

# Publisher's Note

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<b>CANADIAN DEFAMATION LAW AND PRACTICE</b> <b>Pepper, Morritt, Stephenson &amp; Ross</b> <b>Release No. 2, December 2021</b>
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## Publisher's Special Release Note 2021

The pages in this work were reissued in September 2021 and updated to reflect that date in the release line. Please note that we did not review the content on every page of this work in the September 2021 release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This book is designed to provide an overview of the Canadian law of defamation and a practice guide for lawyers advising on defamation issues or engaged in prosecuting or defending defamation actions. It will also assist in-house counsel in recognizing areas of concern and help editors and others involved in the communications, advertising and media fields avoid publishing defamatory material. It is an extremely practical guide to the area providing an overview of the law, practice tips and precedents. Topics covered include: the plaintiff and defendant, defences, remedies, defamation and the internet, defamation and the charter, and more.

### **What's New in This Update:**

This release provides valuable updates to chapter 1 (Introduction), Chapter 3 (The Defendant), Chapter 6 (Defences), Chapter 6 (Remedies), Chapter 7 (Litigating a Defamation Action), Chapter 8 (Contempt of Court), Chapter 11 (The Internet), Chapter 12 (Quebec), Chapter 13 (Defamation Law and the Charter), and Chapter 14 (Related Actions).

### **Highlights:**

- **Defences – What is “Fair Comment”** – *Neufeld v. Hansman* provides a good review of the “Fair Comment” defence in the context of a successful s. 137.1 motion where the court found that the plaintiff had failed to show that the defence had no real prospect of success. In *Neufeld v. Hansman*, at paras. 23-40 where the British Columbia Court of Appeal reviewed the requirements for establishing a fair comment defence and held that the motion judge below, in granting an order to dismiss a proceeding under s. 137.1, had erred by not considering whether each of the publications in issue included statements recognizable as comments founded on identifiable facts. *Neufeld v. Hansman*(2021), 459 D.L.R. (4th) 121, 2021 BCCA 222 (B.C. C.A.)
- **Litigating a defamation Action – Anti-SLAPP Motions – Matter of Public Interest** – Courts have been reviewing the meaning of “relates to a matter of public interest”. This was reviewed in *Grist v. TruGrp Inc.* While it is important to consider the publication as a whole, it is also necessary to focus the s. 137.1 analysis on those parts of the publication that are the subject of the litigation if claims are asserted with respect to only part of a broader expression. In *Grist v. TruGrp Inc.*, the Court of Appeal held that the motion judge erred by failing to analyze the specific statements that were the subject of the action rather than the broader expressions of which they were part. The plaintiff was not attempting to use legal process to discourage the defendant from making

the unchallenged statements. While the whole of the expression provides context for understanding the part challenged, it is the latter that is the relevant subject matter for the motion. In this case, the appeal was allowed based on a finding that an allegation that a building restoration business engaged in conduct that was tortious and contrary to labour laws in order to harm competitors was, fundamentally, a private dispute to which s. 137.1 did not apply. *Grist v. TruGrp Inc.* (2021), 459 D.L.R. (4th) 489, 2021 ONCA 309 (Ont. C.A.), additional reasons (2021), 74 C.C.L.T. (4th) 243, 2021 ONCA 374 (Ont. C.A.)

- **The Internet – The World Wide Web and the Issues of Jurisdiction** – The global reach of the Internet creates challenges for defining the jurisdictional scope of Canadian courts. In *Giustra v. Twitter, Inc.*, the British Columbia Supreme Court concluded it should not decline jurisdiction over claims for damages and an injunction in respect of defamatory tweets authored by others and relayed on Twitter’s internet platform. The plaintiff had strong connections to British Columbia and California and Twitter was based in California. The tweets were read in Canada and the United States. The jurisdiction of the British Columbia court was challenged under the *Court Jurisdiction and Proceedings Act*. The tweets related to both Canadian and U.S. matters and made serious personal attacks against the plaintiff. Significant to the decision of the court to accept jurisdiction was the concession by both parties that Twitter would have no liability to the plaintiff in California as a result of the freedom of expression protection of the First Amendment to the U.S. Constitution and two other statutes. The court noted that the case largely hinged on the question of the real and substantial connection between British Columbia and the facts on which the proceeding was based. The *Haaretz.com* decision was reviewed at length by the court which found that the plaintiff had a significant reputation in British Columbia and strong ties to the province. The fact that he also had a reputation and connections to other jurisdictions did not detract from this. It further concluded that the *lex loci delicti* leads to the conclusion that tweets published in the United States and read there would be governed by U.S. law, but that there was a real and substantial connection between British Columbia and the facts on which the action was based. Further, the *forum non conveniens* analysis as described in *Haaretz.com* favoured British Columbia. Particular emphasis was placed by the court on the fact that Twitter failed to establish that there was a clearly more appropriate forum, recognizing that California could not be presented as an alternative appropriate forum given that the plaintiff would have no cause of action that he could assert there for tweets published and harm suf-

ferred in British Columbia. *Giustra v. Twitter, Inc.*(2021), 63 C.P.C. (8th) 259, 2021 BCSC 54 (B.C. S.C.)

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