

**IN THE SUPREME COURT OF CANADA**

**B E T W E E N:**

**PETER GRANT and GRANT FOREST PRODUCTS INC.**

**Appellants**

**and**

**TORSTAR CORPORATION, TORONTO STAR NEWSPAPERS LIMITED  
BILL SCHILLER, JOHN HONDERICH and MARY DEANNE SHEARS**

**Respondents**

**and**

**CANADIAN CIVIL LIBERTIES ASSOCIATION**

**Intervener**

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## PART I – FACTS

### Overview of the CCLA’s position

1. This appeal, along with the appeal in *Quan v. Cusson*, is about whether the existing common law of defamation strikes a reasonable balance between the interest of protecting reputation and the constitutional value of free speech. The CCLA intervenes in this appeal to assist the Court in considering to whom the public interest responsible communication defence ought to be available, how it ought to be adjudicated, and how its application should be reviewed by appellate courts. The CCLA’s position is that written or spoken communication both in the public interest and reasonably made – as determined at the time of publication – should be exempt from civil liability.
2. The court below recognized that strict liability for writing, publishing or broadcasting statements in the public interest is inconsistent with *Charter* values. The CCLA asks this Court to affirm that s.2(b) of the *Charter* extends beyond that which the speaker can prove is literally correct. Rather, when expression is in the public interest, the constitutional guarantee of free expression should also protect statements that were reasonably made.
3. The CCLA asks, as it did in *Cusson*, that this Court make it clear that the defence is not limited to journalists or the media (who have no monopoly on expression that furthers that public interest), but ought to extend to anyone making a communication to the public or a portion of it on a matter of public interest (a well-known concept in defamation law).
4. Public interest, in order to give full effect to s. 2(b) of the *Charter*, ought to be given a broad and generous interpretation. Public interest has been found across a wide spectrum of subject matter. Indeed, the House of Lords has cautioned that courts should be slow to conclude that a publication was not in the public interest and that the public had no right to know.
5. Since the public interest responsible communication defence performs the same function as a constitutional remedy, whether or not it applies ought to be a question for the trial judge, and not the jury. Exercising implicit jurisdiction under s. 24(1) of the *Charter*, the judge should decide, based on an application of the *Reynolds* factors (the “constitutional balancing factors”) or any other appropriate factor, whether the communication was (1) in the public interest, and (2) responsibly made. Although the CCLA has described the defence as “reasonable

communication,” it is emphatically not suggesting that the standard is akin to negligence; the “reasonableness” question must be decided in light of the *Charter* guarantee of free expression, and not any particular standard of care.

6. Finally, since the defence is decided by the trial judge as (effectively) a matter of law, the defence should be reviewed by appellate courts on a correctness standard (giving deference only to factual findings such as who said what, where and when, as opposed to the legal inferences and characterizations that are drawn from those facts).

## PART II – QUESTIONS IN ISSUE

7. The CCLA’s submissions are directed to the interpretation of the *Charter* guarantee of freedom of expression and how those rights will be affected by this Court’s interpretation of the public interest responsible communication defence. The guidelines that this Court imposes in its interpretation of the public interest communication defence are of crucial importance and they will map the contours of the application of this defence by lower courts for years to come.

8. The CCLA therefore submits that those contours should reflect these principles:

- (1) Where a defendant can show that it communicated on a matter of public interest and acted reasonably in the circumstances, there should be no liability for defamation.
- (2) The public interest communication defence ought not to be limited to the media, but ought to extend to anyone making a communication in the public interest.
- (3) Consistent with the long-standing law of defamation, what constitutes public interest ought to be broadly interpreted. At the very least, communication about someone who wields public power acting in that capacity should be presumed to be a matter of public interest.
- (4) Whether the public interest communication defence applies, ought to be a question for the trial judge to decide and not the jury.
- (5) When applying the defence, the judge ought to consider the meaning of the words that the journalist or publisher reasonably understood them to mean at the time of publication, so long as the words are reasonably capable of that meaning.

- (6) The standard of review for the application of the defence, which requires balancing a number of different legal evaluations made from facts, should be correctness.

### **PART III – ARGUMENT**

#### **Defamation must accommodate free expression**

9. This Court has regularly directed lower courts to develop the principles of the common law in a manner consistent with the fundamental values enumerated in the *Charter*. Recently, this Court held that the traditional elements of the tort of defamation may require modification to provide more robust accommodation for the values underlying freedom of expression.

*Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130  
*WIC Radio Ltd. v. Kari Simpson*, 2008 SCC 40 at para. 15

10. As the CCLA argued in *Cusson*, adapting the common law of defamation to include a defence of reasonable publication in the public interest strikes an appropriate balance between the protection of free expression and the protection of an individual’s reputation, two important (and in the context of defamation law, competing) values. The Privy Council recognized this, stating that “[r]esponsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputation of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved.”

*Bonnick v. Morris and Others*, [2002] UKPC 31 at para. 23 (P.C.)

11. Adopting this defence does not significantly impair reputation (because the requirement of reasonableness incorporates numerous safeguards) but does dramatically enhance free expression. In particular, this defence lowers the risk that expression in the public interest will be “chilled” because of a defendant’s uncertainty about whether it can prove the truth of the story, in Court.

#### **The defence ought to protect responsible communication in the public interest**

12. The public interest communication defence ought not to be limited to the media, but ought to extend to anyone making a communication in the public interest. To protect the *Charter* value of free expression, the relevant question is not who is making a statement, but rather whether it is in the public interest. Communications to the public, or a portion of it, that

are not formally journalistic in nature and cannot be said to be communications by “the media” but which communicate on a matter of public interest, ought to receive equal protection.

*Seaga v. Harper (Jamaica)*, [2008] UKPC 9 at para. 11 (P.C.)  
*Jameel v. Wall Street Journal Europe Sprl*, [2007] 1 A.C. 359 at 383 (HL)

### **Public interest is broad**

13. During this Court’s hearing of the *Cusson* appeal, there were questions asked and answers offered about how to determine whether or not a publication is in the public interest. The CCLA submits that this concept has long been a part of defamation law, as part of the defence of fair comment.

14. Public interest has been found across a wide spectrum of subject matter. This is entirely consistent with s. 2(b) of the *Charter*, which does not limit the guarantee of free expression to any particular type of discourse. Rather, to give full effect to s. 2(b), what constitutes public interest ought to be given a broad and generous interpretation. The concept of public interest extends to matters of political, social, economic, and cultural interest. It will include debate on subjects such as the law, health care, education, welfare, taxation, the environment, and morality. It will undoubtedly shift over time, and therefore, the categories are never closed. As Lord Denning stated, “whenever a matter is such as to affect people at large, so that they may legitimately be interested in, or concerned at, what is going on; or what may happen to them or others; then it is a matter of public interest.” Of course, a matter does not have to be of interest to the entire public – “public interest” can include matters of interest to a particular community or a segment of the public.

*WIC Radio Ltd. v. Kari Simpson*, 2008 SCC 40 at para. 30  
*London Artists Ltd. v. Littler*, [1969] All E.R. 193 at 198 (HL)

15. The House of Lords has cautioned that courts “should be slow to conclude that a publication was not in the public interest, and, therefore, the public had no right to know.” Where there is ambiguity, any lingering doubts should be resolved in favour of a determination that publication was in the public interest. At the very least, communication about someone who wields public power acting in that capacity should always be a matter in the public interest.

*Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 at 205 (HL)  
*WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 15

## **Defence is to be decided by the trial judge, not the jury**

16. Once the Court concludes that the impugned expression is in the public interest, it must evaluate whether the circumstances of publication were reasonable. This reasonableness assessment is, in essence, a judicial assessment of how to strike the right balance between the right to free expression and the importance of reputation. As the U.K. Courts have recognized, it is therefore a question to be decided by the judge, and not the jury. The CCLA submits that there is no reason to depart from the U.K. rule — the defence ought to be decided by the trial judge.

### ***U.K. Rule: responsible journalism defence is for the trial judge***

17. Courts in the U.K. have repeatedly held that the responsible journalism defence is for the trial judge, not the jury. Indeed, the House of Lords in the leading case, *Reynolds v. Times Newspapers Ltd.* made the limited role of the jury clear, reserving to it only questions of “primary fact” (i.e., genuine factual controversies that are capable of objective determination). Even inferences to be drawn from “raw data” are left to the judge in determining whether this defence applies.

*Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 at 178, 188, 205, and 215-216 (HL)  
*Jameel v. Wall Street Journal Europe Sprl*, [2005] Q.B. 904 at para. 70 (C.A.); rev'd on other grounds in [2007] 1 A.C. 359 (HL)  
*Prince Radu of Hohenzollern v. Marco Houston, Sena Julia Publicatus Ltd.*, [2007] EWHC 2328 at para. 13 (QB)  
*Galloway v. Telegraph Group Ltd.*, [2005] EMLR 7 at paras. 38, 40-43; aff'd [2006] EMLR 11  
*Charman v. Orion Publishing Group Ltd.*, [2007] 1 All E.R. 622 at para. 4; rev'd on other grounds in [2008] E.M.L.R. 16

### ***U.K. Rule recognizes that defence requires evaluation, not fact-finding***

18. The reason for the limited role of the jury is apparent on reviewing the different factors that the Court looks to in determining whether the defence ought to apply. They are:

- (1) **The seriousness of the allegation:** the more serious the charge, the more the public is misinformed and the individual harmed if the allegation is false. Conversely, more serious allegations may be more crucial to publish in the public interest.

- (2) **Relevance:** the nature of the information, and the extent to which the subject matter is of public concern.
- (3) **The source of the information:** whether the information came from a reliable source or whether reliance was placed on hostile, biased, interested or ignorant sources that can misinform the public.
- (4) **Due diligence:** whether the media outlets tried to verify the controversial information in the story and what kinds of steps they took to do so.
- (5) **The status of the information:** whether the allegation may have already been the subject of an investigation that should command respect.
- (6) **The urgency:** the degree to which it was important to communicate the information as quickly as possible.
- (7) **Seeking balance:** whether comment was sought from the plaintiff, recognizing that in some cases, it may be unnecessary, impractical, or obviously futile to do so.
- (8) **Reflecting balance:** whether the story contained the plaintiff’s side of the story.
- (9) **The tone of the story:** the defendant can set the tone of the article — for example, a publication or broadcast outlet can raise queries or call for an investigation without adopting allegations as statements of fact.
- (10) **Context:** the overall circumstances of the story, including the timing of publication.

*Reynolds v. Times Newspapers Ltd.*, [2001] 2 A.C. 127 at 205 (HL)

19. Once the primary facts have been found, most, if not all, of these factors, will require judicial evaluations. Put a different way, there is no purely “objective” answer to most of these questions; they are all characterizations based on known facts. For example, the characterization of an allegation as “serious”, the suggestion that a story is “balanced” or the determination that publication was “urgent” are all value judgments that are appropriate for a judge to make, rather than a jury.

*Prince Radu of Hohenzollern v. Marco Houston, Sena Julia Publicatus Ltd.*, [2007] EWHC 2328 at para. 13 (QB)  
*Galloway v. Telegraph Group Ltd.*, [2005] EMLR 7 at para. 23;  
aff’d [2006] EMLR 11

***Reasonable publication should be a matter for the judge***

20. The U.K. rule has been in place for many years and has worked well in dividing the roles of the judge and the jury in defamation cases involving responsible journalism on the basis that a jury can decide only true “factual” questions, while the characterizations required in applying the *Reynolds* factors, and the balance of those factors, must be reserved to the judge. At a minimum, this distinction provides a useful starting point for the Court’s analysis.

21. Moreover, this division of responsibilities is reinforced by the structure of Canada’s constitutional system. Indeed, the best reason for requiring the trial judge, and not the jury, to determine the application of the public interest reasonable communication defence relates to the role of judges in applying the *Charter*. The defence, in each case, requires a balancing of constitutional values. The Court must ask whether, in light of the *Charter* guarantee of free expression, in the circumstances, the defendant ought to be excused from liability for publishing in the public interest. This performs the same function as a constitutional remedy under s. 24(1) of the *Charter*, and therefore should be viewed as a matter for a “court of competent jurisdiction” and not a jury.

22. ***Constitutional balancing, not standards of care.*** The *Reynolds* factors are not a test for negligence. Although there is some linguistic similarity between “reasonable care” (the negligence standard) and “reasonable publication” (the standard the CCLA is advocating for this defence), they are substantively different. Negligence requires an analysis into whether the defendant departed from a standard of care and caused foreseeable harm. This is ultimately a factual question, which a jury can answer by asking the question “what would a reasonable person do” (often with the benefit of expert evidence) and comparing it with the facts of the case before it.

*Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28

23. Reasonable publication, on the other hand, is, in essence, a constitutional balancing. It is not about professional standards or evaluating departures from those standards. The Court has to ask itself what steps the publisher took, not to compare it with any standards (which would be impossible to set out in advance in any event), but to ask whether the circumstances of publication strike a reasonable balance between the interest of reputation and the constitutional value of free speech.

24. ***Constitutional balancing is for the Court under s. 24(1) of the Charter.*** The essence of the reasonable publication defence is a constitutional balancing, guided by the *Reynolds* factors. When this balance tips in favour of publication, it provides a remedy in the form of a full defence to liability. While the CCLA urges the Court to incorporate this defence into the common law of defamation, it also recognizes that each time the defence is applied, the Court is effectively conducting a *Charter* analysis. The remedy provided is therefore (implicitly or explicitly) a s. 24 remedy, which is reserved to a “court of competent jurisdiction,” i.e., a judge and not a jury.

25. ***Transparency in decision-making required to prevent libel chill.*** As the CCLA argued in *Cusson*, one of the most important reasons for the defence of reasonable publication in the public interest is to prevent expression from being chilled by uncertainties of proof. A publisher simply cannot know in advance what s/he will be able to prove by the time of trial, and it is therefore reasonable to infer that valuable expression in the public interest is not always published.<sup>1</sup> As a result, it is crucial to ensure that the defence of public interest reasonable communication is structured to avoid any further libel chill.

26. The CCLA submits that transparent and reviewable judicial decision-making is best positioned to avoid libel chill, for three reasons. First, the accumulation of judicial reasons creates a corpus of law on which publishers can make their decisions. Second, rational publishers will inevitably have greater confidence in a decision-making process that they can read and understand. As a result, determinations made in the bright light of reasons for decision will inspire more confidence and understanding than those made in the darkness of a jury’s deliberations. Third, and as explained below, judicial reasons can be (and should be) meaningfully reviewed by courts of appeal, on a correctness standard, to ensure consistency of application.

***Reasonably capable of meaning – at the time of publication***

27. The Court of Appeal in this case held that it could not decide on the application of the responsible journalism defence because the question of the meaning of the words needed to go to the jury. The CCLA respectfully submits that this was not the correct way to approach the issue. Rather, for the defence to afford the appropriate protection of freedom of expression, those who

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<sup>1</sup> This is not the only reason for this defence. In particular, sometimes the constitutional interest in the publication of a story remains strong even if it contains some falsity, and in other cases the un-chilled true story cannot be proven true. However, the possibility of libel chill is one of the most powerful constitutional reasons for the defence.

publish should be able to reasonably assess whether they have met the standards of the defence at the time of publication. This, in turn, means that the availability of the defence ought to be determined on the basis of the meaning that was or could be reasonably understood by the publisher at the time of publication, and not as a result of a jury's decision about meaning many months or years later. Similarly, it is for the trial judge, and not the jury, to decide whether the words used can be reasonably understood to be comment, rather than fact. The risk that one defence may be defeated by a jury's determination that the publication bore a meaning other than that reasonably anticipated by the publisher inappropriately threatens freedom of expression.

28. This division respects the role of the judge and the jury. The judge will not be required to determine the meaning of words and whether they were defamatory (traditionally the role of the jury). Rather, the judge will simply be required to decide whether the publisher's intended meaning falls within an acceptable range of meanings (traditionally the role of the judge).

29. Waiting to evaluate the defence of reasonable publication in the public interest until the jury has given meaning to the words is a misapplication of the Court's (implicit or explicit) role under s. 24(1). The Court effectively must look at the judgment made by the publisher and ask whether, having regard to the importance of reputation, it was appropriate to exercise his or her freedom of expression rights in this publication. It is for the judge to act as arbiter of whether the defendant got this constitutional balancing right.

**Standard of review: correctness**

30. It is well settled law that the standard of review for questions of law is correctness.

*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at 247

31. In cases involving the interpretation of the *Charter*, Canadian courts have held that a standard of correctness applies to a review of those findings.

*R. v. V. (S.E.)*, 2009 ABCA 108 at para. 4

*Karas v. Canada (Minister of Justice)*, 2007 BCCA 637 at para. 73

*United States v. Fordham*, 2005 BCCA 197 at para. 13

32. The interpretation and application of the reasonable communication defence will necessarily entail an application of the same kind of reasoning and balancing that the courts will undertake when interpreting the *Charter*, and should be subject to the same amount of deference

on review. These are legal questions that the Court must answer correctly. In fact, in applying these tests, the Court will have recourse to the *Charter* as any balancing of interests in the law of defamation invokes consideration of free expression under section 2(b) and proportionality under section 1.

33. While, on its face, it might appear that the reasonable communication defence involves questions of fact and law, the CCLA urges this Court to make it clear that the only portion of the test that requires deference is any actual determinations of fact (i.e., what happened, to whom, who said what, etc.). To ensure a robust and consistently applied defence, the application of these facts to the *Reynolds* factors, and how these different factors ought to be weighed, should be treated as reviewable questions of law.

34. It is too easy for appellate courts to look at the *Reynolds* factors, declare the application of the test a “question of mixed fact and law” and defer to the trial judge’s application. However, these factors should be seen as what they are: the way in which the Court applies s. 2(b) of the *Charter* in the context of defamation. Seen in this light, it is apparent that the factors themselves, as well as their ultimate balance, should be seen as a question of law.

#### **PART IV – SUBMISSIONS ON COSTS**

35. The CCLA does not seek costs, and asks that it not be liable for costs to any other party.

#### **PART V – ORDER REQUESTED**

36. The CCLA requests the opportunity to make 15 minutes of oral submissions to the Court at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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## PART VI - TABLE OF AUTHORITIES

Authority	Reference in Argument
1. <i>Bonnick v. Morris and Others</i> , [2002] UKPC 31 (P.C.)	10
2. <i>Charman v. Orion Publishing Group Ltd.</i> , [2007] 1 All E.R. 622; rev'd on other grounds in [2008] E.M.L.R. 16	17
3. <i>Galloway v. Telegraph Group Ltd.</i> , [2005] EMLR 7; aff'd [2006] EMLR 11	17, 19
4. <i>Hill v. Church of Scientology</i> , [1995] 2 S.C.R. 1130	9
5. <i>Housen v. Nikolaisen</i> , [2002] 2 S.C.R. 235	30
6. <i>Jameel (Mohammed) v. Wall Street Journal Europe Sprl</i> , [2005] Q.B. 904 (C.A.); rev'd on other grounds in [2007] 1 A.C. 359 (HL)	12, 17
7. <i>Karas v. Canada (Minister of Justice)</i> , 2007 BCCA 637	31
8. <i>London Artists Ltd. v. Littler</i> , [1969] All E.R. 193 (HL)	14
9. <i>Prince Radu of Hohenzollern v. Marco Houston, Sena Julia Publicatus Ltd.</i> , [2007] EWHC 2328 (QB)	17, 19
10. <i>Reynolds v. Times Newspapers Ltd.</i> , [2001] 2 A.C. 127 (HL)	15, 17, 18
11. <i>R. v. V. (S.E.)</i> , 2009 ABCA 108	31
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13. <i>Seaga v. Harper (Jamaica)</i> , [2008] UKPC 9	12
14. <i>WIC Radio Ltd. v. Kari Simpson</i> , 2008 SCC 40	9, 14, 15
15. <i>United States v. Fordham</i> , 2005 BCCA 197	31

## PART VII - STATUTORY PROVISIONS

Nil