

# Defamation and Privacy in the #MeToo era

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Defamation  
Defined

#MeToo  
Litigation

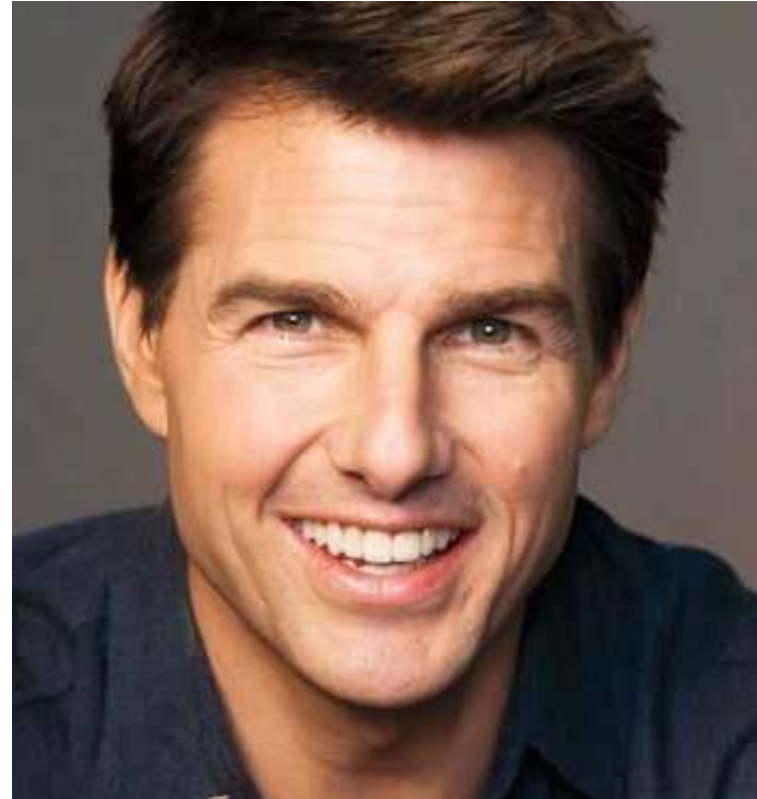
Privacy

Questions

# Defamation

## “I think Tom Cruise is an awful actor”

- ▶ Technically defamatory of Tom Cruise
- ▶ But likely not actionable
- ▶ “Everything is defamatory” – but there are lots of defences



## What is defamation?

1. *Were the words published to a third party?*
2. *Are they about the plaintiff?*
3. *Would they lower the plaintiff's reputation?*

*“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”*

- Lord Aitken

## What is defamation?

*Being “about” the plaintiff is a low threshold:*

Canadian Libel and Slander Actions, McConchie/Potts at page 324:

“As a question of fact, does the article in fact lead reasonable people who know the plaintiff to the conclusion that it does refer to him.”

## Libel vs. Slander

- ▶ Defamation contains two separate torts, libel and slander.

**Libel** is defamation in written or permanent in form, which extends to pictures, statues, films, TV or even conduct implying a defamatory meaning.

**Slander** is oral defamation.

## Low Threshold for a Claim

- ▶ *Dering v. Uris*
  - ▶ “performed 17,000 ‘experiments’ in surgery without anesthetics”
- ▶ Publication low threshold
  - ▶ Can be putting in envelope in desk





## Libel vs. Slander

- ▶ In libel, the common law presumes falsity, fault, and damages. In slander, special damages must be alleged and prove, subject to the following exceptions:
  - ▶ Words imputing an action of a crime or general accusation of criminality.
  - ▶ Words imputing existence of a loathsome or communicable disease.
  - ▶ Words imputing unfitness to practice trade or profession
  - ▶ Allegations of unchastity directed at a woman
- ▶ No requirement of intent

## What is defamation?

- ▶ Allegations of criminality especially serious:

“Expressions alleging, even by implication or insinuation, criminal conduct are extremely serious and damaging to a person’s reputation and are defamatory.”

*Galloway v A.B.*, 2021 BCSC 2344 at 326

## Online publications are libel



### ▶ Facebook

- ▶ 2.96 billion monthly active users
- ▶ 2.0 billion log in daily
- ▶ Average user has 338 friends

### ▶ Twitter

- ▶ 450 million active users (monthly)

### ▶ Instagram

- ▶ 2.35 billion monthly active users

### ▶ TikTok

- ▶ 1.53 billion users



## Damages

Damages are “at large” – so a judge or jury has wide discretion to pick number, bearing in mind:

- ▶ (a) the seriousness of the defamatory statement;
- ▶ (b) the identity of the accuser;
- ▶ (c) the breadth of the distribution of the publication of the libel;
- ▶ (d) republication of the libel;
- ▶ (e) the failure to give the audience both sides of the picture and not presenting a balanced review;

## Damages

- ▶ (f) the desire to increase one's professional reputation or to increase ratings of a particular program;
- ▶ (g) the conduct of the defendant and defendant's counsel through to the end of trial;
- ▶ (h) the absence or refusal of any retraction or apology;
- ▶ (i) the failure to establish a plea of justification;
- ▶ (j) injury caused to the feelings of the plaintiff and the plaintiff's grief are to be taken into account. In that case, great pains were taken to set out the effect of the defamation on the plaintiff.

## ***Pritchard v. Van Ness, 2016 BCSC 686***

Facebook posts calling plaintiff a “creep”, accusing him of spying on children. Had 2000 friends on Facebook.

\$65,000 damages, including \$15,000 punitive

## May be liable for what others write

Republication (if reasonably foreseeable) or control over website:

- 1) actual knowledge of the defamatory material posted by the third party
- 2) a deliberate act that can include inaction in the face of actual knowledge
- 3) power and control over the defamatory content.

After meeting these elements, it may be said that a defendant has adopted the third party defamatory material as their own –  
*Pritchard v. Van Nes*, 2016 BCSC 686

## So why not sue?

1. Strong defences
2. Cost and expense
3. Can win the lawsuit but lose the battle (draw attention to the publication/nominal damages)



## Defences to Defamation

- A. Truth
- B. Absolute privilege
- C. Qualified privilege
- D. Fair comment
- E. Responsible communication
- F. PPPA Act
- G. Other miscellaneous – not about plaintiff, not defamatory, “Weber” defence – arising out of or incidental to collective bargaining

## Defences to Defamation

- A. Truth
- B. Fair comment
- C. Absolute privilege
- D. Qualified privilege
- E. Responsible communication
- F. Protection of Public Participation Act (*New*)

## Defences to Defamation

### A. Truth

- Onus on party asserting truth
- Cannot use discovery to “uncover the truth” – must have facts and particulars on hand at the time the allegation was made

## Defences to Defamation

### B. Absolute privilege

- Complete defence, but limited circumstances
- Testifying in court, Parliamentary or Legislative privilege

## Defences to Defamation

### c. Qualified privilege

- Statement made on a reciprocal “occasion of privilege”
- Can be moral, legal, social
- Can be very technical inquiry

## Defences to Defamation

### c. Qualified privilege

- Can be exceeded
  - Same words to same audience – can be privileged on one occasion but not on another
  - Key in #MeToo cases

## Defences to Defamation

### D. Fair comment

- Based on these facts, this is my opinion
  - Just has to be an opinion “someone” could reasonably have
- ▶ *WIC Radio Ltd. v. Simpson*, 2008 SCC 40

## Defences to Defamation

### D. Fair comment

- What is opinion
- Is it opinion to say: “my former employer sexually harassed me”
  - Why or why not?



## Defences to Defamation

### E. Responsible Communication

- Always pleaded, but seldom successful outside of “media” cases
- Analysis of professionalism/urgency

▶ *Grant v. Torstar Corp.*, 2009 SCC 61

## Other defences

- ▶ Not concerning the plaintiff
- ▶ Not defamatory – see ***Ralston v. Fomich*, [1992] B.C.J. No. 463 (B.C.S.C.)**:
  - ▶ In my opinion the words "son of a bitch" by themselves are not capable of any defamatory meaning. They are peculiar, in that they take their meaning either from the tone of voice used or from whatever adjective accompanies them. They are a translucent vessel waiting to be filled with colour by their immediate qualifier.
  - ▶ Thus, one has sympathy for a poor son of bitch, admiration for a brave son of a bitch, affection for a good old son of a bitch, envy for a rich son of a bitch and, perhaps incongruously, dislike for a proper son of a bitch.
- ▶ Not the publisher – hyperlinks:  
*Crookes v. Newton*, 2011 SCC 47

## Other defences

- ▶ Statutory protections
  - ▶ Anti-SLAPP legislation (BC and Ontario)
  - ▶ Certain types of official reporting obligations
- ▶ Jurisdiction (particularly in internet cases)
  - ▶ *Breedon v. Black*, 2012 SCC 19
  - ▶ *Haaretz.com v. Goldhar*, 2018 SCC 28

## Publicity – even in victory

“I spent nearly \$2000 for [lawyer] to lose a case for me that they seemed they didnt (sic) put any effort into. Anywhere else would be moore (sic) helpful.worstest (sic) lawyer.would not recommend”

- ▶ Default judgment
- ▶ \$1 in damages
- ▶ Publicity in local media

## Anonymity

- ▶ Online posts can be difficult to track down
  - ▶ Key is using metadata to track down author

## Apologies

Under *Apology Act*, apologies are not considered an admission of guilt

- So if a member has defamed someone, seek legal advice because can be done early
- Early apology may reduce damages

#MeToo

## **#MeToo**

Movement against sexual harassment and sexual assault

- Spread virally in October of 2017, following sexual misconduct allegations against Harvey Weinstein
- Started in 2006 by Tarana Burke, social activist and community organizer



## **Whisper Lists – lists of men to avoid**

“Shitty Media Men” – list of people to avoid in New York publishing and journalism

- Shared outside of private network
- Author lost her job and was sued

We are seeing this in Canada – “Are We Dating the Same Guy Vancouver”

## American vs. Canadian Differences

1. New York Times v. Sullivan – if person is “public figure”, must prove knowledge of falsity
2. Communications Decency Act – s.230 provides immunity to “hosts”, who are not considered authors
3. First Amendment Protections – in some cases, plaintiff has to prove falsity
4. Defences for “matter of public concern”

## **In the United States, much stronger protection of speech**

So cases in which allegations of sexual misconduct are made in Canada, courts have applied existing laws

- Despite public interest
- Despite high profile individuals

## ***Lyncaster v Metro Vancouver Kink Society, 2019*** **BCSC 2207**

Open letter published “warning” members of kink community about potential predatory sexual conduct by plaintiff

- Public interest in advocating for members of kink community
- But, too broad – although there may be circumstances in which it is beneficial or necessary to report allegations of criminal wrongdoing beyond the police, to a targeted group of individuals who are potentially impacted by future misconduct. In this case I find that a reasonable judge could conclude that the alleged defamatory statements were published “to the world” and not only to people who had a corresponding interest in receiving them.

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## ***Smith v. Nagy*, 2021 ONSC 4265**

Defendant alleged plaintiff had sexual, physically and emotionally abused her during marriage

- While acknowledging public interest in protecting expression and debate on the topic of sexual and domestic violence and abuse, court permitted lawsuit to proceed as:
  - “the right to free expression does not confer a licence to ruin reputations.” In *Platnick v. Bent*, Côté J. noted at para. 146 that reputation is one of the most valuable assets that a person can possess, and that, because a good reputation is closely related to an individual’s innate worthiness and dignity, “it must, just as much as freedom of expression, be protected by society’s laws.”

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## ***Deeb v. Zebian, 2022 ONSC 6947***

It has been five years since the emergence of the “#MeToo” movement. Women have felt empowered to speak out in protest about sexual violence typically suffered at the hands of men in positions of power. Importantly, some men who have abused positions of power to sexually exploit women have been called upon to account for their misdeeds. ...

The defendant, Najwa Zebian, now a poet, added her voice to the #MeToo chorus. The difficulty is that her #MeToo moment is considerably nuanced.



***Deeb v. Zebian, 2022 ONSC 6947***

- Alleged improper sexual conduct and grooming from a position of power
- Did not refer to plaintiff by name, but as principal at high school
- She applied to dismiss claim under PPPA

## ***Deeb v. Zebian, 2022 ONSC 6947***

▶ [151] The historic significance of the #MeToo movement cannot be overstated. Sexual misconduct by men in positions of power towards women is being brought into the light. Many of the perpetrators have faced major consequences for their actions, including criminal convictions, loss of high paying positions and loss of celebrity status (at least favourable celebrity status).

▶ [152] Thus, the 6 symbols “#MeToo” are extremely powerful and must not be bandied about indiscriminately. Once branded by #MeToo, the target faces a grave, likely non removeable, stain on his reputation. While I do not wish to slow the #MeToo movement, it is critically important that those stamped with # are not cast out of society unless the conduct complained of merits that punishment.

## ***Deeb v. Zebian*, 2022 ONSC 6947**

► [162] I have considered whether allowing this action to continue might suppress other women who want to express their #MeToo moment. Where those expressions fairly depict the inappropriate behaviour, I see no chilling effect. There is a very strong public interest in reporting sexual assault, for example, as our courts have recognized (see, for example, *R. v. Seaboyer*, [1991 CanLII 76 \(SCC\)](#), [1991] 2 S.C.R. 577). There are cases where abuse or violence will be apparent. When the allegations fall within the nuanced grey areas, as I believe they do here, even those in positions of disproportionate power should be permitted to defend themselves through the court process. It is certainly in the public interest to ensure that potent labels are used legitimately and with caution.

## ***Galloway v. AB*, 2021 BCSC 2344**

- ▶ High-profile author and novelist, professor sued multiple defendants in respect of allegations of sexual misconduct
  - ▶ Some of the defendants had discussed the allegations in the context of broader #MeToo allegations in the context of academia, and the allegations were widely reported on by traditional media
- ▶ Defendants brought PPPA applications, largely unsuccessful
- ▶ Appeal to be heard in May of 2023

## *What can be done if advising a victim?*

- ▶ Emphasis on qualified privilege
  - ▶ Police, therapist, close friends and family, and narrow audience
- ▶ Lawsuit
  - ▶ No limitation period for sexual assault in British Columbia, and media can report on filing of claim
- ▶ Apology if published online
  - ▶ Apology Act provides limits on how apology can be used, and apology is considered in assessment of damages

# Privacy and Intimate Images

## Legislative Framework – BC

- ▶ Freedom of Information and Protection of Privacy Act (FIPPA)
- ▶ Personal Information Protection Act (PIPA)
- ▶ PIPEDA
- ▶ BC Privacy Act
- ▶ Criminal Code provisions (voyeurism)

## Privacy Breach Defined

- ▶ An incident involving the unauthorized collection, use or disclosure of personal information



## “Personal Information” Defined

- ▶ **“Personal information”** means recorded information about an identifiable individual other than contact information
- ▶ Very broad – but some personal information is more sensitive (financial, medical, sexual)

## Privacy Act

The *Privacy Act* gives people the right to sue in British Columbia:

**S. 1** (1) It is a tort, actionable without proof of damage, for a person, willfully and without a claim of right, to violate the privacy of another.

## Privacy Act

**§ 1(2).** The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.

## Privacy Act

**S. 1 (3).** In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.

- ▶ *Milner v. Manufacturers Life Insurance Company (2005)*

## Privacy Act – Section 3

**S. 3(2)** It is a tort, actionable without proof of damage, for a person to use the name or portrait of another for the purpose of advertising or promoting the sale of, or other trading in, property or services, unless that other, or a person entitled to consent on his or her behalf, consents to the use for that purpose.

## How is the law evolving?

- ▶ Proliferation of electronic personal information
- ▶ Courts in Canada are increasingly emphasizing individual's right to privacy

## Intrusion Upon Seclusion

- ▶ **Common law legal action *Jones v. Tsige*, 2012**
  - ▶ Both bank employees
  - ▶ Tsige has relationship with Jones' ex
  - ▶ Tsige snooped on Jones financial information in the bank records
  - ▶ 174 times in 4 years!
  - ▶ **Invasion of privacy = \$10,000 damages!**



## Tucci v. Peoples Trust Company (2020)

- ▶ Court of Appeal left the door open for litigants advancing argument that a common law *Jones* tort exists in BC

[66] It may be that in a bygone era, a legal claim to privacy could be seen as an unnecessary concession to those who were reclusive or overly sensitive to publicity, though I doubt that that was ever an accurate reflection of reality. Today, personal data has assumed a critical role in people's lives, and a failure to recognize at least some limited tort of breach of privacy may be seen by some to be anachronistic.

[67] For that reason, this Court may well wish to reconsider (to the extent that its existing jurisprudence has already ruled upon) the issue of whether a common law tort of breach of privacy exists in British Columbia.



## What Changed?

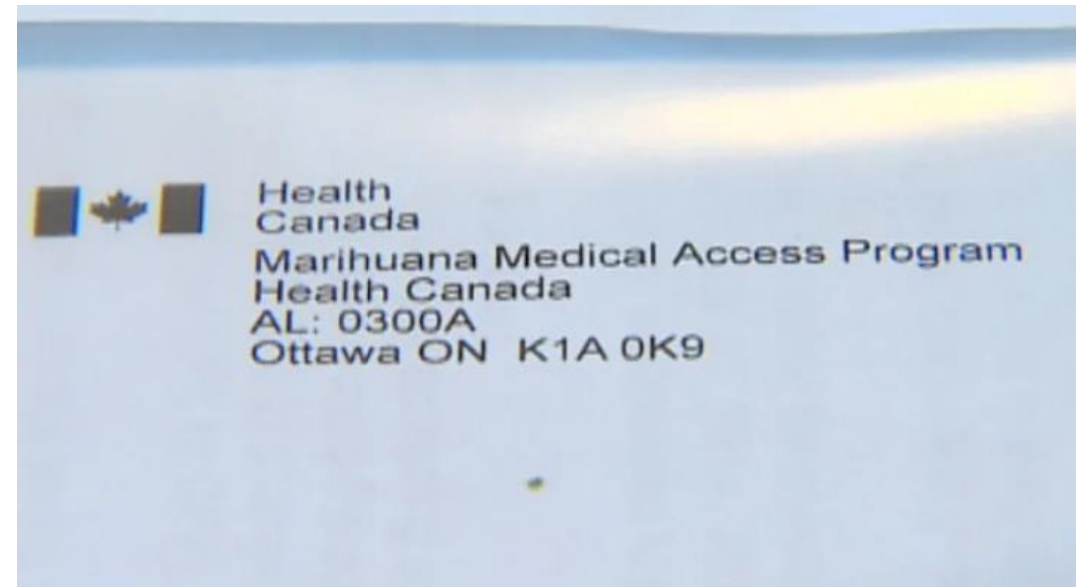
- ▶ Broader expectation of privacy, even in public places (*Grillo v. Google*, 2014 QCCQ 9394)
  - ▶ **Facts:** Woman was sunbathing on her front porch, Google Street view car took her image. Face and other features were blurred out, but still identifiable based on the fact it was her house

## What Changed?

- ▶ *R. v. Jarvis*, 2019 SCC 10
  - ▶ **Facts:** A high school teacher was charged with voyeurism after secretly recording female students as they engaged in ordinary activities in public areas of the school
  - ▶ "...“privacy,” as ordinarily understood, is not an all-or-nothing concept...being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording.”
  - ▶ Expectation of privacy is a normative standard

## Medical Marijuana Class Action

- ▶ Federal Court of Canada has certified a class action involving 40,000 people in the medical marijuana medical access program
- ▶ Participants were sent an envelope in 2013 from Health Canada marked with the program's name



## ***Ari v. ICBC*** (2022)

- **Facts:** ICBC employee accessed and sold personal information for hundreds of ICBC customers. Information used to target customers in arson and shooting attacks. Class action commenced.
- Court found ICBC employee liable under *Privacy Act*, and ICBC vicariously liable.

## Amanda Todd case (R v. Coban - 2022)

- ▶ **Facts:** 15-year old Amanda Todd targeted by Dutch man who created fake social media accounts to anonymously threaten, extort and bully her online over 3 years before taking her own life
- ▶ Landmark “Sextortion” and “Cyberbullying” case
- ▶ Offender sentenced to 13 years in prison

## **B.C. Intimate Images Protection Act**

- ▶ Announced March 2023
- ▶ Applies to intimate images, videos, livestreams and digitally altered images over which an individual has a reasonable expectation of privacy
- ▶ Expedited process to stop distribution without consent
- ▶ Clearer legal avenue for lawsuits to seek damages

**Questions?**