COURT OF APPEAL FOR ONTARIO

CITATION: Lascaris v. B'nai Brith Canada, 2019 ONCA 163
DATE: 20190304
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Doherty, Pardu and Nordheimer JJ.A.

BETWEEN

Alexander Dimitri Lascaris

Plaintiff
(Appellant)

and

B'nai Brith Canada

Defendant
(Respondent)

Marie Henein, Alex Smith and Mark Strycmar-Bodnar for the appellant

David Elmaleh and Gabriela Caracas, for the respondent

Heard: February 15, 2019

On appeal from the order dated June 28, 2018 by Justice Helen A. Rady of the Superior Court of Justice, with reasons reported at 2018 ONSC 3068.

Nordheimer J.A.:

[1] The appellant, Dimitri Lascaris, appeals from the order of the motion judge that dismissed his action pursuant to s. 137.1 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 on the basis that it was a so-called SLAPP action.[1]

[2] For the reasons that follow, I would allow the appeal and set aside the order below.

Background

[3] The appellant is a lawyer. He was member of the New York State Bar from 1992 to 2016, and has been a member of the Law Society of Ontario since 2004. At the end of 2015, the appellant retired from private practice to further pursue independent journalism, provide *pro bono* legal services in human rights matters and engage in other activities.

[4] The appellant is an advocate for human rights. He publicly criticizes a range of states and governments for human rights violations, including Saudi Arabia, Egypt, the United States, Canada, and Israel. The appellant advocates for Palestinian rights, and has criticized certain actions taken by Israel.

[5] The respondent B'nai Brith Canada is an independent, charitable organization involved in human rights and advocacy initiatives. It describes itself as the primary grassroots voice for the Canadian Jewish community. It is dedicated

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[1] Strategic Litigation against Public Participation ("SLAPP").

to combating anti-Semitism and racism. The respondent intervenes in courts on issues that it views as important to Canadians, and it publishes articles, press releases and studies on topics that it views as being of interest to the Canadian public.

[6] In the 2015 federal election, the appellant ran as a candidate for the Green Party of Canada. Despite not securing a seat in Parliament, in early 2016, the appellant was invited by the Green Party's leader, Elizabeth May, to become the Justice Critic in her shadow cabinet. He took on this role in March 2016.

[7] In April and May of 2016, the appellant visited Israel to meet with and interview Eritrean refugees connected to a legal case (otherwise unrelated to this appeal). During his visit, the appellant met with Mr. Muhammad Alayan, a lawyer and author in East Jerusalem who wanted to discuss a human rights matter. On April 30, 2016, the two met in the lobby of the appellant's hotel for two hours. During their interaction, Mr. Alayan told appellant the following:

- One of his children, Bahaa Alayan, had been a political activist in East Jerusalem;
- To draw attention to the plight of Palestinians, Bahaa and fellow activists formed the largest ever human reading chain around the walls of Jerusalem's Old City;

- After the peaceful reading chain, Bahaa had been repeatedly questioned and harassed by Israeli intelligence officials;
- In October 2015, he learned that his son had been killed by Israeli forces in East Jerusalem. The Israeli authorities alleged that his son had attacked and killed adult Israeli settlers on a bus with a knife in Mr. Alayan's neighbourhood. Mr. Alayan had not seen any evidence to support the allegations against his son and he did not believe them. Further, he stated that he believed his son had been killed by Israeli forces extrajudicially. His son's body was never returned to the family.
- Mr. Alayan had repeatedly requested the return of his son's body, as he wanted to conduct a proper burial and wanted an independent forensic examination to be conducted. Because he was a respected lawyer, other families in East Jerusalem asked Mr. Alayan to also negotiate for the return of their relatives' bodies that were being similarly held by Israeli authorities.
- After protracted negotiations, Mr. Alayan rejected the only offer made by the authorities, that the bodies would be returned on the strict condition that they be buried within an hour of delivery to the families, precluding proper burials and ensuring that no independent examinations could be conducted.
- Within 24 hours of rejecting the offer, Israeli authorities ordered the demolition of Mr. Alayan's family home and his family was now homeless, living in a tent on their property.

[8] Mr. Alayan stated that whatever his son may or may not have done, he believed that he and his family were being subjected to collective punishment and this would constitute a violation of international law. Mr. Alayan asked the appellant to speak out on his family's behalf and authorized the appellant to disclose everything he had relayed, as he had nothing to hide.

[9] It was reported widely in the media that, on October 14, 2015, Bahaa Alayan boarded a public bus in Jerusalem, together with an accomplice, and began a shooting and stabbing spree, murdering three Israeli civilians. Police arrived, and shot and killed Bahaa Alayan. Bahaa Alayan's accomplice was captured alive and eventually found guilty of murder and terrorism-related offences, receiving three life sentences. After this event, the Popular Front for the Liberation of Palestine issued a statement which specifically noted that Bahaa Alayan was "one of the resistance fighters who engaged in an operation at a Zionist bus station in Jerusalem".

[10] After the meeting, the appellant conducted some of his own research into what Mr. Alayan had told him. On May 1, 2016, the appellant posted two Facebook comments. In the first post, the appellant articulated what Mr. Alayan told him, stated that Bahaa Alayan had been killed extrajudicially, posted a link to an article supporting this narrative, criticized the use of collective punishment in general, and against the Alayan family in particular, and stated that "whatever Bahaa Alayan

may or may not have done, the Israeli government's treatment of Muhammad Alayan [the father] is an outrage."

[11] In a subsequent post the same day, the appellant posted a photo of himself with Mr. Alayan. He referred back to his "preceding post", and restated that Bahaa Alayan had been killed extrajudicially and that his body had not been returned to Mr. Alayan.

[12] Upon his return to Canada, in May 2016, the appellant decided to advance a policy 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.

[13] Starting in June 2016, the respondent began a campaign against the Green Party, Ms. May, the appellant, and others related to the BDS Resolution. In several statements posted to its website, the respondent stated that support for the BDS Resolution was anti-Semitic and that one group involved in drafting the BDS Resolution had engaged in Holocaust denial and promoted anti-Semitism.

[14] On August 3, 2016, Ms. May's Chief of Staff warned the appellant that the respondent had informed Ms. May that it intended to release an "investigation" it had conducted into the appellant and was going to make serious accusations against him.

[15] On August 4, 2016, the day before the commencement of the Green Party's biannual convention, the respondent published an article entitled "Green Party Justice Critic Advocates on Behalf of Terrorists". The article contained a photo of the appellant with Mr. Alayan and a screen shot of the appellant's second Facebook post. The first sentence of the article stated "Dimitri Lascaris, official Justice Critic of the Green Party of Canada, has used social media to advocate on behalf of terrorists who have murdered Israeli civilians, a B'nai Brith Canada investigation has revealed." The article went on to describe the appellant's trip to Israel, his meeting with Mr. Alayan, and some of the appellant's other postings on social media. The article called on Ms. May to remove the appellant from her shadow cabinet. The appellant had not been contacted by the respondent regarding the article.

[16] On August 10, 2016, the appellant gave an interview wherein he discussed the BDS Resolution and responded to the respondent's claim that he had advocated on behalf of terrorists. He said in the interview that:

> I don't know, and I don't purport to know, whether in fact [Bahaa Alayan] committed the crimes of which he is accused. And if he actually attacked innocent civilians, I condemn that. I do not condone any attacks by anybody on any innocent civilians or civilian infrastructure. That's against international law. It's an atrocity. And it's not to be tolerated.

[17] On September 13, 2016, the appellant was removed from his position in the Green Party's shadow cabinet for refusing to apologize for an op-ed article that he

and others had written criticizing the leader of Green Party of British Columbia for his condemnation of the BDS Resolution. On September 14, 2016, the respondent published an article praising the appellant's removal and linking back to its previous article. It stated that the respondent had "previously urged ... Elizabeth May to dismiss Lascaris as justice critic after it exposed that he advocated on behalf of terrorists who murdered three Israeli civilians in Jerusalem."

[18] On December 20, 2016, the respondent published a 'year in review' article, wherein it again stated that it had exposed the appellant for using "social media to evoke sympathy for a Palestinian terrorist."

[19] On or about April 3, 2017, the appellant discovered another publication on the respondent's Twitter account, stating: "Dimitri Lascaris resorts to supporting #terrorists in his desperation to delegitimize the State of #Israel". The tweet contained a link to the respondent's August 4, 2016 article, which accused the appellant of being an "advocate on behalf of terrorists".

[20] After the tweet, the appellant served notice upon the respondent regarding the defamatory publications under s. 5(1) of the *Libel and Slander Act*, R.S.O. 1990, c. L.12. The respondent did not retract, remove, correct or edit its publications. The appellant then served an amended statement of claim on or about July 4, 2017, and the respondent served a statement of defence on or about August 24, 2017. In its statement of defence, the respondent pleaded justification,

qualified privilege, fair comment, and notice based defences under the *Libel and Slander Act*.[2]

The s. 137.1 motion

[21] The respondent's motion to dismiss the action under s. 137.1 was heard on February 6 and April 20, 2018.On June 28, 2018, the motion judge released her decision in which she granted the respondent's motion and dismissed the appellant's action.

[22] The motion judge found there was no doubt that the respondent's expressions related to matters of public interest, under s. 137.1(3): at paras. 39-40. The motion judge then proceeded from that point to say that she was prepared to assume that the appellant's claim had substantial merit, within the meaning of s. 137.1(4)(a)(i): at para. 46.

[23] Turning to s. 137.1(4)(a)(ii), which requires the plaintiff to prove that the respondent has no valid defence in the proceeding, the motion judge stated that this required the appellant to demonstrate that none of the defences raised by the respondent "could possibly succeed": at para. 48. However, in considering the defences raised by the respondent, the motion judge found that the appellant faced

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[2] In its statement of defence, the respondent raises issues regarding the timing of the notice that the appellant provided. The motion judge briefly adverted to (but did not deal with) this defence. The parties did not address this issue in their written submissions to this court. As a result, I do not view it as necessary to deal with this defence in these reasons.

an "insurmountable hurdle" with respect to the defence of fair comment: at para. 55. Consequently, she did not deal with the respondent's justification, qualified privilege or notice defences. The motion judge also did not consider the "balancing" part of the test set out in s. 137.1(4)(b).

[24] Regarding the issue of fair comment, the motion judge set out the constituent elements of the defence of fair comment, as articulated in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 28:

> (a) the comment must be on a matter of public interest;
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> (b) the comment must be based on fact;
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> (c) the comment, though it can include inferences of fact, must be recognisable as comment;
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> (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts?
>
> (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.

[25] The motion judge was satisfied that each constituent element was present. The motion judge had already found that the comments were on matters of public interest. She also found that they were based on fact. The motion judge further found that the comments were "arguably" recognizable as opinion. She referred to the view that words that appear to be statements of fact may, in pith and substance, be properly construed as comment, "particularly in an editorial context where

loose, figurative, or hyperbolic language is used in the context of political debate, commentary, media campaigns and public discourse": at paras. 56-58.

[26] Regarding the last constituent element of the defence of fair comment, the motion judge found that any person could honestly express the opinion, on the proved facts. She found that while it might not be reasonable to hold this view, a person could honestly believe that support for Mr. Alayan and his family constituted support for terrorists. She stated that "a person who knows that Bahaa Alayan was allegedly involved in a terrorist attack could believe that Mr. Lascaris supported terrorists as a result of his meeting with Mr. Muhammad Alayan and his posts online about the Alayan family": at para. 60.

[27] Finally, the motion judge found that the respondent was not motivated by malice as there was no evidence that the respondent was acting other than in the pursuit of its genuinely held beliefs: at paras. 63-64. The motion judge found that the expressions fell within the purpose of the fair comment defence which "is the protection of freedom of expression in order to influence public opinion on genuine public issues": at paras. 62, 65.

[28] In the end result, the motion judge concluded that the appellant had not met his burden of demonstrating, under s. 137.1(4)(a)(ii), that no valid defence exists.

Analysis

[29] Before I begin my analysis, I should note that the motion judge heard and decided the s. 137.1 motion before this court released a series of judgments interpreting s. 137.1 in some detail: see *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685, 142 O.R. (3d) 161, and the related cases that were released simultaneously. To a large degree, the motion judge's analysis has been overtaken by *Pointes* and those related authorities.

[30] I begin with two observations regarding the purpose behind s. 137.1. As this court observed in *Pointes*, at para. 73, s. 137.1 operates as a screening device. It is not to be used as a surrogate for summary judgment: *Pointes,* at para. 78. The motion is intended to be brought at the outset of the proceeding before either the plaintiff or the defendant has had the opportunity to marshal the type of evidence that they would for a trial. Indeed, motions under s. 137.1 will often be heard before there has been any form of pre-trial discovery.

[31] The other observation is that this action has none of the recognized indicia of a SLAPP lawsuit. As pointed out in *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60, at para. 99, those indicia are:

- a history of the plaintiff using litigation or the threat of litigation to silence critics;
- a financial or power imbalance that strongly favours the plaintiff;

- a punitive or retributory purpose animating the plaintiff's bringing of the claim; and
- minimal or nominal damages suffered by the plaintiff.

[32] There is no history of the appellant using litigation or the threat of litigation to silence critics. If there is any financial or power imbalance, it would appear to be in favour of the respondent, not the appellant. There is no evidence that the appellant has a punitive or retributory purpose in bringing this action and, as I discuss further below, the potential damages to the plaintiff are significant.

[33] In my view, the motion judge erred in her analysis in one principal respect. The burden on the appellant under s. 137.1(4)(a)(ii) is not to show that a given defence has no hope of success. To approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under s. 137.1 into a summary judgment motion. Rather, all that the appellant need show is that it is possible that the defence would not succeed. As Doherty J.A. stated in *Pointes,* at para. 84:

> The onus rests on the plaintiff to convince the motion judge that, looking at the motion record through the reasonableness lens, a trier could conclude that none of the defences advanced would succeed. If that assessment is among those reasonably available on the record, the plaintiff has met its onus.

[34] In my view, a reasonable trier could conclude that the defence of fair comment would not succeed. It would be open to a trier to conclude that the statements made about the appellant – namely, that he supported terrorists – were

uttered as statements of fact, not as statements of opinion. Further, even if the statements are viewed as opinion, a trier could also conclude that, on the available facts, a person could not honestly express that opinion based on the proved facts. The fact that a person supports a parent, whose child has committed a terrible act, does not make that person a supporter of the child's actions. A trier might also conclude that the respondent's repetition of the statements, after the appellant expressly disavowed support for terrorism, made the defence of fair comment unavailable.

[35] While the motion judge did not deal with the other defences raised because of her conclusion on the defence of fair comment, I must do so given the error that I have found in the motion judge's analysis. For the same reasons that I have just outlined in dealing with the defence of fair comment, those realities could serve to defeat any defence of justification.

[36] For qualified privilege to apply, the respondent must have "an interest or a duty, legal, social, or moral, to make [the impugned statements] to the person to whom [those statements are] made": *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, at para. 143. It is unclear what duty, of that type, the respondent could point to in order to qualify its statements as falling within a situation of qualified privilege, which in any event is rarely available for widely circulated publications Indeed, I note that the respondent did not pursue this defence on the appeal.

[37] In the end result, in my view, the appellant has met his burden under s. 137.1(4)(a)(ii) to show that a reasonable trier might conclude that none of the defences advanced would succeed.

[38] That leaves the balancing requirement under s. 137.1(4)(b). Because of her conclusion regarding the defence of fair comment, the motion judge did not consider the balancing requirement under s. 137.1(4)(b). Consequently, this court must do so.

[39] Section 137.1(4)(b) reads:

> [T]he 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.

[40] In my view, this balance clearly favours the appellant. I say that because, if the appellant's action proceeds and if the appellant is ultimately successful, the damages to which the appellant would be entitled could be significant. Accusing any person of supporting terrorists is about as serious and damaging an allegation as can be made in these times.

[41] That reality is sufficient to establish the seriousness of the harm to the appellant and to rebut the respondent's submission that the appellant failed to lead any evidence to show any damage to his reputation arising from the impugned

statements. On that latter point, I would adopt the observation made by Bean J. in *Cooke v. MGN Limited*, [2014] EWHC 2831, [2015] 2 All ER 622 (QB), at para. 43:

> Some statements are so obviously likely to cause serious harm to a person's reputation that this likelihood can be inferred. If a national newspaper with a large circulation wrongly accuses someone of being a terrorist or a paedophile, then in either case (putting to one side for the moment the question of a prompt and prominent apology) the likelihood of serious harm to reputation is plain, even if the individual's family and friends knew the allegation to be untrue.[3]

See also *Grant v. Torstar Corp.,* 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 111.

[42] Further, the appellant is a lawyer. A lawyer's reputation is central to his/her ability to carry on their profession. As Cory J. said in *Hill*, at para. 118:

> The reputation of a lawyer is of paramount importance to clients, to other members of the profession and to the judiciary. A lawyer's practice is founded and maintained upon the basis of a good reputation for professional integrity and trustworthiness. It is the cornerstone of a lawyer's professional life. Even if endowed with outstanding talent and indefatigable diligence, a lawyer cannot survive without a good reputation.

[43] The fact that the appellant is no longer engaged in private practice does not mean that his reputation is still not of consequence. The appellant continues to represent clients on a *pro bono* basis. His reputation will mean as much to those

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[3] This passage was cited with approval in *Lachaux v. Independent Print Ltd* [2017] EWCA Civ. 1334, [2018] QB 594 (C.A.), at paras. 65-66.

clients as it would to any other client, especially given the nature of the clients to whom he devotes his services.

[44] In reaching that conclusion, I do not mean to suggest that the views of the respondent are not without merit or importance. However, fair disagreements over policies and principles can be undertaken, indeed ought to be undertaken, through responsible discourse. Whatever disagreements there may be between the appellant's views and the respondent's views, those views can be exchanged and debated without the need for personal attacks. It remains open to the respondent to express its views on issues that concern it, such as the BDS Resolution and broader BDS debate, for example, without engaging in speech that is arguably defamatory.

Conclusion

[45] The appeal is allowed, the order below is set aside, and the matter is remitted to the Superior Court of Justice. The appellant is entitled to his costs of the appeal in the agreed amount of $15,000 inclusive of disbursements and HST.

[46] If the parties cannot agree on the costs of the motion below, they may make written submissions. I would note, on that point, that s. 137.1(8) provides a presumption that there will be no costs of an unsuccessful motion under s. 137.1. The appellant is to file his submissions within 15 days of the date of these reasons and the respondent is to file its submissions within 10 days thereafter. No reply

submissions are to be filed and each party's submissions shall not exceed five pages.

Released: DD MAR 04 2019

Gillese J.A.

I agree K. Benotto J.A.

I agree G. Pardu J.A.