

# KEEPING CURRENT

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## Defamation claim against Global News by former Liberal MP survives Anti-SLAPP motion (*Dong v. Global News*)

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Anti-SLAPP motions are an important tool available for defendants to put a stop to claims that are intended to silence free expression through litigation. However, anti-SLAPP motions may themselves be abusive by intending to complicate, delay or otherwise end a legitimate defamation claim before trial. When there is a genuine dispute over whether a publication is defamatory and has damaged the reputation of a plaintiff, the battleground to adjudicate the dispute is likely at trial, not at an early-stage motion, as demonstrated by *Dong v. Global News*, 2024 ONSC 3532 [not yet on CanLII].

Han Dong, a Chinese Canadian citizen and Member of Parliament for the Liberal Party, was the subject of a sensational headline in a series of news stories about foreign interference in Canada's elections published by Global News. The headline at issue stated: "*Liberal MP Han Dong Secretly advised Chinese diplomat in 2021 to delay freeing of Two Michaels: sources*". The article described a telephone conversation between Mr. Dong and a senior Chinese diplomat

about delaying the release of two Canadians known as the "Two Michaels" who had been imprisoned by the Chinese government on espionage charges.

The Global News article which intimated that Mr. Dong betrayed the Two Michaels and Canada had an immediate and devastating effect on his political career. He was removed from the Liberal caucus and the Parliamentary committees of which he was a member.

Mr. Dong then sued Global News and others involved in the story for defamation. Mr. Dong did not deny discussing the Two Michaels with the Chinese diplomat but said that he was actually trying to advocate for their release.

The defendants brought an "anti-SLAPP" motion under [section 137.1](#) of the Ontario [Courts of Justice Act](#) (the "[CJA](#)"), which permits the dismissal of proceedings that limit debate on matters of public interest.

An anti-SLAPP motion is not intended to involve an adjudication of the merits of the underlying claim or a conclusive

determination of the potential defences. Most of the issues that would be addressed at trial are nevertheless raised at a preliminary level. The court has to take into account the limited nature of the record, the timing, and the potential of future evidence emerging: *1704604 Ontario Ltd. v. Pointes Protection Association*, [2020 SCC 22 \(CanLII\)](#), at paragraph [37](#).

In the motion judge's words, the nature of an anti-SLAPP motion is a "legal riddle," since it is intended to separate or screen actions that may be prosecuted from those that should be stopped because they are strategic attempts to silence freedom of expression. This puts the court in the position of having to decide what is "really going on" based on a preliminary, limited record.

In the case at hand, there was no doubt that the news article giving rise to the proceeding involved a matter of public interest of the highest magnitude. It was also indisputable that Mr. Dong had suffered immense damage to his reputation and career as a result.

Mr. Dong had the onus to satisfy the criteria set out in [section 137.1\(4\)\(a\) and \(b\)](#) of the *CJA*, specifically that there were grounds to believe that the proceeding had substantial merit, that the 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 \(CanLII\)](#), at paragraphs [18](#), [33](#).

The motion judge was satisfied that the action was a "pure defamation action" that was intended to restore Mr. Dong's reputation by exposing himself to the risks of litigation in doing so. Since it involved limiting the defendants' freedom of expression on matters of public interest, the main issue was the defences that they relied upon: (i) trust or justification and (ii) responsible communication.

The defence of truth or justification requires a defendant to demonstrate that the "sting" or main thrust of the statement at issue was substantially true: *Grant v. Torstar Corp.*, [2009 SCC 61](#); *Libel and Slander Act*, [R.S.O. 1990, c. L.12, section 22](#).

Significantly, the defendants did not argue that it was actually true that Mr. Dong had told the Chinese diplomat to delay the release of the Two Michaels, but only that "sources" had made this allegation. In the motion judge's view, it was conceivable that a court would regard this argument as sophistry. The sting of the news article was not that a source believed that Mr. Dong was a traitor to the Two Michaels and Canada but that he was.

Further, the "repetition rule" in defamation law means that a defendant cannot escape liability by pleading that they were simply repeating a defamatory statement made by someone else: *Douglas v. Tucker*, [1951 CanLII 54 \(SCC\)](#). Accordingly, the defendants may not have a valid defence of truth or justification.

The defence of responsible communication requires a defendant to establish that (a) the impugned statement is a matter of public interest; and (b) the publication of the statement was responsible by showing that reasonable steps were taken to ensure (i) the overall accuracy of any factual assertions, and (ii) the fairness of the publication of the statements: see *Armstrong v. Corus Entertainment Inc.*, [2018 ONCA 689 \(CanLII\)](#), at paragraph [28](#).

The motion judge reasoned that the nature of the story required the defendants to show that they had met the highest level of diligence called for in order to rely on this defence. The defendants were faced with the dilemma that they had no tangible or documentary corroboration to produce concerning the information derived from their "sources" about the conversation between

Mr. Dong and the Chinese diplomat.

While the motion judge acknowledged that confidential sources and whistleblowers have an important role in exposing important stories, it may nevertheless be unreasonable to rely solely on a confidential source in some cases. In the circumstances, it was quite conceivable that a court would find that the test required for responsible communication was not met and that the defendants had not exercised the appropriate level of investigation “before dropping a cluster bomb on Don’s reputation.”

Mr. Dong therefore established that neither of the defences raised by the defendants were valid for the purposes of the anti-SLAPP motion.

The penultimate issue was whether the public interest in permitting the proceeding to continue outweighed the public interest in protecting the expression. The motion judge concluded that there was little public interest in protecting the defendants’ expression from the scrutiny of a defamation trial. Rather, it was in the public interest to have a trial.

In that regard, if it was true that Mr. Dong assisted the Chinese government and thereby betrayed the Two Michaels and Canada, then the attack on his reputation should be upheld. If the Global News allegations were not true, however, then it was of considerable public interest that Mr. Dong be allowed to vindicate his reputation in a court of law. Whether he was villain or wrongly accused should not be determined on a preliminary motion.

The anti-SLAPP motion was therefore dismissed with costs to be awarded to Mr. Dong in an amount to be determined. While there is ordinarily a presumption under [section 137.1\(8\)](#) of the [CJA](#) that costs of an anti-SLAPP motion are not awarded to the responding party, the motion judge reasoned that costs should be awarded against the moving parties in this case

since the motion itself resembled an abusive anti-SLAPP.

The decision demonstrates that care should be taken to bring an anti-SLAPP motion in cases where a plaintiff will be able to establish that there is a genuine purpose for the action and that no defences may be valid. In this case it was the anti-SLAPP motion was viewed by the court as strategic litigation against public participation. Mr. Dong’s communications were worthy of being adjudicated within open court system and “[i]t remains for the public to decide whether Dong was justifiably disgraced.”

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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