

Former Liberal MP's defamation claim survives anti-SLAPP motion

By **James R.G. Cook**

Law360 Canada (July 15, 2024, 2:37 PM EDT) -- The anti-SLAPP motion decision of the Ontario Superior Court of Justice in *Dong v. Global News*, 2024 ONSC 3532, offers a cogent example of a defamation lawsuit that will require a full trial to determine or disprove liability. In response to the defendants' motion to dismiss the action at an early stage, the motion judge determined that there was a genuine dispute over whether the impugned publication was defamatory and had damaged the reputation of a plaintiff. In such a case, the proper battleground to adjudicate the dispute is at trial not at an early-stage motion.



James R.G. Cook



Yutthana Gaetgeaw: ISTOCKPHOTO.COM

The background to the case received considerable Canadian media attention in 2023. 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 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 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.

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

After pleadings were exchanged in the defamation action, the defendants brought an "anti-SLAPP"

motion under s. 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, 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 Dong had suffered immense damage to his reputation and career as a result.

Dong had the onus 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 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*, at paragraphs 18, 33.

The motion judge was satisfied that the action was a "pure defamation action" that was intended to restore 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, s. 22.

Significantly, the defendants did not argue that it was actually true that 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 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*, [1952] 1 SCR 275. 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, 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 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 Dong's

reputation.”

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 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 Dong be allowed to vindicate his reputation in a court of law. Whether he was a villain or wrongly accused should not be determined on a preliminary motion.

A key takeaway from the decision is the consideration that an anti-SLAPP motion may itself be determined by the court to be strategic litigation against public participation. Dong's communications were worthy of being adjudicated within an open court system and, in the words of the motion judge, “[i]t remains for the public to decide whether Dong was justifiably disgraced.” Although s. 137.1(8) of the CJA contains a presumption that the moving party on an unsuccessful anti-SLAPP motion is protected from a costs award, the motion judge reasoned that Dong had rebutted the presumption on the grounds that the action was not strategic litigation and that it was the defendants' motion that resembled an abusive anti-SLAPP.

The anti-SLAPP motion was, therefore, dismissed with costs to be awarded to Dong in an amount to be determined.

James R.G. Cook is a partner at Gardiner Roberts LLP and has been with the firm since he articulated there in 2002. As a litigator in the firm's dispute resolution group, he has experience in a broad range of commercial, real estate and professional liability litigation.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the author's firm, its clients, LexisNexis Canada, Law360 Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.