



# What's New in HR Law

## Findings from Workplace Investigation Not Defamatory, Says Court of Appeal for Ontario

March 16, 2023 | By Charles Muriithi

### Bottom Line

The Court of Appeal in [Safavi-Naini v. Rubin Thomlinson LLP, 2023 ONCA 86](#), upheld the dismissal of a defamation action under section 137.1 of the Ontario *Courts of Justice Act* (the “CJA”).

The Court’s decision provides interpretive guidance on when workplace investigations will be considered “matters of public interest” that may be protected by the anti-SLAPP provisions of the *CJA*, and when an investigator’s report may be subject to legal privilege.

### Background Facts

In 2018, the Northern Ontario School of Medicine (“NOSM”) learned of allegations of workplace harassment and sexual harassment raised by Dr. Anahita Safavi-Naini (the “Appellant”) who was, at the time of her complaint, a medical resident. The complaint named two respondents: Drs. SG and SS, both of whom were affiliated with NOSM when the inappropriate conduct had allegedly occurred.

NOSM retained the law firm of Rubin Thomlinson LLP to investigate the Appellant’s allegations. Katherine Montpetit (the “Investigator”), a lawyer at the firm with expertise in sexual violence and sexual harassment investigations, was assigned to conduct the investigation.

*This article is for the purposes of only general information and does not constitute legal advice or opinion.*

Before the investigation began, the Appellant issued a press release that publicized her allegations against Drs. SG and SS.

The investigation concluded in March 2019, and the Investigator submitted her final report and two executive summaries of her investigation to NOSM. The summaries stated that the Appellant's allegations could not be substantiated.

Neither the investigation report nor the executive summaries were released to the public. However, the executive summaries were submitted to the Human Rights Tribunal of Ontario in response to an application that the Appellant had filed about the same allegations.

In March 2021, the Appellant sued NOSM and the Investigator in court, claiming that the Investigator's executive summaries were defamatory.

### **The Lower Court's Decision**

NOSM and the Investigator brought a motion to dismiss the Appellant's lawsuit under subsection 137.1(3) of the *CJA* on the basis that the executive summaries related to matters of public interest and were therefore protected by law.

The Superior Court of Justice granted the dismissal, finding that: (i) the summaries *did* relate to a matter of public interest; (ii) the Investigator's communications were privileged because NOSM was entitled to receive frank communications related to an important topic; (iii) there was no evidence that the Investigator acted maliciously; and (iv) the value in protecting the Investigator's communications outweighed any harm suffered by the Appellant.

### **The Court of Appeal's Decision**

On appeal, the Appellant challenged all four conclusions of the lower court. However, a unanimous panel of the Court of Appeal dismissed the appeal on all grounds.

The Court found that the Investigator's executive summaries related to general matters over which the public had substantial interest. In particular, the public had significant concern over sexual harassment and workplace harassment, as well as investigations into these issues. The public interest was highlighted by the media attention that the Appellant's press release had garnered, NOSM's nature as an educational institution, and the public safety concerns arising from the Appellant's allegations.

The Court also confirmed that the Investigator's executive summaries were protected by qualified privilege. The Investigator and her law firm had a legal duty under the Ontario *Occupational Health and Safety Act* to complete the investigation for which they were retained and report the findings to NOSM. NOSM had a corresponding duty to receive the report and provide, in writing, the results of the investigation to the Appellant and Drs. SG and SS. In the circumstances, the Court held that the executive summaries were protected by qualified privilege and could not form the subject of a defamation action.

### **Check the Box**

This decision provides welcome news for employers who conduct legally required workplace investigations, by confirming that there are legal defences to protect such investigations from claims of defamation.

Nevertheless, employers may wish to consult with legal counsel before, during, and after the conduct of harassment-related investigations to ensure compliance with their legal and procedural requirements, and any other matters arising throughout the lifespan of a workplace investigation.

### Need More Information?

For more information or assistance with workplace investigations, contact Charles Muriithi at [cmuriithi@filion.on.ca](mailto:cmuriithi@filion.on.ca), or your regular lawyer at the firm.



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