

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Lascaris v. B'nai Brith Canada, 2019 ONCA 163 (CanLII)

Court of Appeal for Ontario, Doherty, Pardu, Nordheimer JJA, 4 March 2019

Defamation, Canada, Ontario, [Libel and Slander Act, R.S.O. 1990, c. L.12](#), motion on defences, burden on the appellant

1. The appellant, Dimitri Lascaris, is a retired lawyer who works as an advocate for human rights by engaging in independent journalism, and providing *pro bono* legal services in human rights matters. He publicly criticizes a range of states and governments for human rights violations, including Saudi Arabia, Egypt, the United States, Canada, and Israel. He also advocates for Palestinian rights, and has criticized certain actions taken by Israel. The respondent, B'nai Brith Canada, is an independent, charitable organization involved in human rights and advocacy initiatives. It describes itself as the primary grassroots voice for the Canadian Jewish community, and is dedicated to combatting anti-Semitism and racism. The respondent intervenes in courts on issues that it views as important to Canadians, and it publishes articles, press releases and studies on topics that it views as being of interest to the Canadian public.
2. The complaint of defamation arose because the appellant ran as an unsuccessful candidate for the Green Party of Canada in the 2015 general election. In early 2016 the appellant was invited by the Green Party's leader to become the Justice Critic in her shadow cabinet. He took on this role in March 2016 even though he was not elected to parliament. After a visit to Israel in 2016, the appellant published two Facebook posts discussing a certain case in Israel involving an attack on a bus by individuals who were claimed to be part of the Popular Front for the Liberation of Palestine in a press statement issued by the PFLP. After his return to Canada in May 2016, the appellant promoted a resolution to the Green Party for a boycott, divestment, sanctions (BDS) campaign against Israel within Canada, and also published an opinion piece in the media advancing the same views.
3. The respondent began an investigation into this matter which resulted in two written statements, one in a letter to the Green leader, and one in a 'year in review' report at the end of 2016, to the effect that the appellant was a supporter of terrorism. Later, on or about 3 April 2017, the appellant discovered another publication on the respondent's Twitter account, stating: "Dimitri Lascaris resorts to supporting #terrorists in his desperation to delegitimize the State of #Israel". The tweet contained a link to the respondent's opinion article and accused the appellant of being an "advocate on behalf of terrorists".

4. After the tweet, the appellant served notice upon the respondent regarding the defamatory publications under [s. 5\(1\)](#) of the [Libel and Slander Act, R.S.O. 1990, c. L.12](#) (the Act). The case proceeded to trial. The respondent applied to dismiss the case citing the defences of justification, qualified privilege, fair comment, and notice. The motion judge agreed that the respondent's comments were of public interest and based on fact, and that there was a defence available of fair comment. The motion judge dismissed the appellant's case. On appeal, the court of appeal held that the motion judge erred in her finding about defences (at [33]):

The burden on the appellant under s. 137.1(4)(a)(ii) is not to show that a given defence has no hope of success. To approach s. 137.1(4)(a)(ii) in that fashion risks turning a motion under [s. 137.1](#) into a summary judgment motion. Rather, all that the appellant need show is that it is possible that the defence would not succeed.

5. It was the court of appeal's view that a reasonable person could conclude that a defence of fair comment in this case might not succeed. Indeed, the appellant expressly disavowed support for terrorism in his public responses to the respondent's publications, which made the defence of fair comment unavailable. The court of appeal concluded that no other defences were available.

6. On the issue of balancing of interests, section 137.1(4)(b) of the Act provides:

[T]he 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.

7. The court of appeal said on this issue (at [40]):

...this balance clearly favours the appellant. I say that because, if the appellant's action proceeds and if the appellant is ultimately successful, the damages to which the appellant would be entitled could be significant. Accusing any person of supporting terrorists is about as serious and damaging an allegation as can be made in these times.

8. The court noted that the appellant is a lawyer, saying (at [42]-[44]):

A lawyer's reputation is central to his/her ability to carry on their profession...The fact that the appellant is no longer engaged in private practice does not mean that his reputation is still not of consequence. The appellant continues to represent clients on a pro bono basis. His reputation will mean as much to those clients as it would to any other client, especially given the nature of the clients to whom he devotes his services. In reaching that conclusion, I do not mean to suggest that the views of the respondent are not without merit or importance. However, fair disagreements over policies and principles can be undertaken, indeed ought to be undertaken, through responsible discourse. Whatever disagreements there may be between the appellant's views and the respondent's views, those views can be exchanged and debated without the need for personal attacks. It remains open to the respondent to express its views on issues that concern it, such as the BDS Resolution and broader BDS debate, for example, without engaging in speech that is arguably defamatory.

9. The appeal was allowed and the case was remitted to the Superior Court of Justice for rehearing.

IMPLICATIONS



This case is an important reminder for charities and nonprofit organizations to implement appropriate operational policies about their official statements including those on social media. Organisations can be held accountable at law for the statements that they make.

VIEW THE CASE



This case may be viewed at: <https://www.canlii.org/en/on/onca/doc/2019/2019onca163/2019onca163.html>

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