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U.K. Defamation Law May Lead to Greater Protection for Canadian Website Operators

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INTRODUCTION

Canadian website operators may indirectly benefit from proposed legislation in the United Kingdom increasing protection in that country from liability for user content. This past May, the Draft U.K. Defamation Bill (the Bill) was introduced, setting out a proposed new statutory defence for website operators against defamation claims arising from allegedly defamatory content posted by users. While the proposed new defence does raise concerns about privacy and about a potential chilling effect on free speech, it should provide greater and more certain protection to website operators in the U.K. The recent trend in the Supreme Court of Canada (the SCC) has been to look to U.K. defamation law as a guide to modernize the Canadian law of defamation. This makes the Bill relevant to Canadian website operators because if the Bill is passed, it may very well inform how Canadian courts develop the law of defamation in this increasingly important area.

BACKGROUND – LIABILITY FOR PUBLICATION AND THE INNOCENT DISSEMINATION DEFENCE

Under Canadian law, a defamation plaintiff must prove that the defendant "published" the material in question. Proof of publication requires only that the plaintiff show that the defendant had, by any act, conveyed defamatory meaning. This is a low threshold and could mean as little as proving that the defendant clamped down a printing press or pointed to a sign.

The low threshold for publication is problematic for website operators because it makes them *prima facie* liable for all content appearing on their websites, including content posted by users. By its very nature, user content is not generally created or edited by the operator. The operator would not have the information to defend a defamatory posting, even if it was inclined to do so. The operator would therefore be in a very difficult position when required to defend allegedly defamatory user content.

An analogous problem was faced earlier by libraries, booksellers, and others that played a subordinate role in the distribution of allegedly defamatory content. As with website operators, libraries and booksellers did not author the thousands of titles they carried and were likely unable to defend the content in the titles. To address these difficulties, the common law established the defamation defence of innocent dissemination. This defence states that where a defendant has played a subordinate role in the distribution of defamation, it will not be liable if:

1. the defendant disseminated the defamation in the ordinary course of business;

2. the defendant was not aware of the defamation (he was "innocent");

3. nothing in the work or surrounding circumstances should have led the defendant to suppose that it contained a defamation; and

4. the fact that the defendant was not aware of the defamation was not the product of negligence on its part.

There are, however, several limitations to relying on the innocent dissemination defence to defend defamation claims based on user content. First, it is not yet clear under Canadian law whether the innocent dissemination defence is ever available to website operators and Internet service providers. Second, the potential usefulness of this defence may be limited by the requirement that defendants demonstrate that they did not act "negligently" because the applicable standard of care in the Internet context is not yet clear. Finally, since a defendant must be *unaware* of the defamation if it wishes to rely on this defence, website operators who screen or moderate comments or other user content appear to lose any available protection. In effect, to make use of the innocent dissemination defence, a website operator must surrender the option to exercise control over offensive or otherwise objectionable user content, thereby risking reputational damage to the website.

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THE U.K. DRAFT BILL

Section 5 of the Bill creates a new defence for a website operator where an action for defamation is brought against it in respect of material posted by a user. In order to avoid liability, the operator of the website must simply show that it did not post the material. However, this defence can be defeated if the claimant then shows three things:

1. That "it was not possible for the claimant to identify the person who posted the statement". (There is some ambiguity to this requirement. It is not clear how much information would be sufficient to identify the poster – for instance, whether a username containing a first and last name would be sufficient. This provision, in conjunction with the requirement that the operator respond to the notice of complaint in accordance with the regulations, appears to mean that an operator will need to provide identifying information to a claimant when a notice of claim is received.);

2. That the claimant gave the operator a notice of complaint that conforms to requirements in the Bill; and,

3. That the operator failed to respond to the notice in accordance with regulations to be made under the Bill.

The full details of the defence will not be clear until the regulations are available. However, the Bill does indicate that to avail itself of the defence, an operator will have to identify the poster of the alleged defamatory material. This requirement obviously raises concerns about online privacy.

RECENT TREND IN CANADIAN DEFAMATION LAW HAS BEEN TO USE U.K. LAW AS A GUIDE

In recent years, the SCC has sought to modernize several aspects of defamation law to bring it in line with the constitutional protection of freedom of expression. In so doing, it has often used U.K. defamation law as a guide. In 2009, the SCC established a new defence of responsible communication on matters of public interest in *Grant v. Torstar Corp*. This new defence was based on the U.K. defence of responsible journalism. In another recent decision, *Crookes v. Newton*, the SCC was asked to decide whether hyperlinking to defamatory material on a different website constitutes "publication" of the hyperlinked material such as to give rise to liability for defamation. In deciding that the hyperlinks did not constitute publication, the SCC relied on U.K. case law holding that a person acting as a 'mere conduit' has not "published" defamatory material and is not liable. This U.K. case law was based on an interpretation of section 1 of the U.K. *Defamation Act 1996*, and was specifically concerned with whether Internet service providers fell within the definition of "authors, editors or publishers" under that statute. While the SCC in *Crookes v. Newton* did not explicitly adopt the U.K. law, the decision suggests that U.K. defamation law will continue to inform its decision-making and may serve as a model for future reform.

ADVANTAGES OF A U.K. BILL-STYLE DEFENCE

The SCC recognized in *Crookes v. Newton* the unique nature of the Internet and the need to account for this "uniqueness" in striking the delicate balance in defamation law between freedom of expression and protection of reputation. The proposed new defence in the Bill may serve as a better model for striking this balance than innocent dissemination. The proposed new defence has the advantage of setting out a clear list of positive obligations for website operators to meet in order to avail itself of the defence. This is in stark contrast to the ambiguity surrounding the availability of the innocent dissemination defence. In addition, unlike the innocent dissemination defence, the proposed new defence does not appear to preclude moderation of comments and other user content.

Notwithstanding the advantages of the proposed new defence, real concerns arise as to whether the Bill will undermine free debate on the internet. This is because it likely limits anonymity by requiring website operators to disclose the identity of posters in order to rely on the defence. The concern is that the lack of anonymity will create a chilling effect on online free speech. On the other hand, it can also be argued that the present lack of a clear defamation defence for user comments creates a chilling effect on free speech by limiting the willingness of websites to open the door to user comments or to allow user comments without significant moderation. Further, the English Justice Minister has actually disputed the chilling effect of the defence, indicating that the Bill is designed to preserve free expression by removing incentive for an operator to remove content as soon as a complaint is made.

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CONCLUSION

The reliance by the SCC on U.K. law in modernizing Canadian defamation law suggests that the U.K. Draft Defamation Bill will, if passed, impact on the development of Canadian law in the increasingly important area of defamation based on user content. A review of the Bill at this stage indicates that its impact will be in providing greater and more certain protection to website operators against defamation claims arising from user content.

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