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PASSION AND DEFAMATION

By Donald J. Bourgeois*

Iago, in Act 3 of *Othello*, says:

> Good name in man and woman, dear my lord, Is the immediate jewel of their souls. Who steals my purse steals trash; 'tis something, nothing; 'Twas mine, 'tis his, and has been slave to thousands; But he that filches from me my good name Robs me of that which not enriches him, And makes me poor indeed.

We all know the truth of this statement. Reputation is important to each of us and something that we want to protect.

People involved in charitable and not-for-profit organizations want to protect their reputations and that of their organizations. They are also passionate about the cause and purposes of the organization – they want to improve their community and passion often drives them through the thick and thin of fundraising, implementing programs, evaluating what works and does not work, countless meetings and so forth.

This passion, which is essential to success, can sometimes lead to legal issues. One of those issues is when we allow our passion to rule our comments to the detriment of the reputation of others. Thankfully, this occurs only rarely, but it has occurred in the cut and thrust of a public debate. Unfortunately, at times this situation has also led to others taking legal action either to recover damages and "to set the record straight" or through strategic lawsuits against public participation in hearings or other similar forums for public discourse and discussion.

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The Supreme Court of Canada has recently weighed in on the issue of defamation. Although it was in a different context, involving newspaper articles about an individual in one case and an individual and a business in the other, the Court took the opportunity to establish new law. It did so looking to the future with respect to different ways people communicate and "publish" their views, including the internet and social media.

The Court in December 2009 issued its reasons for judgment in *Grant v. Torstar Corp.*, 2009 SCC 61 and *Quan v. Cusson*, 2009 SCC 62. Importantly, all judges who heard the appeals concurred on most of the key legal issues.

What did the Court say? A lot. First, the Court noted the importance of freedom of expression in Canada. Using the *Canadian Charter of Rights and Freedoms* as background to the issue, the Court stated that freedom of expression "is essential to the functioning of our democracy, to seeking truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization." While the last purpose is not directly relevant to the issue of defamation in publishing, the first two are – democracy is dependent upon public debate and we as a society value truth.

But this freedom of expression is not absolute. People have a right not to be defamed or to have their privacy unreasonably infringed. Freedom of expression and the protection of reputation and privacy need to be balanced.

The Court, drawing on legal developments in other countries, articulated a new defence to defamation. Historically, a plaintiff needed to demonstrate that statements were (a) defamatory, (b) words referred to the plaintiff, and (c) the words were published, i.e., communicated to at least one other person other than the plaintiff. The defendant had some defences, the most common being "truth of the statement". The difficulty with this defence was that the defendant had to prove that the statement was substantially true. In the cut and thrust of public debate or discussion, the defence was not always easy to establish and may have led to "libel chill" impeding the seeking of truth and the proper functioning of democracy.

The Court developed a new defence, which it termed "public interest responsible communication". It set out a number of elements of this defence:

> A. The publication is on a matter of public interest; and
> B. The publisher was diligent in trying to verify the allegation having regard to:
> (a) the seriousness of the allegation;
> (b) the public importance of the matter;
> (c) the urgency of the matter;
> (d) the status and reliability of the source;
> (e) whether the plaintiff's side of the story was sought and accurately reported;
> (f) whether the inclusion of the defamatory statement was justifiable;
> (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and
> (h) any other relevant circumstances.

The Court's discussed what is or is not "a matter of public interest". It wrote:

> How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject – say, the private lives of well-known people – is not on its own sufficient to render an essentially private matter public for purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. It is enough that some segment of the community would have a genuine interest in receiving information on the subject.

While there is no single test for public interest nor a static list of topics, the case law does provide some guidance. It is a subject matter (quoting from another case) that "must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached." It is not confined to publications on government and political matters. "The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence."

It is important to note that while the Court has recognized that public discourse and the exchange of information is essential to democracy and the finding of truth, and "freedom of expression" is critical to doing so, freedom does not negate responsibility. There needs to be a reasonable balance between freedom of expression and the protection of reputation and privacy. This balance, though, does allow charitable and not-for-profit organizations to participate in a meaningful way through freedom of expression – provided it is done in a responsible manner, respecting the reputation and privacy of others, and in accordance with the principles set out by the Supreme Court of Canada.

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