

CITATION: Rebel News v. Al Jazeera Media, 2021 ONSC 1035
COURT FILE NO.: CV-19-631770-0000
DATE: 20210216

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
REBEL NEWS NETWORK LTD.) *A. Irvin Schein and Samantha Schreiber,*
) lawyers for the plaintiff
Plaintiff)
)
– and –)
)
AL JAZEERA MEDIA NETWORK) *M. Philip Tunley and Jennifer P. Saville,*
) lawyers for the defendant
Defendant)
)
) **HEARD: February 1, 2021**
)

REASONS FOR DECISION

DIAMOND J.:

Overview

[1] In late November 2019, the plaintiff Rebel News Network Ltd. (“Rebel”) commenced this proceeding against Al Jazeera Media Network (“Al Jazeera”) seeking damages for defamation in the amount of \$500,000.00, plus punitive and exemplary damages in the amount of \$100,000.00.

[2] Rebel’s cause of action arises out of allegedly defamatory statements contained in an internet article and YouTube video published by Al Jazeera on or about September 29, 2019. Rebel alleges that within the said article and video, Al Jazeera published three, separate defamatory statements (described in greater detail hereinafter).

[3] After defending Rebel’s Statement of Claim, Al Jazeera now brings a motion pursuant to section 137.1(3) of the *Courts of Justice Act*, R.S.O. 1990 c. C43 (“*CJA*”) for an order dismissing this action as being a strategic lawsuit against public participation (“SLAPP”).

[4] Al Jazeera’s motion was argued before me via video conference on February 1, 2021. At the conclusion of the hearing, I took my decision under reserve. These are my Reasons for Decision.

The Parties

[5] Rebel was founded in 2015 by Ezra Levant (“Levant”). According to Levant, Rebel is an online source of news and commentary designed to be an alternative to mainstream news outlets and publications. It is not generally in dispute that Rebel has adopted a conservative and right-wing orientation in its presentation of news and commentary.

[6] Al Jazeera is public utility private corporation created in accordance with the laws of the state of Qatar. Al Jazeera was founded in 1996, launching an English language branch in 2006, and now broadcasts news worldwide.

[7] On this motion, each of Rebel and Al Jazeera have attempted to portray the other in an unflattering, and arguably extremist, light. Al Jazeera argues that Rebel and its founder Levant are “alt-right” commentators who often publish anti-minority themes, allegedly entering on occasion into the realm of hate speech. While Rebel agrees that its views can be characterized as displaying an “anti-Islamist” orientation, it describes Islamism as being the political manifestation of radical Islam.

[8] Rebel argues that Al Jazeera is a branch of the Qatar media empire that uses its influence on a regional and global basis to promote Qatar’s foreign policy objectives, and that there is a strong connection between Al Jazeera and the allegedly “anti-semitic, terrorist-financing Qatari government”.

The allegedly defamatory statements

[9] As set out above, the three allegedly defamatory statements are contained in an internet article and YouTube video published by Al Jazeera on or about September 29, 2019. Both the article and the video were co-produced by Ryan Kohls (“Kohls”) and Florence Phillips (“Phillips”) for a weekly program called “The Listening Post”. Kohls is a journalist who has worked as an interview producer for Al Jazeera since 2013. Phillips is a senior producer and reporter who has worked for Al Jazeera since 2009.

[10] The internet article was entitled “The Right Perspective? YouTube Radicalization and Rebel Media”. After describing Rebel as “one of the internet’s most influential far-right publications”, the article contained the following statements:

“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” (the “first statement”).

[11] Of note, after subsequently receiving Notices of Libel from Rebel, in mid-November 2019 Al Jazeera published the following addendum:

“Correction, November 15, 2019: Since this report was first published, we have updated it to correct the following facts: ... In the web article it was stated that the perpetrators of three violent attacks had all watched Rebel News. For strict factual accuracy, we have clarified that they watched Rebel News or the work of their regular contributors.”

[12] Within the YouTube video, the following statement was made at the 22 second mark.

“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.” (the “second statement”).

[13] At the approximate 8 minute mark of the same video, the following statement was made:

“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”).

[14] Once again, after Al Jazeera received Rebel’s Notice of Libel, it published this addendum in mid-November 2019 stating as follows:

“Correction, November 15, 2019: Since this report was first published, we have updated it to correct the following facts: In the video report we stated that the Ottawa Police had filed a criminal complaint against Rebel. In fact, a complaint had been received by the Ottawa Police.”

[15] The program generated slightly less than 40,000 views on the internet.

Test for dismissal under section 137.1 of the CJA

[16] The provisions of section 137.1 of *CJA* are as follows:

- (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 2015, c. 23, s. 3.
- (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. 2015, c. 23, s. 3.
- (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. 2015, c. 23, s. 3.
- (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,
 - i. the proceeding has substantial merit; and
 - ii. 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. 2015, c. 23, s. 3.”

[17] Section 137.1 came into force in 2015. It took several years for the jurisprudence under section 137.1 to settle, but ultimately the guiding principles for the exercise of the Court’s discretion under a stated test was developed. In both *1704604 Ontario Ltd. v. Pointes Protection Association* 2020 SCC 222 and *Bent v. Platnick* 2020 SCC 23, the Supreme Court of Canada set out the burdens placed upon both parties on motions under section 137.1.

[18] To begin, the initial burden is on the defendant to satisfy the Court that (a) the proceeding in question arises from an expression made by the defendant, and (b) the said expression relates to a matter of public interest.

[19] If the defendant fails to discharge that onus, the motion is dismissed and the action continues. However, if the defendant does satisfy the threshold onus, then the burden shifts to the plaintiff to satisfy the Court that:

- a) there are grounds to believe that the proceeding has substantial merit;
- b) there are grounds to believe that there is no valid defence(s); and,

- c) the harm suffered by the plaintiff as a result of the defendant's expression is sufficiently serious that the public interest in permitting the plaintiff's action to proceed outweighs the public interest in protecting the defendant's expression.

[20] Of note, the plaintiff's burden requires all three elements set out above to be proven.

[21] If one element is not proven, then the motion must be granted and the action is dismissed.

[22] I shall now address each element of the test under section 137.1 in turn.

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

[23] As stated, the initial burden is upon Al Jazeera to satisfy the Court that this proceeding arises from an expression made by Al Jazeera, and more importantly that the expression relates to a matter of public interest.

[24] There is no doubt that the three statements are expressions made by Al Jazeera.

[25] As held in *Pointes*, the words "relates to a matter of public interest" should be given a broad and liberal interpretation, consistent with the legislative purpose of section 137.1.

[26] During argument, Rebel conceded that the impugned expressions all relate to matters of public interest as contemplated by section 137.1. This was a proper and understandable concession. In my view, the public has a clear interest in several matters raised in the Al Jazeera publications, including the reasons behind individuals' decisions to commit violent hate crimes such as those referred to within the article and the video.

[27] Accordingly, I find that Al Jazeera has satisfied its onus on this motion. The burden now shifts to Rebel to satisfy the three elements set out above.

Issue #2 Are there grounds to believe that this proceeding has substantial merit?

[28] As held by the Supreme Court of Canada in *Bent*, unlike a balance of probability standard, a "grounds to believe" standard requires "a basis in the record and the law – taking into account the stage of the litigation – for finding that the underlying proceeding has substantial merit and that there is no valid defence." This means that any basis in the record and the law will be sufficient for Rebel to discharge its initial onus.

[29] Whatever basis may exist, it must be legally tenable and reasonably capable of belief. The Court must be satisfied that Rebel's prospects of success in this proceeding are more than a mere possibility.

[30] One issue which arose during argument was the level to which the Court may delve into the merits of the proceeding (ie. the evidence filed on this motion) at this early stage. As recently held by the Court of Appeal for Ontario in *Subway Franchise System of Canada Inc. v. Canadian Broadcast Incorporation* 2021 ONCA 26 (CanLII), given the early stage at which motions under sections 137.1 are argued, “there is only a limited assessment of the evidence from the motion judge’s perspective”. If the record before the Court raises serious credibility issues, or perhaps inferences necessary to be drawn from competing material facts, “the motion judge must avoid taking a ‘deep dive’ into the ultimate merits and instead, engage in a much more limited analysis.”

[31] Counsel for both parties suggested that the lens through which the Court should assess the test under section 137.1 lies somewhere between the “plain and obvious” test under a Rule 21 motion to strike, and the “no genuine issue requiring a trial” test under a Rule 20 motion for summary judgment. While this may be somewhat accurate, wherever the test under section 137.1 may land on that scale, in my view there must be a sufficient evidentiary basis to support the findings on this motion being reasonable conclusions ultimately made by the trier of fact.

[32] In support of its motion, Al Jazeera tendered the affidavits of Kohls along with Richard Warman (“Warman”, a human rights lawyer and advocate against hate speech), John Miller (“Miller”, a professor at Ryerson University School of Journalism and former newsman editor at the Toronto Star), and Dr. Barbara Perry (“Dr. Perry”, a professor at Ontario Tech University and the director of the Center on Hate, Bias and Extremism).

[33] In response, Rebel tendered the affidavit of Levant.

[34] I have reviewed all of the above affidavits, and the transcripts from the cross-examinations.

[35] Rebel argues that the first statement leaves the reasonable reader with the clear impression and/or takeaway that Rebel is connected to three violent crimes (the Finsbury Park Mosque attack in London, the Quebec City Mosque shooting and the murder of four people in Fredericton, New Brunswick), and that in each case the perpetrators had watched Rebel media and become convinced that Muslims were invading their respective countries (England and Canada).

[36] Rebel argues that the second statement leaves the reasonable viewer with the clear impression and/or takeaway that Rebel broadcasts drive individuals to acts of violence.

[37] Rebel argues that the third statement is simply wrong, as the Ottawa police never filed a criminal complaint against Rebel (but only received one).

[38] It is somewhat trite to state that for a statement to be defamatory, three elements must be established:

- 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.

[39] Al Jazeera concedes the first two elements of the above test. However, Al Jazeera argues that Rebel cannot show that there are grounds to believe that its action against Al Jazeera has substantial merit, in particular because Rebel already owned the reputation of being connected to violent acts and of publishing hateful conduct, including far-right discourse disguised as cutting-edge journalism, which could lead to real-life ramifications. In support of its position, Al Jazeera relies upon the evidence of Warman, Miller and Perry who all go to great lengths in their respective affidavits to document Rebel's alleged history of "platforming" (i.e. providing a voice/platform to) contributors who are sympathetic to and/or have been described as alt-right, neo-Nazi or anti-Muslim.

[40] Simply put, Al Jazeera submits that at the time of publication, Rebel's reputation was already "so low" (due to its allegedly pre-existing connection to violent acts and hateful conduct), and as such Rebel's reputation could not be further lowered by the publication of the three statements.

[41] While Al Jazeera argues that cases such as *WIC Radio Ltd. v. Simpson* 2008 SCC 40 (CanLII) permit the Court to consider "how much is publicly known about the plaintiff" when assessing the defamatory nature of a statement, that analysis is typically carried out when the full merits of the claim are in play, either by way of trial or summary judgment. I agree with Rebel that the Court's job at this early stage of the proceeding is more of a screening function than a full determination of the merits.

[42] In my view, Al Jazeera's argument cannot be accepted at this stage. The issue of Rebel's existing reputation is one that inherently requires the Court to perform the frowned upon "deep dive". Rebel's existing reputation as at the time of publication is an issue better suited for a consideration of Al Jazeera's defence(s) or perhaps Rebel's claimed damages. As the Court must not wade past shallow waters when conducting a section 137.1 analysis, I am not prepared to draw any conclusions with respect to the status of Rebel's reputation as at the date of publication of the article and video.

[43] I find that the three statements are quite capable of being defamatory, and as such there are grounds to believe that Rebel's action has substantial merit. At a minimum, the first statement is an imputation of fact that there was a causal connection between the three perpetrators carrying out their criminal events and them having watched Rebel and become convinced that Muslims were invading their respective countries.

[44] I find that the likely natural meaning of the second statement is that Rebel was one of the best-known practitioners of the art of potentially radicalizing the views of its readers, and driving "some of them to acts of violence".

[45] With respect to the third statement, it is clear from the record (and Al Jazeera's own correction) that the Ottawa police never took the active step of filing a criminal complaint against Rebel, but instead only received a criminal complaint from a private citizen (who was in fact Warman) about Rebel.

[46] I thus find that Rebel has met its burden to show grounds to believe that its action has substantial merit.

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

[47] As held in *Pointes*, Rebel now has the burden to show that there are grounds to believe that the defences raised by Al Jazeera have no real prospect of success.

[48] In *V.(W.) Brad Blair v. Premier Doug Ford*, 2020 ONSC 7100 (CanLII) Justice Belobaba held that a "real prospect of success" is less than "a likelihood of a success" but more than merely "some chance of success" or even "a reasonable prospect of success." If the Court concludes that even one of the defences raised by Al Jazeera has a real prospect of success (more than just a chance or even a reasonable chance, but less than probability), that alone is enough to dismiss Rebel's action.

[49] Al Jazeera raises three defences to Rebel's claim: (a) justification, (b) fair comment, and (c) responsible communication on matters of public interest.

a) Justification

[50] The evidence shows that none of the Finsbury Park, Fredericton or Quebec City murders directly watched Rebel Media. At most, there is a slight possibility that the Finsbury Park and Quebec City murderers may have been exposed to publications made by one or two prior contributors to Rebel, but the nature of those communications are unknown.

[51] Al Jazeera admits that it was a mistake when Kohls wrote that the Ottawa Police had filed a criminal complaint against Rebel, as the Ottawa Police had only received a private criminal complaint from Warman. Al Jazeera argues that this error was inconsequential. I do not agree. In my view, the ordinary reader could easily conclude that whatever Rebel may have done warranted independent action on the part of the Ottawa Police, leading to an active investigation. There is a difference between the Ottawa Police taking action against Rebel in a "self-starter" manner, and the Ottawa Police processing a private criminal complaint.

[52] Accordingly, I agree with Rebel and find on the record before me that there are grounds to believe that Al Jazeera's defence of justification has no real prospect of success.

b) Fair Comment

[53] To succeed with its defence of fair comment, Al Jazeera must prove the following five elements:

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

[54] I have already found that the three statements were made on matters of public interest, and so Al Jazeera has satisfied the first element of the test.

[55] The background facts must either be stated in the publication (i.e. within the article and/or video) or otherwise publicly well known and understood by the reader/viewer. I agree with Al Jazeera that background facts concerning the Finsbury Park, Fredericton and Quebec City crimes had already been well publicized through various other sources, and therefore likely known to the reader/viewer.

[56] That said, are the allegedly defamatory statements recognizable as comment? As held in *B.W.(Brad) Blair*, “words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. What is comment and what is fact must be determined from the perspective of a ‘reasonable viewer or a reader’. The notion of ‘comment’ includes ‘deduction, inference, conclusion, criticism or judgment and is generously interpreted’”.

[57] I do not agree with Al Jazeera. A plain reading of the first statements discloses that Kohls reported as a fact that (a) all three perpetrators watched Rebel, and (b) all three perpetrators had become convinced Muslims were invading their countries. While the causal connection between the perpetrators being convinced that Muslims were invading their respective countries and the perpetrators having watched Rebel Media is a reasonable and arguably evident inference, I cannot agree with Al Jazeera that those statements are necessarily recognizable as comment. Those statements are more likely expressed as fact, or at a minimum, imputations of fact.

[58] While the contents of the second statement could be construed as comment in that the second statement characterizes Rebel as a practitioner of the art of disguising content as cutting-edge journalism, the first statement does not describe Rebel in any manner. Rather, the first statement reports as fact that all three perpetrators watched Rebel, and then became convinced that Muslims were invading their respective countries. This is linked back to the “connection” between Rebel’s reputation and violent acts in general set out in the first sentence of the first statement.

[59] I find that Rebel has shown the presence of grounds to believe that Al Jazeera has no valid defence of fair comment.

c) Responsible Communication on Matters of Public Interest

[60] The defence of responsible communication on matters of public interest requires two elements to be proven: (a) the impugned statements must be on a matter of public interest, and (b) the publisher must demonstrate that it was reasonably diligent in the steps taken to validate the accuracy of the factual statements made.

[61] Once again, I have already found that the three statements were made on matters of public interest, and so the first element of this defence has been met.

[62] With respect to the second element, Al Jazeera must not adhere to a standard of perfection, but rather demonstrate that its publications were responsible in that it was reasonably diligent in its efforts to verify the allegations having regard to all the relevant circumstances. As held in *Bent*, Rebel must demonstrate that there is a basis in the record and the law – taking into account the state of the proceeding – to support a finding that the defences put in play do not tend to weigh more in Al Jazeera’s favour.

[63] In my view, Rebel cannot discharge its onus with respect to this defence. To begin, it led the evidence of Levant, and no other witnesses, choosing instead to rely upon Levant’s evidence and the cross-examination of Al Jazeera’s witnesses. Indeed, Rebel attempted to extract an expert opinion of journalistic standards “on the fly” during Miller’s cross-examination. To the extent that Miller attempted to answer the questions posed of him, those answers cannot be construed to form the basis of an expert opinion capable of being considered on this motion. Miller was never engaged to provide any opinion on journalistic standards, and Rebel’s reliance upon his answers at cross-examination are essentially carried out in a vacuum.

[64] Rebel made strong submissions that Kohls never presented a balanced view in the video and article, and his entire investigation was “aimed at sourcing publications that vilified Rebel.”

[65] Rebel seeks to cast Kohls’ credibility into significant doubt on this motion. Kohls gave evidence that his interest in writing about Rebel began when he read a New York Times article called “The Making of a YouTube Radical” in June 2019. Rebel argues that it was never mentioned in the article, and only a few of the individuals shown in the article’s cover graphic picture were associated with Rebel.

[66] Kohls explained his decision not to speak to other sources due to his desire to speak directly to Levant himself, which Kohls attempted to do. Given the opportunity to provide Rebel’s side of the story, neither Levant nor Rebel provided any relevant comments, responses or facts.

[67] In this regard, the record before the Court raises serious credibility issues, and inferences necessary to be drawn from competing material facts. In such circumstances, the “deep dive”, while necessary to resolve this issue, is precluded.

[68] The defence of responsible communication on matters of public interest is thus open for Al Jazeera to pursue. Rebel has failed to discharge its onus to show that the defence has no real prospect of success.

[69] For that reason, Al Jazeera's motion is granted and this action is dismissed.

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

[70] While I have already granted the relief sought by Al Jazeera on its motion, in the event I am incorrect and for completeness of the record I will address the final issue.

[71] Rebel bears the onus of satisfying the Court that the harm it suffered as a result of the publication is sufficiently serious that the public interest in permitting Rebel's action to continue outweighs the public interest in protecting Al Jazeera's expressions.

[72] In *Pointes*, the Supreme Court of Canada held that prior to the Court embarking upon this weighing exercise, Rebel must show (a) the existence of some harm, and (b) that the harm was caused by Al Jazeera's expression. There must be evidence before the Court to draw the necessary inferences in respect of both the harm suffered and the said causal link.

[73] Apart from relying upon the traditional principle that damages in a defamation action can be "at large" (ie. presumed), Rebel (a corporate plaintiff) has led no evidence of any particular or specific economic harm or damage to its reputation as a result of the video and article. In my view, Rebel's obligation to lead such evidence was arguably even more necessary given the evidence led by Al Jazeera on this motion, namely that Rebel's reputation is already poor to begin with (although I have made no specific finding on that submission).

[74] While Rebel argues that Al Jazeera's position is that any harm to Rebel was likely caused by other or previous publications, Rebel has not led any evidence to counter that suggestion. In addition, Rebel has not led any specific evidence that any specific harm has been suffered as a direct result of Al Jazeera's publications.

[75] As such, in the words of Justice Belobaba in *B.W.(Brad) Blair*, Rebel has "not cleared the threshold of showing harm and causation." While I have already found that there is substantial merit to Rebel's defamation claim, the public nevertheless maintains a strong interest in the subject matter of expressions concerning far-right political and social commentary websites, and the causes that lead individuals to commit violent hate crimes such as those referred to in the article and video.

[76] I therefore find that the weighing of the two public interests favours free expression and public debate as sought by Al Jazeera.

[77] Rebel's action is therefore dismissed.

Costs

[78] In light of the costs provisions set out in section 137.1(7) of the *CJA*, absent an agreement between the parties, counsel may serve and file written submissions on the issue of costs of this motion and this action. Those costs submissions shall be limited to five (5) pages including a Costs Outline, and be served and filed in accordance with the following timetable:

- a) Al Jazeera's costs submissions to be served and filed within ten (10) business days of the release of these Reasons; and,
- b) Rebel shall thereafter have an additional ten (10) business days from the receipt of Al Jazeera's costs submissions to serve and file its responding costs submissions.



Diamond J.

Released: February 16, 2021

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Plaintiff

– and –

AL JAZEERA MEDIA NETWORK

Defendant

REASONS FOR DECISION

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