

# KEEPING CURRENT

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## CBC liable for defaming investment advisor

By James R.G. Cook

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In June 2012, the Canadian Broadcasting Corporation (CBC) televised two news stories featuring a retired Canadian Pacific Railway employee who claimed to have lost more than half of his pension of approximately \$675,000 after he invested the proceeds in a portfolio created by an investment advisor. Articles about the investment advisor were also published on the CBC news website.

In the news stories, the railway client claimed that he agreed to an investment plan devised by the investment advisor that tore his retirement dreams to shreds. He claimed that he and his wife would be forced to sell their house and return to work to make ends meet, rather than enjoying a life of leisure in retirement.

Imagery in the news broadcasts included a headshot of the investment advisor from his online profile juxtaposed with dramatic music and the words "*Is your money safe?*", followed by the news anchor's comments "*Our top story tonight has to do with your hard-earned savings.*"

One of CBC broadcasts reported that the investment advisor recorded false information in the railway client's file, including inflated income levels, intended to justify higher-risk investments than would otherwise have been permitted by the regulatory body. It was also reported that the investment advisor was under strict supervision by the Manitoba Securities Commission and had been ordered to pay a fine for actions contrary to the public interest.

The investment advisor sued the CBC for defamation. The stories and links thereto remained active on the CBC news website after the CBC was served with a notice indicating that a defamation action was pending and remained active throughout the trial, which concluded in May of 2021.

In Canadian law, a plaintiff must prove the following elements for a claim of defamation: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words

in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff: *Grant v. Torstar Corp.*, [2009 SCC 61 \(CanLII\)](#).

At trial, the CBC agreed that the news stories referred to and identified the plaintiff and that they were communicated to a third party. At issue was the third element, namely whether the news stories lowered the plaintiff's reputation in the eyes of a reasonable person.

In a decision released in December 2021, the court ruled that the CBC news stories were defamatory: *Muzik v. Worthington*, [2021 MBQB 263](#). The court assessed the cumulative impact of all of the news stories and was satisfied that the statements were capable of imputing dishonest and deceitful conduct on the part of the investment advisor. The natural, ordinary and inferential meanings that arose from the CBC news stories were that the investment advisor was a dishonest person who was guilty of misconduct in how he handled the financial interests of his former railway client.

At trial, the CBC had relied on the defences of fair comment, justification, and public interest responsible communication. If a defamatory statement is a statement of fact capable of objective proof, then the defence of justification must be considered. On the other hand, if the defamatory statement conveys an expression of opinion then the defence of fair comment may apply: *Chopak v. Patrick*, [2020 ONSC 5431 \(CanLII\)](#), at para [41](#).

As to the defence of fair comment, the court found that the innuendo created by the words used in the news stories, when considered in their full context, implied dishonest and

deceitful conduct on the part of the investment advisor. The CBC was not merely commenting on the conduct of the investment advisor and then expressing an opinion about what he did. Rather, the news stories implied as a matter of fact that the investment advisor was the cause of the dramatic drop in the value of his railway client's investment portfolio.

The defence of justification requires a defendant to prove that the impugned statements were factually accurate and substantially true. At trial, the CBC relied on an expert opinion to argue that the investment portfolio was inherently unsuitable to meet its purported goal of offering returns substantially similar to what the railway pension would have provided to the client for the rest of his life.

The court found, however, that the critique of the portfolio devised by the investment advisor took place after he was investigated by his regulatory body, which did not make any findings that recommendations he may have made to the railway client were unsuitable or that he provided any advice or recommendations that caused the railway client to suffer a financial loss.

In addition, the court found that the CBC had omitted material facts in the news stories, which defeated the defence of justification. Amongst other things, the CBC failed to report that the railway client had made several unscheduled lump sum withdrawals, which reduced the value of the portfolio and repeatedly failed to adhere to the advice provided by the investment advisor.

Further, the CBC failed to report that it had not been provided with the lion's share of a surreptitious audio recording made by the railway client without the investment advisor's knowledge. The CBC made no effort to disclose the crucial



fact that the railway client deliberately withheld most of the surreptitious recording and the public was never informed why the CBC never challenged the railway client as to why this evidence was being withheld or whether the suppressed parts of the conversation might support the investment advisor's position. In the court's view, this amounted to malice on CBC's part.

In the court's view, the CBC news stories were not really about the financial risks of commuting a private pension, risks that investors face with their hard-earned savings, or issues with the regulation of the investment industry. Rather, the CBC stories established "a David and Goliath narrative". What was a private dispute between an investor looking for compensation and a financial advisor who denied wrongdoing, was dressed up by the CBC to look like a matter of public interest.

Based on the lack of due diligence and genuine public interest, the CBC could not avail itself of the public interest in responsible communication defence.

The investment advisor was awarded total damages against CBC of approximately \$1.6 million, consisting of general damages of \$400,000, aggravated damages of \$400,000, special damages for lost income of \$609,403, and punitive damages of \$250,000.

The court found that the cumulative effect of the CBC news stories was devastatingly defamatory to the investment advisor. The suggestion that a financial advisor is dishonest and lacks integrity in how the financial interests of a client are managed, constitutes a devastating blow to their professional reputation. The defamatory statements not only demean the advisor in the eyes of colleagues and regulatory bodies, but also the community at large. He experienced a

"calamitous drop" in his income, and aggravated and punitive damages were appropriate to sanction CBC's conduct.

The case demonstrates that the target of a sensational news broadcast based on unproven facts that is dressed up as a serious investigation may ultimately receive compensation from the courts. Unfortunately for the investment advisor, it took over eight years from the time of the television broadcasts to obtain judgment vindicating the attack on his professional reputation.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please contact [James Cook](mailto:jcook@grllp.com), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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