

Defamation, Privacy and Intimate Images – Recent Updates

Daniel Reid

Harper Grey LLP

November 25, 2025



Topics

Defamation

Defences

Privacy

Intimate
Images

Defamation and Defences

Defamation

- ▶ Reinforce three key elements of defamation
 - ▶ Publication about a person/organization
 - ▶ To a third party
 - ▶ That would lower the reputation of the person/organization “in the minds of right thinking members of society
- ▶ Discuss defences
- ▶ Truth, fair comment, absolute privilege, qualified privilege
- ▶ Newer defences: responsible communication, *Protection of Public Participation Act*

Defamation - elements

- ▶ Publication about a person
- ▶ Does not require name – can be description, example, or context
- ▶ “would the average person who knows the plaintiff know that the publication was about them”

Defamation - elements

- ▶ Publication to a third party
- ▶ Can be one other person – letter in envelope found later
- ▶ Does not have to be “deliberate” publication
- ▶ Cannot defame someone to their face

Defamation - elements

- ▶ A reasonable person would think less about the person/organization
- ▶ Can be tricky legal test – are the words defamatory or not?
- ▶ Case: *Ralston v. Fomich*, 1992 CanLII 1652 (BC SC)

Key Defences

- ▶ Truth/justification
- ▶ Fair comment
- ▶ Absolute Privilege
- ▶ Qualified privilege
- ▶ Responsible Communication on Matters of Public Interest
- ▶ *Protection of Public Participation Act (BC)*

Truth (Justification)

- ▶ Truth is an absolute defence in defamation cases.
- ▶ Must prove the 'sting' of the allegation is substantially true.
- ▶ No malice requirement; ill intent irrelevant if truth is proven.
- ▶ Example: Allegation of fraud substantiated by court records.
- ▶ Case: *Torstar Corp. v. Grant* (2009 SCC 61).

Truth (Justification)

- ▶ The journalist/person publishing the allegation has the onus of proving it
- ▶ Must rely on facts that are in hand at the time the publication is made
 - ▶ Case: *International Brotherhood of Electrical Workers, Local 213 v. Pacific Newspaper Group Inc. (The Vancouver Sun)*, 2005 BCCA 44
- ▶ If you get it wrong, can increase damages

Fair Comment

- ▶ Protects opinions on matters of public interest.
- ▶ Requirements:
 - ▶ Based on true facts – either stated or known
 - ▶ Clearly opinion, that a person could honestly hold (does not require person saying it to actually hold that opinion)
- ▶ Example: Film critic calling a movie 'a tasteless disaster.'
- ▶ Case: *WIC Radio Ltd. v. Simpson* (2008 SCC 40).

Fair Comment

- ▶ Can be very technical inquiry into what is “fact” and what is “opinion”
- ▶ Is calling someone a “liar” a factual allegation?
An opinion?
- ▶ It depends on *context*

Absolute Privilege

- ▶ Provides complete immunity in specific contexts:
 - ▶ Parliamentary, judicial, or tribunal proceedings.
 - ▶ Executive communications.
- ▶ Idea is that this type of environment is so important that we encourage people to be fully honest without worrying about being sued for defamation
- ▶ Example: Witness testimony in court.
- ▶ Case: *Salgado v. Toth* (2010 ONSC 6080).

Qualified Privilege

- ▶ Protects statements made with a duty to communicate to an interested party.
- ▶ Defeated by malice or exceeding the duty's scope.
- ▶ Example: Teacher providing a reference letter.
- ▶ Case: Hill v. Church of Scientology (1995).

Qualified Privilege

- ▶ Protects many types of “occasions”
- ▶ Reports to police, discussions with therapist or physician, discussion with close friends and family members, reference letter
- ▶ Does not apply to communications to “the world at large” – so doesn’t apply to online publications

Other Defences

- ▶ Limitation Act – 2 years in most provinces
- ▶ Notification – some provinces
- ▶ Libel and Slander Act
- ▶ Reportage – newsworthy because it happened
- ▶ Jurisdiction – didn't happen here
 - ▶ Case: *Haaretz.com v. Goldhar*, 2018 SCC 28 (CanLII), [2018] 2 SCR 3

Responsible Communication

- ▶ Protects defamatory statements on public interest issues if responsibly verified.
- ▶ Factors considered:
 - ▶ Seriousness, urgency, source reliability, and balance.
- ▶ Example: Investigative journalism on government corruption.
- ▶ Case: Grant v. Torstar Corp. (2009 SCC 61).

Responsible Communication

- ▶ Requirement to give both sides of story
- ▶ Duty to update story? – The UK says yes
 - ▶ Case: *Flood v. Times Newspapers Ltd.*, [2010] EWCA Civ 804
- ▶ Social media has changed things – everyone is a publisher

Consent

- ▶ • Plaintiff explicitly or implicitly consents to the publication.
- ▶ • Scope of consent matters; publishing beyond scope negates defence.
- ▶ Example: Politician consenting to an interview on policies.
- ▶ Case: *Lawrence v. BBC* (1981).

Innocent Dissemination

- ▶ Protects distributors unaware of defamatory content:
 - ▶ ISPs, libraries, booksellers.
- ▶ Ends once notified of the content's nature.
 - ▶ Case: *Pritchard v. Van Nes*, 2016 BCSC 686
- ▶ Example: ISP hosting user-generated content without moderation.
- ▶ Case: *Crookes v. Newton* (2011 SCC 47).

PPPA Purpose and Framework

- ▶ BC and Ontario only: Enacted in 2019 to prevent misuse of defamation lawsuits.
- ▶ Protects freedom of expression on matters of public interest.
 - ▶ Deters lawsuits aimed at silencing critics (SLAPPs).
- ▶ Key Tools:
 - ▶ Early dismissal of lawsuits (Section 4).
 - ▶ Cost awards for successful defendants.

Two-Part Test Under the PPPA

1. Threshold for Defendants:

- ▶ Show the lawsuit arises from public interest expression.

2. Burden for Plaintiffs:

- ▶ Demonstrate substantial merit.
- ▶ Show “grounds to believe” no valid defence exists.
- ▶ Prove harm outweighs public interest in the expression.

Key Cases: *Galloway v. A.B.*, 2021 BCSC 1419

- ▶ Galloway sued individuals for defamation over #MeToo allegations.
- ▶ Court dismissed some claims under the PPPA.
 - ▶ Expressions related to systemic issues and accountability deemed public interest.
 - ▶ Highlights the role of anti-SLAPP laws in protecting public discourse.

Key Cases: **Galloway v. UBC, 2022 BCSC 1081**

- ▶ Defamation claims brought against UBC and investigators.
- ▶ Court applied PPPA to dismiss some claims while allowing others.
- ▶ Demonstrated nuanced balancing of public interest and harm.

Supreme Court of Canada Guidance

1. *Pointes Protection Association* (2020 SCC 22):
 - Established anti-SLAPP framework across Canada.
2. *Bent v. Platnick* (2020 SCC 23):
 - Clarified assessing defences and balancing public interest vs. harm.
3. *Hansman v. Neufeld* (2023 SCC 14):
 - Reaffirmed broad protections for public discourse, even when polarizing.

Critiques and Challenges

- ▶ Potential misuse by defendants to dismiss legitimate claims.
- ▶ Balancing harm and public interest remains complex.
- ▶ Anti-SLAPP motions can consume judicial resources and delay resolutions.

Key Considerations for Litigants

Defendants:

- ▶ Show public interest nature of expression.
- ▶ Ensure factual accuracy and absence of malice.

Plaintiffs:

- ▶ Prove harm outweighs public interest.
- ▶ Assess merits and potential defences before filing lawsuits.

Privacy – More Important than Ever

“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)*

Importance of Privacy

Across the board, courts and regulators in Canada are increasingly emphasizing individual's right to **privacy**



What Changed?

- ▶ Proliferation of electronic personal information
- ▶ 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.

Importance of Privacy (Location)

What's changed?

- ▶ Courts have consistently recognized a broader expectation of privacy, even in public places (*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.

Importance of Privacy (Location)

[37] One question raised by the present appeal is whether a person can ever retain [a reasonable expectation of privacy] when she knows she can be observed by others or when she is in a place from which she cannot exclude others — what may be described as a “public” place. In my view, on an ordinary understanding of the concept of privacy, this question must be answered in the affirmative. ...

...

[41] These examples illustrate that “privacy,” as ordinarily understood, is not an all-or-nothing concept. Furthermore, being in a public or semi-public space does not automatically negate all expectations of privacy with respect to observation or recording. ...

Multiple avenues

- ▶ **Regulatory complaints** – complaints to the Office of Information and Privacy Commissioner under PIPA, FOIPPA, PIPEDA;
- ▶ **Civil lawsuits** – *Privacy Act* – very low threshold

Smith v. Jones

- ▶ Psychiatrist retained by defendant wanted to share opinion about patient, who he thought posed a risk to society
- ▶ *Health care provider has a general obligation/duty to patient to keep confidential.*
 - ▶ *Subject to narrow exceptions – PIPA, FIPPA and other statutes*

Exceptions – FIPPA (public body)

Disclosure to third parties if:

“compelling circumstances that affect anyone’s health or safety”

- does not have to be life or death
- must be unusual, urgent
- must be clear benefit
- must be rational connection

FIPPA, s. 33(3)(a)

Exceptions – FIPPA (public body)

Mandatory disclosure:

- “risk of significant harm to the environment or the health or safety of the public or to a group of people and could include serious mental health concerns or threat of violence”

Exceptions – PIPA (not public body)

Can disclose without consent if:

- reasonable grounds to believe compelling circumstances exist that affect health or safety
- disclosure is clearly in interests of person and cannot be obtained in a timely way
- contacting the next of kin or friend of ill, injured or deceased

Other Acts

- always, pursuant to court order
- records only, pursuant to subpoena
- if Health Care Practitioner who is not competent/impaired (HPA), sexual misconduct
- child welfare (Child, Family and Community Service Act)
- coroners act
- infection/immunization issues

Circumstances that Give Rise to Breach

Access

- ▶ Privacy can be violated even if “internal access” –
Privacy Act claims if wrong person looks at information

A number of cases where accessed for personal reason
(neighbour, ex-wife) or for financial gain

- ▶ *Ari v. ICBC*, 2015 BCCA 468
- ▶ *Jones v. Tsige*
- ▶ *Evans v. Bank of Nova Scotia*, 2014 ONSC 7249

Key case: *Insurance Corporation of British Columbia v. Ari*, 2025 BCCA 131

- ▶ **Class proceeding:** disclosure of address and contact information
- ▶ \$15,000 in damages for each class member, despite no proof of consequential harm to the whole class
- ▶ “general damages may be awarded to compensate, vindicate and deter injuries to privacy interest, given quasi-constitutional nature of right”

Commonalities

- ▶ **Must be brought in Supreme Court of British Columbia** (except for intimate images, see next section)
- ▶ **Defences to defamation typically apply to privacy claims**
- ▶ **Expensive and complicated claims to advance/defend**
- ▶ **Think about insurance!!!!**

Intimate Images Protection Act

New legislation

- ▶ Came into force January 2024
- ▶ Allows for claims to *Civil Resolution Tribunal*
- ▶ Proposed changes
 - ▶ Increasing limitation period from 2 years to 4 years
 - ▶ Increasing damages from \$5,000 to \$75,000
- ▶ Ability to order global takedown and penalties
- ▶ X challenging \$100,000 in penalties - ongoing

Questions?

dreid@harpergrey.com