AN INTRODUCTION TO DEFAMATION LAW:
A RESOURCE FOR CANADIAN SCHOLARS

A Federation member resource

This document, developed in collaboration with the Association of Canadian College and University Teachers of English, is intended to provide members of the Federation for the Humanities and Social Sciences with a general understanding of the law of defamation in the context of academic work. Assessing defamation is highly context-specific and subject to various provincial and territorial statutes. This information is therefore not intended to provide a legal opinion and cannot be relied upon as legal advice.
Balancing free expression, public debate, and protection of a person’s reputation

Freedom of expression is a fundamental right cherished by all Canadians, but it is not absolute. By providing a basic understanding of the legal principles and processes involved in balancing the various interests at play, this document aims to empower individuals who spend their careers expressing themselves through their teaching, public speaking, administrative work, research publications and other writings.

a) Institutional context

The Canadian Charter of Rights and Freedoms protects our freedom of expression, but the scope of the Charter is often misconstrued. Charter rights protect individuals only from actions by the State (e.g. statutes, regulations, policies). As the law does not treat universities and colleges as part of the government apparatus, the Charter does not automatically prevent post-secondary institutions from implementing measures that curtail freedom of speech (or infringe on other rights).

That said, courts have increasingly been applying the Charter to specific actions taken by independent bodies when they are performing “activities that are governmental in nature.” This expression has led to the application of Charter rights to campuses in a growing number of cases. What constitutes an action that is “governmental in nature” — and whether it can be justified as pressing and proportional under s. 1 of the Charter — are evolving questions when it comes to post-secondary institutions. Recent court decisions have created some regrettable confusion and there is little doubt that the Supreme Court of Canada will need to bring a greater degree of clarity to this question.¹

b) Personal context

When actions committed by a person affect someone else, but do not violate criminal law, this is considered a civil matter and is entirely governed by common law principles (and the Civil Code in Quebec) and applicable statutes. More specifically, clashes between free expression and the need to protect a person’s reputation are governed by law of defamation.

This colourful quote from the Supreme Court encapsulates the inherent tension at play: “[a]n individual’s reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to ‘chill’ freewheeling debate on matters of public interest.”² In recent years, the law has been evolving in ways that tend to favour rigorous public debate.

Defamation Law 101 — A two-stage analysis

Defamation is considered a “tort,” an act that makes its author liable for any resulting damages. To determine whether, as the author of a statement, you might be crossing the conceptual line of defamation, the law proceeds in two stages.

1. These articles provide further reading on the applicability of the Charter to post-secondary institutions: Linda McKay-Panos in the Canadian Journal on Human Rights, Franco Siletta in Appeal, and Dwight G. Newman in the Revue de droit de l’Université de Sherbrooke.
2. WIC Radio Ltd. v Simpson, 2008 SCC 40 (CanLII) at paragraph 2.
Test #1 — Were the words defamatory? — The legal analysis

The plaintiff — the person claiming that they were harmed — must first convince the Court that the words were defamatory. This test requires proving three things:

a) The words used would *tend to lower the plaintiff’s reputation in the eyes of a reasonable person*. The plaintiff’s own views on the matter are not relevant. The test is how the average person in society would understand the words in their context.

b) The words in fact referred to the plaintiff. If the person is not named specifically, they must convince the Court that the words plainly and clearly refer to them.

c) The words were “published.” “Publication,” in the defamation context, has a very broad meaning: as long as the words are communicated to at least one person other than the plaintiff, they are considered “published.” Sending a group email, tweeting, and even lecturing are acts of publication.

Importantly, your intent behind the statement — whether or not you wanted to harm the reputation of the plaintiff — is irrelevant. The law only looks at the nature and the effects of the words. If you are thinking that the threshold of “defamation” is easily crossed, you are right.

Challenging a decision made by a senior administrator, questioning the research methodology of a colleague, pointing to the flaws in an author’s conclusions, are all examples of statements that would possibly be seen as “tending to lower the reputation” of the person involved. That’s where the second step comes in.

Test #2 — Were the words justified? — The defenses to defamation

Public debate and academic discourse inevitably involve making critical statements of others in class, in meetings, in publications, etc. Even if they constitute “defamation” under the first step — even if they might harm the reputation of the person — these statements are fine if they fall under one of the defences set out below.

**Facts** — Stating something that is objectively and completely true (“X said the following”; “Y did the following”) is practically an absolute defence to a claim of defamation. As embarrassing as the statement might be to the plaintiff, if it is true, it can be “published” — communicated to others.

**Opinions** — Expressing an opinion (or “fair comment” in legal vocabulary) is also protected as long as the following criteria are met: (a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognizable as comment; (d) the comment must be such that any person could honestly express that opinion on the proved facts.

The criteria are applied generously: marginal views are protected as long as they are grounded, to some extent, in fact. However, if the author of the words acted out of malice, purposely trying to cause harm, this justification will fail. The same will be true if the opinion comes across (intentionally or not) as fact. Stating, for example, that facts A, B, and C lead you to conclude that the plaintiff is corrupt is not the same as stating that the plaintiff is indeed corrupt.

**Responsible communication on matters of public interest** — Although more applicable to the media,
this concept can be relevant in an academic context. To qualify, the statement published must first be on a matter of “public interest.” Second, the author must show that the publication was “responsible,” in that the author was diligent in trying to verify the allegation.

The Courts provide only general guidance as to whether something is of “public interest,” as each case is different. Two questions that help illustrate this element of the test is whether “some segment of the public has a genuine stake in knowing about the matter” or whether this is something to which controversy has already attached. The Supreme Court was careful in pointing out that this is not a test of notoriety or a popularity contest. A publication that is of interest to a small, niche segment of academics would likely be considered “of public interest” (they have a genuine stake in the issue) while gossip about a celebrity would not be (curiosity does not equate to a genuine stake in the information).

Determining whether the publication was “responsible” will depend a variety of factors including the urgency of the matter, presenting both sides of a dispute, or indicating assumptions that might have been made.3

Lastly, it is worth keeping in mind that in any lawsuit — for defamation or on other grounds — the plaintiff must demonstrate harm or an actual loss. Gossiping around the water cooler can certainly be defamatory under law, and is ill advised, but the actual harm would be negligible and it is doubtful that it would lead to a successful lawsuit. In other circumstances, you might feel compelled to report certain things that have come to your attention (to a superior, or to the Human Resources department of your institution). Indeed, your employer’s policies might require an employee to report suspected cases of harassment, for example. Such actions would not constitute defamation.

**Lecturing, posting, tweeting and linking**

If you “publish” defamatory content without justification, you can be held liable. Stating something in a lecture, posting or re-posting on your social media feeds, tweeting and re-tweeting, as well as sending or forwarding emails are acts of “publication.” Remember that “publishing” simply means communicating the content to a third party, whether or not you intend harm.

Hyperlinks are a different matter.4 Adding a link to a web page or an article is not typically considered “publishing” the information. It is treated more like a footnote or a source rather than taking ownership of the content itself. To use the words of the British Columbia Court of Appeal, acts that “merely transmit information in a content-neutral way, without expression, adoption or endorsement” are generally not considered publications.5 There is therefore a gray zone when reposting/retweeting links. The more you are seen as endorsing the content or inviting recipients to take notice of the content, the more likely that retweeting a link on its own — for example — could be considered “publishing” the content.

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3. The Supreme Court’s decision in Grant v Torstar Corp., 2009 SCC 61 (CanLII) provides a good overview of the law. It is in this decision that the defence of “responsible communication” was recognized for the very first time.
5. Weaver v Corcoran, 2017 BCCA 160 (CanLII).
Criminal aspects — Defamation and hate speech

Although defamation is largely left to the realm of the civil courts, the Criminal Code does set out a criminal offense of “Defamation” as well. To constitute a crime, there has to be intent on the part of the author and the statement must expose the victim to “hatred, contempt or ridicule.” This provision is seldom used but it carries a maximum penalty of two years imprisonment.

Defamation law protects only the reputation of an individual (a person, a corporation, etc.). As a result, an unincorporated group cannot bring a lawsuit for outlandish or derogatory comments. The only protections for statements relating to groups are found in the Criminal Code but the threshold is high. The Code contains penalties for inciting or promoting hatred against specific groups in society. The harm is not to an individual but to an identifiable group. The offense does not require any harm actually occurring — simply inciting or promoting hatred is sufficient — and carries a maximum penalty of two years imprisonment.

The federal government also has the ability to prohibit entry, into Canada, of any material that it considers contrary to the provisions of the Criminal Code.

Dealing with a lawsuit — A short Q&A

Q: I just received a letter from a lawyer (or a Statement of Claim initiating a lawsuit) about something I wrote on Facebook. What do I do?

Step one: Buy yourself some time and catch your breath. The worst thing you can do is ignore the matter as this could eventually lead to a default judgment against you. Simply send a written response (email or mail) to the plaintiff’s lawyer indicating that you have received the document, that you are seeking legal advice, and that your counsel will respond once you have retained one.

Step two: Reach out to your department or faculty administration. If you are unionized, contact your union as well. Your employer has a stake in what is happening because if the defamation occurred in the context of work, your employer could be held liable for your actions. The best outcome is often to develop a joint strategy and have the employer manage the file.

Q: Does that mean my employer has to provide me with a lawyer?

The short answer is “no.” There is no general obligation under law to do this. However, collective agreements do sometimes contain provisions to that effect so contacting your union is important.

As indicated above, your employer has a stake in what is happening and although they may not have a legal obligation to help you, your common interests can make it strategically worthwhile for your employer to do so.

Q: I’m not a tenured faculty member. Does that make a difference?

Again, the short answer is “no.” The precarious nature of your employment does not change the fact that your employer can be held liable. It doesn’t matter if you are a sessional lecturer, a teaching assistant or a dean: you are employed by the institution. What might change is your access to rights under a collective agreement.
**Q:** I know I said nothing wrong. Can this person still sue me?

There is nothing in our legal system that prevents anyone from filing a claim. If the claim is frivolous or vexatious, there are procedures to get the lawsuit “thrown out” but this still requires going to court — and getting legal advice.

**Q:** As an academic, does the principle of “academic freedom” not make a difference?

While academic freedom is often recognized as an important element of the employer-employee relationship in academia (and is often integrated into collective agreements), in the context of defamation, academic freedom does not per se confer any special status. The principle could potentially become an element in buttressing a defence of “fair comment” or “responsible communication” but, otherwise, it plays no role in the context of defamation.

**Q:** How long could this lawsuit take?

A full lawsuit can take months or years to resolve. If you are faced with this situation, you must think of it as a long-term project. Finding ways of managing the issue professionally and personally, particularly with a sturdy support network through what could be a prolonged stressful period, is key to ensuring resilience.
Defamation Law – The Distinct Framework in Québec

This Addendum completes the general understanding of the law of defamation in the context of academic work provided to members of the Federation for the Humanities and Social Sciences by outlining the distinctions applicable to defamation in Quebec. Neither document is intended to provide a legal opinion and cannot be relied upon as legal advice.

Similar Dilemma – Different Approach

Defamation law falls under provincial jurisdiction. The legal framework applicable in Quebec is therefore different from the one found in common law provinces.

Unlike the Canadian Charter (which only places constraints on State actions), the Quebec Charter of Human Rights and Freedoms sets out a number of rights and obligations affecting relations between persons. As one might expect, the Quebec Charter protects freedom of expression. However, it also provides that “every person has a right to the safeguard of his dignity, honour and reputation.” (Section 4)

We therefore find, in Quebec, the same tension between freedom of expression and the protection of a person’s reputation but the tools used to balance these two principles are unique to Quebec’s civil law legal tradition.

Analysing Defamation in the Quebec Context

In Quebec, the limits to freedom of expression are found in each person’s general obligation not to cause harm to others. The Civil Code of Quebec states that the exercise of a person’s rights – like freedom of expression – must be done reasonably and in good faith (sections 6 and 7). In addition, section 1457 states that a person who does not “abide by the rules of conduct” that are incumbent on them will be held liable for any harm caused by their fault. In other words, if a person expresses remarks in a manner that is deemed unacceptable, and that these remarks cause harm to someone, the author of the remarks will be held liable for their civil fault.

Case law indicates three main contexts in which expressing remarks constitutes unacceptable behaviour or a civil fault:

1. Making unpleasant remarks about a third party knowing them to be false.
2. Making unpleasant remarks about a third party when one should know them to be false.
3. Making unfavourable but true statements about another person without any valid reason for doing so.

It is therefore the intention of the remarks’ author, as assessed objectively by the Court, that is the principal factor in determining whether the remarks will be considered defamatory in the eyes of Quebec law.