Palestinian Postal Service Workers Union (PPSWU). In addition, CUPW also takes positions on political and human rights issues from time to time, and has for many years supported Boycott, Sanctions and Divestment Movement ("BDS Movement") through a boycott of Israeli products because of what the union believes is Israel's mistreatment of Palestinians in the occupied territories.

B'nai Brith recognizes that criticizing Israel is not in itself anti-Semitic but it believes that much anti-Israel activity is anti-Semitic, and it regards the BDS Movement as an anti-Semitic movement designed to delegitimize and demonize Israel. A worker and Jewish CUPW member brought a complaint to B'nai Brith about the union's support of the BDS movement, which led to them looking into CUPW's 2018 activities and associations. In the course of this research, the defendant discovered CUPW's support of PPSWU.

When investigating social media accounts associated with the Palestinian union, B'nai Brith found a page maintained by a senior member of the union which included messages in Arabic praising individuals involved in terrorist activity as heroes. B'nai Brith sent this information to CUPW and called for a comment, advising that they intended to publish a story about CUPW and its association with PPSWU. Five days later, they published a press release under the heading "Canadian Postal Workers Align with Pro-Terrorism Palestinian Union" with statements that PPSWU glorifies terrorists and "rather than using the union movement to build peace between Israel and the Palestinians, the CUPW leadership has aligned itself with the path of violence and extremism." A second press release was published on August 2, 2018, which commented on the unfairness of the union compelling Jewish and Israeli members to pay union dues and using those dues to "pay fees, which may be used to support a foreign organization that wants to see them murdered".

CUPW subsequently sued for defamation. In turn, B'nai Brith brought the anti-SLAPP motion seeking to have the action dismissed.

The Court dismissed the motion, allowing the defamation lawsuit to move forward. The Court held that "there is no doubt that there is a solid case for defamation" (para 25) and that the defences raised by B'nai Brith are not certain to be successful.

It agreed that the issue of the conflict between Israel and Palestine was a matter of public interest and that legitimate criticism of the union's views was protected speech. However, it also found that it would be difficult for B'nai Brith to rely on 'truth' as a defence to its public claims about CUPW, noting that like CUPW, the Canadian government, the European Union, the United Nations and the State of Israel had all sponsored projects in the past in Gaza and the West Bank. The Court pointed out that this alone would not be enough to validate a claim of supporting terrorism.

The Court also found evidence to suggest that B'nai Brith had acted on assumptions without exercising due diligence, which may be fatal to a defence of "fair comment" in the defamation action. Its research into PPSWU consisted of a cursory internet search and review of a few social media pages, and it had ignored completely CUPW's publicly-posted policies against terrorism, violence, and anti-Semitism. The Court went as far as noting that there was also the possibility that B'nai Brith had acted with malice, stemming from its vast disagreement with CUPW's support of BDS, noting that "rather than attacking that directly without defaming the union, the defendants chose to focus on the relatively minor involvement with the PPSWU and to blow that out of proportion" (para 30).

The Court held that based on the evidence before it, it was satisfied there was a legitimate defamation action, and dismissed the motion. No order was made on costs.

## **CUPW V B'NAI BRITH CANADA**

## ASSAULT AND BATTERY

If you were threatened and reasonably believed you were in immediate physical danger (assault), or if you were actually physically touched and the contact was uninvited (battery), there may be a civil claim for assault and/or battery. Even an action that doesn't physically harm the other person, such as spitting at someone, or grabbing something they're holding, can be a battery.

## BENEFITS AND PROBLEMS WITH LITIGATION

- **Lawsuits for violations of constitutional rights may help to advance the law on social justice issues and protect movements for social change.**
- **Lawsuits can result in good precedent that advances social justice, or can create bad precedent and present a legal setback.** In either case, movements often continue to press for justice in other ways to create an environment that will be favourable to the changes they seek. The often unfavourable legal climate for many social justice causes makes using the law more difficult. Lawsuits should therefore be thought of as one of many tactics to achieve a movement's goals, when undertaken at the direction of and in close coordination with that movement. But they should not be relied on or considered an end in themselves.
- **Always consider the downsides of litigation. Lawsuits can be expensive and often take years with no guarantee of a just resolution.** Even a victory can be subject to a lengthy appeal process that could take years. Meanwhile, the movement

may have moved on and your lawsuit may become irrelevant. Being a party to a lawsuit may cause anxiety and can distract you from your life and movement work. Also consider what may be exposed if the other party is allowed to see your documents and other private or group strategy communications as part of the discovery process in a lawsuit.

- **If you challenge a lawsuit brought against you as a SLAPP (Strategic Lawsuit Against Public Participation) that aims to silence your legitimate speech or activities through expensive litigation, the other party could be forced to pay your legal fees and other penalties.** If you are thinking of filing a lawsuit, bear in mind that it, too, may be subject to an anti-SLAPP motion. Currently, anti-SLAPP legislation only exists in British Columbia, Ontario, and Quebec.
- **Litigation is usually best viewed as a last resort when your rights have been violated.** While it's difficult to achieve social change through a lawsuit alone, many whose rights have been violated have been vindicated in court.

**IF YOU BELIEVE YOUR RIGHTS WERE VIOLATED IN ORDER TO REPRESS YOUR PALESTINE SOLIDARITY ACTIVISM, CONTACT PALESTINE LEGAL RESOURCES IN CANADA AT [INFO@JUSTPEACEADVOCATES.CA](mailto:INFO@JUSTPEACEADVOCATES.CA).**

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## ABOUT

Just Peace Advocates is a Canadian, independent organization promoting the human rights of the Palestinian people and those that stand in solidarity for the human rights of the Palestinian people. Its vision is to provide a civil society voice focused on governmental, institutional, and societal accountability to the rule of law, and the standards of international human rights and humanitarian law for the rights of Palestinian people.

The work of Just Peace Advocates is accomplished through research, monitoring, education, communications, advocacy, programs, and service provision.

## DISCLAIMER

This guide is meant to provide basic information on legal issues that Palestinian rights activists may face, and tips on how to navigate them. It provides some generally applicable information and some campus-specific information for student activists. Any legal information in this resource is intended for general educational purposes and is **NOT a substitute for legal advice** – federal and provincial laws differ, laws may change, and the application of all laws depends on the specific facts of a case. Make sure to consult with a lawyer before relying on any information you find here.

For legal advice on your campaign or about a specific issue you are facing, or to report incidents of repression of your activism, please email [info@justpeaceadvocates.ca](mailto:info@justpeaceadvocates.ca).

We are also glad to provide workshops or schedule meetings to discuss your particular needs, whenever possible.

Just Peace Advocates thanks Palestine Legal for allowing us to have access to their existing resources and giving us permission to update them to the applicable Canadian legal context. For more information about Palestine Legal, see [palestinelegal.org](http://palestinelegal.org).

## JUST PEACE ADVOCATES

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