

Rebel, Rebel, Your Case is a Mess: More on the Challenges of Anti–SLAPP Motions

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By Carlos Martins

In November 2015, amendments to Ontario's *Courts of Justice Act* facilitated the early dismissal of “strategic lawsuits against public participation”. The aim was to prevent the censure and intimidation of persons expressing themselves on matters of public interest by actors who attempted to silence critics through the expense (emotional and financial) of unmeritorious litigation.

There was, and remains, much ambiguity in the jurisprudence on how to apply these provisions and the case law continues to evolve, even though the Supreme Court of Canada released two decisions interpreting these provisions in September 2020: *1704604 Ontario Ltd. v. Pointes Protection Association* [2020 SCC 22](#) and *Bent v. Platnick* [2020 SCC 23](#).

(Check out the recent blog post by Emma Romano of WeirFoulds LLP on new developments in anti-SLAPP case law [here](#).)

The provisions are as follows:

37.1 (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.

(2) In this section,

“expression” means 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.

(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,

1. the proceeding has substantial merit; and
2. 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.

It is important to note that where the Court finds an expression to be "in the public interest", the onus shifts to the plaintiff to establish all the elements of s. 137.1(4) are met – otherwise the claim **shall** be dismissed.

Justice Diamond of the Ontario Superior Court of Justice, recently released a decision that provides both:

- further guidance on how Courts will consider anti-SLAPP applications; and
- a useful, high level review of some of the most common defences argued in defamation claims.

Facts

Uncharacteristically, both parties in this litigation are media outlets.

Rebel News, founded by Ezra Levant in 2015, was described by Justice Diamond as "an online source of news and commentary designed to be an alternative to mainstream news outlets and publications." He also noted that *Rebel News* has "adopted a conservative and right-wing orientation in its presentation of news and commentary."

Al Jazeera is a Qatari "public utility private corporation" broadcasting news worldwide, which was founded in 1996 and launched an English language service in 2006.

In September 2019, *Al Jazeera* published an online article as well as a YouTube video, both referencing *Rebel News*.

The online article, titled "The Right Perspective? YouTube Radicalization and Rebel Media" contained the following words, among others:

Perhaps even more damaging to The Rebel's reputation has been its connection to violent acts; acts like the Finsbury Park Mosque attack in London, the Quebec City mosque shooting, and in Fredericton, New Brunswick, the murder of two police officers. In all three instances, the men involved watched The Rebel Media and had become convinced Muslims were invading their countries.

These words were subsequently corrected to state that the perpetrators, in fact, claimed that they "watched *Rebel News* **or the work of their regular contributors.**" (**emphasis added**)

The YouTube video contained the following statements:

The content, typically disguised as cutting-edge journalism, can have real-life ramifications; viral material that is capable of not just radicalizing the views of those that watch it, but driving some of them to acts of violence. Among the best-known practitioners of the art: The Rebel Media."

and

The Ottawa Police have filed a criminal complaint alleging that Rebel Media had breached a section of the Canadian Criminal Code by wilfully promoting hatred of the Muslim community.

The third statement was subsequently corrected to state that the criminal complaint was not filed but, rather, received by the Ottawa Police.

Following the issuance of the claim by *Rebel News*, *Al Jazeera* successfully moved to strike it out by way of an anti-SLAPP application. In doing so, the Court considered four issues, as derived from the legislative provisions set out above.

Issue #1: Do the impugned statements relate to a matter of public interest?

The Court did not struggle to find that the subject matter in issue – namely, “the reasons behind individuals’ decisions to commit violent hate crimes” was a matter in the public interest. *Rebel News* conceded the point and was commended by the motions judge for doing so.

The onus then shifted to *Rebel News* to provide justification as to why the claim should survive.

Issue #2: Are there grounds to believe that the claim had ‘substantial merit’?

In support of their positions on the motion, *Rebel News* filed an affidavit sworn by its founder, Ezra Levant. *Al Jazeera* filed an affidavit sworn by one of the producers of the online article and YouTube video, as well as three expert affidavits from a lawyer/human rights activist and two university professors.

The aim of the evidence was to address the three-part test that a plaintiff in a defamation action must pass to establish a *prima facie* claim for defamation (subject to the defences to be advanced by the defendant). The elements of the test are as follows:

- a) the words complained of must be published to at least one person;
- b) the words must refer to the plaintiff; and,
- c) the words must be defamatory in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person.

The first two elements were conceded by *Al Jazeera*.

As to the last element, Justice Diamond found that, on their face, the statements complained of did, indeed, lower *Rebel News’* reputation in the eyes of a reasonable person.

However, through its affidavit evidence, *Al Jazeera* sought to establish that *Rebel News’* reputation was not compromised in any event because it was already significantly compromised “due to its allegedly pre-existing connection to violent acts and hateful conduct.”

Justice Diamond was not prepared, on an anti-SLAPP application, to “wade past shallow waters” in analyzing the evidence on this point. Rather, without the ability to do a “deep dive” on this issue (which is forbidden in the jurisprudence), he could not draw any conclusions on *Rebel News’* pre-existing reputation. On this basis, *Rebel News* was able to establish that its claim had “substantial

merit”.

Issue #3: Do grounds exist to believe that Al Jazeera has no valid defence?

At this stage of the anti-SLAPP analysis, *Rebel News* was required to address the viability of *Al Jazeera's* defences to the action. Three defences were addressed. In the case of two of these defences, the Court found that grounds did not exist to believe the defences were valid; in the third, the opposite was true.

(a) Defence of Justification

In the normal course of defamation litigation, the expression of true statements, regardless of how damaging they may be, is not actionable.

In this case, while *Al Jazeera* acknowledged that it had to correct two of the statements in question, it argued that the errors were inconsequential.

Justice Diamond did not agree. In the case of the correction regarding the source of the inspiration for the perpetrators, the Court found that the evidence was that none of the murderers had watched *Rebel News*. While there may have been some evidence that they may have been influenced by prior contributors to *Rebel News*, the nature of those communications was unclear on the record.

As to the error regarding who initiated the criminal complaint to the Ottawa Police, Justice Diamond found that this error was, indeed, consequential. In his mind, there was a significant difference (from a reputational perspective) between a complaint initiated by the Police and one initiated by a private party.

On this basis, the Court found that *Al Jazeera's* justification defence had no real prospect of success.

(b) Defence of Fair Comment

To successfully resist the anti-SLAPP motion, *Rebel News* also had to establish that *Al Jazeera's* fair comment defence likewise had no real prospect of success.

To make out a fair comment defence, the comment:

- a) must be on a matter of public interest;
- b) must be based on facts referred to in the publication or otherwise widely known;
- c) although it can include inferences of fact, must be nevertheless recognizable as comment;
- d) must be one that any person can honestly make on the proven facts; and
- e) was not actuated by express malice.

It had already been established (as described above) that the expression in this case was on a matter of public interest. Also, the Court found that the crimes in question were notorious to the reader/ viewer through media coverage of them – making them widely known to the public.

However, Justice Diamond found that there were grounds to believe that *Al Jazeera* had no valid defence of fair comment on the third element of the test.

That is, he found that the statements that all three perpetrators:

- watched *Rebel News*; and
- had become convinced Muslims were invading their countries,

were not clearly recognizable as comment, but “more likely expressed as a fact, or at a minimum, imputations of fact”.

(c) Defence of Responsible Communication

Finally, *Rebel News* addressed the validity of *Al Jazeera*'s responsible communication defence. Put succinctly, this defence protects expression in a matter of public interest, where the communicator of the words exercised reasonable diligence in validating the statements prior to uttering them – even where those words are damaging to the plaintiff.

In this case, the Court found that *Rebel News* did not discharge its onus to demonstrate that *Al Jazeera*'s responsible communication defence was bound to fail.

Instead, the Court noted that:

- there was not sufficient evidence on the record to establish lack of diligence the part of *Al Jazeera* in the reporting;
- *Rebel News* failed to provide its side of the story, even though it was invited to; and
- although *Rebel News* tried to elicit “expert evidence” on journalistic standards from *Al Jazeera*'s expert witnesses when cross-examining them, any such evidence would not be admissible in any event as this was not the proper manner to put this sort of evidence before the Court.

Because *Rebel News* failed to show that the defense of responsible communication was doomed to fail, the motion was granted and the claim was dismissed.

Issue #4: Which of the two public interests outweighs the other?

Although the final branch of the anti-SLAPP test was moot, given the Court's finding on responsible communication, Justice Diamond addressed it in any event.

The key to the court's decision (which was in favour of *Al Jazeera*) was *Rebel News*' failure to demonstrate:

- The existence of harm because of the dissemination of the words in question; and
- Any such harm was caused by *Al Jazeera*'s expression.

There being no evidence of harm, there was no basis upon which to compare the effect of the utterance of the words against *Al Jazeera*'s interest in free expression. As such, even if the conclusion on the viability of the responsible communication defence is wrong, the claim must still be struck.

Take Aways

- Parties seeking to resist an anti-SLAPP motion have a heavy onus where the expression relates to a matter of public interest.

- To meet that heavy onus, care must be taken to adduce evidence in the proper manner.
- Critical to the last stage of the analysis is to show real damage because of the utterance of the words complained of.

Rebel News Network Ltd. v Al Jazeera Media Network, [2021 ONSC 1035](#)

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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