

# COMMERCIAL LITIGATION AND ARBITRATION REVIEW

VOLUME 1, NUMBER 2

Cited as 1 C.L.A.R.

MAY 2012

## IN THIS ISSUE

*Jones v. Tsigie*: Ontario Court of  
Appeal Recognizes Tort  
for the Invasion of Privacy

*Rahool P. Agarwal and Pamela Sidey*.....17

Set the Controls for the Heart of the  
Sun: Ontario Court of Appeal Allows  
*Securities Act* Claims against Foreign-  
Listed Issuers in *Canadian Solar*

*Brandon Kain*.....23

*Crookes v. Newton*: Hyperlinking,  
Defamation Law, and Freedom  
of Expression on the Internet

*Matthew Nied*.....27

*Nearctic Nickel Mines Inc. v.  
Canadian Royalties Inc.* : Exécution  
en nature, Injonction et Mesures  
provisionnelles en droit québécois  
de l'arbitrage

*Stéphanie Bachand*.....31

## ***JONES V. TSIGIE*: ONTARIO COURT OF APPEAL RECOGNIZES TORT FOR THE INVASION OF PRIVACY**

RAHOOL P. AGARWAL AND PAMELA SIDEY

### **Introduction**

In *Jones v. Tsigie*,<sup>1</sup> the Ontario Court of Appeal recognized the tort of “intrusion upon seclusion.” In doing so, Ontario became Canada’s only province with a fully articulated civil cause of action for invasions of privacy under the common law. Other provinces have an articulated civil cause of action that is statutory, so it is inaccurate to say it is the only common law province with a fully articulated civil cause of action—some others have one, but it is a statutory tort. The courts in those provinces have interpreted and are using that tort, though not necessarily in a uniform fashion.

While the specific facts of the case are narrow, the decision raises a number of interesting implications. In this article, we review the background of the case and the Court’s decision, and discuss three issues: (i) the potential for employers to be vicariously liable for intrusions into private affairs or concerns by their employees; (ii) the potential for class actions based on invasions of privacy; and (iii) conflict of laws and the enforcement of Ontario judgments for invasions of privacy in other Canadian provinces.

## Commercial Litigation and Arbitration Review

The **Commercial Litigation and Arbitration Review** is published quarterly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Markham, Ont., L3T 7W8, and is available by subscription only.

Web site: [www.lexisnexis.ca](http://www.lexisnexis.ca)

Design and compilation © LexisNexis Canada Inc. 2012. Unless otherwise stated, copyright in individual articles rests with the contributors.

**ISBN 0-433-47142-5**

**ISBN 0-433-47146-8** (print & PDF)

**ISBN 0-433-47144-1** (PDF)

Subscription rates: \$265.00 (print or PDF)

\$405.00 (print & PDF)

### National Editor:

#### Yousuf Aftab

Dan Tan Law

Tel.: (646) 580-0080

E-mail: [yousuf@dantanlaw.com](mailto:yousuf@dantanlaw.com)

### LexisNexis Editor:

#### Boris Roginsky

LexisNexis Canada Inc.

Tel.: (905) 479-2665

Fax: (905) 479-2826

E-mail: [clrv@lexisnexis.ca](mailto:clrv@lexisnexis.ca)

### Editorial Board:

- **Rahool Agarwal** Norton Rose Canada LLP
- **Pierre-Jérôme Bouchard** McCarthy Tétrault LLP
- **Tina Cicchetti** Fasken Martineau DuMoulin LLP
- **Robert Deane** Borden Ladner Gervais LLP
- **Stephen Drymer** Norton Rose Canada LLP
- **Barry Leon** Perley-Robertson, Hill & McDougall LLP/s.r.l.
- **Nicholas McHaffie** Stikeman Elliott LLP
- **Justin Nepal** Torys LLP
- **Megan Shortreed** Paliare Roland Barristers
- **John Terry** Torys LLP
- **Evan Thomas** Osler, Hoskin & Harcourt LLP
- **Maia Tsurumi** Cohen Commission

Note: This Review solicits manuscripts for consideration by the National Editor, who reserves the right to reject any manuscript or to publish it in revised form. The articles included in the *Commercial Litigation and Arbitration Review* reflect the views of the individual authors. This Review is not intended to provide legal or other professional advice and readers should not act on the information contained in this Review without seeking specific independent advice on the particular matters with which they are concerned.

## Background

The appellant Sandra Jones, a bank employee, discovered that the respondent Winnie Tsige, an employee of a different branch of the same bank, had been secretly viewing her bank records. According to the evidence, Tsige had used her work computer to access Jones's banking information almost 200 times over a period of four years—conduct the Court described as “deliberate, prolonged and shocking.”<sup>2</sup> While Jones and Tsige did not know each other, Jones had formed a relationship with Tsige's ex-husband, which had prompted Tsige's snooping.

When confronted about the snooping by the bank, Tsige admitted that she had no legitimate reason to access Jones's bank records, although she explained that she was in a financial dispute with Jones's ex-husband and wanted to know whether he was paying his child support. The bank disciplined Tsige by suspending her for one week without pay and denying her a bonus.

Jones, however, sought a personal remedy. She commenced an action against Tsige for invasion of privacy and breach of fiduciary duty, and then moved for summary judgment. Tsige brought a cross-motion for summary judgment requesting dismissal of the action.

## The lower court decision

Justice Whitaker, the motion judge, dismissed the fiduciary duty claim on the basis that Tsige owed no fiduciary obligation to Jones.

Justice Whitaker also dismissed Jones's claim with respect to invasion of privacy on the basis that no such tort existed in Ontario. He arrived at that conclusion by relying on the Court of Appeal's decision in *Eutenier v. Lee*, and specifically on Justice Cronk's statement that “[the plaintiff] properly conceded in oral argument before this court that there is no free-standing right to dignity and privacy under the *Charter* or at common law.”<sup>3</sup> Justice

## *CROOKES V. NEWTON*: HYPERLINKING, DEFAMATION LAW, AND FREEDOM OF EXPRESSION ON THE INTERNET

MATTHEW NIED

### Introduction

In *Crookes v. Newton*,<sup>1</sup> the Supreme Court of Canada held that creating an Internet hyperlink to defamatory material on the Internet does not constitute publication of the defamatory material.

Although this decision may limit the remedies available to those harmed by Internet defamation, it will protect website operators, Internet search engines, and other Internet intermediaries from liability for publishing hyperlinks to defamatory material, provided that the hyperlinks are not presented in a way that repeats the defamatory material. This article discusses the decision's background, reasoning, and implications.

### Background

The appellants, Wayne Crookes and West Coast Title Search Ltd. (collectively "Crookes"), brought numerous defamation actions against various individuals and organizations alleging that Mr. Crookes had been defamed in several articles on the Internet. After those actions were commenced, the respondent, Jon Newton, posted an article on his website that commented on the implications of Crookes's defamation suits for operators of Internet forums. Newton's article included hyperlinks to websites containing some of the allegedly defamatory articles that were the subject of Crookes's actions. Newton's article did not reproduce or comment on the content in those articles.

Crookes discovered Newton's article and advised him to remove the hyperlinks. When he refused, Crookes brought an action seeking damages for defamation on the basis that the hyperlinks constituted publication of the allegedly defamatory articles. There was evidence that Newton's article had been viewed 1,788 times, but no evidence as to

how many times, if any, the hyperlinks in the article had been followed.

### Decision of the Supreme Court of Canada

The issue on appeal was whether creating a hyperlink to allegedly defamatory material constitutes publication of that material. The reasons of the six-justice majority, penned by Justice Abella, began by describing the evolution of the "publication rule." Under this rule, any act that had the effect of communicating defamatory words to a third person constituted publication. The breadth of activity caught by the publication rule over the years has been vast. For example, a person whose role was manually to operate a printing press was, in one older case, found liable for defamatory words contained in the publication, despite being unaware of its contents.

The majority observed that the harshness of the publication rule was later alleviated by the development of the "innocent dissemination" defence, which protects those who unknowingly play a role in the distribution of potentially defamatory material. Defendants such as booksellers and libraries may avoid liability if they had no actual knowledge of alleged libel, were not aware of circumstances that would give cause to suspect a libel, and were not negligent in failing to discover the libel.

Justice Abella also noted that, in recent years, the application of the publication rule has been tempered by cases that suggest that some acts of communication are so passive that they should not be considered publication. For example, English courts have held Internet service providers and search engines not liable as publishers, because they only played a passive instrumental role, and

acted without knowledge in the process of publishing the defamatory words. In other cases, courts have held that merely making a reference to defamatory material was not publication.

In light of these developments, the majority concluded that creating a hyperlink to defamatory material is not the type of act that constitutes publication. Modern realities make it necessary to interpret the publication rule to exclude references, such as hyperlinks, in order to accord with *Charter* values, recent jurisprudence, and the evolution of communications technology.

In declining to expose hyperlinks to the wide breadth of the traditional publication rule, Abella J. reasoned that hyperlinks are essentially content-neutral references to material that hyperlinkers have not created and do not control. Although a hyperlink communicates the existence of information, and may facilitate the transfer of that information, it does not, by itself, communicate information.

The majority's reasons focused on the important role of the Internet in promoting freedom of expression, and the importance of hyperlinks in facilitating access to information on the Internet:

*[36] The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential 'chill' in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.*

Justice Abella also recognized, however, that a hyperlink will constitute publication if it “presents content from the hyperlinked material in a way that actually repeats the defamatory content.” This might occur, for example, where a person inserts a hyperlink in text that repeats the defamatory content in the hyperlinked material. In these cases, the

hyperlink would be more than a reference; it would be an expression of defamatory meaning. This had not occurred in the case at bar, so the majority dismissed the appeal.

Chief Justice McLachlin and Justice Fish substantially agreed with the majority, but held that “a hyperlink should constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to.” In these cases, the hyperlink “ceases to be a mere reference and the content to which it refers becomes part of the published text itself.”

Justice Deschamps agreed with the result but disagreed with the approaches taken by the other justices. In her view, the blanket exclusion of all references from the scope of the publication rule erroneously treats all references alike. According to Justice Deschamps the majority's approach “disregards the fact that references vary greatly in how they make defamatory information available to [readers] and, consequently, in the harm they cause to reputations.” To address this concern, Deschamps J. proposed a nuanced and highly fact-driven framework under which a hyperlink would constitute publication if the plaintiff established two elements: that the defendant “performed a deliberate act that made defamatory material readily available to a third party in a comprehensible form,” and that “a third party received and understood the defamatory [material].”

To establish the first element under Deschamps J.'s approach, plaintiffs would need to demonstrate that the defendant played more than a passive instrumental role in making the information available, which would depend on numerous factors bearing on the ease with which the referenced information could be accessed. To establish the second element, plaintiffs would need to adduce direct evidence that a third party had received and understood the defamatory material, or convince the court to draw an

inference to that effect based on the totality of the circumstances.

## Implications

*Crookes* presented the Court with a welcome opportunity to reconsider the proper balance between the competing interests of freedom of expression and the protection of reputation in the new context of Internet communications. Five years ago, defamation law leaned significantly towards protecting reputation. Today, as a result of *Crookes* and other landmark cases—such as *WIC Radio*<sup>2</sup> and *Grant*<sup>3</sup>—defamation law better protects and promotes the fundamental right to freedom of expression.

In *WIC Radio Ltd.*, the Court widened the scope of the defence of fair comment. In *Grant v. Torstar*, the Court created the new defence of responsible communication, which allows defendants to evade liability if they can show that they acted responsibly in reporting on a matter of public interest. In light of this jurisprudence, *Crookes* represents a further move by the Court to shape defamation law in a manner that provides increasingly broader accommodation to the value of freedom of expression.

The decision in *Crookes* could have unfortunate consequences in certain circumstances. As the Court recognized, the Internet’s borderless and far-reaching mode of publication has “tremendous power to harm reputation.”<sup>4</sup> As a result of *Crookes*, a victim of Internet defamation who wishes to vindicate his or her reputation and prevent the spread of defamatory material only has a remedy against the person who created and controls the material—not persons who have referred their readers to it.

Interestingly, the majority was of the view that its approach creates “little or no limitation to a plaintiff’s ability to vindicate his or her reputation.” In certain circumstances, however, the majority’s approach may in fact create a heightened opportunity for abuse that significantly limits a plaintiff’s ability to vindicate his or her reputation. The creation

of a hyperlink is a means by which defamatory material can be rapidly disseminated. Defamatory material contained on an obscure website may, for example, receive the attention of a vast number of readers if a popular blogger hyperlinks to it. In these circumstances, the majority’s approach would provide that the plaintiff would have no action against the hyperlinker, even if the hyperlink was created with the malicious intent of spreading the defamatory words.

Such a situation would be especially troubling if the victim were also unable to pursue a remedy against the creator of the defamatory material because it was published anonymously—a common occurrence on the Internet. In addition, if the defamatory material were posted on a website operated in the United States, and the operator of that website passively hosted the material, American legislation could apply to immunize the website operator from liability.<sup>5</sup> If the website operator refused to remove the defamatory material, the victim would be left without a remedy, the material would remain visible for the world to see, and the use of hyperlinks could cause the defamatory material to rise from obscurity to notoriety.

Although this concern might be alleviated by adopting the more contextual and nuanced approaches suggested by McLachlin C.J. and Fish J., and by Deschamps J., those approaches lack the welcome certainty of the majority’s bright-line rule. McLachlin C.J. and Fish J.’s test for publication is dependent on the presence of *indicia* of “adoption or endorsement,” the scope of which is inherently uncertain. Justice Deschamps’s approach is similarly fact driven. If either test applied, it would be difficult to predict in advance whether a hyperlink constituted publication. Uncertain exposure to liability might then deter the public from using hyperlinks, which could inhibit the Internet as a medium for free expression. This very concern likely drove the majority to establish its bright-line rule.

The concurring approaches would also have the undesirable effect of shifting the weight of litigation to defendants. Once a plaintiff establishes that the defendant has published defamatory statements, the onus shifts to the defendant to raise any available defences. Both the concurring approaches would lower the threshold to be met by plaintiffs in order to establish that the defendant has published defamatory statements. As a result, more Internet users would be thrown into the costly position of having to justify their conduct by reaching for the protection of a defence. Although the wide availability of defences for hyperlinkers may, as Deschamps J. suggests, “dissuade overeager litigants from having a chilling effect on hyperlinking,” it would not deter plaintiffs who wish to stifle criticism by intimidating defendants through costly litigation.

It is important to recognize that a defendant’s act of hyperlinking to defamatory material, although not sufficient in itself to create liability, may in certain circumstances be relevant to the availability of defences. In cases where a defendant is found to have published material defamatory of the plaintiff, evidence that the defendant also published hyperlinks to material defamatory of the plaintiff may constitute evidence of malice on the part of the defendant. Evidence of malice may prevent the defendant from establishing certain defences.

Lastly, the decision in *Crookes* may not be the final word on defamation liability for hyperlinks. The Court expressly left open the question of whether the same principles apply to embedded or automatic hyperlinks, which are links that automatically display linked material with little or no prompting from the user.<sup>6</sup> These hyperlinks are distinguishable from user-activated hyperlinks, such as those at issue in *Crookes*, which require users to click on them in order to access the hyperlinked content.

Although the Court declined to comment on the legal implications of automatic or embedded hyperlinks, it appears that they would constitute publication, according to the majority’s reasoning, to the extent that they automatically make third-party content appear as part of the website that the hyperlinker controls.

[*Editor’s note*: Matthew Nied, B.Comm. (Alberta), LL.B (Victoria) practises commercial litigation in the Vancouver office of Stikeman Elliott. Before commencing practice, he clerked for the judges of the Supreme Court of British Columbia. The views expressed are the personal opinions of the author and not those of his employer.

This article was originally published in October 2011 at TheCourt.ca (Osgoode Hall Law School), and is republished here with permission.]

<sup>1</sup> [2011] S.C.J. No. 47, 2011 SCC 47, aff’g [2009] B.C.J. No. 1832, 2009 BCCA 392, aff’g [2008] B.C.J. No. 2012, 2008 BCSC 1424 [*Crookes*]. To succeed in a defamation action, a plaintiff must first prove that defamatory words were published.

<sup>2</sup> [2008] S.C.J. No. 41, 2008 SCC 40.

<sup>3</sup> [2009] S.C.J. No. 61, 2009 SCC 61.

<sup>4</sup> *Crookes*, supra note 1 at para. 37, citing *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329 (C.A.) at para. 32. For a discussion of the manner in which the Internet’s power to harm reputation may affect damage awards in Internet defamation cases, see Matthew Nied, “Damage Awards in Internet Defamation Cases: Reassessing Assumptions about the Credibility of Online Speech” *Alberta Law Review* (October 2010), cited in *Wilson v. Switlo*, [2011] B.C.J. No. 1800, 2011 BCSC 1287 at para. 505.

<sup>5</sup> See *Crookes*, supra note 1 at para. 28, citing the *Communications Decency Act*, 47 U.S.C. § 230, which grants immunity to all Internet intermediaries who publish defamatory material, provided that the material was authored by a third party. Also see the *Speech Act*, 28 U.S.C. §§ 4101-4105, which requires American courts to decline to recognize or enforce foreign defamation judgments that conflict with American law, and which may, as a result, make it difficult to enforce Canadian defamation judgments in the United States.

<sup>6</sup> The Supreme Court of Canada described embedded or automatic hyperlinks in the following way in *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] S.C.J. No. 44, 2004 SCC 45 at para. 25:

Automatic links employ an embedded code in the Web page that automatically instructs the browser, upon obtaining access to the first site, to download a file from a second site. The user does not need to do anything but visit the initial site before information from the second site is ‘pulled’. A different legal issue may arise where the user must take action, such as to click the mouse button over the hyperlink, in order to obtain access to the information from the second site.