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Business Defamation

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I. INTRODUCTION [§1.1]

Traditionally, a reputation carefully fostered over decades could be destroyed in minutes through a defamatory comment. The Internet can now accelerate this destruction to mere seconds. While a person’s good name is, in Shakespeare’s phrase, a precious jewel, a company’s reputation, if lost, can represent billions of dollars in lost sales or share value. Tort law protects business reputation just as it does moral reputation, and an untrue and harmful statement about a company or businessperson may be remedied, albeit imperfectly, through several different causes of action.

Communicative attacks on businesses come in all flavours. A few entirely fictional ones follow:

- A cosmetic surgery clinic accuses a rival clinic of having a higher surgery complication rate.
- A disgruntled customer sets up a “copycat” website, with a web address similar to the name of a company, that features shoddy visuals and inaccurate information.
- An environmental activist falsely accuses a company of polluting a river.
- A competitor runs an advertisement claiming that a rival company is under investigation by the U.S. Food and Drug Administration.
- A corporate press release accuses a rival company of stock manipulation.
• One trade union accuses another of financial mismanagement and corruption.
• An exposé television program falsely accuses two stores of colluding to fix prices.
• A telecommunications company asserts that it has better and faster Internet connectivity than its competitor.
• A company is accused of not owning the intellectual property rights to the movie it is distributing, and a threat is made to sue any purchasers of the show.
• A blogger accuses a mining company of salting core samples and making false statements about preliminary exploration results in an area thought to be rich in minerals.
• A financial services firm runs a radio advertisement implying that its competitor employs a convicted fraudster.
• One soft-drink manufacturer falsely advertises that its competitor has twice the sugar of its own brand.

This chapter will not attempt to describe all nuances of defamation and other reputational claims; such an undertaking would and does fill multiple volumes. Instead, this chapter will focus on tort claims that are designed to remedy harm inflicted on business reputations, with an emphasis on corporate and trade libel.

II. OVERVIEW: CATEGORIZATION OF CLAIMS [§1.2]

A harmful and false publication may give rise to several causes of action, some overlapping in scope and effect.

A. DEFAMATION [§1.3]

Defamation is the intentional publication of a false and harmful statement (Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para. 170). A publication is considered defamatory if it has the tendency to lower the reputation of a company in the estimation of reasonable persons in the community. Companies enjoy business reputations that may be protected against defamatory accusations, just as individuals may protect their personal reputations.
B. NEGLIGENT COMMUNICATION [§1.4]

The tort of negligent communication is a claim in negligence. It thus requires only that the court find a duty of care, proximity between plaintiff and defendant, foreseeability of damage, and actual damage. The classic defamation defences do not apply (Young v. Bella, 2006 SCC 3 at paras. 55 and 56).

C. INJURIOUS FALSEHOOD [§1.5]

Injurious falsehood is the malicious publication of a falsehood concerning the plaintiff that leads other persons to act in a manner that causes damage to the plaintiff. This tort provides a general protection against false statements that would lead people to avoid dealings with a company, or that would undermine the business use or sale of property or products. The tort of injurious falsehood overlaps considerably with defamation, but defamation defences do not apply. Further, unlike defamation, injurious falsehood seeks to protect business and commercial interests, not general reputation; this tort may be useful to combat attacks on goods and services that do not harm the overall reputation of the company (an admittedly rare occurrence).

D. FALSE ADVERTISING [§1.6]

Under the Competition Act, R.S.C. 1985, c. C-34, it is illegal to knowingly or recklessly make false or misleading representations for the purpose of promoting a product or business interest. The advertisement is considered holistically; if the general impression is misleading, the advertising will contravene the Competition Act, even if claims are technically true and are clarified by fine print. Claims may also be made directly to the Competition Bureau for advertising that is misleading but was not made knowingly. Again, defamation defences do not apply.

E. BREACH OF TRADE-MARK OR PASSING OFF [§1.7]

A business reputation may sometimes be attacked through a false statement that a shoddy or disreputable person, product, or service is associated with the plaintiff’s business. This can be achieved by misuse of a registered trade-mark, or, where there is no registered trade-mark, any other action creating a false public belief of association between
companies: the common law tort of passing off. For example, a low-market competitor or provider of similar but inferior goods or services could seek to drag down the reputation of the plaintiff by using names, products, trade-dress, or advertising that would lead members of the public to think that the source was identical. As an alternative attack, a defendant could seek to malign the plaintiff’s business by falsely associating it with a separate disreputable business or person unconnected with the defendant. A plaintiff may combat such mischief through a statutory breach of trade-mark remedy under the Trade-marks Act, R.S.C. 1985, c. T-13, or a common law action in passing off (which is also codified in the Trade-marks Act).

F. PROFESSIONAL AND TRADE COMPLAINTS [§1.8]

The bylaws and codes of conduct of many professional and trade organizations prohibit their members from disparaging fellow members. While these bodies do not generally award damages for such statements, a complaint to the governing body may lead to an investigation and possible discipline of the offending member, and thus potentially provide some redress.

III. DEFAMATION [§1.9]

Although a corporation has no personal reputation, character, or feelings, “[t]he law of defamation protects the reputations of corporations as well as individuals” (St. Elizabeth Home Society v. Hamilton (City), [2005] O.T.C. 1074 (S.C.J.), at para. 166, affirmed 2010 ONCA 280). A claim in defamation is the most common means of combating an attack on a business reputation, although, as set out below, it may not be the simplest course of action.

A. TEST [§1.10]

Generally, to establish a cause of action in defamation, a plaintiff must prove that:

1. the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person;

2. the words in fact referred to the plaintiff; and
the words were published, meaning that they were communicated to at least one person other than the plaintiff.

(Grant v. Torstar Corp., [2009] 3 S.C.R. 640 at para. 28)

1. **IS THE STATEMENT DEFAMATORY? [§1.11]**

A communication is defamatory if it tends to lower a person in the estimation of right-thinking members of society, expose a person to hatred, contempt, or ridicule, or otherwise deter third persons from associating or dealing with them (Cherneskey v. Armadale Publishers Ltd., [1979] 1 S.C.R. 1067. The standard for evaluating the statement is the perspective of an individual who is reasonably thoughtful and informed, rather than someone with an overly fragile sensibility (Colour Your World Corp. v. Canadian Broadcasting Corp. (1998), 38 O.R. (3d) 97 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 170 (QL)).

BUSINESS DEFAMATION


Many comments that would be defamatory of an individual may not be defamatory of a business where those comments refer to actions that a corporation cannot by definition do (Church of Scientology of Toronto v. Globe and Mail Ltd. (1978), 84 D.L.R. (3d) 239 (Ont. H.C.J.) at paras. 13–15). For example, a corporation cannot be accused of practising medicine without a licence, as only an individual can practise medicine; nor could a corporation be accused of rape or incest, or sue for such a statement. The key consideration is whether the words, properly understood, convey an imputation that is injurious to the trading reputation of the company. Older cases limiting such claims may be questionable: occasionally corporations are accused of murder, and where the claim has no basis and could be reasonably believed as true, a claim in defamation should be permitted.

The overall effect of the publication must be considered, and the allegedly defamatory statement must not be viewed in isolation. If something disreputable is said about the plaintiff in one part of a publication but is qualified or corrected in another part of the same publication, the overall effect of the article may not be defamatory (P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd., 2005 BCCA 210 at para. 46).

Non-profit corporations can also claim in defamation because they depend on their business reputation for financial support from the public (St. Elizabeth Home Society v. Hamilton (City), supra, §1.9).

2. DOES THE STATEMENT REFER TO THE PLAINTIFF? [§1.12]

In order to establish that the words refer to the plaintiff, the plaintiff must prove two elements:

(1) As a question of law, can the communication be regarded as capable of referring to the plaintiff?
(2) As a question of fact, does the communication lead reasonable people who know the plaintiff to the conclusion that it does refer to the plaintiff?


The issue is not whether the defendant intended to refer to the plaintiff, but whether people who read or heard the statement would reasonably understand the statement to refer to the plaintiff (Monument Mining Ltd. v. Balendran Chong & Bodi, 2010 BCCA 373 at paras. 13 and 14). If identification is dependent upon special knowledge or circumstances, it must be shown that the words were published to persons who had this knowledge. Unless the recipients of the defamatory publication would have associated the allegations with the plaintiff, no liability will lie (Home Equity Development Inc. v. Crow, 2004 BCSC 124 at paras. 187 to 191).

As a corporation can act only through its directors and employees, an attack on those persons will harm the reputation of the corporation with which they are associated, or over which they had responsibility, if the “corporation’s trading reputation is integrally related to the personal plaintiff’s business or trading reputation” (Johnson v. Jolliffe (1981), 26 B.C.L.R. 176 (S.C.) at 188; Barrick Gold Corp. v. Lopehandia (2004), 239 D.L.R. (4th) 577 (Ont. C.A.) at para. 47; Monument Mining Ltd. at para. 13; M.D.A. Marine Design Associates Ltd. v. British Columbia Ferry Services Inc., 2008 BCSC 1432 at paras. 19 to 21). For example, comments that refer to the corporate employees by the corporate name may be defamatory of the corporation as it could be understood that the corporation was involved or supported the alleged conduct (Greenpeace Foundation of Canada v. Toronto Sun Publishing Corp. (1989), 69 O.R. (2d) 427 (H.C.J.); Archer International Developments Ltd. v. Pacific Press Ltd., [1989] B.C.J. No. 1198 (QL) (S.C.)).

3. WAS THE STATEMENT PUBLISHED? [§1.13]

a. Publication Generally [§1.14]

Publication of the defamatory statements is a necessary element of a claim in defamation. In a defamation context, “publication” does not indicate the use of a printing press but simply means that the statements were communicated to a person other than the plaintiff. Publication may be direct or indirect, and oral or written. It may be
shouted in a square, placed on a poster, published in a newspaper editorial, broadcast on television, drawn in a cartoon, acted in a play, sung in a pop song, sky-written in smoke, sent in an e-mail, or blogged on the Internet.

The essence of publication is communication of the defamatory statement to a person other than the plaintiff. Communication of hurtful or false statements about the plaintiff to only the plaintiff will not establish defamation. Nor will a spiteful thought, or the commitment of that thought to paper in private, or the solitary utterance of that thought constitute defamation, absent communication to a third party.

b. Slander versus Libel [§1.15]

Slander is spoken defamation; libel is written defamation. Spoken word in a television or Internet broadcast is, however, generally treated by the common law and, in some jurisdictions, by statute, as libel. The rationale for the distinction is that written defamation is more permanent than spoken defamation, and would be perceived as a more harmful statement than would be an off-the-cuff remark.

The distinction is primarily important with respect to damages. Written defamation is actionable even if the plaintiff can prove no actual instances of harm; harm is presumed. In contrast, slander requires proof of special damages; in other words, proof of actual harm.

The exception to the slander rule, however, is relevant to this chapter: if the impugned words are slanderous per se, then no actual harm need be proved even if the words are spoken. The classic example of such a statement is one that attacks the professional or trade reputation of the plaintiff (Grant v. Torstar Corp., supra, §1.10 at para. 28; R.E. Brown, supra, §1.11 at ss. 8.5(3)(a) and 25.1). In other words, a spoken attack on a business will in most cases be sufficient to prove defamation, although, as set out below, the damages award may be modest without proof of special damages.

c. Republication [§1.16]

Every instance of republication or repetition of a defamatory statement is a separate tort with a separate potential legal action resulting from the statement (Robbins v. Pacific Newspaper Group Inc., 2005 BCSC 1634; St. Elizabeth Home Society v. Hamilton (City), supra, §1.9). As set out below, this rule has important significance for limitation periods, which may restart years after the initial publication.
Generally, a defendant will be responsible only for his or her own defamatory publication, and not for republication by others. There are three exceptions to this rule:

1. when the person who published the defamatory statement requests or authorizes someone (implicitly or expressly) to communicate defamatory remarks to others. For example, where an e-mail invites the recipient to forward the e-mail to other recipients, the original sender may be liable for any republication falling within the scope of instructions for republication (M.D.A. Marine Design Associates Ltd. v. British Columbia Ferry Services Inc., supra, §1.11);

2. when the person to whom the original publication was made was under a moral, legal, or social duty to repeat or publish the words to someone else; or

3. when the republication was a “natural and probable consequence” of the original publication. The plaintiffs must show that republication was a probable result, or likely, in the ordinary course of the initial publication.

(Speight v. Gosnay (1891), 60 L.J.Q.B. 231 (C.A.))

d. Repetition of a Defamatory Statement Made by Someone Else [§1.17]

It is no defence that one is merely repeating someone else’s defamation, and it is no defence to say that the statement is only a rumour. Under the “repetition rule”, repeating a libel has the same legal consequences as originating it (Grant v. Torstar Corp., supra, §1.10 at para. 119). That being said, such repetition may be protected as “reportage” (discussed at §1.30) if the repetition is communicated on a matter of public interest, and with fair context provided, including a caution that the repeated statement may in fact be untrue.

e. Repetition or Referral through Hyperlinks [§1.18]

Where a website provides its viewers with a hyperlink (an easily-clickable connection) to another website on which defamatory statements are found, is the hyperlinking website liable for republication or repetition? Only where a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be “published” by the hyperlink (Crookes v. Newton, 2011 SCC 47 at para. 42).
B. DEFENCES [§1.19]

If the plaintiff proves the three required elements of defamation, the onus then shifts to the defendant to advance a defence in order to escape liability. Recognizing the importance of free speech in our society, the law provides the defendant with several venerable defences to a defamation claim. These defences have been augmented and strengthened by several important Supreme Court of Canada decisions.

Note that there is no due diligence defence or a defence of innocent error to a defamation. The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is one of a strict liability (Grant v. Torstar Corp., supra, §1.10 at para. 28). That said, with the new defence of responsible communication on a matter of public interest (see §1.28), the Supreme Court of Canada has introduced a more negligence-based analysis to counteract the unfairness of a strict liability defence, at least with respect to matters of public importance.

1. JUSTIFICATION / TRUTH [§1.20]

The simplest and strongest defence is that the statement is true: “[w]hat is true cannot be defamatory” (Courchene v. Marlborough Hotel Co. (1971), 20 D.L.R. (3d) 109 (Man. Q.B.) at para. 11, affirmed (1972), 22 D.L.R. (3d) 157 (Man. C.A.)). A plaintiff has no right to have his or her character or reputation free of an imputation that is true (Ho v. Ming Pao Newspapers (Western Canada) Ltd., 2000 BCSC 8 at para. 103).

The applicable test is whether, on the balance of probabilities, the injurious imputations made by the statement are substantially true in the setting, context, and circumstances in which the words were used (Grant v. Torstar Corp., supra, §1.10 at para. 33; P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd., 2005 BCCA 210 at paras. 42, 46, and 27). The whole of the statement must be substantially true, including the specific charges and inferences flowing from it (Taylor-Wright v. CHBC-TV, [1999] B.C.J. No 334 (QL) (S.C.) at para. 33, affirmed 2000 BCCA 629; Price v. Chicoutimi Pulp Co. (1915), 51 S.C.R. 179).

[§1.21] HAS BEEN DELETED.
2. Absolute Privilege [§1.22]

It is not uncommon for a business’s reputation to be criticized in the Legislature or in a courtroom. Such attacks, even if harmful and untrue, are generally immune from claims in defamation as they are protected by the defence of absolute privilege.

The defence of absolute privilege will bar a finding of liability even where the statement is proved to be harmful and false. The defence generally protects communications of traditionally special importance where complete freedom of communication is considered paramount and crucial for the convenience and welfare of society (Grant v. Torstar Corp., supra, §1.10 at para. 30). For example, statements made in Parliament or in court are absolutely privileged and not subject to a defamation claim even if they are reckless or false. If the same statements are made on the steps of the court or Legislature, however, the privilege is lost.

Therefore, absolute privilege protects communications made in the course of or incidental to the processing and furtherance of judicial and quasi-judicial proceedings, including demand letters (Hamouth v. Stuart Video Technologies Inc., 2005 BCCA 172). Its application is narrow. Absolute privilege applies only where the tribunal in question exercises powers equivalent to those of a court of justice (Wilson v. Switlo, 2011 BCSC 1287 at para. 342). The defence covers all parties involved in the proceedings, including witnesses, parties, and their counsel (McDaniel v. McDaniel, 2009 BCCA 53; Moseley-Williams v. Hansler Industries Ltd. (2004), 32 C.C.L.T. (3d) 266 (Ont. S.C.J.) at para. 60). Absolute privilege may arise before the commencement of the judicial proceedings, for example, in the taking of witness statements by a solicitor (Lincoln v. Daniels, [1961] 3 All E.R. 740 (C.A.)). Absolute privilege that arises due to judicial proceedings cannot be negated by proof of malice or bad faith (1522491 Ontario Inc. v. Stewart, Esten Professional Corp., [2009] O.J. No. 53 (QL) (S.C.J.)). Absolute privilege does not extend to investigations conducted by employers into employee conduct that may later result in criminal proceedings (P. (D.) v. Wagg (2002), 222 D.L.R. (4th) 97 (Ont. S.C.J.), varied on other grounds (2004), 239 D.L.R. (4th) 501 (Ont. C.A.)). The defence extends to communications sent to individuals who are not party to a dispute, but who have an interest in knowing that an investigation or lawsuit is under way (for example, a party’s shareholders or stockbrokers) (Hamouth v. Smart Video Technologies Inc.; Merit Consultants International Ltd. v. Chandler, 2012 BCSC 1868 at paras. 44 to 46).
Absolute privilege also protects all statements made by high executive government officers acting in the performance of their official duties relating to matters of state. This extends from communications between high officials to communications between high officials and their subordinates (Doucette v. Region 7 Hospital Corp., 2002 NBQB 39).

3. QUALIFIED PRIVILEGE [§1.23]

a. The Defence [§1.24]

Similarly, a statement concerning a business or within a business that is harmful and untrue may nonetheless be protected from a defamation claim because of the social interest that such complaints and concerns be made freely. Qualified privilege protects statements made in situations that are traditionally less immune from claims than legislative and court proceedings, yet are nonetheless important to protect. The defence is not absolute, however, and may be defeated if abused through malice or excessive language or distribution.

Qualified privilege applies where the defendant has a legitimate interest or a duty—legal, social, or moral—to communicate information, and where the recipients have a corresponding legitimate interest or duty to receive that information (Hill v. Church of Scientology of Toronto, supra, §1.3 at para. 143).

Generally, communications within a business (whether between directors, employees, or shareholders) and between business affiliates are protected by this defence, as employees and executives have a legitimate interest in communications made during the course and scope of the employment relationship that are intended to further the interests of the company. Society endorses such free and frank communications (see generally R.E. Brown, The Law of Defamation in Canada, 2nd ed. at s. 13.6(3)(d)(i)). Occasions of qualified privilege in the business context include employee reference letters, credit reports, satisfaction reports issued by Better Business Bureaus, and warnings issued by a company about the potential dishonesty of, or danger posed by, an employee or customer (Grant v. Torstar Corp., supra, §1.10 at para. 30; Pleau v. Simpsons-Sears Ltd. (1977), 75 D.L.R. (3d) 747 (Ont. C.A.); Gillett v. Nissen Volkswagen (1975), 58 D.L.R. (3d) 104 (Alta. S.C.T.D.)). Complaints to and reports by Better Business Bureaus are protected by qualified privilege (Walsh Energy Inc. (The Energy Centre) v. Better Business Bureau of Ottawa-Hull Inc., 2012 ONSC 5819 at para. 34). Communications with one's banks with respect to the
potential perpetrators of forged cheques or compromised accounts have the requisite interest-duty to found a defence in qualified privilege (see generally R.E. Brown at s. 13.6(3)(e)(ii)). A company may communicate with its clients and customers on matters of interest to them about which the company would be obliged to communicate; for example, about potential improper practices perpetrated by its employees against them (Weisenberger v. Johnson & Higgins Ltd. (1998), 168 D.L.R. (4th) 298 (Man. C.A.) at paras. 25 and 26, leave to appeal refused [1999] S.C.C.A. No. 70 (QL), reconsideration denied 2002 MBCA 33). The public has an interest in encouraging these types of communications because of the public interest in preventing crime, encouraging business, and encouraging efficient movement of labour.

The defence of qualified privilege includes an “attack privilege”, which permits the subject of a defamatory statement to defend itself from attacks. This may include making negative comments about the publisher and, in an appropriate case, could include defaming the publisher of the statement. As with other forms of qualified privilege, this right is limited in scope and forum to that which is appropriate in the circumstances (Wilson v. Switlo, 2011 BCSC 1287 at paras. 578 to 584).

b. **Defeat of Defence through Malice or Excessive Communication [§1.25]**

As indicated by its name, qualified privilege is not an absolute defence. It may be defeated if the defendant was predominantly motivated by malice, or if the publication was excessive in terms of communication or distribution.

i. **Malice [§1.26]**

Malice is shown where the defendant published a falsehood deliberately or recklessly, without regard to its truth or falsity, or where the defendant published not for the sake of the social purpose protected by the qualified privilege but rather to advance an ulterior purpose (Ward v. Clark, 2001 BCCA 724 at para. 53, leave to appeal refused [2001] S.C.C.A. No. 73 (QL)). This ulterior purpose, usually the desire to injure the person who is defamed, must be the dominant motive for the defamatory publication. Even if the defendant is shown to dislike the plaintiff, malice will not be made out unless it was the primary motivation for the communication (M.D.A. Marine Design Associates Ltd. v. British Columbia Ferry Services Inc., supra, §1.11 at para. 64). Intention is a matter of inference, and the court may look at all
circumstances including the actions of other members of a group within which the defendant operates (McDonald’s Corp. v. Steel and Morris, [1995] 3 All E.R. 615 (C.A.)). Circumstantial considerations such as the untruth of the statement, the source of the information, and the fairness of the report take place at this stage of the analysis where the plaintiff bears the onus of proof. It does not matter whether the defendant knew or cared that the statements were true or false. Proof of either state of mind will establish malice. Mere carelessness, short of recklessness, however, is insufficient to defeat the defence.

In a business context, the fact that the plaintiff and a defendant are bitter competitors may be helpful in drawing an inference that the defendant made the communication not for the sake of benefitting society, but predominantly for the ulterior motive of harming the plaintiff and improving its own economic interests.

ii. Excessive Communication [§1.27]

Persons making potentially defamatory statements must be careful not to go beyond what their duties and interests require them to communicate, both in terms of the content of the statement and the number of persons who receive the information.

Defendants may not rely on qualified privilege if they include with the communication additional statements unnecessary to achieve the societal purpose in protecting the kind of communication in question. For example, a report to a government agency concerning a company’s food safety (a communication that would ordinarily be protected by qualified privilege), may lose the protection if it includes extraneous and irrelevant allegations about the company president’s sexual peccadillos. The information communicated must be “reasonably appropriate in the context of the circumstances existing on the occasion when that information was given” (Hill v. Church of Scientology of Toronto, supra, §1.3 at paras. 146 and 147; RTC Engineering Consultants Ltd. v. Ontario (Ministry of the Solicitor General and Correctional Services) (2002), 58 O.R. (3d) 726 (C.A.) at para. 18; M.D.A. Marine Design Associates Ltd. v. British Columbia Ferry Services Inc., supra, §1.11 at paras. 59 to 63). This is determined by asking whether the person communicating the allegedly excessive information honestly and on reasonable grounds believed that the information was true and a necessary part of the communication.
Merely inflammatory language is insufficient to defeat qualified privilege. It is the content, not the tone, that defeats the privilege and courts will allow wide latitude to the defendant in the words used (Ward v. Clark, supra, §1.26 at paras. 57 to 60).

Qualified privilege may also be defeated if publication goes beyond the interest group protected (Botiuk v. Toronto Free Press Publications Ltd., [1995] 3 S.C.R. 3). For example, a false and harmful complaint about a company’s food safety may be protected if forwarded to government inspectors, but not if blogged to the world at large.

4. **Fair Comment [§1.27A]**

a. **The Defence [§1.27B]**

Many attacks on a business will be immune from a defamation claim because they represent the publisher’s opinion, rather than an allegation of fact. The defence of fair comment concerns statements not of fact but of opinion, a category that includes any “deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof” (Ross v. New Brunswick Teachers’ Assn., 2001 NBCA 62 at para. 56, cited in WIC Radio Ltd. v. Simpson, 2008 SCC 40 at para. 26). The defence permits a person to comment on a matter of public interest. Protected speech ranges from an attack on a politician’s competence to a scathing restaurant review.

In 2008, the Supreme Court of Canada significantly broadened the defence of fair comment to make it more consistent with Charter values such as freedom of expression and freedom of the media (WIC Radio Ltd. v. Simpson). WIC Radio changed the traditional requirement (that the opinion be one that a “fair-minded” person could honestly hold) to a more relaxed requirement that the opinion be one that “anyone could honestly have expressed” (paras. 49 to 51), allowing for robust debate. As stated by Binnie J., “[w]e live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones” (para. 4). The result was a modified test for the “honest belief” element of the fair comment defence, such that the test now consists of the following elements:

1. The comment must be on a matter of public interest.
2. The comment must be based on fact.
3. The comment, though it can include inferences of fact, must be recognizable as comment.
(4) The comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts? (WIC Radio Ltd. at para. 28)

The Supreme Court provided further guidance on the elements of the test:

(1) Public interest is defined broadly, including matters that “affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or others” (London Artists Ltd. v. Littler, (1968), [1969] 2 All E.R. 193 at 198 (C.A.)).

(2) The facts must be sufficiently stated or otherwise known to the listeners so that listeners are able to make up their own minds on the merits of the editorial comment in issue. If the factual foundation is unstated or unknown, or turns out to be false, the fair comment defence is not available.

(3) Comments must be clearly recognizable as statements of opinion. Assertions of bare facts are not protected (Ross v. New Brunswick Teachers’ Assn. at para. 55). The reader must be put in a position to arrive at his or her own conclusion on whether the defamatory expression is founded or unfounded. If the facts are not commonly known, they must be presented together with the defamatory statement (Vander Zalm v. Times Publishers (1980), 109 D.L.R. (3d) 531 (B.C.C.A.) at para. 11).

(4) “Honest belief” requires the existence of a nexus or relationship between the comment and the underlying facts. The test is whether anyone (however prejudiced or obstinate that person is in their views) could honestly have expressed the defamatory comment on the proven facts. This is an objective test. The proper question is whether the defamatory imputation is an opinion that could be held by an honest person in the circumstances.

b. Defeat of Defence through Malice [§1.27C]

Like the defence of qualified privilege, fair comment is not an absolute defence, and can be defeated by a finding of malice. Even if the comment satisfies the objective test of honest belief, the defence can be defeated if the plaintiff proves that the defendant was subjectively motivated by express malice (WIC Radio Ltd. v. Simpson, supra, at para. 28). The defendant must prove the four elements of the defence before the onus switches back to the plaintiff to establish malice.
(Cherneskey v. Armadale Publishers Ltd., supra, §1.11 at 1080–1081). A fair comment defence will not be defeated unless the defendant’s dominant purpose in publishing the statement was to injure the plaintiff, based on ill will or contempt. The language in the publication itself, the conduct of the defendant before and after the publication of the proceeding, and failure to behave respectfully during proceedings may serve as evidence of malice (Wilson v. Switlo, 2011 BCSC 1287 at paras. 474 to 477. For further discussion of malice, see §1.26.

5. RESPONSIBLE COMMUNICATION ON MATTERS OF PUBLIC INTEREST [§1.28]

In an important development affecting potential defamation claims for publications concerning businesses, the Supreme Court of Canada has confirmed a new defamation defence of “responsible communication on matters of public interest” (Grant v. Torstar Corp., supra, §1.10; Quan v. Cusson, 2009 SCC 62). This defence is related to the defence of qualified privilege but is defined as a separate defence. Responsible communication protects journalists, publishers, and—importantly—citizen-journalists and bloggers, from a defamation claim if the defendant can show that he or she acted responsibly in reporting on a matter of public interest even if the facts turn out to be wrong.

Before the recognition of this defence, courts struggled with the issue of defamatory statements made “to the world”; for example, in a newspaper, on a television program, or on the Internet (Grant, supra, at paras. 65 and 85). The duty-interest test under qualified privilege did not apply cleanly to a publication made in a newspaper where the ultimate readership was not fully known, and where it could not be established that every reader had an interest in the statement. As some courts recognized, however, such statements made to the world at large are nonetheless in the public interest and should be encouraged and protected even if incorrect.

In Canada, the responsible communication defence is not limited to issues of political importance (as it is in other jurisdictions) and will be readily applied to protect statements made against businesses from defamation claims. Where the test for responsible communication is met, untrue and harmful allegations about a business in a newspaper or on a blog may nonetheless be protected.
The defendant must prove two elements in order to establish the defence of responsible communication:

(1) the publication was on a matter of public interest; and
(2) the publication was responsible, in that the defendant showed diligence in trying to verify the allegations, having regard to all of the circumstances.

a. **Was the Publication on a Matter of Public Interest? [§1.29]**

To qualify as a matter of public interest, the public must have some substantial concern about the subject matter, either because it affects the welfare of citizens or because it has attracted considerable public notoriety or controversy. Some segment of the public must have a genuine stake in knowing about the matter; mere curiosity or prurient interest is not sufficient. The defence extends to protect responsible but erroneous statements concerning all areas of social discourse in which the public has a vested interest, including the actions of businesses. The statements need not be on a subject of obvious public importance such as environmental standards or product safety; almost any statement concerning a business activity with potential public effects could be protected. Further, the defence protects reports on persons who are not necessarily famous public figures, as long as the report concerns a matter of public interest.

Given the broad comments of the Supreme Court, to be protected by this defence, the comment need not be on a subject of public importance as obvious as that of environmental standards or product safety: almost any statement concerning a business activity with a potential public effect could be protected, if the defendant exercised reasonable care in making the statement.

b. **Was Publication of a Defamatory Communication Nonetheless Responsible? [§1.30]**

The Supreme Court of Canada provides a list of considerations that will guide trial courts as to whether publication of the defamatory statement was nonetheless responsible:

(1) the seriousness of the allegation;
(2) the public importance of the matter;
(3) the urgency of the matter;
(4) the status and reliability of the source;
(5) whether the plaintiff’s side of the story was sought and accurately reported;

(6) whether inclusion of the defamatory statement was justifiable; and

(7) whether the defamatory statement’s public interest lay in the fact that it was made rather than in its truth (that is, the statement merely reports what another person said, and provides a proper context, with no endorsement of those words; this is known as “reportage”).

The above seven considerations are the most important but they are not exhaustive. Each defamatory statement and each set of facts of due diligence must be assessed individually, and the court may consider other matters and place different weight on those considerations in concluding whether or not the communication was made responsibly.

Another potentially relevant consideration is the tone of the article. While distortion or sensationalism may undermine the defendant’s claim of responsible communication in the public interest, “the defence of responsible communication ought not to hold writers to a standard of stylistic blandness” (Grant v. Torstar Corp., supra, §1.10 at para. 123). Nor is the defence lost if the communicator takes a partisan or adversarial position in the article.

As reflected in the name of the defence—responsible communication on matters of public interest—the defence is not limited to professional journalists and traditional paper-based publications. The Supreme Court of Canada confirmed that the new defence is “available to anyone who publishes material of public interest in any medium” (Grant, supra, at para. 96). It extends to bloggers and other online media even though these Internet-based communications are potentially much broader, more permanent, and more harmful than traditional print media.

C. DAMAGES [§1.31]

1. GENERALLY [§1.32]

Among other presumptions that assist a plaintiff in Anglo-Canadian defamation law, harm to the plaintiff is presumed by the court if the plaintiff proves on a balance of probabilities the three elements of defamation: the words were published, they concerned the plaintiff, and they tended to lower the plaintiff’s reputation. The presumption
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is, however, subject to proof to the contrary by the defendant (Grant v. Torstar Corp., supra, §1.10 at para. 28). As stated in Hill v. Church of Scientology of Toronto, supra, §1.3 at para. 164, “it has long been held that general damages in defamation cases are presumed from the very publication of the false statement and are awarded at large”.

An award of general damages for defamation seeks to remedy both personal and public injuries. As identified by the British Columbia Court of Appeal in Brown v. Cole, (1999), 61 B.C.L.R. (3d) 1 at para. 107, general damages are:

1. compensation for “insult offered and pain given”;
2. compensation for injury to pride and self-confidence;
3. vindication of reputation; and
4. compensation for social damage and possible economic damage which may result but which cannot be expressly proven.

In the corporate context, damages in defamation are intended to compensate for harm done to corporate goodwill, where the libel was calculated to injure the company’s reputation with the public and affect its trade or business (Lee v. Lee, 2000 BCSC 1770).

Damages for defamation are notoriously difficult to assess with precision (Best v. Weatherall, 2010 BCCA 202 at para. 46):

It has been said that the calculation of damages for defamation is speculative and an inexact science, that there is no objective measure and that damages need not be calculated mathematically. Further, although damages for defamation are difficult to assess, courts should sensibly and rationally attempt to arrive at a monetary sum that will compensate the plaintiff appropriately...

As indicated by the list of considerations below, damages determinations are fact-specific. For example, where a franchisor was attacked based on its relationship with its franchisees, damages were deemed to be severe because that uniquely co-dependent business relationship is based entirely on reputation between franchisor and franchisee, and the ancillary damage to the goodwill and trust of every franchisee (Second Cup Ltd. v. Efotoda, [2006] O.J. No. 3155 (QL) (S.C.J.) at para. 37; 122164 Canada Ltd. v. C.M. Takacs Holdings Corp., 2012 ONSC 6338 at para. 15.
2. **General Damages** [§1.33]

a. **General Damages Generally** [§1.34]


1. the seriousness of the defamatory statement;
2. the position and standing of the plaintiff;
3. the likely impact on the plaintiff's reputation (and business) by the imputation conveyed;
4. the nature of the libel;
5. the mode and extent of publication;
6. the conduct of the defendant before and after the action, and in court (including conduct of defendant's counsel);
7. the identity of the accuser;
8. the breadth of the distribution of the publication of the libel;
9. any republication of the libel;
10. the failure to give the audience both sides of the picture and not presenting a balanced review;
11. any personal motivations on the part of the defendant to increase his or her own business or gain other advantage through the defamation;
12. the absence or refusal of any retraction or apology; and
13. failure on the part of the defendant to establish the defence of publication or truth.

With respect to a full retraction and apology, these actions may reduce the damages otherwise payable to the plaintiff (*Newson v. Kexco Publishing Co.* (1995), 17 B.C.L.R. (3d) 176 (C.A.)). Conversely, a failure to apologize will generally lead to more substantial damages. A prudent defendant is thus well advised to swiftly investigate the allegations and apologize promptly, possibly with a payment of funds into court, rather than adopting a traditional steadfast defence posture.
b. General Damages for Corporate Plaintiffs [§1.35]

Damages have been the main area of defamation where courts have treated individual plaintiffs and business plaintiffs differently. Traditionally, a corporation could suffer only “in its pocket” as it had no feelings or pride to be harmed in the same manner as a personal plaintiff. Thus, a business plaintiff could generally only recover a nominal sum if it could not show a direct effect on credit or property, or other pecuniary injury such as diminution of profits or decline in trade (Walker v. CFTO Ltd. (1987), 37 D.L.R. (4th) 224 (Ont. C.A.)). Without proof of damage, a corporation would generally receive lower damages than an individual (Townhouses of Hogg's Hollow Inc. v. Jenkins, supra, §1.11). For example, corporate plaintiffs that were unable to show specific financial loss, or special damages, were awarded nominal damages of $1,000 (Ho v. Ming Pao Newspapers (Western Canada) Ltd., supra, §1.20; see also D. Crerar, “Damages in Corporate Defamation Law” (2000), 7(4) Commercial Litigation 370).

A corporate plaintiff may, however, claim considerable damages at large without the need to prove special damages. A corporation may sue based on injury to reputation without other proof of loss, where, for example, the statements seriously harm the reputation of the company. As stated by the court in Hiltz and Seamone Co. v. Nova Scotia (Attorney General), supra, §1.11 at para. 137, “[d]efamatory statements, such as in the present case, strike at the very foundation of the reputation and erode the confidence of the public in the defamed party, no less when it’s a corporation than when it’s an individual” (see also Ascot Holdings Ltd. v. Wilkie (1993), 49 C.P.R. (3d) 188 (B.C.S.C.)). In 122164 Canada Ltd. v. C.M. Takacs Holdings Corp., 2012 ONSC 6338, the court noted at para. 15 that “[i]t takes little to damage the corporate reputation, and much to restore it”. The court in Barrick Gold Corp. v. Lopehandia, supra, §1.11, expressly declined to follow jurisprudence that awarded only modest damages on the basis that successful reasons for judgment themselves sufficiently vindicate the corporate plaintiff’s reputation.

Thus a corporation is entitled to vindication of its reputation in the same manner as any other plaintiff. In some cases, consistent with older case law, the court’s judgment in itself was considered sufficient to achieve this goal, leading to a modest damages award. However, a large damages award may be necessary where “the defendant’s refusal to retract or apologize makes it possible to argue that the only way in which the reputation of the company can be vindicated in the eyes of
the world is by way of a really substantial award of damages" (Barrick Gold Corp. v. Lopehandia at para. 50; $75,000 general and $50,000 punitive damages awarded). Regardless of whether the plaintiff will be able to collect on a judgment, a higher damages award may be warranted to affirm the good name of the company (122164 Canada Ltd. v. C.M. Takacs Holdings Corp. at para. 25; $425,000 general; $75,000 punitive). Recent cases awarding corporations significant general damages include Mainstream Canada v. Staniford, 2013 BCCA 341 at paras. 56 and 59 ($25,000 general; $50,000 punitive); Hunter Dickinson Inc. v. Butler, 2010 BCSC 939 ($75,000 general; $25,000 punitive); WeGo Kayaking Ltd. v. Sewid, 2007 BCSC 49 ($150,000 general; $5,000 punitive); Amalgamated Transit Union v. Independent Canadian Transit Union, [1997] 5 W.W.R. 662 (Alta. Q.B.) ($200,000 general; $125,000 punitive); Olive Hospitality Inc. v. Woo, 2006 BCSC 1554, reversed on other grounds 2007 BCCA 355 ($50,000 general; $10,000 punitive); and Hiltz and Seamone Co. v. Nova Scotia (Attorney General) (1997), 164 N.S.R. (2d) 161 (S.C.) ($200,000 general).

Despite this growing trend to recognize the importance of compensating companies for damage to their corporate reputations, potential corporate defamation plaintiffs must be cautioned that as a general rule, absent proof of specific economic loss, large damages awards remain unusual, and the cost of litigation may well exceed the eventual award (Farallon Mining Ltd. v. Arnold, 2011 BCSC 1532 at para. 81).

Where the defamatory words are likely to produce a general loss of business, damages in the form of loss of earnings or customers may be inferred. It is not necessary to prove a direct link between the loss of specific contracts and the defamatory publications (Hiltz and Seamone Co.) This inference may be rebutted by evidence of increased share value or profitable sales during the relevant period (Farallon Mining Ltd. at para. 107).

Factors that suggest a larger award for general damages:

(1) the good reputation of the plaintiff;
(2) the seriousness of the statements;
(3) actual or potential significant economic damage;
(4) the defendant's motivation to cause economic damage, including driving down share value;
(5) the defendant's personal self-interest;
(6) publication via the Internet, in order to reach the widest possible target audience;
(7) targeting persons who are potential or actual customers or shareholders of the plaintiff company;

(8) bad faith on the part of the defendant;

(9) if the defendant lies about and denies authorship; and

(10) the absence of an apology, or, where there is an apology, the inadequacy or limited publication or qualifications attached to the apology.

(Farallon Mining at para. 106)

Factors that suggest a smaller award for general damages:

(1) the absence of any direct evidence that the plaintiff suffered any loss to business reputation;

(2) the absence of any direct evidence that the plaintiff suffered any economic loss;

(3) the general rule that corporations are limited to nominal damage in the absence of evidence of economic loss;

(4) a lack of evidence of the numbers of persons who spread the defamatory statements;

(5) indications that the company value was not harmed by the publications;

(6) the credibility of the publication venue of the defamatory publication, and how the reasonable reader would interpret the credibility of the publication;

(7) exaggerations in the publication that would be obvious to the ordinary reasonable reader;

(8) alternative causes for any damage that may have been suffered by the plaintiff; and

(9) the defendant’s attempts to apologize.

(Farallon Mining, supra, at para. 107)

It is also important to note that losses arising independently from publication of the defamatory statement will not be compensated. This may include damage to the corporate reputation caused by word-of-mouth spreading of the incident, economic downturns that coincide with publication, or losses caused by the truthful portions of the publication (P.G. Restaurant Ltd. v. Cariboo Press (1969) Ltd., 2005 BCCA 210 at para. 59; Canuck Security Services Ltd. v. Gill, 2013 BCSC 893 at para. 237).
3. **Special Damages** [§1.36]

Special damages compensate the plaintiff for specific measurable losses caused by the plaintiff’s statement. Examples are specific lost contracts, and costs of hiring a public relations firm or additional staff to counteract the effects of the defamation. Special damages, unlike general damages, are not presumed and must be proven. Losses must be the natural and proximate result of the defamatory publication and be capable of monetary measurement (*WeGo Kayaking Ltd. v. Sewid*, *supra*, §1.35 at para. 93). It is usually difficult to ascertain the extent of the damage to one's reputation resulting from defamation, and special damages are relatively rare in defamation cases (*Hodgson v. Canadian Newspapers Co. Ltd.* (2000), 189 D.L.R. (4th) 241 (Ont. C.A.) at paras. 67 to 69, leave to appeal refused [2000] S.C.C.A. No. 465 (QL)).

A plaintiff may well decide not to seek special damages, as the claim may require production of sensitive financial records and documents to a defendant who will often be hostile to, or in competition with, the plaintiff (*Reichmann v. Toronto Life Publishing Co.* (1990), 66 D.L.R. (4th) 162 (Ont. C.J.)).

4. **Aggravated Damages** [§1.37]

Aggravated damages are intended to compensate for the intangible damages that result from mental distress and hurt feelings. In assessing aggravated damages, the court or jury may express its indignation at the malicious conduct or motives of the defendant, including whether the comments were orchestrated, repeated, or widely circulated (*Hill v. Church of Scientology of Toronto*, *supra*, §1.3 at paras. 188 and 189).

Attacks on an individual plaintiff’s professional reputation, especially when communicated to the plaintiff’s employer, provide a strong basis for aggravated damages (*Fagan v. Andrews*, 2011 NLCA 15).

But as a corporation cannot suffer injured feelings, a corporate plaintiff cannot receive aggravated damages (*Barrick Gold Corp. v. Lopehandia*, *supra*, §1.11 at para. 50; *Walker v. CFTO*, *supra*, §1.35 at 113; *Hunter Dickinson Inc. v. Butler*, *supra*, §1.35 at para. 61).

5. **Punitive Damages** [§1.38]

Punitive damages are often appropriate to condemn particularly malicious, irresponsible, or harmful defamation. They are punitive rather than compensatory, and may be awarded to both individuals and
corporations. The Supreme Court of Canada set out the principles of an award of punitive damages in *Hill v. Church of Scientology of Toronto*, supra, §1.3 at para. 196:

Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.

(see also *Barrick Gold Corp. v. Lopehandia*, supra, §1.11 at para. 64)

The amount of punitive damages must be based on a rational purpose and must be proportionate to:

1. the blameworthiness of the defendant's conduct;
2. the plaintiff's degree of vulnerability;
3. the harm or potential harm directed at the plaintiff;
4. the need for deterrence;
5. the other penalties awarded; and
6. the advantage wrongfully gained by the defendants.


Where the defendant persists in a campaign of repeated defamation and indicates an intention to continue this behaviour, punitive damages are especially appropriate (*Mainstream Canada v. Staniford*, 2013 BCCA 341 at para. 58; *Hunter Dickinson Inc. v. Butler*, supra, §1.35 at paras. 70 to 73; *122164 Canada Ltd.* at paras. 27 to 29).

6. **SPECIAL CONSIDERATIONS FOR INTERNET PUBLICATIONS [*§1.39*]**

In *Barrick Gold Corp. v. Lopehandia*, supra, §1.11, at paras. 30 to 34, the Ontario Court of Appeal noted that Internet-based defamation holds
the potential for much greater harm, and thus greater awards of damages:

In the Internet context, these factors must be examined in the light of what one judge has characterized as the “ubiquity, universality and utility” of that medium.

Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed ....

These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

See also Vaquero Energy Ltd. v. Weir, 2004 ABQB 68 at para. 26, where particularly malicious comments in e-mails sent by the defendant resulted in an award of punitive damages.

While the informal nature of some websites, particularly blogs, may tend to indicate to the casual Internet reader that the assertions ought not to be taken seriously, thereby lowering the damages award, the court in Farallon Mining Ltd. v. Arnold, 2011 BCSC 1532 recognized that even if some people “might have considered the [message board] as a forum for blowhards and gossips ... they might have considered that investing in or doing business with a company tainted by gossip involves a greater risk than a company not so tainted” (Farallon Mining Ltd. at para. 86).
It should also be noted that to justify damages the corporate plaintiff must demonstrate loss caused specifically by the statement in issue. When there are multiple proceedings dealing with similar comments, or defamatory statements were made in response to other comments (for example, on a message board or blog), it is unlikely that the plaintiff will be able to make out its claim against individual defendants (Farallon Mining Ltd. at para. 86).

IV. NEGLIGENT COMMUNICATION [§1.40]

A. INTRODUCTION [§1.41]

A plaintiff, particularly a corporate plaintiff, may face difficulty in claiming in defamation. This is largely due to the defences of qualified privilege and (since 2009) the defence of responsible communication on a matter of public interest. In particular, it is notoriously difficult to establish the malice necessary to defeat the former defence.

A business plaintiff may nonetheless be able to successfully combat a careless statement that harms its reputation through an action in negligent communication. This action is not a true cause of action on its own; it is simply a claim in negligence. The negligence in question is not a failure to warn passersby, clear ice, or drive carefully, but rather, a failure to be careful while communicating. The Supreme Court of Canada confirmed the validity of such a claim in Young v. Bella, supra, §1.4.

In a business context such a claim could arise, for example, from a negative customer reference letter that contained negligently inaccurate assertions, or an advertisement erroneously claiming that a trade competitor had been subject to criminal investigations. Plaintiffs should keep in mind, however, that courts will be quick to stifle any attempts to do an end run around defamation defences by recasting a claim as negligent communication (Byrne v. Maas, [2007] O.J. No. 4457 (QL) (S.C.J.)). Further, the rise of the defence of responsible communication on a matter of public interest, which applies a test similar to negligence in considering whether the defendant should be protected by the defence, may well have rendered redundant claims in negligent communication.
B. GENERAL PRINCIPLES [§1.42]

Negligent communication, like negligence, is based largely in the close relationship between the maker of the statement and the plaintiff. This stands in contrast to many defamation claims, where the plaintiff may not in fact know or have any relationship with the defendant. In further contrast, defamation is an intentional, strict-liability tort while negligent communication is based on a negligent act: the defendant may avoid liability by meeting the appropriate standard of care.

Liability based on negligent communication can exist only if the damage is foreseeable (and damage occurs), and there is sufficient proximity between the communicator and the subject of the statement such as to impose a duty of care on the former for the protection of the latter. In other words, the court will ask whether the particular person making the statement in question should have considered that errors in the statement would harm the person they are communicating about. There is no need to prove the absence of good faith in making the publication; it is sufficient if it was made without reasonable cause (Young v. Bella, supra, §1.4).

For example, in the case of a business owner writing a reference letter for a former employee, the two individuals have a sufficiently close relationship such that the employer should consider that a negligently prepared reference letter would harm the subject of the letter. In this scenario there is sufficient proximity between the defendant and the plaintiff to impose a duty of care on the defendant to take care with respect to the plaintiff (Spring v. Guardian Assurance plc, [1994] 3 All E.R. 129 (H.L.)).

The harm complained of must go beyond harm to reputation; it must reflect broader personal and economic harm (Young v. Bella at para. 56). If only reputation is harmed, the court will likely reject the claim as defamation dressed up as negligence.

Further, freedom of expression and the policies underlying qualified privilege (and presumably the defence of responsible communication on a matter of public interest confirmed in Grant v. Torstar Corp., supra, §1.10, decided three years after Young v. Bella) may be taken into account in determining and potentially limiting the appropriate standard of care in negligence (Young v. Bella at para. 56). Thus a claim that is essentially one in defamation cloaked in a claim of negligent communication will likely face difficult scrutiny at trial.
The leading case of Young v. Bella provides an analytical approach to these concepts. In that case, a "bizarre misunderstanding" led to a finding of liability based on negligent communication. The plaintiff was a student at Memorial University, studying to become a social worker. She attached as an appendix to a term paper a "first person" account in which the female writer wrote of being sexually abused as a child, and then herself sexually abusing children in her care. The appendix was not footnoted in the body of the text. The defendant professor speculated that the appendix was a confessional "cry for help" by the plaintiff herself. The professor, and later the director of the school, suggested to the provincial Child Protection Services ("CPS") that the matter be investigated. The allegation was widely discussed within the university, and was communicated to the RCMP and external social workers. There was economic harm beyond mere reputational harm: the plaintiff had great difficulties finding work as a social worker. Neither the professor nor the director of the school had ever sought an explanation from the student-plaintiff.

The court found that proximity was rooted in the broad relationship between university professors and their students. It was both foreseeable and proximate that negligent actions by the professors, beyond the misguided CPS report, could seriously hinder a student’s future prospects. The relationship gave rise to duties that sounded in both contract and tort. Although there was a clear legislative and judicial policy mandate to report suspected abuse, the would-be reporter must have some sufficiently rational basis for suggesting that the CPS investigate. As the professors had acted on pure speculation and had failed to confer with the plaintiff (with obvious and foreseeable harmful effects), they were found to have breached their duty of care.

C. BUSINESS CONTEXT CASES [§1.43]

This tort is less than a decade old, so it is not surprising that there are no direct applications of it in a business context.

In a pre-Bella case, the British Columbia Supreme Court found the defendant liable for negligent communication in a business context (Dinyer-Fraser v. Laurentian Bank, 2005 BCSC 225). In Dinyer-Fraser, the defendants had accidentally distributed a warning to clients about a temporary order issued by the British Columbia Securities Commission to the plaintiff’s clients; the warning erroneously indicated that their investments (and by extension, the plaintiff) were the subject of the order. In allowing the action, the court relied upon a House of
Lords decision, Spring v. Guardian Assurance, supra, §1.42. The court held that there must exist a sufficient duty of care between the plaintiff and defendant, and the harm suffered must exceed merely reputational harm. The court noted that where the harmful communication was unintended, policy concerns about suppressing free speech were artificial.

D. FUTURE CLAIMS IN NEGLIGENT COMMUNICATION [§1.44]

What does the future hold for claims in negligent communication? It is possible to conceive of its use in cases where a defamation defence (notably one in qualified privilege, as would presumably arise on the facts of both Young v. Bella and Dinyer-Fraser, supra, §1.43) would ordinarily bar a claim framed in defamation. But where the negligence is so profound, and the harm to the economic and personal interests of the plaintiff as a result of the negligence is so clear and foreseeable, the claim should be permitted. But generally, such claims will be viewed with skepticism by courts.

V. INJURIOUS FALSEHOOD [§1.45]

A. GENERALLY [§1.46]

I. GENERAL PRINCIPLES [§1.47]

Injurious falsehood consists of:

1. a false statement;
2. made with malice;
3. published to a third person;
4. regarding the plaintiff’s business, trade, or property; and
5. which results in actual pecuniary loss.


The action protects the plaintiff’s access to current or future customers or business partners. The plaintiff must thus prove that third parties received notice of the statements. Malice will be shown where the defendant knew that the statement was false or was reckless as to whether the statement was true or false. The falsehood must directly
cause the harm. Harm that is likely to satisfy this requirement is the loss of long-term customers or broken contracts. If damage accrues gradually over a longer time period, the plaintiff will have to show that the losses were clearly caused by the statements. Actual damage to business interests is at the core of the tort.

Malice in injurious falsehood (as in defamation) does not necessarily mean ill will. Rather, malice is defined as an intentional action done without cause or excuse, combined with the presumption that an individual intends the natural or probable consequences of his or her own acts (Manitoba Free Press Co. v. Nagy (1907), 39 S.C.R. 340; Noble v. Stevenson, 2006 BCSC 627 at para. 41). The defendant thus need not be motivated by any special antipathy towards the plaintiff, and may not even be acquainted with the plaintiff. An example of malice is publishing something that the defendant knows is false or does not believe is true. Mere carelessness, however, is insufficient to constitute malice.

As with defamation, injurious falsehood requires publication to a third person. Unlike defamation, however, injurious falsehood does not require that the plaintiff be personally identifiable. The manufacturer of the denigrated good may recover simply because people ceased to buy it, not because the defendant specifically identified the manufacturer or damaged the company's reputation (Marathon Mutual Ltd. v. Waters, [2009] EWHC 1931 (Q.B.)).

Similarly, slander of title does not require that any individual be named in the statement. It is also possible that claims about one individual would allow another to sue, such as in the case of a false statement regarding infectious diseases carried by a shop worker that causes customers to avoid the shop. The shop owner would have a claim in injurious falsehood against the maker of the statement.

In addition to slander of title (see below), the tort is also sometimes referred to as “trade libel”, “commercial disparagement”, and “malicious falsehood”.

2. **Slander of Title** [§1.48]

“Slander of title” is a specific form of injurious falsehood. Slander of title refers to a false and malicious statement questioning or denying a person’s title to property, such that special (that is, specific and actual) damages are suffered. Despite the term “slander”, the statement may be either written or oral. The effect of the statement is to cast a “cloud” over the property in question in such a way that it becomes less...
commercially attractive, thus causing other parties to shun and avoid the plaintiff's property and decline to enter into commercial relations concerning it.

The tort is most commonly used where the defendant improperly files a court-related document against title of the plaintiff's real property, thus limiting the plaintiff's use of that property and deterring other persons from purchasing that property. Examples include the filing of a caveat, a certificate of pending litigation, or a judgment against title.

But the tort is not limited to improper court filings, as shown by the following examples. A false assertion that there is a lease or other interest encumbering a property that is about to be sold, or even an assertion that a house is haunted (Manitoba Free Press Co. v. Nagy, supra, §1.47), may constitute slander of title with respect to real property. With respect to personal property, an improper filing of a security interest against property owned by the plaintiff constitutes the tort (Osman Auction Inc. v. Murray, [1994] 4 W.W.R. 513 (Alta. Q.B.)). Intangible property rights may also be subject to a slander of title, for example an assertion that the plaintiff is in breach of patent rights (Alberta Geophysical Products Ltd. v. Geo. E. Failing Supply Co. Ltd. (1963), 44 W.W.R. 588 (Alta. S.C.)) or a wine magazine alleging a vineyard did not in fact win the medaille d'or in a certain wine category.

The test for slander of title is essentially identical to that of injurious falsehood. The plaintiff must prove that:

1. the defendant published words in disparagement of the plaintiff's property;
2. the words were false;
3. the words were published with actual malice (that is, made in bad faith, with a specific intention to injure the plaintiff); and
4. the plaintiff sustained special damages as a result. 

(Western Surety Co. v. Hancon Holdings Ltd., 2007 BCSC 180 at paras. 50 to 54)

Slander of title is often wedded with a claim in abuse of process, another intentional tort, where a judicial document is abusively filed in relation to the plaintiff's property. In this context the plaintiff must show malice in the sense that the judicial filing process was used improperly, that is, apart from the legitimate judicial purpose of providing notice of an actual or pending claim against the property.
3. **Injurious Falsehood under Trade-marks Act** [§1.49]

Although rarely used, s. 7 of the *Trade-marks Act* also sets out a statutory action for injurious falsehood, with the same test as the common law tort:

7 No person shall:
   (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;


For example, a representation that one’s company has a valid patent, and the corresponding suggestion that a competitor was thus committing patent infringement in selling a given pharmaceutical, may amount to discrediting the business of that competitor. It is no defence that the defendant was unaware that the statement was false at the time it was made (*Apotex Inc. v. Eli Lilly and Co.*, 2012 ONSC 3808 at para. 41, leave to appeal granted 2013 ONSC 1135).

**B. Contrast with Defamation** [§1.50]

The main difference between injurious falsehood and defamation lies in the interests protected. Unlike defamation, which focuses on protecting the plaintiff’s reputation, injurious falsehood seeks primarily to protect business and commercial interests. In the specific sub-injurious-falsehood context of slander of title, the false words attack not the company but the property of the plaintiff (*Western Surety Co. v. Hancon Holdings Ltd.*, supra, §1.48 at para. 49).

Included in injurious falsehood are simple statements about the quality of the plaintiff’s products or services that would not necessarily qualify as business defamation (insofar as an attack on a company’s goods may not harm the reputation of the company itself). The duty in injurious falsehood may be defined as a duty not to disparage goods, services, or property, untruthfully and maliciously (*Byrne v. Maas*, supra, §1.41).

There are also significant differences between the torts in the burden of proof. A claimant in injurious falsehood must prove falsity of the statement, as well as malice and special damages. By contrast, in defamation falsity is assumed and malice need only be proved in response to
defences such as qualified privilege and fair comment. And in defama-
tion general damages, and to a certain extent economic loss, are
assumed (Hamilton v. Rocky View School Division No. 41, 2009 ABQB
No. 104 (QL)). Given the difficulties of showing malice, in some
circumstances a defamation claim may be easier to prove than a claim
in injurious falsehood.

C. DEFENCES [§1.51]

1. PRIVILEGE [§1.52]

The privileges available in an action for defamation are also available to
a defendant in an injurious falsehood action (R.E. Brown, at
ss. 28.1(12)(a) and (b)).

Courts have recognized the social desirability of allowing a company
to make statements setting out the superiority of its goods or services
over those of another company. Businesses enjoy a broad privilege to
make general, unfavourable comparisons of competitive merchandise
with their own products. This covers only general statements such as a
claim of superior overall quality. And courts will be generous in grant-
ing the privilege. Businesses are allowed to use a degree of hyperbole or
"puffery" to describe their own goods, as it is assumed that consumers
will be naturally suspicious of these claims (Frank Flaman Wholesale
Ltd. v. Firman (1982), 20 C.C.L.T. 246 (Sask. Q.B.)).

The line between permissible comparison and impermissible disparage-
ment depends on whether a reasonable person with knowledge of the
facts would take the claim being made to be a serious one (Rust Check
Canada Inc. v. Young (1988), 47 C.C.L.T. 279, 22 (Ont. H.C.J.)). An
example of an impermissible comparison is the distribution of pam-
phlets that purport to show scientific laboratory tests indicating the
ineffectiveness of the plaintiff's products (De Beers Abrasive Products
Ltd. v. International General Electric Co. of New York Ltd., [1975] 2 All
E.R. 599 (Ch.)). Further, if a court finds that two products are
precisely the same, it will be an injurious falsehood to say that one of
the two is prepared using a secret and unique method (Thorley's Cattle
Food Co. v. Massam (1880), 14 Ch. D. 763).
2. **JUSTIFICATION [§1.53]**

The defence of a *bona fide* assertion of right, or justification, exists where a defendant publishes the impugned falsehood as a way of asserting his or her own claim to property. There is a conditional privilege to honestly assert a good faith claim to real property, regardless of whether that the claim is inconsistent with the title to that property (*Gudger v. Manton* (1943), 21 Cal. 2d. 537). Put another way, such a motivation would eliminate the key ingredient of malice.

An example of this is a false claim to a title made in a genuine attempt to reclaim the title, which the maker of the statement believes to be theirs. The plaintiff can respond to this defence by establishing malice, either by showing that the defendant did not honestly believe in the validity of his or her claim, or that the claim was made without reasonable or probable cause.

**D. DAMAGES [§1.54]**

Generally the plaintiff must prove special damages, that is, specific business losses for injurious falsehood (*Ratcliffe v. Evans*, [1892] 2 Q.B. 524 (C.A.); *Glo-Klen Distributors Ltd. v. B.C. Chemicals Ltd.* (1959), 19 D.L.R. (2d) 635 (B.C.C.A.)). The damages must be specific and pecuniary, and they must be shown to have reasonably resulted from the slander complained of (*Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.)). General evidence of depreciation of property value is also sufficient (*Manitoba Free Press Co. v. Nagy*, supra, §1.47).

Evidence of a general loss of business, as opposed to, for example, proof of a distinct loss of customers, will suffice to show damage where the statement is likely to cause loss of business (*Petten v. E.Y.E. Marine Consultants* (1994), 120 Nfld & PEIR 313 (S.C.T.D.)). The required degree of specificity of the loss will depend on the nature of the dissemination of the falsehood (*Petten*). For example, if only a select group of people received the publication, it will be insufficient to show only a general loss of business.
VI. FALSE ADVERTISING [§1.55]

A. COMPETITION ACT [§1.56]

Section 52(1) of the Competition Act creates both civil and quasi-criminal liability for knowing or reckless misrepresentations that are false or misleading in any material respect, and are made for the purpose of promoting, directly or indirectly, a product or business interest:

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

The test has been paraphrased as a “false or misleading statement intended to injure made through illegal, dishonest or reckless means which either has or will cause economic loss to the plaintiff” (Boehringer Ingelheim (Canada) Ltd. v. Pharmacia Canada Inc. (2001), 12 C.P.R. (4th) 317 (Ont. S.C.J.) at para. 65).

To be liable, the defendant must either know that the representations were misleading, or be reckless as to whether the representations were misleading. However, simply denying knowledge will be insufficient to disprove false advertising if the ignorance claimed is of something that the defendant knew or ought to have known.

Misleading advertising must be misleading in a material sense, in that it is “so pertinent, germane or essential” that it would have an effect upon consumer buying decisions (Apotex Inc. v. Hoffman La-Roche Ltd. (2000), 195 D.L.R. (4th) 244 (C.A.) at para. 16). Mere puffery would not constitute misleading advertising. For example, claims of “powerful prices” or “powerful networks” have been considered mere puffery (Bell Mobility Inc. v. Telus Communications Co., 2006 BCCA 578).

There is a two-step test for determining whether an advertisement is misleading in a material respect (Bell Mobility v. Telus, at paras. 16 to 18; TELUS Communications Co. v. Rogers Communications Inc., 2009 BCCA 581 at para. 51):

(1) first, what is the general impression that the advertisement, on its own, conveys to consumers? For this analysis, the court must look at the advertisement in isolation and on its own wording to
determine its literal meaning. The portion of the public to whom the advertisement is directed should be considered. The public includes the non-Canadian public; and

(2) second, is the impression conveyed to consumers by the representation false or misleading in a material respect? If necessary, the court may consider extraneous evidence to assist its determination.

The claimant need not show that a particular consumer has been misled, unless that is required to show damages (Maritime Travel Inc. v. Go Travel Direct.Com Inc., 2009 NSCA 42 at para. 64).

Mere aggressive advertising is insufficient; in order to be considered misleading, advertising must constitute untruthful disparagement of goods or services of a competitor. The court will not likely interfere unless the advertisement is “clearly unfair” (Purolator Courier Ltd. v. United Parcel Service Canada Ltd. (1995), 20 B.L.R. (2d) 270 (Ont. Gen. Div.) at para. 62). An example of materially misleading advertising is an advertisement that shows a price comparison that is based on incorrect or inadequate information, leaving out a disclaimer on availability or price variation (Maritime Travel Inc. v. Go Travel Direct.Com Inc.).

It is no defence to claim that the customer may have been able to easily rectify the false impression created by the misleading advertisement through simple research or asking a question of the defamed company. Notably, if an advertisement has two possible meanings, only one of which violates s. 52(1), the claimant will fail to prove that the advertisement is materially misleading (Maritime Travel Inc. v. Go Travel Direct.Com Inc.).

A defendant in a Competition Act claim will often argue that the “fine print” provides sufficient additional information to save the advertisement from being misleading. However, a disclaimer does not automatically nullify a misleading impression created by an advertisement. The court will also consider the emphasis placed on the disclaimer, the sophistication of the target audience, and how much the main advertisement misleads without the fine print (Purolator Courier v. United Parcel Service at paras. 46 to 52; TELUS Communications Co. v. Rogers Communications Inc., 2009 BCCA 581 at para. 56).
B. REMEDIES [§1.57]

1. DAMAGES AND COMPENSATION [§1.58]

If s. 52 of the *Competition Act* is breached, the plaintiff is entitled to bring an action for damages under s. 36, which creates a civil remedy for any conduct contrary to any provision of Part VI of the *Competition Act*. Under s. 36, the claimant may receive not only “an amount equal to the loss or damage proved to have been suffered by him” but also “any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section”.

2. INJUNCTIONS [§1.59]

See §1.77 to §1.82 for discussion of injunctions.

3. FINES [§1.60]

Under the criminal provisions of the *Competition Act*, a defendant found guilty of contravening s. 52 is liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both. On summary conviction, a defendant is liable to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

The Commissioner of Competition itself may also pursue civil enforcement proceedings against an entity responsible for misleading advertising, and may also seek to have administrative monetary penalties imposed.

VII. BREACH OF TRADE-MARK OR PASSING OFF [§1.61]

A. INTRODUCTION [§1.62]

A business’s reputation may also be harmed through misuse of its trademarks, or through other attempts to falsely associate its business with other businesses, persons, or images. An abuse of intellectual property to harm the trade reputation of a business may be addressed through a statutory remedy for breach of trade-mark under the *Trade-marks Act* or, where there is no registered trade-mark, a common law action in passing off (which is also codified in the *Trade-marks Act*, s. 7).
Usually, the act of using another’s trade-mark or passing off is, in a way, a form of flattery: the defendant seeks to boost the reputation of its own product by false association with the plaintiff’s product. But a breach of trade-mark or passing off scenario may also constitute a form of business defamation: the defendant tries to create in the public mind an association between the plaintiff’s products or services and those of an unappealing, defective, or incompetent imposter.

Compelling and colourful examples of a denigration of a business’s reputation through an assault on its intellectual property rights are seen in *Inform Cycle Ltd. v. Draper*, 2008 ABQB 369 and *Law Society of British Columbia v. Canada Domain Name Exchange Corp.*, 2004 BCSC 1102, affirmed 2005 BCCA 535, where the defendants directed Internet users seeking the plaintiffs’ websites to pornographic websites, thus creating the impression that the plaintiffs were affiliated with the websites and harming their reputation and goodwill. A similar form of passing off *qua* defamation can be seen with copycat website addresses (also known as “mousetrapping”, “cyberjacking” or “typosquatting”), where a typographic error in the plaintiff’s web address (e.g., “googel.com”; “aple.com”; “pepsi.cm”) sends the web reader to an unrelated and disreputable website that the viewer might nonetheless erroneously associate with the plaintiff, to the plaintiff’s detriment.

As Chapter 13 (Intellectual Property Disputes) deals with these claims at length, discussion here will only touch briefly upon these causes of action and remedies.

**B. BREACH OF TRADE-MARK [§1.63]**

Sections 19, 20, and 22 of the *Trade-marks Act* address infringement of a registered trade-mark, and offer protection to registered trade-mark owners whose trade-marks are used in a manner that denigrates their wares and services, or confuses consumers into thinking less highly of the wares or products of the trade-mark holders.

**I. TRADE-MARK INFRINGEMENT [§1.64]**

The owner of a trade-mark has the exclusive right to use that trade-mark throughout Canada in respect of those wares or services (s. 19).
2. **Use of a Mark Confusing with a Registered Trade-mark [§1.65]**

Section 20 offers broader protection than s. 19, and protects the holder of a registered trade-mark from the defendant’s use of a “confusing” trade-mark or name when selling, distributing, or advertising goods or services. The exact registered trade-mark need not be used and the wares and services need not be identical to those of the legitimate trade-mark holder, although the greater the differences between the respective parties’ marks, and wares and services, the less likely a court will be to find confusion.

In determining confusion, the standard perspective is that of an “ordinary hurried purchaser”, located between the extremes of a “careful and diligent purchaser” and a “moron in a hurry” (*Mattel Inc. v. 3894207 Canada Inc.*, 2006 SCC 22 at para. 56). The question is not whether a customer who investigates the trade-mark would be confused, but rather what the consumer would infer based on a first impression (*Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, 2006 SCC 23 at para. 20). It is not necessary to show actual confusion, only the likelihood of confusion.

3. **Depreciation of Goodwill [§1.66]**

Section 22(1) states that “[n]o person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto”. Of the three infringement provisions, s. 22(1) is the least used.

There is a four-part test to show an infringement by depreciation of goodwill under s. 22(1):

1. A claimant’s registered trade-mark was used by the defendant in connection with wares or services, whether or not such wares and services are competitive with those of the claimant.

2. The claimant’s registered trade-mark is sufficiently well known to have significant goodwill attached to it. Section 22 does not require the mark to be well known or famous (in contrast to the analogous European and U.S. laws), but a defendant cannot depreciate the value of goodwill that does not exist.

3. The claimant’s mark was used in a manner likely to have an effect on that goodwill.
(4) The likely effect is that the value of its goodwill will be depreciated (that is, the claimant will suffer damage).

(Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée, supra, §1.65 at para. 46)

C. PASSING OFF [§1.67]

Passing off consists of a public misrepresentation that creates a public belief that the parties are associated and that results in threatened or actual damage, either through diversion of customers or through injury to a plaintiff’s reputation (Law Society of British Columbia v. Canada Domain Name Exchange Corp., supra, §1.62). A defendant may attempt to pass off its or another party’s wares or services as those of the plaintiff through use of similar names, slogans, packaging, trade-dress, signs, or advertising. Usually, the defendant creates the false impression that the defendant’s product or services are those of the plaintiff (as in a typical counterfeit goods scenario). But passing off may also occur when the defendant has promoted its business or product in such a way as to create the false impression that the plaintiff somehow approves, endorses, or authorizes the defendant’s business (Law Society v. Canada Domain Name Exchange Corp. (B.C.S.C.) at para. 13).

The tort is concerned with the honesty and fairness of competition, the protection of traders’ interest in their names and reputation, and as part of this, with ensuring that consumers know what they were purchasing and from whom (Kirkbi AG v. Ritvik Holdings Inc., 2005 SCC 65 at para. 63). It prevents a defendant from making claims that its own goods or services are those of the plaintiff. It protects a plaintiff’s proprietary interest in the goodwill of its business, which attracts and retains customers (Ciba-Geigy Canada Ltd. v. Apotex Inc., [1992] 3 S.C.R. 120 at para. 43). Put another way, goodwill is the benefit and advantage of the good name, reputation, and connection of a business (Commissioners of Inland Revenue v. Muller & Co.’s Margarine, Ltd., [1901] A.C. 217 at 223–224).

Three elements are required to establish the tort of passing off:

(1) the existence of reputation or goodwill at the relevant time (i.e., that the plaintiff was recognized by the trade name);

(2) a misrepresentation leading the relevant public to believe that there is a business association or connection between the parties; and
actual or potential damage to the plaintiff as a result of the misrepresentation.


The plaintiff must prove the existence of goodwill with respect to the distinctiveness of its product in the public marketplace. It is not sufficient to set out goodwill only with respect to the manufacturing of the product in question. The tort of passing off protects names, symbols, marketing, and packaging that publicly identify the distinctiveness of the source of the product (Kirkbi AG v. Ritvik). The defendant's own use of the plaintiff's trade name or other distinguishing mark to market its similar product can itself prove the reputation and goodwill of the plaintiff (Orkin Exterminating Co. v. Pestco Co. of Canada Ltd. (1985), 19 D.L.R. (4th) 90 (Ont. C.A.)).

In the context of passing off, misrepresentation includes both deliberate attempts to deceive the public and negligent or careless representations indicating a connection between the products (Kirkbi). Misrepresentation may occur through use of an identical or similar name, dress, get-up of goods, advertisement, appearance, lettering, size, shape, and colour of packaging or products, or logo (see generally, D.C. Loeschmann, “Passing Off”, in Remedies in Tort (Carswell, 1987), ch.19 ss. 31-46).

Potential damage due to a loss of control over the reputation of the plaintiff is presumed where a misrepresentation is found. It is sufficient that the misrepresentation be likely to cause confusion for a typical consumer, or misrepresent a connection or association with the plaintiff’s business. It is unnecessary to establish that actual confusion has taken place (Ciba-Geigy Canada Ltd. v. Apotex Inc.).

The use of a domain name that is confusing with the plaintiff’s mark constitutes the tort of passing off (Inform Cycle Ltd. v. Draper, supra, §1.62; Law Society v. Canada Domain Name; Dentec Safety Specialists Inc. v. Degil Safety Products (1989) Inc., 2012 ONSC 4721 at paras. 12 and 13; Saskatoon Star Phoenix Group Inc. v. Noton, 2001 SKQB 153). However, mere registration of a confusing domain name that harms the reputation of the plaintiff is insufficient; liability under passing off or defamation arises from the use of the offending domain name (Inform Cycle Ltd. v. Draper at paras. 39 and 40).
Passing off is both a common law and a statutory tort, as codified in s. 7(b) of the Trade-marks Act:

7 No person shall:

... (b) direct public attention to his wares, services or business in such a way as to cause or be likely to cause confusion in Canada, at the time he commenced so to direct attention to them, between his wares, services or business and the wares, services or business of another;

A violation of s. 7(b) is made out when a person other than the registered owner sells, distributes, or advertises wares or services in association with a trade-mark or trade name likely to be confused with the registered mark.

In contrast to a claim in injurious falsehood, the plaintiff in a passing off claim need not prove actual damage, but only the probability of harm. In further contrast, there is no need to prove malice or an intentional attempt to injure.

D. DEFENCES [§1.68]

If the plaintiff delays in asserting its rights or acquiesces in the defendant’s use of confusing names or marks, the plaintiff may lose its ability to claim in passing off. This is particularly so where the defendant has taken steps in reliance on the plaintiff's silence, such as the development of the business. The delay may also restrict a plaintiff’s ability to claim an injunction, or result in lower damages (*Institut National des Appellations d’Origine des Vins et Eaux-de-Vie v. Andres Wines Ltd.* (1987), 40 D.L.R. (4th) 239 (Ont. H.C.J.), affirmed (1990), 71 D.L.R. (4th) 575 (Ont. C.A.), leave to appeal refused [1990] S.C.C.A. No. 386 (QL)). For this reason, a company must act swiftly to assert its rights as soon as it learns of the use of similar marks or products that may cause confusion among the public.

E. REMEDIES: BREACH OF TRADE-MARK AND PASSING OFF [§1.69]

The remedies available for trade-mark infringement or passing off include damages, an accounting of profits, injunctive relief, and orders to destroy the offending wares, packages, labels, and advertising material (*Trade-marks Act*, s. 53.2).
1. **Damages [§1.70]**

Threatened damage may be remedied by an injunction, while actual damage may result in both a damages award and an injunction. Where no monetary loss is established, damages may nonetheless be awarded because the law presumes damage to the plaintiff in the case of passing off. These are not necessarily limited to nominal damages (*Law Society of British Columbia v. Canada Domain Name Exchange Corp.*, 2004 BCSC 1102 at para. 49). For example, where the passing off took place over a full four years and the defendant insinuated itself into the valuable goodwill attached to the plaintiff's business, the general damages were set at $20,000 even though there was no proof of actual monetary loss (*Edward Chapman Ladies' Shop Ltd. v. Edward Chapman Ltd.*, 2006 BCSC 477 at paras. 7 to 12, affirmed 2007 BCCA 370 at paras. 4 and 5). Punitive damages may be appropriate where the defendant persists in the conduct *Law Society of British Columbia v. Canada Domain Name* at para. 52).

2. **Accounting of Profits [§1.71]**

As an alternative to a damages award, a successful plaintiff may opt for an order for an accounting of the defendant’s profits flowing from its misuse of the plaintiff’s names or marks (*Draper v. Trist*, [1939] 3 All E.R. 513 (C.A.); *2 for 1 Subs Ltd. v. Ventresca* (2006), 48 C.P.R. (4th) 311 (Ont. S.C.)). If an accurate estimate of the profits made by the infringer is unavailable, the court will assign a nominal award of between $7,250 and $30,000 per infringement (*Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799 at para. 60 (as at 2008 prices); *Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*, 2011 FC 776). These amounts may be further increased when there is evidence of ongoing activities that represent multiple simultaneous infringements (*Louis Vuitton Malletier S.A. v. Yang*, 2007 FC 1179 at para. 43).

3. **Delivery Up [§1.72]**

The court may also order that the defendant deliver up to the plaintiff the goods, packaging, labelling, or advertisements that are the subject of the litigation, for destruction or marking out of the offending mark or image (*Noshery Ltd. v. Penthouse Motor Inn Ltd.* (1969), 61 C.P.R. 207 (Ont. H.C.J.)).
4. **Injunctions** [§1.73]

See §1.77 to §1.82 for discussion of injunctions.

5. **Correction of Illegitimate Website Addresses** [§1.74]

Apart from court proceedings, if someone has registered a domain name ending with .ca for an illegitimate purpose against the business, it is possible to have the domain name cancelled or transferred by filing a complaint with the Canadian Internet Registration Authority ("CIRA", at www.cira.ca). CIRA outlines a dispute resolution process in its Domain Name Dispute Resolution Policy (www.cira.ca/assets/Documents/CDRPpolicy.pdf; note this URL is case-sensitive). The dispute resolution process is carried out in writing and adjudicated by one or more arbiters. To be successful the applicant must generally prove:

1. a legitimate claim to a .ca domain by being resident in Canada or by having a registered business in Canada;
2. the offending domain name is identical or confusingly similar to a trade-mark or service mark in which the applicant has rights;
3. the domain offender has no rights or legitimate interests in respect of the domain name; and
4. the domain offender has registered the domain name and is using it in bad faith.

For American domain names (usually ending in .com), dispute resolution is governed by the Internet Corporation for Assigned Names and Numbers ("ICANN", at www.icann.org), under its Uniform Domain-Name Dispute-Resolution Policy (www.icann.org/en/udrp/udrp.htm).

An arbiter’s decision under both Canadian and U.S. dispute resolution procedures may be appealed to a court, by either party.

**VIII. Professional and Trade Complaints** [§1.75]

Where a member of a profession or occupation disparages a person within the same governing authority, that person may be subject to discipline by the governing body, apart from any civil claim by the plaintiff. For example, Rule 2.1-4(a) of the *Code of Professional Conduct for British Columbia* dictates that “[p]ersonal remarks or references between lawyers should be scrupulously avoided” (available at
www.lawsociety.bc.ca). The Insurance Council of British Columbia Code of Conduct, Article 8.2, forbids the defamation or discrediting of insurers; Article 9.2 forbids the defamation or discrediting of other insurance council licencees (March 2005, available at www.insurancecouncilofbc.com).

Most professional and trade codes of conduct expressly distinguish between irresponsible disparagement of colleagues, on one hand, and responsible and necessary reporting of concerns about the competence or professionalism of colleagues to the appropriate organizations or persons, on the other. For example, the Canadian Medical Association CMA Code of Ethics, Article 48, requires its members to “[a]void impugning the reputation of colleagues for personal motives; however, report to the appropriate authority any unprofessional conduct by colleagues” (2004 update, available at www.cma.ca).

The remedy imposed by most professional and trade bodies is not damages akin to those awarded in a civil claim. Instead, such a complaint generally leads to investigation and potential discipline against the offending member. However, the fact that a defamatory comment also breaches a professional or trade code of conduct may serve as an aggravating factor in the assessment of damages in a separate civil claim based on the same offending communications.

**IX. PROCEDURAL ISSUES [§1.76]**

**A. INJUNCTIONS [§1.77]**

It is not unusual for a complicated commercial dispute to take two or three years to reach trial. A harmful statement about the plaintiff’s business or product could well destroy the business in the meantime. It is thus often desirable to obtain an interlocutory injunction limiting further publication of the harmful statement pending trial. That being said, such injunctions are very difficult to obtain, particularly where the statement in question goes beyond mere commercial competition to engage broader expression concerns.
1. **General Test [§1.78]**

In considering an injunction application, Canadian courts examine two main issues:

1. **Does the applicant’s claim raise a fair question to be tried?** Courts apply a relatively low threshold for this examination of the substance of the claim.

2. **On a balance of convenience, should the injunction be granted?** In other words, will the harm potentially suffered by the applicant by the refusal of the injunction exceed the harm potentially suffered by the respondent if the injunction is issued?

   *(Bell Mobility Inc. v. Telus Communications Co., 2006 BCCA 578 at para. 10; RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at paras. 78 to 80)*

With respect to (2) above, courts can consider any and all relevant factors in determining whether justice requires the issuance of an injunction.

The most important “balance of convenience” factor is known as “irreparable harm”, and the court will invariably consider whether either of the parties will suffer irreparable harm from an order allowing or denying an injunction. The primary focus of irreparable harm is whether the claimed harm cannot adequately be compensated for by a future award of damages. Examples of irreparable harm include the potential destruction of a business through the poaching of customers, or the demolition of a heritage house. A strong case on the merits will infer significant harm to business reputation that will be difficult to quantify in damages *(Bell Canada v. Rogers Communications Inc. (2009), 76 C.P.R. (4th) 61 (Ont. S.C.J.))*. Loss of actual and potential customers is recognized as irreparable harm not compensable in damages. Actual and potential loss of goodwill and diminution of a plaintiff’s reputation also constitutes irreparable harm *(Church & Dwight Ltd. v. Sifto Canada Inc., supra, §1.47)*. Irreparable harm is such an important consideration that some courts will include it as a separate component within a three-part injunction test *(British Columbia (Attorney General) v. Wale (1986), 9 B.C.L.R. (2d) 333 (C.A.), affirmed [1991] 1 S.C.R. 62)*.

Other “balance of convenience” factors include, but are not limited to, which of the parties has acted to alter the balance of the relationship so as to affect the status quo; the likelihood that a future damages award would be paid; and matters affecting the public interest. Also to be considered in assessing the balance of convenience is the strength of the
applicant’s case, particularly where the extent of non-compensable disadvantage to each party would not differ significantly (Canadian Broadcasting Corp. v. CKPG Television Ltd. (1992), 64 B.C.L.R. (2d) 96 (C.A.)).

2. INJUNCTIONS FOR DEFAMATION [§1.79]

As courts are loathe to suppress free speech before defamation is proven, interlocutory injunctions are generally not granted for defamation or other causes of actions that are similar to defamation (Bonnard v. Perryman, [1891] 2 Ch. 269 at 284 (C.A.)). The granting of an injunction to restrain publication of an alleged defamation is an exceptional remedy granted only in the rarest and clearest of cases (Meier v. Canadian Broadcasting Corp. (1981), 28 B.C.L.R. 136 (S.C.); John Doe v. Canadian Broadcasting Corp. (1993), 86 B.C.L.R. (2d) 202 (S.C.)).

The test for an interim injunction for defamation is stringent. A court will only restrain potentially defamatory speech where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the court of appeal (Lasik Vision Canada Inc. v. TLC Vancouver Optometric Group Inc. (1999), 37 C.P.C. (4th) 380 (B.C.S.C.), leave to appeal refused 2000 BCCA 65; Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626; Nazerali v. Mitchell, 2011 BCSC 1846 at para. 5). For example, in the unusual facts of Church of Scientology of British Columbia v. Radio NW Ltd. (1974), 46 D.L.R. (3d) 459 (B.C.C.A.), an injunction was issued where the falsity of the statements—that the plaintiff organization was criminal and fraudulent—was not contested, and no defence was advanced. See also the successful pre-trial injunction application in Canadian National Railway Co. v. Google Inc., 2010 ONSC 3121, in which a motion to take down an allegedly defamatory website was unopposed by both the defendant and Google Inc., and no defence was filed.

The pervasive and instantaneous nature of Internet defamation distinguishes it from ordinary defamation, and may result in a higher damages award (Barrick Gold Corp. v. Lopehandia, supra, §1.11, at para. 28). But this does not prompt a different test for the granting of an injunction against allegedly defamatory Internet publications (Canadian National Railway Co. v. Google Inc. at para. 13).
In contrast to a pre-trial interlocutory injunction, a post-trial injunction (permanent or on terms) after the court determines liability for defamation is more readily granted. In this, the court is more inclined to grant a permanent injunction where the defendant is judgment-proof and where there is more than a reasonable apprehension that the defendant will repeat the defamation (Hunter Dickinson Inc. v. Butler, supra, §1.35 at paras. 17 and 75 to 79; Cragg v. Stephens, 2010 BCSC 1177 at paras. 34, 35, and 40; Astley v. Verdun, 2011 ONSC 3651 at paras. 21 and 35; 122164 Canada Ltd. v. C.M. Takacs Holdings Corp., 2012 ONSC 6338 at paras. 34 and 35).

3. INJUNCTIONS FOR INJURIOUS FALSEHOOD [§1.80]

Where the plaintiff establishes a good or prima facie basis for all elements of the tort, an injunction may be granted to restrain injurious falsehood (Church & Dwight Ltd. v. Sifto Canada Inc., supra, §1.47). It may be sufficient to prove the future likelihood of damages, instead of the fact that damages have actually occurred (Church & Dwight).

4. INJUNCTIONS FOR MISLEADING ADVERTISING [§1.81]

The Competition Act does not expressly provide for injunctions as a remedy for breach of its provisions, but instead focuses on payment of damages and fines. Notwithstanding this silence, a provincial superior court has jurisdiction to grant an interlocutory injunction (TELUS Communications Co. v. Rogers Communications Inc., supra, §1.56 at para. 44). However, it is not clear that a court has the jurisdiction to issue a permanent injunction against a party found to be in contravention of the Competition Act (947101 Ontario Ltd. v. Barrhaven Town Centre Inc. (1995), 121 D.L.R. (4th) 748 (Ont. Gen. Div.); TELUS at para. 45). Further, the statute’s focus on monetary remedies requires the court to closely scrutinize the applicant’s claim that it will suffer irreparable harm if no injunction is granted. If the harm could just as readily be addressed by a future award of damages, it is likely that no injunction will be issued (TELUS at para. 46). Proof of irreparable harm is likely to require a claimant to demonstrate ongoing harm, such as evidence that customers are and will continue to be lost (Bell Canada v. Rogers Communications Inc., 2010 ONSC 2788 at para. 28).

As set out above, courts are very reluctant to issue injunctions that restrain freedom of expression. In a case of trade disparagement, a party may have greater success in seeking an injunction if it is framed
as a *Competition Act* claim rather than a pure defamation claim. Speaking in the absence of a formal *Charter* challenge, the British Columbia Court of Appeal confirmed that where there is a strong case of misleading advertising, public policy favours restraining the representation: "Misleading information in the marketplace does no one any good" (*TELUS* at paras. 81 and 82). That being said, courts will likely be quick to reject any attempt to avoid the difficulties of a defamation injunction by casting what is essentially a defamation claim in the cloak of a *Competition Act* action.

5. **INJUNCTIONS FOR PASSING OFF AND BREACH OF TRADE-MARK** [§1.82]

Interlocutory injunctions are available for actions in passing off (*Law Society of British Columbia v. Canada Domain Name Exchange Corp.*, supra, §1.62; *Hermes Canada Inc. v. Park*, 2004 BCSC 1694). Permanent injunctions are also available; for example, Walt Disney received a permanent injunction in a passing-off action that prevented another company from using the word "Fantasyland" as the name of its amusement park (*Walt Disney Productions v. Triple Five Corp.* (1994), 113 D.L.R. (4th) 229 (Alta. C.A.), leave to appeal refused [1994] S.C.C.A. No. 204 (QL)). The use of the name “Fantasyland" was found to constitute a misrepresentation that the company had authorization from Disney to use the name and thus was somehow associated with Disney.

B. **SUMMARY TRIALS** [§1.83]

1. **DEFAMATION** [§1.84]

The cost of litigating a defamation action is often high. Personal animosity between the parties often prompts interlocutory skirmishes and battles over discovery. The use of the summary trial mechanism, permitted under Supreme Court Civil Rule 9-7 (formerly Rule 18A), may offer some respite from these problems (see D.A. Crerar, "Defamation Actions Determined by Summary Trial" (2002), 13 C.P.C. (5th) 125). Under the summary trial procedure, one or both parties may apply to have all or part of an action determined on the basis of affidavits, along with other written evidence such as interrogatory answers, admissions, and evidence taken on examination for discovery.
When deciding whether to permit a defamation action to proceed by summary trial, the court will consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings, and any other matters that arise (Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 at 214 (C.A.)).

These factors indicate the usefulness of the summary trial in the defamation context. The modest amount of damages likely to issue in a defamation trial, in relation to the cost of bringing the case to a full trial, indicates the wisdom of the summary trial procedure. Prejudice in delay is especially acute in defamation actions, as the longer the defamatory statement is allowed to stand unchallenged, the greater the damage to the plaintiff. Where the matter is not complex, key facts are not in dispute, and credibility is not a factor, a court will be more inclined to grant judgment in a defamation action in a summary trial (Hunter Dickinson Inc. v. Butler, supra, §1.35 at para. 28).

Although the summary trial rule permits the court to grant judgment "either on an issue or generally", courts are increasingly unenthusiastic about determining only one issue in isolation from the overall issue, otherwise known as “litigating in slices” (Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd., 2002 BCCA 138 at paras. 7 and 28). That being said, it may be possible to resolve a defamation dispute on a predominantly legal ruling, such as the viability of a defence completely defeating the claim. Whether a given relationship creates an occasion of privilege or whether a statutory defamation defence applies are issues that are often able to be determined on simple and uncontested affidavit facts. Similarly, whether the impugned statements bear a defamatory meaning may be resolved at summary trial.

Although earlier jurisprudence casts doubt on the appropriateness of summary trials for defamation actions (Campbell v. Finlayson, [1998] B.C.J. No. 1922 (QL) (S.C.) at para. 16), it is now clear that courts will decide defamation matters on summary trial (Hung v. Gardiner, 2003 BCCA 257 at paras. 54 and 57). However, where malice (which is not readily described or resolved on affidavits) is a significant issue in the litigation, it may be difficult to resolve a defamation action on summary trial. Similarly, a defendant’s deposition in support of the defence of fair comment—that a statement was based on an “honestly-held belief”—is difficult to attack, support, or evaluate in affidavit form.
Despite this, there is “no hard and fast rule that defamation actions involving malice cannot be resolved on the basis of affidavit evidence in a summary trial” (Nazerali v. Mitchell, supra, §1.79 at para. 20), and many defamation cases have been so determined even where malice is alleged (Miller v. Canadian Broadcasting Corp., 2003 BCSC 258 at paras. 6 to 9). For example, it is possible to show on documentary evidence that the publication did not seek to accomplish the societal good underlying the defence of qualified privilege. Where the defendant has made out a prima facie defence of qualified privilege, the plaintiff bears the onus of proving malice to rebut the defendant’s assertion of honest belief. The plaintiff’s failure to produce evidence of this could result in dismissal of the action. The plaintiff may also be able to show malice through the intrinsic hostility of the publication, repetition of the publication, or the conduct of the defendant.

The fact that a respondent opposing a summary trial has already filed a jury notice may incline a court against granting judgment on a summary trial. Despite Rule 12-6(5) (which appears to provide an absolute right to trial by jury in a defamation action) and the traditional importance of jury trials for defamation actions, filing a jury notice in a defamation action does not effectively preclude resolution by summary trial (Hung v. Gardiner at paras. 54 and 57).

2. Passing Off [§1.85]

Actions for passing off have been resolved by way of summary trial, especially where the evidence was clear, the amount involved was small, the matter was straightforward, and no party expressed a desire to go to trial (Lions Gate Enterprises Ltd. v. Ohana Sushi Japanese Restaurant Ltd., [1999] B.C.J. No. 2963 (QL) (S.C.) at para. 2). This is possible even before the infringing conduct takes place. However, there must be a “real probability” or “probable grounds” that a defendant will engage in the infringing conduct (Price Costco International, Inc. v. Welcome Warehouse Ltd., 2007 BCSC 1227 at para. 56). For example, simply applying to the Registrar of Trade Marks to have a trade-mark approved for use would not constitute a “real probability” of infringement (Price Costco v. Welcome Warehouse)).

C. Orders to Reveal Unknown Person Posting Internet Defamation [§1.86]

The Internet is not only the most ubiquitous communications tool for business defamation, it is also the most anonymous. An Internet
comment disparaging a business will typically be posted under a pseudonym, or under no name at all. This section will briefly set out methods by which a defamed person or company may seek to reveal the identity of the person posting the harmful remarks (see D. Crerar and R. Purita, “No Hiding Place in Cyberspace: Electronic Discovery from Non-Parties”, The Advocate (November, 2006)).

For the technical means of learning more about the sender of a defamatory e-mail or Internet web posting, see the Crerar/Purita article cited above. The primary information will be the IP (Internet protocol) address of the sender, which may allow the ISP (Internet service provider), such as Telus, Rogers, or Shaw, to identify who sent the message at the specific time. As ISPs are generally bound by contractual and privacy obligations, they normally require a court order before providing that information.

There are two forms of application to obtain information about an anonymous sender or poster of defamatory information. The first involves starting an action against “John Doe”, the fictitious name standing in for the anonymous sender or poster. The plaintiff then immediately brings an application for discovery from a non-party (that is, the ISP) under Rules 7-1(18) and 7-5. The test under Rule 7-1(18) is reasonably simple to meet: the applicant must satisfy the court that the application is not a mere “fishing expedition” and that the non-party has documents in its possession relating to a matter in issue.

The second means of obtaining or potentially unmasking the anonymous author is to make what is known as a Norwich Pharmacal application. In the Norwich Pharmacal application, the ISP itself is named as a defendant; the sole purpose of the litigation is to obtain information so as to start an action against the anonymous sender or poster. To obtain the order, the applicant must prove the following seven components:

(1) The plaintiff must show that a bona fide claim exists against the unknown wrongdoer.

(2) The plaintiff must establish that the information is required in order to commence an action against the unknown wrongdoer; that is, the plaintiff must establish that disclosure will facilitate rectification of the wrong.

(3) The defendant must be the only practicable source of the information.
(4) There is no immunity from disclosure (this little-considered requirement flows from the specific context of *Norwich Pharmacal*; in that case, the Customs and Excise Commissioners argued that the governing statute required them to keep the information confidential).

(5) The plaintiff must establish a relationship with the defendant in which the defendant is involved in the wrongdoing. Without connoting impropriety, this requires some active involvement in the transactions underlying the intended cause of action.

(6) Disclosure by the defendant will not cause the defendant irreparable harm.

(7) The interests of justice favour granting the relief.  


For a similar test, but one structured into five considerations, see *1654776 Ontario Ltd. v. Stewart*, 2013 ONCA 184 at paras. 25 and 50, leave to appeal filed [2013] S.C.C.A. No. 225 (QL).

The non-party discovery application has obvious advantages over the *Norwich Pharmacal* application: it is a one-step process, requiring only one piece of litigation rather than two; it does not drag the ISP into the action as a defendant; and the test is easier to fulfill.

**D. JURISDICTION [§1.87]**

Before a court will hear a matter, it may have to consider whether it has jurisdiction to do so. This section examines two concepts of jurisdiction: jurisdiction of different levels and forms of court, and geographic jurisdiction. It does not set out all jurisdictional principles but instead focuses on aspects especially germane to business defamation.

**I. JURISDICTION: COURTS [§1.88]**

Generally the superior courts of the provinces, such as the British Columbia Supreme Court, have an inherent jurisdiction to hear all of the causes of action discussed in this chapter. Most claims will indeed be brought in those courts.

As false advertising and passing off are based on federal statutes, the Federal Court has jurisdiction to hear claims for these matters. Further, any orders issued by the Federal Court of Canada are enforceable across the country; it will thus often be more efficient to prosecute
those claims in the Federal Court if the harmful statements have been spread across Canada or the plaintiff or defendant does business throughout Canada.

The Federal Court does not, however, have jurisdiction over defamation actions, even when a federal entity such as the Canadian Broadcasting Corporation is the defendant (Gracey v. Canadian Broadcasting Corp., (1990), 40 F.T.R. 198).

Provincial legislation may bar defamation and other claims from being brought in some courts. For example, the Provincial Court of British Columbia does not have jurisdiction to hear defamation claims (Small Claims Act, R.S.B.C. 1996, c. 430, s. 3(2)).

2. **Geographic Jurisdiction** [§1.89]

A court will decline to hear a dispute that is more appropriately heard by the courts of another country, province, or state. The increase in international trade and communication, and particularly the rise of the Internet, has complicated the issue of whether a given court should hear a matter or refer it elsewhere. Where the defamed plaintiff resides in British Columbia, the defendant defamer resides in Australia, the website in question can be accessed from every state and country across the planet, and the plaintiff has a multi-national reputation to uphold, where should a claim appropriately be heard?

To answer this question, the court will use a two-step process:

1. **Jurisdiction simpliciter**: Does the court have territorial competence over the dispute? The court will consider whether there is a “real and substantial connection” between British Columbia and the facts on which a proceeding is based. The Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28, s. 10 provides a list of circumstances (for example, a tort committed in British Columbia) where there is presumptively a real and substantive connection to British Columbia.

2. **Forum non conveniens**: Even if the dispute has a real and substantial connection to British Columbia, should a British Columbia court exercise its discretion to hear the matter? In other words, is British Columbia the most appropriate place to adjudicate the disputes, or is another jurisdiction a more appropriate forum, in that there is a more real and substantial connection between the dispute and that other jurisdiction?
The first inquiry is usually easy to satisfy. The tort of defamation crystallizes upon publication; therefore, any place where the defamatory material is available will be prima facie a forum with a real and substantial connection to the dispute. In the context of a defamation claim, a determining factor is where the plaintiff suffered the most injury to his or her reputation (Editions Écosociété Inc. v. Banro Corp., 2012 SCC 18).

It is in the second inquiry where the court may consider the dispute to be more connected to another province, state, or country, and decline to allow it to proceed in the domestic courts. In considering the second inquiry, courts will look at all of the circumstances of the case. Generally, the most important circumstances are where the parties and important witnesses reside, and the comparative convenience of testifying in British Columbia as opposed to the other jurisdictions; the law to be applied at trial; and the likelihood that an eventual judgment will be enforceable (Burke v. NYP; Breeden v. Black, 2012 SCC 19).

With respect to Internet defamation, the Ontario Court of Appeal noted that “[the Internet] enables individuals, institutions, and companies to communicate with a potentially vast global audience. It is a medium that does not respect geographical boundaries” (Barrick Gold Corp. v. Lopehandia, supra, §1.11 at para. 1). That being said, courts have taken a practical approach and have generally applied the jurisdictional test above without being overly swayed by the potentially universal readership of an Internet posting. The fact that a viewer of the Internet in the local jurisdiction could hypothetically view a website containing a defamatory statement, or the fact that a few local viewers have viewed a defamatory statement, is insufficient to establish jurisdiction over an Internet publication. There must be additional facts establishing a real and substantial connection to the local jurisdiction. For example, where only a few copies of the Washington Post containing an allegedly defamatory article were sent to subscribers in Ontario, and the plaintiff had only a recent presence in Ontario, the Ontario court declined jurisdiction over a defamation claim (Bangoura v. Washington Post (2005), 258 D.L.R. (4th) 341, leave to appeal refused [2005] S.C.C.A. No. 497 (QL)). In contrast, where the defendants would have known that the allegedly defamatory press releases posted on the company’s New York website could and would be downloaded in Ontario, the reputation of the plaintiffs was...
predominantly established in Ontario, and the defendants appeared to have targeted readers in Ontario, the court found a sufficiently real and substantial connection over the dispute to confirm jurisdiction (Breeden v. Black; Burke v. NYP Holdings Inc.).

E. LIMITATION PERIODS [§1.90]

In most provinces in Canada actions in defamation must be commenced within two years of discovery of the defamation (Limitation Act, S.B.C. 2012, c. 13, s. 6; Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 4, although actions in Ontario against newspapers must be commenced within three months after the libel has come to the knowledge of the person defamed: Libel and Slander Act, R.S.O. 1990, c. L.12, s. 6).

A civil action for false advertising must be brought within two years from the day on which the conduct was engaged in or the day on which any criminal proceedings relating thereto were finally disposed of (whichever is later) (Competition Act, s. 36(4)).

The Trade-marks Act does not establish a limitation period. The limitation period for breach of trade-mark and passing-off is determined under the relevant provincial legislation; for example, in both British Columbia and Ontario the limitation period is two years.

Under traditional defamation law, each new publication of the offending statement gives rise to a separate and distinct cause of action and in theory starts the limitation period anew. Thus a limitation period could have expired for publication of a statement three years previous, but the repetition of an identical statement or the fresh reading of the publication by a new reader in, for example, a library, will restart the limitation clock.

The consequences of the traditional republication rule are dramatic in the context of Internet-based defamation claims, where the offending statement can remain readily accessible forever, and lead to potential eternal liability. In Canada, the rule remains, for Internet publications as with other media, that each publication of a libel gives a fresh cause of action and a fresh limitation period (Carter v. B.C. Federation of Foster Parents Association, 2005 BCCA 398 at paras. 18 to 20; Schtaif v. Toronto Life Publishing Co. Ltd., 2013 ONCA 405 at para. 32). In contrast, U.S. courts have adopted a “single publication rule” such that the limitation period will not be renewed every time a new reader
accesses a defamatory publication on a website. Canadian companies that maintain websites are thus well-advised to consider modifying or removing a web page upon receiving notice of its allegedly defamatory contents, or at least adding a notice that the contents are disputed.

**X. STRATEGIC CONSIDERATIONS [§1.91]**

**A. GENERALLY [§1.92]**

Businesses should keep a number of strategic considerations in mind when dealing with disparaging statements.

When a company suspects that a defamatory statement has been made, it is prudent to assume a multi-pronged response that may in fact not involve litigation. The focus is on preserving customers and preserving evidence. Websites on which defamatory items appear should be printed and preserved. Where appropriate, employees should be instructed to keep precise and accurate notes about all inquiries and comments received from customers or others about the defamatory publication. They should be provided with a script to counteract the defamatory claims. It may be useful to set up a phone line for concerned customers to ask questions about the statements. This process will also provide the company with a tally of callers and information on how they found out about the defamation, thus providing useful evidence in proving damages to the company in future litigation.

**B. DEMAND LETTER CONSIDERATIONS [§1.93]**

A demand letter to the publisher of a defamatory statement should provide sufficient detail to establish the credibility of the complaint, to allow the recipient to investigate the defamation, and to take steps to stop further statements. All, or a selection of, the falsehoods should be quoted or paraphrased and their falsity explained. If the maker of the statement is an employee of a rival company, that company may not know that one of its employees is making defamatory statements. It is important to consider whether the information in the demand letter will reveal a client as the source of the information, thus causing embarrassment and potential business loss.

Depending on the nature of the statements, the professionalism of the recipient of the letter, and the legal advice the recipient is receiving, the demand letter may receive a curt response or no response at all. In
drafting the demand letter, lawyers should consider the likely response and ensure the client does not suffer insult added to injury by a refusal to comply with an unrealistic demand. Unrealistic demands may lead to further acrimony and result in the parties entering into costly litigation wholly out of proportion to the offending publication. In many cases, the issuance of a demand letter sending a message to the maker of the defamatory statements that first, they are being monitored, and second, their defamatory statements are being reported back to the company, will serve its purpose even if the recipient of the demand letter responds in an obdurate manner, or fails to respond at all.

A typical demand letter will ask for confirmation that the defamation will not be repeated, that all copies of the defamatory statement have been retrieved and destroyed, and that copies of the defamatory statement have been removed from all websites and other locations. The letter may demand a full accounting of all places the defamatory statement was published, and to which persons it was made. (This demand will likely be met with resistance, especially if the publications were made to actual or potential clients or customers.) The letter will typically demand that the individuals or employees making the defamatory statements, or those who are in a position to make other defamatory statements, be specifically told that such statements must not be made and could result in personal liability.

Caution must be exercised with respect to a demand for a retraction or an apology. The publication or distribution of a retraction or apology, particularly to customers, may well have the detrimental effect of reminding the persons of the original defamation (a phenomenon sometimes referred to as the “Streisand Effect”). Again, the goal of stopping future defamatory communications is often accomplished by the demand letter itself, putting the recipient on notice that their actions are noted.

XI. FURTHER READING [§1.94]


D. Crerar, “Defamation Actions Determined by Summary Trial” (2002), 13 C.P.C. (5th) 125