LEADERSHIP UPDATE

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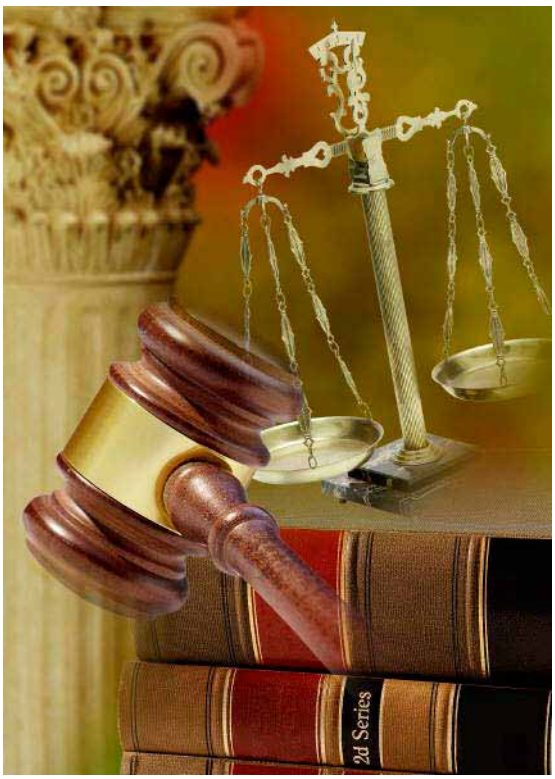
Canada: Defamation and the Internet: Additional Guidance But No Certainty

by Michael Davies

In *Barrick Gold Corporation v. Lopehandia* (2004), 71 O.R. 3d 416 (Ont. C.A.), Justice Blair endorsed the view that the Internet is "potentially a medium of virtually limitless international defamation." In the past year, Canadian courts were frequently occupied with maintaining the balance between free speech and the protection of reputations online. Five recent cases involving defamation and the Internet are of particular note:



First, in *Crookes v. Newton*, 2011 SCC 47, Justice Abella, writing for a majority of the Supreme Court of Canada, found that posting hyperlinks to defamatory material does not expose the person posting the link to liability for defamation. The Court found that hyperlinks are references and, by themselves, are not "publications" of the content to which they refer. Only when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content should that content be considered to be "published" by the hyperlinker. The majority also recognized the potential application of the defence of innocent dissemination to Internet service providers and other Internet intermediaries who may escape liability by showing that they have no actual knowledge of an alleged libel, are aware of no circumstances to put them on notice to suspect a libel and committed no negligence in failing to find out about the libel. The Court also highlighted the difference between knowing involvement with a defamatory publication—which would attract liability—and a mere passive instrumental role. It cited, with apparent approval, the English Court's decision in *Bunt v. Tilley* not to impose liability on an Internet intermediary. Innocent Internet intermediaries should not be put in the untenable position of having to try to accurately adjudicate the merits of defamation claims relating to third-party material or risk exposure to liability in the event they refuse to take action. Hopefully

There is no better exercise for your heart than reaching down and helping to lift someone up.

—Bernard Meltzer

the Court will address this matter definitively at its earliest opportunity.

Publication was also at issue in the second case, *Elfarnawani v. International Olympic Committee*, 2011 ONSC 6784. In this decision, Justice Kenneth Campbell found that defamatory words in a newspaper or broadcast are "deemed to be published" under the *Libel and Slander Act*. As the Supreme Court of Canada observed in *Crookes v. Newton*, there is "no such presumption in relation to material published on the Internet." Accordingly, the issue of "publication" is a matter of proof, by evidence, in each individual case; by failing to lead any evidence at all of "publication" in Ontario in this particular action, the plaintiff had failed to prove that the alleged tort of defamation was committed in Ontario.

The third case, *Baglow v. Smith*, 2011 ONSC 5131, involved defamation claims relating to certain comments posted on a political blog, including the allegation that the plaintiff was "one of the Taliban's more vocal supporters" because the plaintiff opposed the detention of Omar Khadr, a Canadian citizen, at Guantanamo Bay. In granting summary judgment and dismissing the defamation claims, the Court found that in the context of an online debate in a political blog where insults are regularly traded, greater tolerance will be given when assessing whether or not statements are defamatory.

Fourth, in *Warman v. Wilkins-Fournier*, 2011 ONSC 3023, Justice Blishen was asked to determine whether the plaintiff was entitled to third-party discovery in order to determine the identity of certain anonymous defendants. Applying the test established by the Divisional Court for disclosure from Internet intermediaries, Justice Blishen considered

- whether the unknown alleged wrongdoer could have a reasonable expectation of anonymity in the particular circumstances;
- whether the respondent has established a prima facie case against the unknown alleged wrongdoer and is acting in good faith;
- whether the respondent has taken reasonable steps to identify the anonymous party and has been unable to do so; and
- whether the public interests favouring disclosure outweigh the legitimate interests of freedom of expression and right to privacy of the persons sought to be identified if the disclosure is ordered.

In the circumstances of this case, the Court found that the putative defendants had no expectation of anonymity and that the plaintiff had made out a prima facie case and taken all steps necessary in order to try to identify the defendants, including

- examining their postings for any verifiable personal information that they might contain;
- cross-referencing their pseudonyms with other online identities using the same names or other names that could be attributed to the same person; and
- using private investigation firms.

Ultimately, the Court ordered that the documents in the hands of the website owners identifying the IP addresses used by the anonymous posters would have to be produced, even if a further motion to compel the Internet service providers was required in order to link the individuals with the IP addresses.

Finally, in *Nazerali v. Mitchell*, 2011 BCSC 1581, Justice Grauer issued an *ex parte* injunction against Google Inc. and Google Canada Corporation preventing them from returning any search results from a website containing manifestly defamatory material, on the basis that not doing so "might well rob the plaintiff of the value of the relief he has obtained against the other respondents." In a related decision, *Nazerali v. Mitchell*, 2012 BCSC 205, Justice Ross dismissed a motion by certain of the defendants, resident in the United States, to strike the claim on the basis that the British Columbia Superior Court did not have jurisdiction. It will be most interesting to watch, as this case goes forward, what effect the US *SPEECH Act* has on the ultimate enforceability of any decision.

It is expected that cases seeking to define the boundaries of defamation actions on the Internet will continue to occupy the courts' attention into the future.

To find archived issues of *Leadership Update*, go to www.teachers.ab.ca and click on Other Publications (under Publications), then go to School Administrators.

Feedback is welcome. Please contact Konni deGoeij, associate coordinator, administrator assistance, Member Services, at konni.degoeij@ata.ab.ca.

When "Private" Isn't Private: Discovery in the Age of Facebook

by Joan M Young and Daniel Shouldice, McMillan LLP

Parties to litigation cannot hide behind Facebook privacy controls during the discovery process, according to a recent decision of the British Columbia Supreme Court. In *Fric v. Gershman*, 2012 BCSC 614, the plaintiff in a motor vehicle accident claim was ordered to review and produce thousands of photos depicting her travelling and participating in social and sports activities, including those from her private Facebook account.

In its ruling, the court addressed several key issues that define the developing area regarding disclosure of information on social networking sites such as Facebook.

First, courts have held that the information contained on Facebook must be relevant to an issue in dispute. In *Fric*, the court held that the plaintiff had put her physical functioning and activity level in question by claiming damages for loss of amenities of life, loss of mobility and diminished earning capacity as the result of pain and fatigue. Photos depicting the plaintiff, a recent law school graduate, travelling or engaging in social and sports activities, such as an interuniversity competition known as Law Games, were relevant to her claims for physical impairment and social withdrawal.

However, mere proof of the existence of a Facebook profile does not entitle a party to gain access to all information in the profile. Courts will not grant "fishing expeditions" simply because an individual's general health, enjoyment and employability are at issue. Courts have granted production where the plaintiff has acknowledged the existence of relevant information in his Facebook profile or where the public portion of a Facebook profile contains relevant information that suggests it is likely that the private part of the profile contains similar information.

In *Fric*, the plaintiff gave evidence at her examination for discovery that she had posted photos of herself travelling and participating in events such as Law Games on her Facebook profile. As her physical and social capacity were relevant, an order was granted requiring her to produce photos in which she is participating in Law Games and on vacation.

Privacy concerns also arise from the production of information stored on Facebook. For instance, courts have held that while a party may be required to produce information from his or her Facebook profile, the individual is not required to give up username and password to the opposing party. Third-party privacy rights must also be given special attention. The plaintiff in *Fric* was allowed to edit her photos to protect the privacy of her friends and others appearing in her photos. Similarly, commentary associated with the plaintiff's photographs posted on Facebook was not ordered to be produced. The probative value of Facebook commentary was outweighed by the interest in protecting the private thoughts of the plaintiff and third parties.

Two key themes emerged from the decision. First, in the age of digital media, the courts are mindful of the proportionality of requiring parties to disclose potentially thousands of photos versus the benefit of such disclosure. Where production would require the review of hundreds of

documents and potentially delay trial, courts have declined to order production. However, in *Fric*, the court dismissed the plaintiff's concern that the court's order would require her to review more than 12,000 photographs, in addition to several hundred more on her Facebook profile.

Second, where there is a real and legitimate concern that information could be permanently deleted from Facebook, courts may issue an injunction or preservation order until the information has been produced.

What is it all worth in the end?

Individuals required to disclose photos from their Facebook account depicting them as physically active and socially engaged should not despair, however. Courts are reluctant to place much weight on mere snapshots of an individual's life. In *Guthrie v. Narayan*, 2012 BCSC 734, the court held that Facebook photos of the plaintiff's recent Las Vegas trip were of "limited usefulness," noting the plaintiff was "seeking compensation for what she has lost, not what she can still do" and that "she should not be punished for trying to get on with her life."

As *Fric* and recent cases have demonstrated, where there is evidence of information relevant to an issue in dispute, an order for production will likely be granted, regardless of the level of Facebook privacy protection. However, "fishing expeditions" are still prohibited, and production may be subject to conditions to protect privacy interests, including those of third parties. In the end, the weight such information has at trial may be as fleeting as a Facebook status update.

Canada's Outstanding Principals Award

Canada's Outstanding Principals Award recognizes the unique and crucial contributions of principals in publicly funded schools. Each year your Council on School Administration (now known as Council for School Leadership) submits nominations from Alberta. The nomination deadline is November 9, 2012. All nominations must be received into the Alberta Teachers' Association, care of Holly Godson, CSL president. All nominees forwarded by the Council for School Leadership to the National Selection Committee will be informed of the results by The Learning Partnership by January 18, 2013. The successful nominees will be recognized for their unique contribution to education in Canada at a gala celebration event, hosted by The Learning Partnership, during February 24 to 28, 2013, in Toronto. Travel (air and ground), accommodation expenses, the opening dinner, the gala awards celebration dinner, breakfasts and lunches will be paid by The Learning Partnership.

Congratulations once again to the 2012 Alberta winners:

Daniel Danis
Bishop Carroll High School
Calgary Catholic School District
Calgary, Alberta

Katherine Dekker
St Francis of Assisi Catholic Elementary School
Edmonton Catholic School District No 7
Edmonton, Alberta

Kim Hackman
Western Canada High School
Calgary Board of Education
Calgary, Albert

Jacki McLaren
Taradale School
Calgary Board of Education
Calgary, Alberta

If you are interested in nominating a colleague and would like more information about this award, please visit www.thelearningpartnership.ca/page.aspx?pid=404.

Changes to Copyright Law

School administrators need to be aware that Canadian copyright law has recently been changed. The following article, from the *ATA News* volume 47, number 5 (October 23, 2012), is reprinted for your assistance.

New copyright rules for schools

Copyright law and Supreme Court expand "fair dealing"

Margaret Shane, ATA Staff

Freeing teachers from red tape is one of the features of new federal legislation.

On June 29, 2012, the Canadian copyright reform bill received royal assent. Although the *Copyright Modernization Act* (Bill C-11) has passed, its coming-into-force date is still forthcoming.

On July 12, 2012, the Supreme Court issued its Access Copyright decision, protecting and expanding "fair dealing" in schools. The law and the courts have defined new copyright rules for schools (see http://copyright.ubc.ca).

The law: *Copyright Modernization Act*

1. Expanded fair dealing uses
Fair dealing defends some uses of protected works against copyright infringement. The act specifically extends fair dealing to education, as well as satire and parody, research, private study, criticism, review and news reporting.

2. Expanded educational exceptions
Teachers and those acting on behalf of a school can do the following:

- Do anything necessary to display a work. The display of a work is now technology-neutral (no more specific talk of whiteboards and so on). However, the work should be purchased when it is (1) commercially available in a school-friendly format, (2) reasonably priced and (3) accessible in the Canadian market.
- Show a legally obtained film, documentary or other video in class.
- Use, reproduce and communicate (for example, by telecommunication) legally posted Internet content so long as (1) sources and authors are cited, (2) the content is not digitally locked, (3) there is no clearly visible copyright protection notice and (4) the school knows (or should know) that the work is not on the Internet as a result of a copyright infringement in the first place.
- Stop paying royalties, destroying or tracking multiple copies of news reports and commentaries.

3. Distance learning supported
Distance education teachers can provide student lessons through telecommunication. Students can copy the lesson for later use as long as both school and student destroy the copy 30 days after final assessments reach the students. Schools must secure lessons against unauthorized access (through digital locks, encryption, passwords and so on).

The Supreme Court: Access Copyright decision

Michael Geist, copyright analyst and scholar, writes: "The Access Copyright case has enormous implications for education and copyright in Canada" (see "Supreme Court of Canada stands up for fair dealing in stunning sweep of cases," www.michaelgeist.ca/content/view/6588/125/).

The decision specifically addresses teachers' fair dealing as vital to education. Geist quotes Justice Abella:

> Teachers have no ulterior motive when providing copies to students. Nor can teachers be characterized as having the completely separate purpose of "instruction"; they are there to facilitate the students' research and private study.
>
> Abella goes on to say that photocopies made by a teacher … are an essential element in the research and private study undertaken by those students. The fact that some copies were provided on request and others were not, did not change the significance of those copies for students engaged in research and private study. (*Alberta [Education] v. Canadian Copyright Licensing Agency* [Access Copyright], 2012 SCC 37)

The new provisions will advance classroom learning and free teachers from the burden of negotiating outdated copyright laws.

Margaret Shane is the ATA's records and information manager, privacy officer and archivist.

Q & A

GORDON THOMAS
Executive Secretary

Q: How should school leaders respond to issues relating to student assessment and evaluation?

A: Teachers assess student progress to inform and improve their teaching and to better understand student strengths and learning needs. Sometimes, student evaluations are norm-referenced; other times they are measurements linked to specific criteria and outcomes. They can be used for formative or summative purposes. Rightly or wrongly, results reports are used to motivate and shape behaviour, to provide indications of innate ability, to enforce social and institutional norms, and to ration access to scarce resources, including scholarship money and postsecondary placements. With the stakes being so high and given all the competing interests and understandings entailed in student assessment and evaluation, it is hardly surprising that well-intentioned people can disagree about the philosophy, policy and practice of assessment and evaluation.

So how does a school or central office administrator navigate these perilous waters?

The answer lies in effective leadership that encourages respectful dialogue, collaboration and communication. Every school district and most schools have policy on student evaluation that provides a starting point for collective and individual conversations about teachers' practices in this area. However comprehensive the policy, though, there will always be some latitude for school-based decision making and the exercise of individual professional judgment.

School administrators should facilitate a discussion of student assessment and evaluation practices in the school so that teachers, students and parents have a common understanding. Building a consensus around student assessment and evaluation practices must start with the understanding that it is teachers who are best positioned to exercise professional judgment about the assessment and evaluation of their students. At the same time, parents have expectations about the evaluation of their children, and the principal and superintendent each have legal responsibilities and roles relating to the final approval and reporting of student results.

Students must be assessed and evaluated on the curriculum they have been taught. It is unfair and unethical for teachers to evaluate students on material they have not had the opportunity to learn. Classroom teachers are in the best position to develop evaluation strategies that align with the curriculum and address the individual learning needs of students, provide feedback student learning and to parents or guardians.

Conversations about student assessment and evaluation, whether between professional colleagues, or with parents or students can be difficult, but they have great potential to build understanding and support among the members of the school community. They are not conversations to be avoided.

As a final word on assessment, the profession maintains that teachers are ultimately responsible, both legally and professionally, for evaluating and reporting student progress.

A wealth of resources relating to evaluation and assessment practices is available from the Alberta Teachers' Association library. The Association monograph *Teachers' Rights, Responsibilities and Legal Liabilities* includes a section about the role of teacher with respect to student evaluation. You can download this document for free by going to the ATA website, www.teachers.ab.ca, and clicking on Publications>Other Publications and scrolling down to Teachers as Professionals.

Seeking Principals to Serve as Cognitive Coaches

Pilot Project
Cognitive Coaching: Building School Leadership Capacity in Alberta's Education System

A project organized by the Alberta Teachers' Association and funded by Alberta Education

Principals who have completed the Cognitive Coaching Foundations Seminar and are interested in coaching beginning principals are invited to apply to be a part of a provincial pilot project. The intent of the project is to have experienced principals/coaches mentor beginning principals in the development of their leadership practices, using cognitive coaching strategies that will promote self-reflection and professional decision making. The project will start in January 2013 and continue until June 2014. Each principal coach will be matched with no more than three beginning principals from a different Alberta school jurisdiction. Collaborative activities will include workshops focused on the Principal Quality Practice Guidelines and opportunities for face-to-face meetings with coaches. Beginning principals in the project will have an opportunity to determine a professional growth focus based on the Principal Quality Practice Guidelines. A variety of technologies may be used to enhance the coaching experiences and limit travel. The 15 principal coaches selected for this project will be supported in their own professional development through the program activities and have their release time covered and all applicable expenses reimbursed. In recognition of the time and professional support participants will devote to coaching the beginning principals, an honorarium of $2,000 will be provided.

If you are interested in applying to serve as a principal coach in this project and have completed a Cognitive Coaching Foundations series, please contact Jacqueline Skytt by e-mail at jacquie.skytt@ata.ab.ca. Beginning principals will receive information about this program in the coming weeks.

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