S.C.C. File No. 33412

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

WAYNE CROOKES and WEST COAST TITLE SEARCH LTD.

APPELLANTS
(Appellants)

and

JON NEWTON

RESPONDENT
(Respondent)

and

CANADIAN CIVIL LIBERTIES ASSOCIATION, SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, NETCOALITION, CANADIAN NEWSPAPER ASSOCIATION, AD IDEM/CANADIAN MEDIA LAWYERS ASSOCIATION, MAGAZINES CANADA, CANADIAN JOURNALISTS FOR FREE EXPRESSION, THE WRITERS' UNION OF CANADA, PROFESSIONAL WRITERS ASSOCIATION OF CANADA, PEN CANADA and CANADIAN PUBLISHERS' COUNCIL

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TABLE OF CONTENTS

Page

PARTS I & II: OVERVIEW & QUESTION IN ISSUE

1. The British Columbia Civil Liberties Association (the "BCCLA") intervenes to address the issue of whether the author of one website who creates a hyperlink to another website, without otherwise repeating the content of the hyperlinked site, is liable for defamatory material on the hyperlinked site. The central BCCLA submission is that a website author should only be found liable for defamation if he or she knowingly adopts or endorses defamatory material on the hyperlinked site.

2. This position accords with the principles of republication, the innocent dissemination defence, and the recently-recognized reportage defence. A hyperlink, in and of itself, is a mere conduit to another site. It is not a republication. Much more is required to establish liability and to avoid chilling the most publicly accessible and significant forum for expression in Canada today and in the future: the internet.

3. The BCCLA submission is supported by Canadian and international jurisprudence. Fundamentally, its position is the logical extension of the decisions of this Court and others in the fields of freedom of expression and defamation.

PART III: STATEMENT OF ARGUMENT

A. THE VALUES AT STAKE: FREE SPEECH AND PROTECTION OF REPUTATION

4. This Court has consistently held that the analysis of liability in defamation must be grounded in respect for two fundamental values: freedom of expression and the protection of reputation.

> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 100
> *Prud'homme v. Prud'homme*, [2002] 4 S.C.R. 663, 2002 SCC 85 at para. 38
> *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 2008 SCC 40 at paras. 1-2, 15
> *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 3

5. Examining the values at stake in this case is not only important to appreciate the context in which the appeal arises. Those values also provide helpful direction in determining the appropriate resolution of the case.

6. This Court's decisions affirming the importance of freedom of expression to the healthy development of individuals and a democratic society are legion. From hate speech, pornography and tobacco advertising to media reporting and political debate, the Court has been very careful to protect many forms of communicative activity from unwarranted legal restriction. No less robust an approach should be applied to the issues arising on this appeal.

> *Reference re Alberta Statutes*, [1938] S.C.R. 100 at 132-3
> *Switzman v. Elbling and A.G. of Quebec*, [1957] S.C.R. 285 at 326
> *R. v. Keegstra,* [1990] 3 S.C.R. 697 at 725-7
> *R. v. Sharpe,* [2001] 1 S.C.R. 45, 2001 SCC 2 at para. 21
> *RJR-MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311
> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 25
> *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component,* [2009] 2 S.C.R. 295, 2009 SCC 31

7. The Court has emphasized three purposes for protecting expressive activity: (1) to foster and encourage participation in a democratic society; (2) to enable human creativity and self-fulfilment; and (3) to sustain the search for the truth in a marketplace of ideas. Freedom of speech is intended to protect not only the rights of speakers, but also the rights of listeners.

> *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 968-971
> *R. v. Keegstra, supra* at 727-8
> *Montreal v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62 at para. 74
> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33 at para. 17

8. Consistent with the significance of these purposes and the "vital and fundamental importance of freedom of expression", the right to express ideas and put forward opinions can "only be restricted in the clearest of circumstances."

> *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336
> *R. v. Lucas*, [1998] 1 S.C.R. 439, [1998] S.C.J. No. 28 at para. 24

9. The Court's decisions in those cases reveal two key themes that are relevant to this case. First, expressive activity must be protected both for its own sake and for the benefits which it confers on individuals and society. This principle is relevant to this appeal because communication via the internet is expanding exponentially. The limits

to its future utility are not easily predicted. This Court should be careful not to prematurely stunt its growth.

Cerf Affidavit, paras. 10-14 [Appellant's Record ("AR"), Tab 6.c.]

10. Second, legal restrictions on expression must be carefully and narrowly defined. This principle is critical in this case because this Court is asked to provide guidance on the availability of liability in defamation for a broad range of people in a broad range of circumstances.

11. Justice Binnie wrote in *Harvard College v. Canada (Commissioner of Patents)* that "[i]nnovation is said to be the lifeblood of a modern economy. We neglect rewarding it at our peril." The internet is the means by which a large measure of human ideas and innovation are now shared. A chill on the use of that medium should be avoided by establishing a "bright line" test and confining defamation liability to only the clearest of cases.

Harvard College v. Canada (Commissioner of Patents), [2002] 4 S.C.R. 45, 2002 SCC 76 at para. 4

12. The Respondent describes himself as a journalist, and the material on his websites involved debate over freedom of expression and political issues–clearly at the heart of the s. 2(*b*) protection. The common law in general, and defamation law in particular, must develop in accordance with *Charter* values. As such, this Court's extensive s. 2(*b*) jurisprudence provides an essential backdrop against which to analyze the issues on this appeal.

Court of Appeal Judgment, paras. 8-9, 49 (*per* Prowse J.A.) [AR pp. 10, 21]
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 at 875-76, 911-15
Prud'homme v. Prud'homme, *supra* at para. 38
WIC Radio Ltd. v. Simpson, *supra* at paras. 2, 16

13. Freedom of expression must be balanced against the interest in the protection of reputation. However, the protection of reputation through defamation law cannot be at the expense of "freewheeling debate". Even in *Hill v. Church of Scientology of Toronto*, this Court expanded the defence of qualified privilege. Collectively, the Court's

decisions in these areas are consistent with the principle that expressive activity can only be limited in the clearest of circumstances. As Binnie J. stated in *WIC Radio Ltd. v. Simpson*, "[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones."

> *Hill v. Church of Scientology of Toronto, supra* at paras. 107-121, 151-154
> *Prud'homme v. Prud'homme, supra* at para. 43
> *Grant v. Torstar Corp., supra* at paras. 31, 45
> *WIC Radio Ltd. v. Simpson, supra* at paras. 2, 4; see also paras. 48, 72-73

14. In its most recent defamation decision, *Grant v. Torstar Corp.*, the Court again broadened the defences available to public communicators, by establishing the defence of responsible journalism. The defence is not only available to the conventional media; McLachlin C.J. expressly contemplated "others engaged in public communication on matters of public interest, like bloggers".

> *Grant v. Torstar Corp., supra* at paras. 62, 98

15. The Chief Justice also addressed the "repetition rule", and the exception for "reportage" where a defendant fairly reports on others' defamatory statements. The issue of repetition goes to the core of this appeal. The Appellant argues, in essence, that the Respondent's creation of a hyperlink to a website with defamatory content constitutes repetition of that content, and therefore makes the Respondent liable for it.

> *Grant v. Torstar Corp., supra* at paras. 76, 119-121

16. While the Respondent does not rely on the reportage defence, the criteria for its establishment offer guidance on the appropriate test for establishing adoption by hyperlinking.

B. HYPERLINKING IS NEITHER REPETITION NOR PUBLICATION

17. Repetition of libel constitutes its publication, and therefore may ground liability. But a hyperlink alone neither repeats nor publishes any content on the linked site; the link merely provides the reader with a convenient means of connecting to the other site.

18. Interconnectedness is a critical feature of the internet. This essential quality gave rise to the best known part of the internet, the "world wide web". Individuals can simply and almost instantaneously access information and other content from the internet anywhere on the globe by way of hyperlinks. By creating hyperlinks, authors facilitate internet users' ability to obtain and reference other related material. This process demonstrates the critical value of hyperlinks to the strength, breadth and utility of the internet, and thereby to free speech.

19. The fundamental function and purpose of a hyperlink is to connect one website to another, which is neither authored, controlled nor influenced by the creator of the hyperlink. Unlike republication, the creation of a hyperlink in and of itself merely provides "directions" for a reader, calling the reader's attention to the other website. Creating a hyperlink does not affect or change the content of the other, hyperlinked site. Further, the existence of the hyperlink does not deliver or distribute any content, defamatory or otherwise, that may be found on the linked site. The two websites are connected by the hyperlink, but remain independent. As the Court of Appeal held in these proceedings, "[t]he essence of following a hyperlink is to leave the website one was at to enter a different and independent website".

Court of Appeal Judgment, para. 82 (*per* Prowse J.A.) [AR, p. 29]

20. In recent *obiter,* Justice Eady, a very experienced libel judge of the English Court of Queen's Bench, addressed this issue as follows:

> One point that was briefly addressed in the course of submissions was that of the hyperlink. It was said that it is so far undecided in the authorities whether, as a matter of any generality, any material to which attention is drawn in a blog by this means should be taken to be incorporated as part of the blog itself. I suspect that a general rule of thumb is unlikely to be adopted. Much will depend on the circumstances of the particular case . . .

Ali v. Associated Newspapers Inc., [2010] EWHC 100 (QB) at para. 28

21. Just as in all other aspects of the analysis of defamation, context is critical in assessing the potential for liability arising from an internet publication. Divorced from its

context, a hyperlink from one website to another cannot result in strict liability for any libel at the linked site. Otherwise, a search engine like Google or Yahoo! that brings up hyperlinks in its search results would be liable for any defamatory material on the listed websites. Such an outcome, the BCCLA submits, would be absurd.

> *Grant v. Torstar Corp. supra* at paras. 110-126
> *WIC Radio Ltd. v. Simpson, supra* at paras. 56,69
> *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, [2004] 3 S.C.R. 95, 2004 SCC 53 at para. 59

C. LIABILITY REQUIRES KNOWING ADOPTION OF THE LIBEL

22. The BCCLA proposes a two-part test that must be satisfied before a hyperlink creator could be found liable for publication of someone else's libel. First, the hyperlink creator must knowingly, positively, and explicitly adopt or endorse the defamatory content. There can be no ambiguity in the hyperlink creator's endorsement of the message delivered on the hyperlinked website. Satisfaction of this requirement will depend on the context in which the hyperlink creator sets the hyperlink. Where the defendant references defamatory material but condemns it, mocks it, treats it neutrally, or makes no comment at all, there is no adoption.

23. For example, the words "Check out this article on the XYZ website. I agree with what they say about John Doe's involvement in the Green Party" clearly indicate an adoption of the hyperlinked article, satisfying the first step of the test. On the other hand, the mere statement "Check out this article" would be insufficient to attract liability, as the statement does not endorse the text of the article. Somewhat akin to the analysis of malice, context will be critical to determining the website author's dominant motive in creating the impugned hyperlink.

> *WIC Radio Ltd. v. Simpson, supra at* paras. 100, 106

24. The second part of the test would require a clear and precise nexus between the endorsement on the defendant's website and the defamatory content on the linked site. In order to determine the extent of this connection, courts should look at the context and nature of both the initial libel and the alleged adoption so as to ensure that the adoption

relates to the defamatory content. The endorsement should include some suggestion of the materials which are suggested to be found at the hyperlink. In the example above, the reference to "John Doe's involvement in the Green Party" provides this level of specificity.

25. This second criterion is necessitated by the nature of the internet. Websites vary in size tremendously, from small, one-page sites to massive websites with thousands of pages, or a webpage with comments from many different individuals. In such cases, it cannot be sufficient for the plaintiff to establish that the defendant's website expressed some general agreement with the hyperlinked site. The context must indicate that the defendant endorsed the defamatory content on the linked site. Otherwise, the defendant faces strict liability for linked material of which he or she may have been entirely unaware.

26. Moreover, websites are fleeting and transient. Subsequent to the creation of a hyperlink, the hyperlinked website can change without notice and defamatory materials can be added (or removed). A defendant should not be held liable for a general endorsement of a website that may contain vast amounts of ever-changing information.

27. The Appellants' formulation of the law would impose a duty on hyperlink creators to comprehensively review hyperlinked sites prior to creating a link, and to subsequently monitor linked sites for changes over time, for as long as the hyperlink exists. This is an impossible task, and would unduly restrict free speech. It would require every website creator to have an editorial board.

Auvil v. CBS "60 Minutes", 800 F. supp. 928 at 931-32 (1992)

28. The BCCLA's proposed test is consistent with the principles underlying the reportage defence. That defence indicates that even repetition of defamatory words may not constitute their "publication", in a legal sense, where the defamatory statements are clearly attributed to someone other than, and not adopted by, the defendant.

Grant v. Torstar Corp., *supra* paras. 76, 120-121

29. Internet users understand that when they click on a hyperlink and connect to a different website, the author of the linked site is solely responsible for its content. Similarly, the BCCLA's proposed test of endorsement is the flip side of the non-adoption requirement of the reportage defence, as set out in *Grant v. Torstar Corp.* And as the New South Wales Court of Appeal has commented, there are "obvious differences between affirmatively adopting an allegation, repeating it without comment and repeating it in order to refute it."

> *Keramianakis v. Regional Publishers Pty Ltd.*, [2007] NSWCA 375 at para. 44
> See also *Bik v. Mirror Newspapers Ltd.*, [1979] 2 N.S.W.L.R. 679 at 681-2 (C.A.)
> *Graeme v. Globe Printing Co.* (1890), 14 O.P.R. 72 (C.A.)
> *John Fairfax Publications Pty Limited v. Obeid*, [2005] NSWCA 60 at paras. 98-104

30. However, unlike in the reportage scenario, in this case the Respondent's website did not repeat the defamatory words on the hyperlinked site. That fact is fundamental to the proper resolution of this appeal. In the normal course, by creating a hyperlink the website publisher simply identifies for readers the existence of the hyperlinked site and, *ergo*, its content, but does not repeat that content on its own site. Hence, as the Respondent argues, the issue on appeal is whether the Appellant has proven publication, not whether the Respondent has a defence.

> Court of Appeal Judgment, para. 9 (*per* Prowse J.A.) [AR, p. 10]
> Respondent's factum, paras. 78, 91

D. REFERENCE TO ANOTHER'S LIBEL DOES NOT CONSTITUTE ADOPTION

31. The case of a hyperlink creator who does not reproduce the libel can be compared to prior circumstances where parties have not been held liable for defamatory statements to which they have referred.

32. The simple act of calling attention to something, on its own, should not be enough to attract liability. Two American cases illustrate this point. In *MacFadden v. Anthony*, the court dismissed the plaintiff's claim where a radio broadcast called attention to a prior defamatory magazine article without repeating its contents; there was no republication of the libel.

MacFadden v. Anthony, 117 N.Y.S. 2d 520 (Sup. Ct. N.Y. 1952)

33. Similarly, in *Klein v. Biben*, the Court of Appeals of New York held that the specific reference to an earlier libel was not republication.

Klein v. Biben, 296 N.Y. 638, 69 N.E. 2d 682 (N.Y. Ct. App. 1946)

34. In these cases the defendant merely directed interested readers to the location of defamatory content without treating the content in one way or another. Such references do not attract liability in the United States, and should not attract liability in Canada. There is a significant public interest in allowing people to identify documents and websites as noteworthy without fear of prosecution, regardless of the content of the noted publication.

35. Of similar ilk is the decision of the Court of Appeal for British Columbia in *Carter v. BC Federation of Foster Parents Assn*. In that case, the defendant's newsletter listed the address of a website as a place "for more news". The website contained defamatory content, but the newsletter did not indicate that fact and was not itself defamatory. The court distinguished cases where a defendant took active steps to publish the defamatory material or had some degree of control over the defamatory words. Rather, the court likened the factual situation to the *MacFadden v. Anthony* and *Klein v. Biben* cases, and dismissed the claim.

Carter v. BC Federation of Foster Parents Assn., 42 B.C.L.R. (4th) 1, 2005 BCCA 398 at para. 12

36. In *Carter v. BC Federation of Foster Parents Assn.*, a reader of the newsletter was required to type the website address into her browser in order to visit the website and read the defamatory content. A hyperlink is no more than a slight shortcut in the same process and is, in substance, no different than publishing a web address without publishing its content. Neither situation should attract liability.

37. Similarly, mere silence cannot constitute adoption. A defendant was not liable for defamation when he sat silent while the plaintiff was being slandered on a radio talk

show. Similarly, a defendant who did nothing in response to a defamatory email message was not liable.

> *Smith v. Matsqui* (1986), 4 B.C.L.R. (2d) 342 (B.C.S.C.)
> *Stanley v. Shaw*, 58 B.C.L.R. (4th) 212, 2006 BCCA 467

38. Applying these principles to the issue on appeal, absent explicit, affirmative language to indicate endorsement of the defamatory content, a hyperlink creator should not be liable for merely referring to defamatory content located on another website. This approach would prevent a chilling effect on the vast majority of internet users, and is consistent with internet users' legitimate expectations. If publication through a hyperlink is possible without some express endorsement or adoption of the linked content, real doubt would be cast on the ability of people to share information without fear of liability.

E. UNKNOWING ADOPTION

39. As indicated above, the internet is in constant change. As a result, a website publisher who endorses and creates a hyperlink to an innocuous article on "John Doe's involvement in the Green Party" could face liability if the hyperlinked article is subsequently changed to incorporate libellous statements on the same topic.[1] The hyperlink creator may be *prima facie* liable despite never having read the libellous statements on the hyperlinked site, and never having intended to endorse them. Relief should be available to a publisher placed in such a predicament.

40. The BCCLA submits that such a defendant should be permitted to adduce evidence to show that his original endorsement related to different, non-defamatory content. Upon receiving notice of the linked defamatory content, the hyperlink creator would have to either revise his original website to eliminate the endorsement, or remove the hyperlink. Having done so, he would be absolved of any liability.

41. This would be akin to the innocent dissemination defence available to internet service providers ("ISPs"), which host websites. By that defence, ISPs are generally

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[1] If the new and defamatory content related to a different topic than that endorsed by the hyperlink creator, then on the BCCLA's proposed test the hyperlink creator would face no liability: see paras. 24-27 above.

not liable for the content of the sites they host, unless they are notified of defamatory content on a hosted site and refuse to remove it.

> *Godfrey v. Demon Internet Ltd.*, [2001] Q.B. 201
> See also *Grant v. Torstar Corp.*, *supra* at para. 38

42. These principles are also consistent with the requirement of knowing involvement in the publication of libel before liability can be imposed. For example, defendants who have physically distributed libellous material without knowledge of the contents have been held not liable.

> *Bunt v. Tilley*, [2007] 1 W.L.R. 1243, [2006] EWHC 407 (Q.B.)
> *Day v. Bream* (1837), 2 Mood & Rob. 54, 174 E.R. 212
> *McLeod v. St. Aubyn*, [1899] A.C. 549 (P.C.)

43. At first blush it might be expected that a website author who endorses and links to another site would be aware of the content of that site. The reality of the internet is otherwise. Links may stay active for years after the content on a linked site has changed. As such, hyperlink creators should be permitted to avoid liability by demonstrating that they never intended to adopt defamatory material.

PART IV: SUBMISSIONS CONCERNING COSTS

44. The BCCLA does not seek costs with respect to the appeal, and respectfully requests that it not be ordered to pay costs.

PART V: REQUEST FOR ORAL ARGUMENT AND POSITION

45. The BCCLA requests 10 minutes of oral argument to address issues arising from its factum and those of other interveners and parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF November, 2010.

Roy W. Millen

"Paul B. Schabas"
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PART VI: TABLE OF AUTHORITIES