**Canadian Media Law in 2015 – A Snapshot**

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**Defamation**

* **Public Interest Responsible Communication** defence recognized in 2009: *Grant v. Torstar Corp*., 2009 SCC 61
  + Supreme Court of Canada recognized that the defence was necessary to remedy the imbalance in the common law that provided protection to reputation at the expense of freedom of expression, which is protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms.*
  + The defendant must show that (a) the publication complained of related to a matter of public interest; and (b) the “publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances”. The “relevant circumstances” include the seriousness of the allegation; the public importance of the matter; the urgency of the matter; the status and reliability of the source; whether the plaintiff's side of the story was sought and accurately reported; whether the inclusion of the defamatory statement was justifiable; and whether the defamatory statement’s public interest lay in the fact that it was made rather than its truth.
  + Applies to all communications, not just journalists
  + Pre- and post-publication conduct is relevant: *Weaver v. Corcoran*, 2015 BCSC 165
  + All issues may be decided by a jury
  + Also includes a defence of “reportage”
  + Scope remains uncertain, limited cases since 2009
* **Fair Comment/Opinion Defence** expanded in 2008: *WIC Radio v. Mair*, 2008 SCC 40
  + Adopted an objective test for honest opinion
  + Recently applied to bloggers and extreme internet chat: *Baglow v. Smith*, 2015 ONSC 1175
  + Limited by malice: *Awan v. Levant*, 2014 ONSC 6890
* **No Liability for Hyperlinking**: *Crookes v. Newton*, 2011 SCC 47
  + Supreme Court held that including a hyperlink is not a “publication” or republication of the contents of the link, stating that a “strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.”
  + Recognized a “chilling effect” if there is a risk of liability for linking to articles “over whose changeable content they have no control.”
  + However, there may be liability if you adopt or affirm the contents of a link.
  + Linking to your own prior articles may be republication: *Weaver v. Corcoran*, 2015 BCSC 165
* **Multiple Publication Rule**
  + Canadian law still applies the rule that every republication is a new publication: *Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405; *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398
* **ISP/Search Engine Liability/On-line Reader Comments**
  + Innocent dissemination doctrine applies – no liability until put on notice and not taken down: *Weaver v Corcoran*, 2015 BCSC 165; *Carter v. BC Federation of Foster Parents*, 2005 BCCA 398
* **Libel Tourism –** Broad approach taken to jurisdiction: *Breeden v. Black*, 2012 SCC 19
  + If material is downloaded or read in Canada, then there is a rebuttable presumption of jurisdiction over the subject matter.
  + The presumption may be rebutted by showing no “real and substantial connection” with the jurisdiction, or that another forum is clearly more convenient: *Breeden v Black*, 2012 SCC 19, *Éditions Écosociété v Banro Corp*, 2012 SCC 18
* **Anti SLAPP Laws** 
  + Quebec has an anti-SLAPP law: *An Act to amend the Code of Civil Procedure to prevent improper use of the courts and promote freedom of expression and citizen participation in public debate*, S.Q. 2009, c. 12.
  + Ontario has introduced a Bill that will likely pass this year: Bill 83, *Protection of Public Participation Act, 2014*, 2d Sess, 40th Leg, Ontario, 2013 (referred to Standing Committee 16 April, 2014)
  + Ontario law would (if adopted) permit courts to dismiss a lawsuit that relates to expression on a matter of public interest, unless the plaintiff can demonstrate that (a) there are grounds to believe the action has “substantial merit” and the defendant has no valid defence, and (b) that the harm suffered by the plaintiff as a result of the expression is sufficiently serious that the public interest in allowing the case to continue outweighs the public interest in dismissing the case.
* **Criminal Defamation Laws Continue: Criminal Code, ss. 296, 298**
  + Although rarely used, the criminal offence of publishing a libel knowing it to be false has been upheld as constitutional by the Supreme Court: *R. v. Lucas*, [1998] 1 S.C.R. 439
  + Blasphemous libel also remains an offence on the books, though it is never used and would likely be struck down as unconstitutional

**Privacy**

* **Privacy Law Undeveloped**
  + No explicit right to privacy in the *Canadian Charter* and no common law recognition of the right when dealing with matters of public interest
  + The Quebec *Charter of Human Rights and Freedoms*, which applies only in that province, does contain a privacy right. The Supreme Court has relied on this right to hold that someone could sue a magazine for publishing a picture taken of her (and only her) in a public place without her consent. The plaintiff in that case was not a public figure, was 17 years old when the picture was taken, and was not in a place where she would have expected to be included in a photograph. (*Aubry v. Éditions Vice-Versa*, [1998] 1 S.C.R. 591)
  + Tort of “intrusion upon seclusion” recently recognized, but in a non-media context. (*Jones v. Tsige*, 2012 ONCA 32)
* **No “Right to be Forgotten”**
  + Although some lobbying to protect “practical obscurity”, a “right to be forgotten” is unlikely to be adopted in Canada.
  + However, Google was recently ordered to remove stolen trade secrets: *Equustek Solutions Inc v Jack*, 2014 BCSC 1063

**Access to Information**

* + Although a leader in the 1980s and 1990s in introducing ATI/FOIA legislation, Canada has fallen behind and has a poor record on transparency
  + No constitutional right to information from government – and Supreme Court has only recognized it as a “derivative right” where necessary to permit “meaningful expression”: *Criminal Lawyers Association v. Ontario*, 2010 SCC 23
  + Courts have also narrowly construed the application of these laws: *Information Commissioner v. Canada*, 2011 SCC 25
  + Information Commissioners have limited powers, and at provincial levels also wear the hat of being the Privacy Commissioners
* **Robust Access to Courts**
  + Canadian law is very strong on access to courts, court documents and exhibits: *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835; *R. v. Mentuck*, 2001 SCC 76; *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21
  + Presumptive entitlement to all court records including search warrant materials: *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41
* **Open Court Principle and the Right to Proceed Anonymously** 
  + The Supreme Court of Canada has recently watered down the requirement that the open court principle cannot be curtailed in the absence of specific evidence of harm.
  + In *A.B. v. Bragg Communications* (2012 SCC 46) the Supreme Court permitted a teenager to proceed anonymously in her application to find out the identity of her alleged cyberbullies without requiring direct evidence of harm. The Court held that there was “objectively discernible harm” given her age and the nature of victimization. The Court did not address the fact that the application was being brought so that A.B. could sue for defamation based on a fake Facebook profile that had been created.

**Hate Speech**

* + Prohibitions against hate speech infringe the guarantee of freedom of expression under s. 2(b) of the *Charter*, and so these cases turn on whether the prohibition is a justifiable limit on expression under s. 1 of the *Charter*.
* ***Criminal Code* Offences**
  + The *Criminal Code* offence of willful promotion of hatred against an identifiable group was upheld as a reasonable limit on freedom of expression (*R. v. Keegstra,* [1990] 3 S.C.R. 697), but the offence of wilfully publishing a false statement or news that a person knows to be false was not, and was struck down (*R. v. Zundel* [1992] 2 S.C.R.)
* **Human Rights Law**
  + The SCC has upheld human rights laws that make hate speech a “discriminatory practice” that can be subject to prohibition orders. Whether something constitutes hate speech depends on whether “a reasonable person, aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred”. In turn, “hatred” is defined narrowly, “being restricted to those extreme manifestations of the emotion described by the words ‘detestation’ and ‘vilification’”; not expression that is merely “repugnant and offensive” and does not incite the “level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects”. (*Saskatchewan (Human Rights Commission)* *v Whatcott* (2013 SCC 11)
  + The Supreme Court recently upheld a provision in Saskatchewan’s Human Rights Code prohibiting the publication of representations that expose a person or group to hatred on the basis of a prohibited ground (such as sexual orientation, race, or religion), but struck down the part of the provision which prohibited expression that “ridicules, belittles or otherwise affronts the dignity” of such person or group. (*Whatcott,* 2013 SCC 11)