

How a defamation claim survived an anti-SLAPP motion

By **James R.G. Cook**

Law360 Canada (May 27, 2024, 2:58 PM EDT) -- Media organizations faced with a defamation action may seek to dismiss a claim by bringing a motion under Ontario's anti-SLAPP legislation in s. 137.1 of the *Courts of Justice Act* (CJA). While such motions are generally brought at an early stage of the action and are supposed to be heard no later than 60 days after the notice of motion is filed, they may involve an adjudication of the merits of the claim and the validity of all the defences that would be addressed at trial, as demonstrated by the Ontario Superior Court of Justice's decision in *Kielburger v. Canadaland Inc.*, 2024 ONSC 2622.

The anti-SLAPP motion was brought by the defendants in a defamation action commenced by Theresa Kielburger, the mother of WE Charity founders Craig and Marc Kielburger, against Canadaland Inc. and journalist Jesse Brown following a 2021 podcast.

During the podcast, Brown interviewed the author of a 1996 article in *Saturday Night* magazine about the WE organization and Craig Kielburger. A portion of the 1996 article, dubbed the "Money Passage," made untrue statements that claimed that the plaintiff deposited hundreds of thousands of dollars in donations directly into her family's personal bank account and that the family accepted large charitable donations before they were a legally registered charity.



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The 1996 article led to a defamation action against *Saturday Night* and the author concerning the untrue statements. The action was eventually settled for payment of \$319,000 to the plaintiff's son in return for an order dismissing the action. The settlement was not made confidential, notwithstanding the defendants' request to do so.

The theme of the 2021 Canadaland podcast repeated portions of the 1996 article and the Money Passage that had been the subject of the defamation action. The podcast was promoted as "The White Saviors True Crime," with teasers regarding "uncomfortable questions about money." One caveat in the podcast was that the author of the 1996 article "didn't accuse the family of stealing."

The plaintiff commenced a new defamation action on the basis that the 2021 podcast constituted a repetition of the 1996 libel. Neither Brown nor anyone else at Canadaland had reached out to the plaintiff for comment or contacted her for a response to the allegations made in the podcast.

After the action was commenced, the defendants brought an anti-SLAPP motion under s. 137.1 of the CJA, which places an initial burden on the moving parties to satisfy the court that the proceeding arises from an expression relating to a matter of public interest.

The plaintiff conceded that the issue of whether a large amount of money donated for charitable purposes was diverted to private use was a matter of public interest pursuant to s. 137.1(3) of the CJA.

The burden then shifted onto the plaintiff to satisfy the criteria set out in s.137.1(4)(a) and (b) of the CJA, specifically that there were grounds to believe that the proceeding has substantial merit, that the moving party defendants had no valid defence and that the public interest in permitting the proceeding to continue outweighed the public interest in protecting the expression: *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, at paragraphs 18, 33.

As to whether the claim had substantial merit, the plaintiff established the three elements for a defamation action set out by the Supreme Court of Canada in *Grant v. Torstar Corp.*, 2009 SCC 61, specifically that the impugned words were defamatory, referred to her and the podcast was published and made available to third parties. In that regard, the court noted that Canadaland podcasts are accessible to the public without charge and a transcript of the Kielburger podcast was available on the Canadaland website. In 2021, there were over 475,700 downloads of the Kielburger podcast series.

As to whether the meaning or "sting" of the words was defamatory, the court held that it would not have been newsworthy for the podcast to simply state that the charitable funds were received when the charity was in the process of being registered such that another account was used to hold the funds in the interim. Rather, the "sting" was in the inference of improper conduct and mishandling of substantial funds on the plaintiff's part.

In contrast to the Canadaland host, the author of the 1996 article carefully chose her words during the interview and did not comment on, summarize or repeat the earlier allegations in the Money Passage.

Accordingly, for the purposes of s. 137.1(4)(a)(i) of the CJA, the court concluded that there was substantial merit to the plaintiff's claim in respect of Canadaland's repetition of the Money Passage, but there was no merit in the claim that the author of the 1996 article participated in that aspect of the podcast. The impugned words in respect of the Money Passage repetition were those of Brown and Canadaland alone.

The court then assessed the defences raised by the defendants: privilege, responsible communication and reportage and fair comment. None of the defences were found to be valid.

The defence of privilege applies to reports of court proceedings but does not extend to pleadings filed before the matter gets to court or to summaries of or opinions about court proceedings whose publication is not part of the open court policy: *Douglas v. Tucker*, [1952] 1 S.C.R. 275. Here, the statements in the podcast that the plaintiff "deposited hundreds of thousands of dollars in donations directly into the family's personal bank account" was not a privileged report of proceedings in open

court but a restatement of the Money Passage.

The defence of responsible communication requires that a defendant show that (i) the publication was on a matter of public interest; and (ii) the publication was responsible, in that they were diligent in trying to verify the allegation(s), having regard to all the relevant circumstances: *Grant v. Torstar Corp.*, 2009 SCC 61, at paragraph 98.

While there was little doubt that the subject of the podcast was of considerable public interest, the court held that Canadaland did not satisfy the “responsible” requirement of the defence, given its failure to contact the plaintiff to respond to the allegations. The podcast also omitted important information from the plaintiff’s accountant that had been raised during the original defamation proceedings.

Lastly, the court found that Canadaland and Brown did not have a valid defence of fair comment, which applies to statements that are “a mere matter of opinion, and so incapable of definite proof” (*Hansman v. Neufeld*, 2023 SCC 14, at paragraph 108). In the court’s view, the statement that the plaintiff “deposited hundreds of thousands of dollars in donations directly into the family’s personal bank account” was one of fact, not opinion. The statement could be verified as either true or false. Financial documentation would be able to prove the factually correct version of events.

The final consideration on an anti-SLAPP motion requires the court to assess whether the harm likely to be or having been suffered by the responding party because 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. The court concluded that there was personal harm to the plaintiff from the accusations of theft or fraud, and the essence of the defamation was a personal attack on her character rather than a genuine discussion of the WE Organization. In those circumstances, the need for the plaintiff to vindicate her reputational rights outweighed the need for a public airing of the impugned statements. The motion brought by Canadaland and Brown was therefore dismissed.

The decision is a good example of a media organization trying — unsuccessfully — to dismiss a defamation claim at an early stage. Rather than having the action dismissed, the result of the anti-SLAPP motion will likely only serve to bolster the plaintiff’s confidence to move forward to trial. Based on the court’s preliminary determination of the issues, it is difficult to see how the defences raised during the anti-SLAPP motion would ultimately prevail and result in a different outcome.

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