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• REGULATORY NET TIGHTENING ON THE “WILD WEST” OF THE BLOCKCHAIN AND CRYPTOCURRENCY INDUSTRY •

Daniel Fuke, Partner, Taisha Lewis, Associate, Fasken Martineau DuMoulin LLP
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Taisha Lewis

In August 2017, we considered the guidance offered by the Canadian Securities Administrators (CSA) regarding the application of securities laws to the blockchain industry and initial coin offerings (ICOs),

primarily as set out in CSA Staff Notice 46-307 *Cryptocurrency Offerings*. In that post, we noted that the CSA have provided little guidance regarding when they would consider cryptocurrencies to be securities, and thus subject to Canadian securities rules.

Since then, the industry has continued to develop and regulators, both in Canada and the United States, have been steadily increasing efforts to stay abreast of and address the emerging legal issues in this space.

To date, much of the regulatory developments in the blockchain and cryptocurrency industry have been led by the United States Securities and Exchange Commission (SEC). However, given the similarities in securities law and industry between the Canadian and US markets, we believe it is worth noting what actions the SEC has taken recently.

In December 2017, SEC Chairman Jay Clayton issued a statement regarding his concerns with ICOs and the unregulated state of the cryptocurrency market. He warned that while ICOs may be an effective means of raising capital, issuers and their advisors should remember that the substance of the transaction will override its form, and therefore, if a coin or token is fundamentally a security, no matter how the transaction is structured, the required disclosures and investor protections should be provided, or the appropriate exemption relied upon. In all cases, the spirit and purpose of securities laws

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will be central to determining whether or not an instrument is a security.

In the weeks that followed Clayton's statement, the SEC sought and obtained a halt order for an allegedly fraudulent ICO by Dallas-based AriseBank and its founders, and also began issuing subpoenas and demands for information to dozens of cryptocurrency firms and advisors. Included in the mass inquiry were those involved in issuing "simple agreements for future tokens", or SAFTs.

SAFTs are intended to function in much the same way as "simple agreements for future equity", or SAFEs, in that an investor would invest in an early stage company pursuant to the SAFT and receive in exchange the right to obtain something of value in the future; in this case, a utility token. The US-based SAFT Project, a forum focused on regulatory compliance as it relates to token sales, contends that while a SAFT would likely be a security, the utility tokens issued by the company pursuant to the SAFT would not be securities. Despite this characterization, given the SEC's stated position with respect to cryptocurrencies and its recent enforcement actions, those transacting with SAFTs and other novel instruments are well-advised to rigorously consider at what point or points they may be issuing securities.

In Canada, the British Columbia Securities Commission recently issued a notice and request for comment: BC Notice 2018/01 *Consulting on the Securities Law Framework for Fintech Regulation*. The notice identified certain risks associated with ICOs and the cryptocurrency market, including cyber security, price volatility, potential illiquidity, and money laundering. In addition, the notice raises questions around the operations of cryptocurrency investment funds and fund managers, custody requirements in connection with digital assets, know-your-client obligations, and the distinguishing factors between a utility token and a security. Industry members are being asked to provide comments on the notice by April 3, 2018.

Most recently, the Canadian Securities Exchange announced its plans to institute a blockchain platform for clearing and settling securities, which would

allow trades to be confirmed instantly. Rival TMX Group Inc. also broadcast in a press release issued on October 17, 2017 its intention to automate the settlement process using blockchain technology. With the potential advent of these blockchain-driven clearing houses, perhaps there is more of an appetite in Canada for the creation of new ecosystems and exchange rules tailored to the blockchain industry.

It is clear that regulators are paying attention and heightening scrutiny in the blockchain and cryptocurrency industry. Whereas in early 2017 industry participants operated with little regulatory oversight, the past several months have seen an increased effort by lawmakers to zero in on the regulatory issues posed by the emerging space. This presents an opportunity for market participants to

help shape the regulatory framework within which they may operate in the future, as we believe that regulators will seek to work with companies that prioritize matters like investor protection and generally bring trustworthiness to the market. We continue to encourage issuers and other stakeholders to consult with their advisors on these evolving issues.

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• CAN PUBLISHING A REVIEW ON SOCIAL MEDIA BE DEFAMATORY? •

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Samuel Gagnon



Catherine Bourget

Since the arrival of social media, publicly expressing an opinion has taken on a whole new dimension.

The potential audience for online expressions of an opinion is vast, and companies are now paying close attention to comments published about them online. In some cases, the popular verdict can be devastating.

Businesses sometimes have to go to court when they feel victimized by defamatory and baseless statements about them online. That was the case in the recent matter of *9341-5875 Québec inc. (École de conduite Hermès) c. Dubé*, [2017] J.Q. no 16643, 2017 QCC1 12984, in which a Facebook user was ordered to pay the plaintiff \$3,800.

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I FACTS

The plaintiff, Pascal Leyris, is the owner of driving school École de conduite Hermès. Before starting that business, he was an instructor at another driving school, Permis Plus. Relations between the plaintiff and Permis Plus had been highly acrimonious since the plaintiff started his own business.

Several members of the family of the defendant, Charli Dubé, aged 18, were shareholders of Permis Plus. They accused the plaintiff of soliciting clients of their driving school.

Even though he did not know the plaintiff personally, the defendant published a “review” of him on the Facebook page of the plaintiff’s driving school. He gave the business one star (out of a possible five) and insinuated in his comments that the plaintiff behaved inappropriately with some of his teenage clients. The post was withdrawn the following day, at the plaintiff’s request.

The plaintiff claimed \$7,500 from the defendant for defaming him. The defendant maintained that the language he had used was not defamatory and had not damaged the plaintiff’s reputation.

II DECISION

A. DEFENDANT’S LIABILITY

The Court considered that the “review” published by the defendant was defamatory, primarily because of the outlandish insinuations it contained and the doubts it unjustly raised about the plaintiff’s character and behaviour.

Citing the Supreme Court of Canada, the Court pointed out that in order to determine if the plaintiff was defamed, it must be asked “*whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of [the plaintiff...] because of the idea they expressly convey, or by the insinuations that may be inferred from them*”.

The Court found that the statements published by the defendant contained falsehoods and fabrications, and that some of the terms used inherently discredited

the plaintiff and raised doubts about his conduct and character, leading the reader to question his motives.

B. DAMAGES

The Court awarded the plaintiff \$3,500 in moral damages and \$300 in punitive damages. It took into account the impact of the post on the plaintiff’s reputation, the doubts sewn among his entourage, the defendant’s intention to harm him, and the lack on his part of any excuse or attempt to retract the statements. On the other hand, the Court noted that the defamatory statements had not reached a very wide audience, were online for only a short period of time and the relative seriousness of the attack on the plaintiff’s reputation.

III COMMENTS

The line between freedom of expression and damage to another person’s reputation is often thin. However, an individual cannot say whatever he wants, however he wants, on the pretext that he is exercising his right to freedom of expression.

The truthfulness of the message is just one of the factors to be considered in assessing whether a fault has been committed and the truth or falseness of a statement is not in itself determinative. Statements that are true but made with the intent of damaging someone else’s reputation can thus be deemed defamatory and actionable. In this case, the Court found that not only did the statements contain falsehoods, but were made with the intent to cause harm. In the context of reviews of a business published on social media, whether or not the message is true is in our view important, as false statements could denote intent to cause harm.

This is not the first time that a Quebec court has had to determine whether a post on Facebook can give rise to an award of damages.

In 2012, in *9080-5128 Québec inc. c. Morin-Ogilvy*, [2012] J.Q. no 3232, 2012 QCCS 1464, the Superior Court awarded the plaintiffs \$10,000 in compensatory and punitive damages. The judge found that certain statements published on the defendant’s personal

Facebook page were pejorative and harmful, and were intended to give rise to an unfavourable opinion on the part of a reasonable reader. The Court added that the statements went beyond a neutral account of a situation that the defendant had found unsatisfactory. The judge concluded from the statements that anyone who uses this online medium to give free rein to his thoughts must be mindful of the consequences. The judge therefore decided that it was appropriate to allow punitive damages, which are awarded where the defendant knows or intends that the consequences of its conduct will be harmful.

In 2013, in *Carpentier c. Tremblay*, [2013] J.Q. no 390, 2013 QCCQ 392, the Court of Québec awarded \$5,000 in compensatory damages and \$1,500 in punitive damages following the publication online of a photomontage that it considered to be defamatory of the plaintiff.

These decisions are just some examples of instances where courts have had to decide whether or not statements posted on Facebook were defamatory.

Each case must be judged on its facts, and the statements at issue must be analyzed in light of the circumstances specific to each situation.

CONCLUSION

In the context of social media, which facilitate access to a vast readership, the courts must sanction defamatory statements, while at the same time maintaining a balance between freedom of expression and each person's right to reputation.

Ultimately, giving a negative review on the Facebook page of a business is not inherently defamatory, provided the statements are true and not made with the intent to cause harm.

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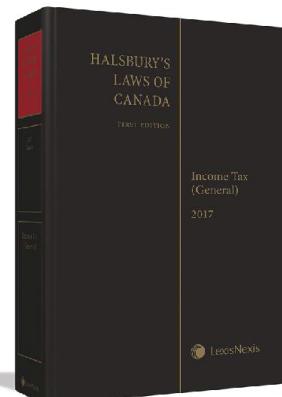
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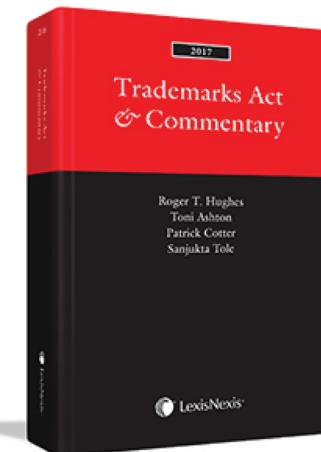
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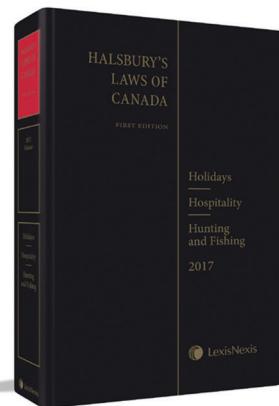
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