



## **Freedom of Expression and the Protection of Reputation: The Canadian Story**

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### **Introduction**

As have many other jurisdictions, Canada has been grappling with how to balance the interests of freedom of expression with an adequate protection for reputation. Recently two cases dealing with this issue made their way to the Supreme Court of Canada. These decisions will show whether the Court will adopt the responsible journalism defence, cling to the qualified privilege approach or adopt another (likely hybrid) approach. Both cases, discussed below, are on reserve and we hope to hear back from the Court in the fall.

#### *Cusson v. Quan*<sup>1</sup>

The plaintiff, Danno Cusson, was an Ontario Provincial Police (“OPP”) constable who, on his own initiative, participated in the search and rescue operations at the World Trade Towers in New York City after the attack on September 11, 2001. He went on his time off and, wearing a Royal Canadian Mounted Police (“RCMP”) uniform and bringing along his pet dog, joined the search and rescue efforts as a K-9 officer. When his time off was over, he returned to Canada and requested leave from the OPP so that he could continue with the search and rescue efforts. The OPP refused, saying it required all officers to do extra shifts to assist with border security. He resigned from the OPP and returned to Ground Zero. However, as he was no longer a police officer, he was barred from assisting with the rescue efforts and had to return to Canada. Upon his return, he was hailed as a hero and the story he told created public sympathy for him and anger against the OPP.

The *Ottawa Citizen* newspaper became interested in the conflict between Mr. Cusson and the OPP, and did some investigating, ending by publishing three articles about Mr. Cusson that cast him in a somewhat negative light, suggesting that he had misrepresented himself as an RCMP officer and that he and his dog may have hampered rescue efforts, as neither had been formally trained for K-9 rescues. Mr. Cusson sued the *Ottawa Citizen* and was partially successful at trial – although one of the articles was found to have been protected by qualified privilege, the two others were found to be defamatory

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<sup>1</sup> *Cusson v. Quan*, [2007] O.J. No. 4348 (C.A.) [hereinafter “*Cusson*”].

and not protected by the privilege. The trial judge had made an advance ruling on qualified privilege and decided that, as he could find no “compelling” moral or social duty on the part of the *Ottawa Citizen* to publish the articles, the privilege did not apply to them. His reasoning, and the *Ottawa Citizen*’s appeal to the Court of Appeal, hinged on his interpretation of the traditional duty and interest test, which was still the law in Canada. The jury awarded \$100,000 in damages against the *Ottawa Citizen*.

The *Ottawa Citizen*, supported by media interveners<sup>2</sup>, appealed to the Court of Appeal. The Court of Appeal created the new defence of “public interest responsible journalism” in Canadian law, applying the defence set out in the English cases of *Reynolds v. Times Newspapers Ltd.*<sup>3</sup> and *Jameel v. Wall Street Journal Europe Sprl*<sup>4</sup> in a Canadian context. The Court also found that the defence could not apply to the *Ottawa Citizen*, as it had not argued the *Reynolds/Jameel* responsible journalism defence at trial (*Jameel* was not decided until after the trial). The *Ottawa Citizen* appealed this decision to the Supreme Court of Canada in February 2009, once again with the support of media interveners (as mentioned above, this decision is currently under reserve).

*Grant v. Torstar Corp.*<sup>5</sup>

Peter Grant is a business man in northern Ontario who had built a private three hole golf course on his property. He wanted to expand the course to a nine hole golf course, and sought the required land and environmental approvals in order to do so. Local residents were concerned about the project and retained their own environmental consultant. On the day of a public meeting about the golf course expansion, the *Toronto Star* newspaper published an article that included a statement that local public opinion was that the expansion was a “done deal”, due in part to Mr. Grant’s well-known friendship with the then Premier of Ontario, Mike Harris. Mr. Grant sued the *Toronto Star*, which pleaded both traditional qualified privilege and the emerging defence of responsible journalism set out in *Reynolds* and *Jameel*. The trial judge rejected the defence of qualified privilege and the jury awarded \$450,000 in general damages and \$1.025 million in aggravated and punitive damages against the *Toronto Star*.

The *Toronto Star* appealed to the Court of Appeal, which allowed the appeal and ordered a new trial, as the trial judge had failed to consider responsible journalism as a defence separate from traditional qualified privilege. Mr. Grant appealed to the Supreme Court of Canada in April 2009 (this decision is also currently under reserve).

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<sup>2</sup> Counsel for the media interveners at the Ontario Court of Appeal included Brian MacLeod Rogers.

<sup>3</sup> [2001] A.C. 127 [hereinafter “*Reynolds*”].

<sup>4</sup> [2007] 1 A.C. 359 [hereinafter “*Jameel*”].

<sup>5</sup> *Grant v. Torstar Corp.* 2008 ONCA 796 at para. [hereinafter “*Grant*”].

## History of qualified privilege in Canada up to *Cusson and Grant*

### (i) the traditional defence of qualified privilege

The effect of the law of defamation in deterring the press from making statements that are true has been noticed by the highest courts in other jurisdictions, such as the Australian High Court:

... there will inevitably be cases where problems of proof of admissible evidence result in a defendant being held liable in damages for publishing a statement which was in fact true. To that disincentive of the publication of even well founded damaging statements must be added the disincentive of the legal costs which a successful defendant will commonly and an unsuccessful defendant will almost inevitably be required to bear.<sup>6</sup>

The traditional defence of qualified privilege is based on the “common convenience and welfare of society”<sup>7</sup>, and recognizes that there are occasions where a duty – social, legal or moral – requires that an honest expression of what someone knows or believes be communicated to a recipient with an interest in receiving the communication. The defence protects not only statements of opinion but also statements of fact which cannot be proven true at trial. It can be lost upon proof of actual malice, essentially where the defence is used for an improper purpose.

### (ii) the *Douglas v. Tucker* line of cases

In the early twentieth century, Canadian courts in several provinces began to apply the defence of qualified privilege to a growing range of circumstances where the public interest called out for critical reporting and commentary; plaintiffs included politicians, union officials and civil servants. However, the Supreme Court of Canada put a stop to this developing case law in a series of cases in the 1950s and 1960s, just as the United States Supreme Court went in an entirely different direction in *New York Times. v. Sullivan*.<sup>8</sup>

In these cases, the Supreme Court of Canada applied the traditional duty-and-interest analysis and held that a journalist had no “duty” to report on matters of public interest, only a right to report truthfully and comment fairly, as publication in a newspaper was “publication to the world”, spreading it beyond recipients with a proper “interest” and vitiating any privilege that might otherwise exist:

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<sup>6</sup> *Theophanous v. Herald & Weekly Times* (1994), 124 A.L.R. 1, at 39, para. 18 (per Deane J.) (AustLII) (H.C.).

<sup>7</sup> *Huntley v. Ward* [1859] 1 All E.R. 557.

<sup>8</sup> (1964), 376 U.S. 254, 84 S. Ct. 710 [hereinafter “*Sullivan*”].

The decision of the learned trial judge in the case at bar . . . appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of a subject-matter of wide public interest throughout Canada without proof of any other special circumstances any newspaper in Canada (and *semble* therefore any individual) which sees fit to publish to the public at large statements of fact relevant to that subject-matter is to be held to be doing so on an occasion of qualified privilege.<sup>9</sup>

The law of qualified privilege in Canada relating to publications “to the world” has largely dealt with the scope of what can be published with regard to elected officials. While the Supreme Court in the *Douglas v. Tucker* line of cases made it clear that there was no automatic privilege for publications about elected officials or political matters, there was little development of the law in terms of the nature and scope of the duty to publish matters “to the world”, and the kind of public interest required to ensure that a publication did not exceed the scope of the privilege.

(iii) *Hill v. Church of Scientology*

Although the Supreme Court of Canada did deal with the defence of qualified privilege in *Hill v. Church of Scientology*,<sup>10</sup> the Supreme Court in that case focused mainly on whether Canada should adopt the United States’ standard for a constitutional qualified privilege.

*Hill* arose out of a press conference held by the Church of Scientology and its lawyer during which defamatory remarks were made about a Crown prosecutor. In the Supreme Court, the defendants argued that the court should accept the *Sullivan* “actual malice” standard, applied in the United States in cases involving public officials. *Sullivan* found that “the citizen’s right to criticize government officials is of such tremendous importance in a democratic society that it can only be accommodated through the tolerance of speech” which may later be found to be false. This standard, in cases involving alleged defamation of public officials, places the onus on the plaintiff to show that the defamatory statements were false and that, at the time of making them, the defendant either knew them to be false or was reckless as to their truth.<sup>11</sup>

The Supreme Court rejected this approach, finding that the current balancing within qualified privilege was not so restrictive or inhibiting as to require the adoption of the more radical *Sullivan* standard, which it found lacking with regard to its protection of reputation. The Supreme Court was not prepared to “do away with the common law presumptions of falsity and malice” and was concerned with the effect this extra burden might have on plaintiffs with limited funds. Nor were they dealing with a case that was

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<sup>9</sup> *Globe & Mail Ltd. v. Boland*, [1960] S.C.R. 203 at 208 [hereinafter “*Boland*”], *Douglas v. Tucker*, [1952] 1 S.C.R. 275, *Banks v. Globe & Mail Ltd.*, [1961] S.C.R. 474 at 484, *Jones v. Bennett*, [1969] S.C.R. 277, *Cherneskey v. Armadale Publishers Ltd.*, [1978] S.C.J. No. 115 at 7 (QL).

<sup>10</sup> *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 [hereinafter “*Hill*”].

<sup>11</sup> *Sullivan*, *supra*.

perceived as “a very serious attack not only on the freedom of the press but, more particularly, on those who favoured desegregation in the southern United States.”<sup>12</sup>

The Supreme Court did limit its findings in *Hill* in several ways, noting that none of the factors that led to the *Sullivan* decision were present in *Hill*:

First, this appeal does not involve the media or political commentary about government policies . . . Second, a review of the jury verdicts in Canada reveals that there is no danger of numerous large awards threatening the viability of media organizations. Finally, in Canada there is no broad privilege accorded to the public statements of government which needs to be counterbalanced by a similar right for private individuals.

In conclusion, in its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter*. [Emphasis added]<sup>13</sup>

Furthermore, when *Hill* was decided in 1995, many of the decisions in other common law jurisdictions on the same issues had not yet been made. In particular, the Supreme Court did not have the advantage of the *Reynolds* and *Jameel* cases that advocate a more incremental and balanced approach than that of *Sullivan*.

However, perhaps the most important step taken by the Court in *Hill* was its ruling that the common law of libel was subject to the values embodied in the Canadian *Charter of Rights and Freedoms* and should be interpreted and applied in accordance with them. As a result of changing circumstances (societal standards and legislation), the Court overturned its own precedent and expanded qualified privilege to encompass reports of publicly-available court documents. This has been relied on for further developments in the law of defamation and acts as an important basis for reviewing the law’s balance between free expression and reputation, recognizing that:

Whatever is “added to the field of libel is taken from the field of free debate”.<sup>14</sup>

**(iv) the *Stopforth v. Goyer* line of cases**

However, before *Hill*, later Canadian cases moved beyond the *Douglas v. Tucker* line of cases, inclining in the same direction as other common law jurisdictions, recognizing that

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<sup>12</sup> *Hill, supra*, at 1187, 1180, 1183 and 1181.

<sup>13</sup> *Hill, supra*, at 1188; The Honourable Madam Justice Beverley McLachlin, “Defamation: What Price Reputation?” at 16-18, (Canadian Institute for Advanced Legal Studies 1997, Cambridge, England, July 14, 1997) [unpublished].

<sup>14</sup> *Hill, supra*, at 1172, 1169-1170, *PizzaPizza Ltd. v. Toronto Star Newspapers Ltd.*, [1998] O.J. No. 4702 at 7 (QL) (Div. Ct.); aff’d. [2000] O.J. No. 228 (C.A.).

a dissemination “to the world” of a matter truly in the public interest should attract a qualified privilege defence.

Most noteworthy was the Ontario Court of Appeal’s re-consideration of the law of qualified privilege following the *Douglas v. Tucker* cases. In *Stopforth v. Goyer*, the plaintiff, a senior civil servant, sued the defendant, a government Minister, in defamation for comments the Minister made about the plaintiff outside the House of Commons. The Minister had read a statement inside the House of Commons about his reasons for removing the plaintiff from a project (protected comment), and had told the press outside the House that the plaintiff had provided him with misinformation or had been grossly negligent. At trial, the judge held that the Minister’s comments were not protected by qualified privilege. The Court of Appeal overturned this finding, stating:

In my opinion the electorate, as represented by the media, has a real and bona fide interest in the demotion of a senior civil servant for an alleged dereliction of duty. It would want to know if the reasons given in the House were the real and only reasons for the demotion. The appellant had a corresponding public duty and interest in satisfying that interest of the electorate.<sup>15</sup>

While the media was not directly involved in *Stopforth v. Goyer*, since the media was the medium through which Goyer disseminated his opinion of Stopforth it is generally accepted that the case is of considerable use to media litigants in persuading courts to accept a broadened duty and interest analysis when it comes to dissemination “to the world”.

In *Grenier v. Southam*, the Ontario Court of Appeal upheld the trial judge’s decision in a brief endorsement, finding that an *Ottawa Citizen* newspaper article had been published on an occasion of qualified privilege, as the newspaper had a social and moral duty to publish an article, stating “in our view, [the trial judge] made no error in so finding.”<sup>16</sup> In *Camporese v. Parton*, a British Columbia trial court found that an erroneous report about botulism caused by faulty canning lids attracted the defence, stating that the newspaper’s readers had a legitimate interest in the adequacy and performance of the lids.<sup>17</sup>

A case from the British Columbia Court of Appeal, *Parlett v. Robinson*, involved the plaintiff, a prison official who re-sold products made by a prison inmate at a large profit, and the defendant, a federal member of Parliament who learned of this. After contacting the authorities and getting nowhere, the defendant called a news conference in an attempt to put public pressure on the government to stop this practice. The Court of Appeal reversed the trial decision, finding that the comments were protected by qualified privilege and stating that when the defendant failed to persuade the correct authorities to deal with the matter:

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<sup>15</sup> *Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 at 699-700 (C.A.) [hereinafter “*Stopforth*”].

<sup>16</sup> *Grenier v. Southam Inc.*, [1997] O.J. No. 2193 at para. 7 (C.A.).

<sup>17</sup> *Camporese v. Parton*, [1983] B.C.J. No. 2464 at paras. 47 and 48 (S.C.).

. . . if he held an honest belief that there had been impropriety within the Correctional Service with respect to taking advantage of the work of inmates, then it was the duty of the defendant to ventilate his concerns in a way that would persuade the Minister to have an investigation conducted into the matter.

In addition to the duty of the defendant to declare his concern in this matter, it appears to me that the electorate in Canada have an interest in knowing whether the administration of the Correctional Service is being properly conducted by the officials in the Department of the Solicitor General.<sup>18</sup>

*Loos v. Robbins* involved the Minister responsible for Saskatchewan Government Insurance, a Crown Corporation, who granted interviews to a newspaper and a television station and made comments touching on the competence of a number of employees who had been fired by the company. The employees sued the Minister for libel. The trial judge found that the interviews were protected by qualified privilege, and the Saskatchewan Court of Appeal upheld the trial decision, specifically declining to find that *Stopforth* had been wrongly decided on the ground that it conflicted with *Boland.*, one of the cases in the *Douglas v. Tucker* line of cases.<sup>19</sup>

In *Campbell v. Jones*, a majority of the Nova Scotia Court of Appeal overturned a trial judgment that did not recognize the defence of qualified privilege for statements made “to the world”, finding that the trial judge, in rejecting the duty and interest defence, had interpreted the older case law too strictly. The Court further found that he gave too much emphasis to the timing of the communication and imposed too heavy a burden to prove the requisite reciprocity of duties and interests. The Court emphasized the *Charter* values at stake and held:

It has always been the task of judges to determine what constitutes an occasion of qualified privilege, and it is, therefore, within the power of the common law courts to modify the common law incrementally to ensure that it conforms with *Charter* values. As Justice Cory stated in *Hill*, the vital importance of freedom of expression cannot be overemphasized.<sup>20</sup>

In each of these cases, the court determined that the material published was in the public interest, and in each, the court found, on the evidence, that the reciprocal duty and interest existed. In contrast to the *Douglas v. Tucker* line of cases, the defence upheld in this line of cases is clearly much closer to what would become the *Reynolds/Jameel* defence, as the courts focused on the public interest in the alleged defamatory material and accepted that publication “to the world” would not defeat the duty.

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<sup>18</sup> *Parlett v. Robinson*, [1986] B.C.J. No. 594 at paras. 29 and 30 (C.A.).

<sup>19</sup> *Loos v. Robbins* (1987), 37 D.L.R. (4<sup>th</sup>) 418 at 423 (Sask. C.A.).

<sup>20</sup> *Campbell v. Jones*, [2002] N.S.C.A. 128 at 223, 227-230, 235 and 236-237 (C.A.); leave to appeal dismissed. [2002] S.C.C.A. No. 543.

## Media interveners' argument in *Cusson* at the Court of Appeal

In the Court of Appeal, the media interveners argued that adopting the *Reynolds/Jameel* defence would produce both a fairer, more rational test for plaintiffs and defendants alike as well as a test more demonstrably consistent with *Charter* values, in that it protected free expression in order to inform and engender public discussion. They argued further that the analysis in the *Stopforth v. Goyer* line of cases held that the establishment of the reciprocal duty-and-interest relationship was predicated on the finding that the published material was in the public interest, linking this to the following statement in *Jameel*:

The *Reynolds* defence was developed from the traditional form of privilege by a generalization that in matters of public interest there can be said to be a professional duty on the part of journalists to impart the information and an interest in the public in receiving it. The House having made this generalisation it should in my opinion be regarded as a proposition of law and not decided each time as a question of fact. If the publication is in the public interest, the duty and interest are taken to exist.<sup>21</sup>

Applying this to the facts in *Cusson*, the interveners argued that the *Ottawa Citizen* articles were written during a time of great emotion about the rescue efforts at Ground Zero, and there was considerable public outcry concerning Mr. Cusson's circumstances. The public focused much anger and criticism on the OPP, and it was clearly in the public interest that the OPP's position be made known to the public it served. The *Ottawa Citizen* had a duty to present the other side of Mr. Cusson's story and also had a duty to investigate and report on the claims Mr. Cusson had already made in accordance with the standards of "responsible journalism."

They also argued that the trial judge erred in concluding that the *Ottawa Citizen* needed to establish a "compelling" moral or social duty to publish the articles. He thereby committed the same error that the courts warned against in *Loos v. Robbins* and *Campbell v. Jones* – applying the test already set out in Canada too narrowly and thus imposing "a more onerous burden on the appellants to prove the requisite reciprocity of duties and interests than is required by the authorities." None of the *Stopforth v. Goyer* cases required a "compelling" duty to publish – thus the two remaining articles would likely also have been protected by the traditional defence of qualified privilege.<sup>22</sup>

## Court of Appeal decision in *Cusson*

Justice Sharpe, writing for the Court, emphasized the importance of freedom of expression, both to political debate and to the "core values" of the communal exchange of ideas, human dignity and democracy itself.<sup>23</sup> He then considered the common law of

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<sup>21</sup> *Jameel*, *supra*, at para. 50

<sup>22</sup> *Campbell v. Jones*, [2002] N.S.C.A. 128 at 230 (C.A.); leave to appeal dismissed. [2002] S.C.C.A. No. 543.

<sup>23</sup> *Cusson*, *supra*, at para. 125.

defamation's no-fault standard, and the fact that this created a powerful incentive to err on the side of caution and avoid controversy, stating that a case like the trial judgment in this case:

. . . sends a strong message: there is simply no margin for error or allowance for the expression of views honestly and reasonably held. A newspaper that has properly investigated the story and has every reason to believe it to be true still walks on thin ice. The fear or risk of being unable to prove the truth of controversial matters is bound to discourage the publication of information the public has a legitimate interest in hearing.”<sup>24</sup>

He found that the traditional common law regime sacrificed freedom of expression to the protection of reputation to a degree that today cannot be sustained as consistent with *Charter* values, agreeing with the courts in other common law jurisdictions that traditional defamation law was incompatible with the climate of free and robust debate now aspired to in democratic societies.<sup>25</sup> He found that the earlier *Douglas v. Tucker* line of cases bore the mark of Canada's “pre-*Charter* past”, a very different legal context and one less concerned with free expression and robust political debate.<sup>26</sup>

Sharpe J.A. chose not to extend traditional qualified privilege, stating that this would be contrary to binding authority and sound legal policy, but instead adopted the defence of public interest responsible journalism, what he saw as an appropriate incremental change reflecting the importance of the free flow of information and ideas but also requiring the media to conduct itself in a prudent and responsible manner:

This defence represents a natural extension of the law as it has been developing in recent years, an incremental change “necessary to keep the common law in step with the dynamic and evolving fabric of our society.”<sup>27</sup>

### **Court of Appeal decision in *Grant***

The Court in *Grant* focused first on the way the defence of responsible journalism would actually work at a defamation trial. Specifically, they dealt with whether the defences of traditional qualified privilege or public interest responsible journalism should be left to the jury, rather than going to the trial judge before any case is put to the jury. The Court was concerned that a Court of Appeal should have a record of the jury's findings, should the trial judge's decision on qualified privilege or responsible journalism be in error. It also found that, in this case, the main issue in the case was the meaning of the article. Without the jury's decision on the meaning of the article, the trial judge would not be in a

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<sup>24</sup> *Ibid*, at para. 127.

<sup>25</sup> *Ibid*, at para. 129.

<sup>26</sup> *Ibid*, at para. 130.

<sup>27</sup> *Ibid*, at paras. 134, 137 and 139.

proper position to weigh the *Reynolds* factors that might apply to the story: “the more serious the defamatory charge, the heavier is the obligation on the journalist.”<sup>28</sup>

The Court also found that the trial judge improperly combined the defences of qualified privilege and responsible journalism, rather than treating the latter as a separate evaluation with an emphasis on allowing freer flow of information in the public interest. The Court found that the trial judge applied the wrong test in deciding that the story was not in the public interest and found that it was in the public interest as it dealt with “the private acquisition of Crown lands by a person who had made large political contributions to the governing political party, as well as with cottagers’ environmental concerns.”<sup>29</sup> The Court found that the trial judge also erred by not carefully weighing the evidence that showed that the defendant journalist had made extensive attempts to get comment from the plaintiff and to include the gist of the plaintiff’s side of the story. The Court concluded that, as a jury would need to decide the meaning of the impugned statements in this case in order that a judge could then properly assess the *Reynolds* factors, the case had to be sent back for a new trial.

## Conclusion

While the enhanced qualified privilege approach (i.e. *Stopforth v. Goyer*) is somewhat attractive in that it appears to be a more incremental approach, it still tries to force all communications in the public interest into the single narrow formulation of the duty and interest test. When the qualified privilege defence was developed it was aimed at allowing a discrete piece of information to be disseminated to someone who had a legal interest in receiving it. It gave the disseminator the right to be wrong if he/she had a duty to communicate to a recipient that had a “legal interest” in receiving the information. This was meant to limit the dissemination so if a mistake was made it was confined to the necessary recipients. The duty and interest defence applied to the media necessarily focuses on “the occasion” and to work effectively and in a predictable manner it requires courts to say that once it has been established that an impugned article was published “in the public interest” it can be published to the world. This defence can be defeated by the plaintiff demonstrating that the defendant acted with actual malice.

The *Reynolds* approach focuses on the journalism itself, requiring the media to act responsibly in its development and execution of the story. It requires no establishment of a “duty” to publish to the world, nor does it require the leap of logic necessary to see every member of the public as having a “legal interest” in receiving the information. This defence is defeated if the media cannot show it practiced responsible journalism.

While the *Reynolds* approach could result in encouraging media outlets to act more responsibly it hopefully will at least result in journalists keeping better records of what they are already doing in order to make out the responsible journalism defence. This is important because the fact that a plaintiff need not go so far as to demonstrate malice should make defeating the defence somewhat easier.

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<sup>28</sup> *Grant, supra*, at paras. 46 and 48.

<sup>29</sup> *Ibid*, at paras. 61 and 63.

The Supreme Court of Canada has heard all of the arguments and has the benefit of the decisions of senior courts in other jurisdictions so its decision and discussion of these issues are eagerly anticipated.