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MEDIA LAW UPDATE

How much trouble are you in when you cannot prove what you published? Recent applications of the New Responsible Communication Defence in BC

By Michael A. Skene and J. Jeffrey Locke

The Supreme Court of Canada articulated the new libel defence of Responsible Communication in December 2009 in *Grant v. Torstar Corp*. 2009 SCC 61. Madam Justice Ross of the BC Supreme Court has considered the defence in two recent decisions: *Hunter v. Chandler* 2010 BCSC 729 and *Shavluk v. Green Party of Canada* 2010 BCSC 804.

The Defence

A defendant must prove that:

(a) the publication was on a matter of public interest, "public interest" being broadly defined as any matter that some segment of the public has a stake in knowing about; and,

(b) he or she acted responsibly in attempting to verify the content of the publication, having regard to the following factors enumerated by the Court:

(i) the seriousness of the allegation;
(ii) the public importance of the matter;
(iii) the urgency of the matter;
(iv) the status and reliability of the source;
(v) whether the plaintiff's side of the story was sought and accurately reported;
(vi) whether the inclusion of the defamatory statement was justifiable;
(vii) whether the defamatory statement's public interest lay in the fact that it was made rather than the truth ("reportage"); and,
(viii) any other relevant circumstances.

The Supreme Court of Canada was clear that the purpose of this new defence was to strike a better balance between freedom of expression and the protection of reputation. Of great practical significance, the responsible communication defence is intended prevent "libel chill", *i.e.*, situations where information of public interest may be held back due to the fear of reprisal stemming from an inability to verify facts where such verification is impractical or impossible.

Failure in *Hunter*

David Hunter was a public representative on a Recreation Commission considering an expansion of a public recreation centre, swimming pool and 52′ tall water slide. Peter Chandler was a public representative on an Advisory Planning Commission that considered the project. Hunter established that Chandler suggested in various conversations that Hunter had a conflict of interest and was acting unethically. One of the conversations was protected by qualified privilege, and one was not. The statement was one of fact, and the defence of fair comment failed.

In considering the Responsible Communication defence, the Court held that the statement was clearly on a matter of public interest. However, Chandler failed to prove that he had acted responsibly. Since the allegation was serious, greater diligence was required. The matter was not urgent. Chandler made the comments while awaiting, but before he had received, a legal opinion on the topic. Chandler did not discuss the allegations with Hunter before making them to others. Chandler also failed to disclose that the Mayor was of the view at there was no conflict of interest, and failed to include any facts that provided a basis for his allegations. Accordingly, the defence failed and general damages of $15,000 were awarded.

Green success

During an election campaign in September 2008, The Green Party of Canada issued a press release stating that John Shavluk would not be a candidate for that party, "following revelations that he made comments in 2006 on an online discussion forum that could be construed as anti-Semitic." The Green Party was able to prove the sting of that statement, but not the innuendo of the whole of the press release that Shavluk in fact held anti-Semitic views. The Fair Comment defence failed since the factual foundation given in the release was not sufficiently stated or known.

The Court held that the release was protected by a Qualified Privilege since the election was imminent, Shavluk had been endorsed as a candidate, the withdrawal of the endorsement required some communication, and there was no malice.

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In considering the defence of Responsible Communication, the Court was satisfied that a communication regarding the suitability of a candidate for public office during an election campaign was a matter of public interest. Ross J. found that the matter was urgent, the timetable was not within the control of the Green Party, the actual post giving rise to the communication was reviewed and considered (so the source was reliable), the party sought Shavluk's side of the story, and that the inclusion of the defamatory statement was justifiable in the circumstances. Accordingly, the statements were protected by the defence of Responsible Communication.

The right to get it wrong?

Hunter and *Shavluk* confirm that the Responsible Communication defence can be applied to communications outside the realm of traditional journalism. In *Hunter*, the Court was willing to consider the defence in the context of verbal communications. In *Shavluk* it was a press release by a political party. Journalists are used to acting "responsibly" when preparing their stories for broadcast or publication. These cases illustrate that all of us should act responsibly when potentially defaming someone in any context. In matters of public interest this may allow us the occasional "right to get the facts a little bit wrong".

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