

A PRIMER ON THE LAW OF DEFAMATION IN ONTARIO

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A. INTRODUCTION

While the Canadian *Charter of Rights and Freedoms*¹ guarantees the right of freedom of expression, this right has always been of a limited nature. One of those limitations can be found in Ontario legislation through the *Libel and Slander Act* (the “*Act*”)², which prohibits the dissemination of defamatory comments, specifically, spoken or written words that discredit an individual in the estimation of right-thinking members of society generally.

Every province and territory in Canada has enacted similar legislation to protect the victims of either spoken or written communication that can disparage that person’s reputation. In this electronic age, communication is packaged in a variety of formats allowing individuals, organizations, government agencies, non-governmental agencies and charitable and not-for-profit organizations the ability to communicate their positions on a plethora of topics, and therefore increasing the opportunity for statements to be misunderstood, and objected to.

The purpose of this *Charity Law Bulletin* is to provide a brief overview of the framework of the *Act* in the province of Ontario specifically, as well as an overview of important court decisions that have been made pursuant to the *Act*.

¹ Part I, *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11

² R.S.O. 1990, c. L.12.

Finally, this *Charity Law Bulletin* will point out some of the pitfalls that charitable and not-for-profit organizations should avoid when expressing opinions and beliefs through the organization's work, and as well as the protections afforded to the same organizations.

B. AN OVERVIEW OF THE LAW OF DEFAMATION IN ONTARIO

Defamation is defined in *Black's Law Dictionary*³ as:

The act of harming the reputation of another by making a false statement to a third person...A false written or oral statement that damages another's reputation.⁴

More specifically, a defamatory statement is defined as:

A statement that tends to injure the reputation of a person referred to in it. The statement is likely to lower that person in the estimation of reasonable people and in particular to cause that person to be regarded with feelings of hatred, contempt, ridicule, fear, or dislike.⁵

Defamation is comprised of two subcategories between libel and slander, which are discussed below.

1. Libel

The first portion of the *Act* deals with libel. Section 2 of the *Act* states that "defamatory words in a newspaper or in a broadcast shall be deemed to be published and to constitute libel". Given the nature of editorial and opinion pieces, many defamation actions for libel are focused on newspaper articles which are alleged to have disparaged, directly or indirectly, the subject of the article. In short, libel refers to *written* defamatory statements.

2. Slander

Slander is the second subcategory of defamation, and encompasses the broadcasting of *spoken* defamatory words. At common law, oral statements relating to the following four categories of slanderous words are automatically considered to have proven that a loss has been sustained:

³Brian A. Garner, ed., 8th ed. (St. Paul: The West Group, 1999).

⁴*Ibid.* at 448.

⁵*Ibid.* at 449.

- a) statements that discredit the plaintiff in relation to his or her work (business, profession, etc.)
- b) statements that impute to the plaintiff the commission of a criminal offence;
- c) statements that impute to the plaintiff a “loathsome or contagious disease”; and
- d) statements that impute “unchastity to a woman”.

Section 16 of the *Act* describes the way in which a plaintiff must prove an action in slander, specifically with respect to Category a) above:

In an action for slander for words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication thereof, it is not necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of the plaintiff’s office, profession, calling, trade or business, and the plaintiff may recover damages without averment or proof of special damages.

Section 16 is very important in situations in particular where a person has suffered business losses and cannot clearly quantify the loss of the dollar amount that their business has suffered due to allegedly slanderous statements. As such, by virtue of the fact that the statements were made, the proposed plaintiff can make out a case without having to suffer from a reverse burden of proving the damages that they suffered. All other oral statements made that do not fall in the above four categories require the proposed plaintiff to prove that they sustained a loss.

Section 17 of the *Act* deals with slander of title, goods and other malicious falsehoods. Slander of title and of goods relates to where slanderous comments are made about an individual or corporation’s property that they own or where they sell. Again, in these sorts of situations a plaintiff does not have to allege or prove special damages:

- a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or
- b) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication, and the plaintiff may recover damages without averment or proof of special damage.

3. Proving a Claim in Libel and/or Slander

In order to initiate a claim of libel or slander in an action for defamation, the allegations must prove the following:

- i) The statements must be made to a third party. Where a statement has been made and no one has read it aside from the individual, organization or corporation about which the statement has been made, the statement cannot be considered libellous;
- ii) The statements must be made specifically about individual, corporation or organization in question. It must be reasonably inferred that the statement that was published could reasonably be inferred to be discussing to or referring to that individual, corporation or organization.
- iii) Finally, the statement made must be considered defamatory, i.e. the statement must be false and disparages the reputation of the individual, corporation or organization.

4. Limitation Periods

Where an individual, corporation or organization decides to bring a court action for alleged defamatory statements, there are important limitation periods that must be noted. Failure to do so can create a situation in which the proposed plaintiff in the proceedings loses their ability to bring their action simply because of a procedural error rather than for lack of a worth-while claim. Section 5 of the *Act* states that a plaintiff cannot bring an action for libel in a newspaper or a broadcast unless within six weeks after the alleged libellous statement has come to the plaintiff's knowledge, the plaintiff has given written notice to the defendant that they have become aware of this statement and that a statement of claim will follow.⁶ Furthermore, at section 6 of the *Act*, a court action for libel must be commenced within three months after the alleged libellous statement comes to the plaintiff's knowledge.

Actions in libel and slander that do not relate to newspapers must be brought pursuant to the *Limitations Act, 2002*⁷, which states that there is a two year limitation period from the date upon which the proposed plaintiff became aware of the alleged libellous or slanderous statements upon which to bring a court proceeding. It is important to note that there are many situations where an individual, corporation or organization is not aware of the libellous or slanderous statements until well after those statements have been published. As such, both the *Act* and the *Limitations Act, 2002* provide protection to proposed

⁶ *Supra* note 1 at s. 5(1).

⁷ S.O. 2002, c. 24, Sch. B.

plaintiffs in that the time limitation starts running once the plaintiff becomes aware of the published or broadcast statements rather than from the date when those statements were actually made.

5. Defences to Actions in Libel and Slander

There are four main defences to an action for libel or slander, which are as follows:

a) Truth

The first defence is the defence of truth, meaning that if a statement made is attacked as being defamatory, the defence can be made that the statement was truthful and therefore there was nothing false about the statement, meaning therefore, that the statement was not defamatory.

b) Fair Comment

The second defence to an allegation of libellous statement is that the statements made were made as a fair comment. The defence of fair comment would be considered by the Court in situations where, by looking at the statement made, the facts and the situation, a conclusion can be made that the statements made were in actuality a fair commentary on the situation at hand and that the comments were fair and were not malicious.

c) Qualified Privilege

The defence of qualified privilege arises normally in situations where based on public policy, even where a person makes a statement that is considered defamatory, the individual, corporation or organization publishing these statements will escape any liability if it can be proven that the public good could be furthered in open debate.

d) Absolute Privilege

Situations where the defence of absolute privilege would apply would be comments made by civil servants, members of parliament, members of provincial parliament, federal government, ministers and the like who make comments that may be defamatory, but were made in the furtherance of investigations, fact finding missions, and reporting for the benefit of public policy.

C. RECENT DEFAMATION COURT DECISIONS

There are three important defamation decisions that have been made in Ontario that clearly indicate that the courts will not be hesitant to award large damages awards, particularly in situations where someone's professional reputation is destroyed. In *Hill v. Church of Scientology of Toronto et al*⁸, Hill, who was a criminal prosecutor, brought an action against the Church of Scientology of Toronto, defendants in a criminal matter in which Hill was prosecuting. The Church of Scientology accused Hill of aiding and abetting other Crown Counsel in improper conduct regarding the sealing of documents and misleading a judge. The Ontario Court of Appeal found that the church's allegations against Hill were unfounded and were made through the church's legal counsel. Mr. Hill was awarded \$300,000.00 in general damages, in addition to \$500,000.00 in aggravated damages and \$800,000.00 in punitive damages.

Two decisions in favour of plaintiffs bringing actions in defamation against the Canadian Broadcasting Corporation (the "CBC") clearly indicate that even a Crown corporation is not exempt from taking responsibility for the material it disseminates. In *Leenen v. Canadian Broadcasting Corporation*⁹ and *Myers v. Canadian Broadcasting Corporation*¹⁰ in relation to a television program which portrayed a number of cardiologists in a negative light as using controversial heart medication. The program was alleged to have portrayed the plaintiff cardiologists as uncaring individuals who were using the drugs without any concern of the potential negative effect of the drug on their patients. In *Leenen*, \$400,000.00 in general damages were awarded, as well as \$350,000.00 in aggravated damages and \$200,000.00 in punitive damages. In the related *Myers* action, brought by another cardiologist, the plaintiff was awarded \$200,000.00 in general damages, and aggravated damages in the amount of \$150,000.00. The *Leenen* and *Myers* decisions also underline that broadcasters of defamatory materials created by others are also exposed to liability.

D. IMPLICATIONS FOR CHARITIES AND NOT FOR PROFIT ORGANIZATIONS

1. Avoiding Defamation Claims

The law of defamation across Canada and particularly under the *Libel and Slander Act* in Ontario is of particular importance to many, if not most charitable and not-for-profit organizations for a number of

⁸ [1994] O.J. No. 961 (Ont. C.A.) [hereinafter *Hill v. Scientology*].

⁹ [2001] O.J. No. 2229 (Ont. C.A.) [hereinafter *Leenen*].

¹⁰ [2001] O.J. No. 2228 (Ont. C.A.) [hereinafter *Myers*].

reasons. Most charitable and not-for-profit organizations, even the smallest entities, do have some sort of written communication that they send out to their members, volunteers, donors, supporters and other interested parties to publicize upcoming events, as well as their position on particular issues. Other tools used in disseminating information about the mandate of the organization and its objects and activities, often include the following:

- Online discussion groups
- E-mail newsletters
- Seminars
- Conferences
- Books
- Handbooks
- E-mails
- Flyers
- Appearances on college/university campuses, community radio, press conferences
- Taped sermons
- Websites
- Presentations
- Workshops
- Journal articles
- Study materials
- Workbooks
- Online posting boards
- Press releases
- Taped speeches
- Church bulletins

Given the vast array of options that charitable and not-for-profit organizations have to disseminate information and to publish their particular views, it is clear that these organizations must take steps to ensure that whatever publications or method of broadcasting they use does not fall offside of the *Act*.

It is advisable for all charitable and not for profit organizations to note that any potentially defamatory statements could also attract human rights complaints through the mechanisms provided by *Human Rights Code (Ontario)* (the “Code”)¹¹ and the *Canadian Human Rights Act*¹², in situations where a potentially defamatory statement could also be construed as a violation of the *Code* or the *Canadian Human Rights Act* provisions that protect a number of enumerated groups stipulated within those pieces of legislation at the provincial and federal levels. Readers are also encouraged to review *Charity Law Bulletin* No. 65 entitled “Employment Advertising by Charities and Not-For-Profits: Issues in Human

¹¹ R.S.O. 1990, c. H.19.

¹² R.S.C. 1985, c. H-6.

Rights Law”, available <http://www.carters.ca/pub/bulletin/charity/2005/chylb65-05.pdf> prepared by the writer and Mervyn F. White, which provides a specific overview of the way in which charities and not-for-profit organizations can protect themselves from human rights complaints when preparing and publishing advertisements for their specific employment needs.

2. Addressing Defamatory Comments against the Organization

It is also important to consider what a charitable or not for profit organization should do in the event of litigation whether it is a proposed plaintiff in an action for defamation for either libel or slander, or if it is a proposed defendant being accused of publishing or broadcasting libellous or slanderous statements. In situations where a charitable or not-for-profit organization believes that there is a possible action for damages for either libel or slander, the organization must consider a few issues before proceeding.

- a) In situations where the statement has not been circulated to a number of people or to a number of organizations, the organization must consider the possibility that by moving forward with a court action, the statements made by the potential defendant will now become a matter of public record. In situations involving large and/or well-known charitable or not-for-profit organizations, the general media may very well report on these proceedings, and thereby circulating on a larger scale the very comments that the organization wishes to quash.
- b) Secondly, an action in defamation for either libel or slander can be, as with any other litigation, very expensive, time consuming and can consume the resources of an organization and distract it from its original objects.
- c) Finally, the fact that a charitable or not for profit organization could be exposed to an action in defamation for libel or slander based on the comments made by one of its spokespersons underlines the critical importance of ensuring that any and all communications by an organization is carefully reviewed and is approved upon by the Board of Directors, or by a qualified senior staff-person when the Board has delegated that authority. It is worth repeating that at any time an organization is unsure whether or not a particular piece of material or whether an oral presentation could be considered defamatory, it would be essential to obtain the advice of legal counsel trained in this specialty.

E. DEFAMATION AND THE INTERNET

The law of defamation with respect to the internet is growing into a subcategory in and of itself, as the internet provides virtually unlimited means by which potentially defamatory material can be disseminated literally across the globe within seconds and with the potential of reaching millions of people. Moreover, the speed and breadth of the internet has increased the number of potential plaintiffs in a proposed defamation action, as the number of persons that could potentially view potentially offensive material and object to it is likely much greater than readers of print materials only.

F. CONCLUSION

The *Libel and Slander Act* is a powerful legislative tool to protect the victims of unscrupulous statements made by individuals that can injure or discredit that person or organization's reputation. In situations involving charitable and not-for-profit organizations, it is imperative that these organizations avoid as much as possible making or broadcasting statements that could expose the organization to liability due to the comments made that might possibly discredit another. In addition, it is important for organizations to be aware of comments that are made about the organization which could destroy its goodwill, and accordingly, take positive steps to minimize dissemination of those statements.