Court File No.: 33412

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

WAYNE CROOKES AND WEST COAST TITLE SEARCH LTD.

Appellants
(Plaintiffs)

- and –

JON NEWTON

Respondent
(Defendant)

FACTUM OF THE INTERVENER, THE SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC

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PART I - OVERVIEW

1. The Internet is one of the greatest vehicles for communication ever invented. The hyperlink, one of the World Wide Web's major innovations, is central to on-line discourse today. Entire information sharing platforms such as Twitter and Facebook are built around the concept of the hyperlink and are used daily by millions of Canadians.

2. This Court is considering under what circumstances, if any, the posting of a hyperlink in a primary article can constitute the publication of defamatory statements contained in a hyperlinked second article. It is the position of the Canadian Internet Policy and Public Interest Clinic ("CIPPIC") that the plaintiff must prove that the hyperlinker knowingly endorsed and adopted the defamatory statements found in the linked second article to constitute publication in defamation law.

3. A hyperlink merely "identifies" the location of the source of information found at a different and independent location from the primary article. This "identification" of the existence of the second article does not "incorporate" the defamatory statements into the primary article and is not an "invitation" to read the defamatory statements. Further, even if the hyperlink was considered an "invitation", this invitation should be treated at law in the same manner as an advertisement is treated in contract law - as an "invitation to treat" which does not give rise to liability.

4. Proof that posting a hyperlink constitutes the publication of defamatory statements in the linked materials cannot be adduced through a presumption nor an inference. CIPPIC submits that a libel plaintiff has the burden to prove publication based upon a convincing evidentiary basis similar to the requirements imposed by this Court in *CBC v. Dagenais* and *R. v. Mentuck* with respect to non-publication orders. Inference, speculation and facile assumptions are inadequate proof of publication to impose liability on a hyperlinker. The expansive liability advocated by the Appellants must be rejected because it tilts the balance between freedom of expression and reputation too heavily in favour of reputation and has the potential to seriously undermine and chill on-line freedom of expression and innovation.

PART II - QUESTIONS IN ISSUE

5. The issue that CIPPIC addresses in this appeal is under what circumstances, if any, the posting of a hyperlink in a primary article can constitute the publication of defamatory statements contained in the hyperlinked second article? Specifically, can publication be presumed or proven by inference? The hyperlink plays a crucial role in on-line discourse today. CIPPIC submits that a hyperlinker can only be found liable for the publication of defamatory statements contained in hyperlinked materials if the hyperlinker has knowingly endorsed and adopted those defamatory statements. Any lesser standard will seriously chill Internet communications.

   It is CIPPIC's position that the common law of libel provides sufficient presumptions that benefit the plaintiff (the presumption of falsity; the presumption of general damages; and, the presumption of legal malice). The creation of a new presumption of publication advocated by the Appellants is unnecessary and will tilt the balance between freedom of expression and reputation disproportionately in favour of reputation. Further, this Court should require a libel plaintiff to prove publication based upon a convincing evidentiary basis. Inferences, speculation and facile assumptions are inadequate proof of publication to impose liability on a hyperlinker.

PART III - ARGUMENT

A. A HYPERLINK MERELY "IDENTIFIES" THE LOCATION OF INFORMATION FOUND AT A DIFFERENT AND INDEPENDENT SITE

6. A hyperlink merely "identifies" the location of a source of information found at a different and independent location from the primary article that contains the hyperlink.

7. The hyperlink does not "incorporate" the defamatory statements into the primary article as argued by the Appellants. A hyperlink's sole function is the same as any other reference – it identifies a source of information for the reader and does nothing more.

8. A hyperlink is not an "invitation" to read the alleged defamatory statements found in the hyperlinked materials. But even if a hyperlink is considered an "invitation" to read the hyperlinked materials that so-called "invitation" does not make the hyperlinker liable for publishing the defamatory statements found in the hyperlinked materials (which could be hundreds of pages or more). The hyperlink should not be treated any differently than an advertisement which in contract law is considered an "invitation to treat" and not an "offer" that can give rise to contractual liability. In other words, the posting of a hyperlink in the primary article is tantamount to a display of goods by a shopkeeper in a shop window – an invitation to treat with no legal consequences.

9. Hyperlinking is the on-line equivalent of footnoting in printed materials such as a book or an article. As with traditional references, the person who posts a hyperlink will in many cases simply provide a citation to a source of information located elsewhere and not repeat any content at all. In contrast, the act of actually incorporating the defamatory statements found in the second article into the primary article requires the acts of "selecting" the defamatory statements from the second article and "adding" those defamatory statements into the primary article. This is not the case with the mere posting of a hyperlink in the primary article because the author of the primary article has not made the editorial decisions of "selecting" and "adding" the defamatory statements into the primary article.

10. There are, in fact, numerous on-line platforms such as Twitter and Facebook, social bookmarking sites such as Reddit.com and Digg.com, and social bookmarking sites such as Delicious.com and Pearltrees.com that will often contain only hyperlinks. Where hyperlinks appear alone in such platforms, without context, they are little more than a reading list shared with friends or others. Yet, if such hyperlinks constitute "publication" as the Appellants advocate, all of these hyperlinkers will become exposed to potential liability as publishers of defamatory statements written by third parties, a most chilling scenario.

B. THE BALANCE BETWEEN ON-LINE FREEDOM OF EXPRESSION AND REPUTATION IN THE 21ST CENTURY

(a) The Balance

11. The hyperlink plays a central and beneficial role in on-line discourse today. The Appellants' position is that posting a hyperlink constitutes publication of defamatory statements found in the linked materials. CIPPIC submits that this position does not strike the appropriate balance between the competing *Charter* values of freedom of expression and reputation.

12. This Honourable Court has held that the common law must develop in a manner consistent with *Charter* values. In doing so, no hierarchy of rights should be created, but rather a purposive approach must be taken in order to ensure the common law reflects the proper balance. The proposed rule advocated by the Appellants strikes the wrong balance. The barriers and chilling effects it imposes on freedom of expression tilts the balance too far in favour of reputation.

Grant v. Torstar Corp., [2009] 3 S.C.R. 640, per McLachlin, C.J., at para. 51.

13. Internet content is "as diverse as human thought" and as such on-line materials and discourse touch heavily on the core values underpinning section 2(b) of the *Canadian Charter of Rights and Freedoms* which guarantees freedom of expression, "including other media of communication". With respect to political debate, the Internet expands infinitely the capacity of individuals to take part in political discourse. Anyone can

become a "town crier" or a "pamphleteer" today. With the evolution of "Web 2.0" (the "participative web", where individual users are empowered to participate in content creation to increasing extents), new forms of mass political discourse are emerging. The platform provided by the Web allows citizen journalists to draw attention to issues that may not be covered by traditional news sources. Social media sites are used to encourage citizens, particularly our youth, to vote and to become engaged in political debate.

***Reno v. American Civil Liberties Union,* 521 U.S. 844 (U.S.S.C., 1997) at 870.**

14. The Internet furthers the truth-seeking component of freedom of expression. The Internet provides tremendous opportunities for robust debate and serves as one of the vastest of marketplaces for ideas to compete. Sites and platforms have mobilized an army of grassroots movements on-line. Individuals are provided with an easy means of developing information repositories that have immense educational and informational impact. Real time grassroots reporting is similarly changing the way information and news is disseminated today. With the rapid uptake of smart phones and social media such as Facebook and Twitter, Internet users receive real-time descriptions of catastrophic events such as earthquakes on the other side of the world, political demonstrations in inaccessible areas or a local political debate..

15. Perhaps the Internet's greatest and rapidly developing benefit is to the third core value of freedom of expression: self-expression and actualization. As noted in *SOCAN,* the Internet's capacity to disseminate art and works of the intellect is one of the greatest innovations of the information age. The participatory web not only expands opportunity for diversity and scope of self-expression, but, it is increasingly entrenched in people's lives. The freedom to hyperlink underpins many of these expressive activities and the platforms that facilitate them.

***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers,* [2004] 2 S.C.R. 427, per Binnie, J., at para. 40.**

(b) Libel Chill

16. The liability proposed by the Appellants favours reputation disproportionately and has the potential to seriously undermine and chill on-line freedom of expression.

17. The hyperlink is an integral component to many of the expression-enhancing innovations that have allowed for this phenomenal vehicle of expression to develop. The "invitation to read" standard proposed by the Appellants will chill hyperlinking which in turn undermines the communicative force of the Internet and deters innovation of new, expression-enhancing platforms that may not develop due to fear of defamation actions. Had the Appellants "invitation to read" rule been in place fifteen years ago, it is uncertain how search engines would have developed.

18. With the development of the participative web, sharing of information through hyperlinks is becoming central to many on-line activities and platforms. The expansive liability proposed by the Appellants will expose all hyperlinkers to defamatory actions at the whims of any disgruntled plaintiff. For instance, an article found on the *New York Times'* website may be linked by thousands of readers on a platform such as Twitter. A plaintiff could, under the Appellants' proposed rule, legitimately commence a defamation action against any one of those thousands of readers as "publishers" of defamatory statements contained in the *New York Times* article.

19. It is in the nature of the Internet that posted articles are linked to by many and with rapidity across a number of platforms (e.g., blogs, Twitter, Facebook). This rapidity and communicative force is one of the great strengths of the on-line world and should not serve as a foundation for exposing hyperlinkers to defamation actions simply because the linked materials are one click away. The hyperlink is a method for "accessing" the second article – however, a method of access (hyperlinking) does not constitute publication of defamatory statements in the second article. CIPPIC submits that this Court should have grave concern about imposing the strict liability regime of the common law of defamation onto hyperlinkers who have not knowingly adopted and endorsed the defamatory words complained about by a libel plaintiff.

20. The Appellants' proposed rule exposes hyperlinkers to liability in circumstances where the defamatory statements are not in the hyperlinked materials when the hyperlink is created. For instance, a hyperlink could be posted in the primary article today that does not contain any defamatory statements at all; subsequently, the hyperlinked article could be edited by a third party to add defamatory statements unbeknownst to the hyperlinker. According to the Appellants' theory, the hyperlinker is nevertheless liable for the publication of the defamatory statements because the primary article contains a hyperlink to the second article that now contains the subsequently added defamatory statements.

21. It is further unclear how, under the Appellants' proposed rule, an individual posting a hyperlink to a secondary article will not also be considered a publisher of any tertiary content hyperlinked in the secondary article. Where does the liability end when the hyperlinked materials also contain hyperlinks? According to the Appellants' theory of liability for hyperlinks, we will have a "six degrees of defamation" scenario where the author of a hyperlink becomes presumptively liable for any linked or sub-linked or sub-sub-linked defamatory statements. Such a scenario would have serious and chilling repercussions for on-line discourse.

C. THE PRESUMPTION OF PUBLICATION ADVOCATED BY THE APPELLANTS

22. The Appellants argue that a hyperlink in a primary article essentially embeds or incorporates all of the content from second article into the primary article. The Appellants ask the Court to presume that any hyperlink will be followed and any defamatory statements contained in the linked materials will in fact be read by a third party.

23. The Appellants' proposed presumption involves a number of sub-presumptions. First, it presumes that readers of the primary article followed all hyperlinks contained in the primary article. Second, as the hyperlink need not point directly to a webpage containing the defamatory statements, but need only point to a website containing the page in question (along with potentially hundreds if not thousands of other pages), it presumes the reader of the primary article will seek out the defamatory statements on the linked

website. Third, it presumes that the reader of the primary article in fact read the defamatory statements in the linked website or linked webpage.

24. CIPPIC submits that there is no valid justification for this Court to adopt the presumption proposed by the Appellants. Many primary articles contain numerous links to diverse materials. There is no reason to presume that a visitor to a site has followed every one of these links. The Appellants also ask the Court to presume that individuals who have followed a hyperlink to a general website URL - in this case www.openpolitics.ca - have diligently and actively tracked down the defamatory statements contained somewhere within the linked site. It further asks for a presumption that those who have viewed the page containing the defamatory statements have in fact read the defamatory statements. As webpages may contain hundreds of pages of text, the presumption proposed by the Appellants is on its face unreasonable and should be rejected.

D. THE INFERENCE OF PUBLICATION ADVOCATED BY THE APPELLANTS

25. Contrary to the Appellants' submission at paragraph 62 of their Factum, it cannot be reasonably inferred that a hyperlink in the primary article brings the defamatory statements in the linked materials to the knowledge of a third person. What is required to attract liability in defamation law is that the plaintiff prove that the defamatory statements were in fact disseminated by the defendant to a third party and read by a third party. CIPPIC submits that when the *Charter* is engaged, a convincing evidentiary basis is required to prove publication of the defamatory statements similar to the standard of proof this Court imposed with respect to non-publication orders in *CBC et al. v. Dagenais et al.* and *R. v. Mentuck*. Any lesser standard of proof denies a hyperlinker the freedom of expression guaranteed by section 2(b) of the *Charter*. Inferences, speculation and facile assumptions are simply not adequate proof to impose liability on the hyperlinker.

> ***Canadian Broadcasting Corporation v. Dagenais et al.,*** **[1994] 3 S.C.R. 835, per McLachlin, J. at pp. 949-950.**
> ***R. v. Mentuck,*** **[2001] 3 S.C.R. 442, per Iacobucci, J. at para. 39.**

26. The Appellants argue at paragraph 70 of their Factum that the creation of a hyperlink signifies more than a "mere mention" of an article without repetition of the defamatory statements and is the Internet equivalent of "pointing to a placard" and as such constitutes

publication (citing the 1894 case *Hird v. Wood)*. CIPPIC submits that in *Hird v. Wood*, the defendant and the placard's defamatory statements were both located "on the same page" – the defendant sat near the placard continually pointing at it with his finger and attracted the attention of all who passed by to the defamatory statements on the placard. Unlike the placard in *Hird*, a primary article that posts a hyperlink does not contain the defamatory statements found in the hyperlinked second article – the primary article simply contains a non-defamatory hyperlink. Further, the creator of the hyperlink is not willfully directing others to defamatory statements as argued by the Appellants in paragraph 75 of their Factum. The hyperlinker may not even know the hyperlinked materials contain defamatory statements. In *Hird v. Wood*, the defendant knowingly endorsed and adopted the defamatory statements by (i) pointing his finger at the nearby placard displaying the defamatory statements and attracting the attention of all who passed by him, and (ii) collecting funds from passersby in order to remedy the wrongs of the plaintiff defamatorily stated on the placard he was pointing to.

Hird v. Wood **(1894), 38 Sol. Jo. 234 (U.K. C.A.).**

27. The Appellants also argue at paragraph 73 of their Factum that the characterization of a hyperlink as being comparable to a footnote for a reader of written material, or a card index in a library is not an apt analogy. CIPPIC submits that the analogy is apt in that footnoting does not constitute the publication of defamatory statements found in the footnoted materials. As is the case with footnotes, a hyperlink merely "identifies" the location or "existence" of the source of information found at a different and independent location from the primary article. Similar to a footnote on a printed page, this "identification" does not incorporate the defamatory statements into the primary article.

E. THE PUBLICATION STANDARD: KNOWING ENDORSEMENT AND ADOPTION OF THE DEFAMATORY STATEMENTS

28. In light of the crucial importance of hyperlinks to Internet communications, CIPPIC submits that a hyperlinker can only be found liable for the publication of defamatory statements contained in the hyperlinked materials if the hyperlinker knowingly endorsed and adopted those defamatory statements. Any lesser standard will seriously chill online discourse and will strike the wrong balance between freedom of expression and

reputation. While the common law will impose liability on an individual for publishing defamatory statements authored by a third party in limited circumstances, care must be taken in applying these situations to on-line communications.

29. In *Scott v. Hull* the owner of an apartment building refused to remove defamatory graffiti painted on the outside wall of the building that could be read by passersby. The owner of the building was not found to be the publisher of the defamatory graffiti ; the Court held :

> "... liability to respond in damages for the publication of a libel must be predicated on a positive act, on something done by the person sought to be charged, malfeasance in the case of an intentional defamatory publication and misfeasance in the case of a negligent defamatory publication. Nonfeasance, on the other hand, is not a predicate for liability.
>
> The only claim against the defendants here, at best, is nonfeasance, not that they published the graffiti by some positive act on their part, but that they published the graffiti merely by failing to remove same after its existence was called to their attention and demand made upon them to do so. The viewing by the public was not at their invitation or a result of any positive act on their part. Such claim is not actionable, ..."

***Scott v. Hull*, 259 N.E.2d 160 (Ohio Ct. App., 3rd Circ., 1970) at 162.**

30. Silence in response to defamatory statements is not an endorsement of those defamatory statements.

***Stanley v. Shaw and Tracey*, 2006 BCCA 467 at paras. 7 and 9.**

31. Where the defendant has played a necessary but passive role in the publication of the initial defamatory statement, the defendant's liability as a publisher will depend on the degree to which the defendant is a knowing and necessary participant in that process. In *Bunt v. Tilley* the Court held:

> "In determining responsibility for publication in the context of the law of defamation, it seems to me to be important to focus on what the person did, or failed to do, in the chain of communication. It is clear that the state of a defendant's knowledge can be an important factor. If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason in principle why liability should not accrue. So too, if the

true position were that the applicants had been (in the claimant's words) responsible for corporate sponsorship and approval of their illegal activities."

***Bunt v. Tilley & Ors.*, [2006] EWHC 407 (QB) at para. 21.**

32. In addressing the issue of online "communication" by intermediaries within the context of the *Copyright Act*, this Court held that merely providing a conduit for others to communicate works does not in itself amount to "communication" or purposeful dissemination of those works. An intermediary in this context is an entity that provides "the means necessary to communicate".

***Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427, per Binnie, J., at paras. 89, 95 and 126-127.**

33. Where the defendant has taken no overt part in the initial publication of the defamatory material, there is no publication unless there is a knowing adoption and endorsement of the defamatory statements by the defendant. As pointed out by Slesser, L.J., in *Byrne v. Deane*:

> There are cases which go to show that persons who themselves take no overt part in the publication of defamatory matter may nevertheless so adopt and promote the reading of the defamatory matter as to constitute themselves liable for the publication.

***Byrne v. Deane*, [1937] 1 K.B. 818 (K.B.), per Sleeser, L.J., at 834-835.**

34. A mere reference, unaccompanied by any type of overt adoption and endorsement, is not publication. In *MacFadden v. Anthony*, a radio host who knowingly referred his listeners to a publication containing defamatory content but did not repeat the defamatory statements or endorse them was found not to have published the defamatory statements in question.

***MacFadden v. Anthony*, 117 N.Y.S.2d 520 (N.Y. S.C., 1952).**

35. In *Carter v. B.C. Federation of Foster Parents Assn.*, the Court of Appeal for British Columbia held that the inclusion of a website address for a website that contained defamatory statements did not constitute publication of the defamatory statements contained therein.

***Carter v. B.C. Federation of Foster Parents Assn.* (2005) 257 D.L.R. (4th) 133 (B.C.C.A.).**

36. In *Jennings v. Buchanan*, the defendant referred, without repeating, to defamatory statements he had made that were covered by parliamentary privilege. The Court held that this reference to his initial defamatory comments amounted to republication of those comments in a circumstances not covered by privilege. The defendant did more than merely refer to the statements. He effectively said "I do not resile" from my prior statements, thereby intentionally re-adopting and ratifying his own prior statements in the context of a newspaper interview.

Jennings v. Buchanan, [2004] UKPC 36 at paras. 5 and 12.

37. In *Hird v. Wood*, the defendant was pointing his finger at a placard (not of his making) which contained statements defamatory of the plaintiff. The defendant was also collecting funds from passersby in order to remedy the wrongs of the plaintiff defamatorily stated in the placard. The court found sufficient evidence to put the question of publication to the jury. In this case the defendant overtly and knowingly endorsed and adopted the defamatory statements on the placard.

Hird v. Wood (1894), 38 Sol. Jo. 234 (U.K. C.A.).

38. U.S. Courts have found that the posting of a hyperlink alone does not constitute republication or trigger a new limitation period as no new publication is created. Words that positively endorse or promote the linked defamatory statements are required before liability is imposed .

Salyer v. Southern Poverty Law Center, 701 F. Supp. 2d 912 (Kent. Dist. Ct., 2009).
Churchill v. _State of New Jersey_, 876 A.2d 311 (N.J. Sup. Ct., 2005).

39. CIPPIC submits that the standard emerging from the above cases is one of knowing endorsement and adoption of the defamatory statements. A reference alone does not constitute publication in defamation law. A mere academic reference akin to a footnote should not, without a knowing endorsement and adoption of the defamatory statements contained in the footnoted materials, amount to publication (particularly where the defendant has no association at all to the initial defamatory statement).

40. If two friends are walking past a sign with defamatory statements on it, and one friend points it out to the other, the law should not make the friend who points to the sign liable as a publisher of the defamatory statements on that sign. This is all the more so with respect to hyperlinks. A hyperlink does not repeat any defamatory words - it merely "identifies" the location of the materials that contain the defamatory words. Posting a hyperlink is not analogous to a refusal to remove defamatory statements displayed on one's property. And nor is a hyperlink a necessary element of the chain of communication of the primary article. The continued availability of the defamatory statements is in no way contingent on the presence of the hyperlink because the hyperlink's removal has no impact on the availability of the defamatory statements at the linked site.

41. The communicative force of the Internet is in large part attributed to the free flow of information it encourages. Inherently, a hyperlink is no more than a reference that identifies the location of an online resource. The hyperlink is employed in diverse settings. In a blog posting, it will typically function as no more than a typical footnote. On social networking sites such as Twitter or social bookmarking sites such as Delicious.com, individuals post hyperlinks to articles they wish to share with their friends. Often the hyperlink will form the entire context of the posting. The posting of a hyperlink in such context does not on its own signal any form of adoption or endorsement of the linked content, whether defamatory or not. The "invitation to read" standard proposed by the Appellants would severely undermine expressive activity on these platforms and the viability of the platforms themselves. Such a standard will also chill innovations of the future. Accordingly, CIPPIC submits that the publication standard for hyperlinks requires that the hyperlinker knowingly endorse and adopt the defamatory statements found in the second article.

PART IV - COSTS

42. CIPPIC does not seek costs and respectfully asks that no costs be awarded against it.

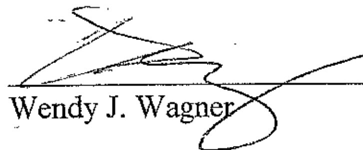
PART V - ORDER REQUESTED

43. CIPPIC respectfully requests that this appeal be dismissed.

44. CIPPIC requests the opportunity to make 15 minutes of oral argument during the hearing of this appeal.

DATE: November 15, 2010

Richard G. Dearden



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PART VI - TABLE OF AUTHORITIES

	Caselaw	Cited at paragraph
1.	*Bunt v. Tilley & Ors*, [2006] EWHC 407 (QB)	31
2.	*Byrne v. Dean*, [1937] 1 K.B. 818 (U.K. C.A.)	33
3.	*Canadian Broadcasting Corporation v. Dagenais et al.*, [1994] 3 S.C.R. 835	25
4.	*Carter v. B.C. Federation of Foster Parents Assn.* (2005), 257 D.L.R. (4th) 133 (B.C.C.A.)	35
5.	*Churchill v. State of New Jersey*, 876 A.2d 311 (N.J. Sup. Ct., 2005)	38
6.	*Grant v. Torstar Corp.*, [2009] 3 S.C.R. 640 (S.C.C.)	12
7.	*Hird v. Wood* (1894), 38 Sol. Jo. 234 (U.K. C.A.)	26, 37
8.	*Jennings v. Buchanan*, [2004] UKPC 36	36
9.	*MacFadden v. Anthony*, 117 N.Y. S.2d 520 (N.Y. S.C., 1952)	34
10.	*R. v. Mentuck*, [2001] 3 S.C.R. 442	25
11.	*Reno v. American Civil Liberties Union*, 521 U.S. 844 (U.S.S.C., 1997)	13
12.	*Salyer v. Southern Poverty Law Center*, 701 F. Supp. 2d 912 (Kent. Dist. Ct., 2009)	38
13.	*Scott v. Hull*, 259 N.E.2d 160 (Ohio Ct. .App., 3rd Circ., 1970)	29
14.	*Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, [2004] 2 S.C.R. 427	15, 32
15.	*Stanley v. Shaw and Tracey*, 2006 BCCA 467	30

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