

Media coverage in politics: court draws line between critical political reporting and defamation

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Introduction

Political candidates in Canada will take comfort from a recent ruling by Justice Strekaf of the Court of Queen's Bench of Alberta in a case where the plaintiff was awarded substantial damages in a defamation action arising from an article published about him while running for office. In *Kent v Martin*, (1) former Progressive Conservative candidate Arthur Kent was awarded C\$200,000 in damages after a prolonged lawsuit. Kent, a former journalist who was nicknamed the 'Scud Stud' for his reporting as an NBC News correspondent during Operation Desert Storm, was the target of a sarcastic and dismissive column published in the *Calgary Herald* and *National Post*. After the article was published, Kent's relationship with voters and donors became "more complex" and he lost the election held less than a month later.

This meticulous and detailed judgment is noteworthy for its careful analysis of where political reporting, which is often highly critical, may become the proper subject of a defamation action and its appraisal of significant damages for the ongoing online publication of the defamatory material. It provides insight into how media outlets might be expected to behave after publishing inflammatory and potentially defamatory columns, and signals that failure to provide a prospective plaintiff with the opportunity to respond – while not inherently malicious – may exacerbate a damages award.

Facts

Kent, a former war correspondent turned star political candidate for the Progressive Conservative Party of Alberta in the March 2008 Alberta general election, sued Don Martin, Canwest Publishing, Postmedia Network and the *National Post* alleging that an article published during the election campaign was defamatory. Describing the article as a "hit piece", Kent sought a finding of malice against Martin for writing the article to destroy his political career and against the corporate defendants for continuing to make it available online for more than four years without publishing Kent's rebuttal.

In the course of the campaign, Kent openly took positions on a number of issues that were inconsistent with the official Progressive Conservative platform. This generated media attention and newspaper columns about a "growing schism" in the party. Kent's behaviour created friction not only with his party leader, but also with party veterans working on his staff. In this context, the official agent and legal counsel to Kent's campaign, who was frustrated with Kent, passed sensitive internal campaign emails to Martin, then a journalist with the *Calgary Herald* and a regular columnist for the *National Post*.

The defamatory article, with the headline "Scud Stud Lands with a Thud", was published in the *Calgary Herald*, the *National Post* and the *Edmonton Journal* – as well as online. The article strongly suggested that Kent was a naïve amateur whose campaign was on the verge of imploding. Although

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upset by the article, Kent decided to wait until after the election campaign to write a formal rebuttal, preferring to focus on the campaign. However, Kent lost the election, which was held less than a month after the article was published. When he submitted a rebuttal to the *Calgary Herald* and the *National Post*, both newspapers refused to publish it.

Kent launched a defamation action in May 2008. In October, the *Calgary Herald* decided to suppress online access to its version of the article; however, the article remained accessible online until late 2012 on various Postmedia websites, with an updated dateline. Postmedia did not suppress online access to the article until November 6 2012.

The defendants contested the allegation that the article was defamatory and argued that it would not have a significant impact on Kent's reputation. They also pleaded the defences of qualified privilege, justification, responsible communication on matters of public interest and fair comment.

Decision

The court noted that the article must be evaluated in the context of Kent's reputation in light of other newspaper articles that had been published on previous days highlighting the tension between Kent and the premier's office. These articles were relevant because they established a benchmark of what Kent's reputation was at the time that the defamatory article was published. Finding that the article contained a harshly critical personal tone and was markedly different from the other articles published about Kent, the court held that the column was defamatory, and that "the overall tenor of the Article is that Arthur Kent is a politically naïve arrogant has-been journalist with a huge ego whose election campaign is in disarray and who is doomed to become an ineffective MLA if elected".
(2)

The court also held that the defence of responsible communication on matters of public interest did not apply.(3) While the article was certainly on a matter of public interest, the court concluded that Martin was not diligent in verifying the allegations in the article. The court conducted a comprehensive review of the factors identified by the Supreme Court of Canada in *Grant v Torstar* (4) for assessing whether journalistic practices are responsible.(5) In this assessment, the court was particularly critical of the fact that Martin did not speak with Kent before publication, and that he was not diligent in verifying the statements that formed the basis of the article.(6) Martin also consulted only sources he knew had an axe to grind with the campaign and who were overwhelmingly negative.(7)

However, the court found that some commentary and expressions of opinion in the article were protected by the defence of fair comment.(8) Reasoning that while some of the commentary in the article was harsh, sarcastic and dismissive in tone, these comments were nonetheless an expression of an opinion that could objectively be honestly expressed based on proven facts. As a finding of malice vitiates the defence of fair comment, the court also carefully considered whether malice had been established.(9) The court ultimately concluded that the fact that the article continued to be available online for four years after publication did not constitute malice on the part of the corporate defendants.(10) Furthermore, although deeply troubled by Martin's conduct and a finding that he had been planning to write a negative article when he first began his research, the court was hesitant to hold that Martin had acted maliciously.(11) The court concluded that "while a number of his statements in the article were exaggerated and not properly verified, Mr. Martin's conduct was not sufficiently egregious to constitute reckless disregard for the truth".(12)

The court also rejected an argument by Postmedia that it was not responsible for the initial publication by its corporate predecessors and that the existence of the article within its databases did not constitute fresh or continuous publication.(13) It distinguished the situation at hand from *Crookes v Newton*,(14) where the Supreme Court of Canada held that a hyperlink to defamatory material does not constitute publication, on the basis that Postmedia was not merely providing a hyperlink, but was itself the source of the material.(15) Postmedia was therefore found to have continued to publish the defamatory article by making it available online through its database until 2012.(16)

Comment

This case will be of particular interest to media organisations that are looking for guidance on how to respond to a latent defamation suit. The court was alive to the steps that the *Calgary Herald* and *National Post* failed to take in the aftermath of the article's publication, and Kent's damage award was significantly increased by what the court considered to be aggravating considerations. Specifically, the court was of the opinion that:

- the defendants should have provided Kent with a reasonable opportunity to respond to the article, given its highly critical nature and Martin's failure to speak with Kent before it was published; and
- the defendants should have taken more steps to suppress the article after the defamation suit was launched.

With respect to the first point, while Kent did write and submit a rebuttal after the election campaign, it was rejected as being too critical by the *Calgary Herald* and too dated by the *National Post*. The court held that both papers should have attempted to address their concerns with Kent or provide him with an alternative opportunity to respond to the article. Simply refusing to publish his response was problematic and was factored into the court's overall assessment of damages.

With respect to the second point, the continued ability for the article to be viewed online for more than four years after its initial publication caused "significant ongoing stress to Mr. Kent" **(17)** and increased his damages award.

While taking these steps in a future case will likely not allow a defendant to escape liability, they may serve to mitigate what might be an otherwise substantial damages award.

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Endnotes

- (1)** *Kent v Martin*, 2016 ABQB 314.
- (2)** *Ibid*, at para 109.
- (3)** *Ibid*, at para 193.
- (4)** *Grant v Torstar*, 2009 SCC 61, 314 DLR (4th) 1.
- (5)** *Kent v Martin*, supra note 1 at para 193.
- (6)** *Ibid*.
- (7)** *Ibid*.
- (8)** *Ibid* at para 209.
- (9)** *Ibid* at para 194.
- (10)** *Ibid* at paras 246-247.
- (11)** *Ibid* at para 237, 244.
- (12)** *Ibid* at para 245.
- (13)** *Ibid* at paras 221-222.
- (14)** *Crookes v Wikimedia Foundation Inc*, 2011 SCC 47, [2011] 3 SCR 269.
- (15)** *Kent v Martin*, supra note 1 at paras 224, 227.

(16) *Ibid* at para 228.

(17) *Ibid* at para 263.

Logan St John-Smith, summer law student at Dentons Canada LLP, assisted in the preparation of this update.

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