The Globe and Mail (Canada)
July 7, 1992 Tuesday

FIFTH COLUMN
LAW AND SOCIETY

Bryan Schwartz isn't warming to libel chill

'LIBEL chill" has been a hot topic. Some highly prominent public figures have threatened or started defamation actions. The Reichmanns launched a $100-million lawsuit against Toronto Life for a story about the family history. The magazine apologized. Allan Gotlieb started (and later withdrew) a suit against a critic of his appointment to the Canada Council. Hees International Bancorp., part of the Bronfman empire, warned a prospective publisher that a book about Hees (by The Globe and Mail's Kimberley Noble) might contain actionable passages. Whether the book will be published remains in doubt. I should also mention Conrad Black's record of threatening defamation actions; then again, maybe I shouldn't.

We need more, not less, investigation and reporting of public affairs in Canada. There are few enough incentives for attempting critical journalism: the investment of time and effort is high, the effort may not produce results, and market demand may be small.

Libel chill makes a bad situation worse. Writers and publishers may be discouraged from publishing the results of their investigations. They may not even bother attempting them. Even trying to defend against a libel suit can be emotionally and financially debilitating. Publishers are sometimes intimidated into choosing the alternative: the phony and self-abasing apology. You know the genre: "We wish to express our sublime and infinite apologies for our story, and regret any aspersion that may have been cast, directly or indirectly, on the reputation or character of Mr. Manson."

In a recent judgment, the British Columbia Court of Appeal has called for judges to reshape libel doctrine in light of the principles of free expression guaranteed in the Charter of Rights and Freedoms. There are some advantages to leaving law reform to judges; innovations can be developed and honed in real circumstances, rather than the abstract. On the other hand, reform by judges can require a very long series of lawsuits. The people involved in the litigation have to learn the new law the hard way. They have to guess about what new rule a judge will invent for the occasion. It's rather like betting heavily on professional wrestling. In the area of libel, where fear of litigation is itself a major problem, it would be better for legislatures to step in. They should pass packages of reform that are comprehensive and clear.

HERE are some of the problems under current law, and some suggestions for improvement:

Under Canadian common law, in many circumstances you can be found liable for defamation even if you made an innocent mistake. In the celebrated case of New York Times v. Sullivan, the U.S. Supreme Court said that the First Amendment requires that libel laws provide some safeguards for free speech. The court ruled that if you criticize a public figure, you can be held liable in court only if your statement is malicious - that is, a deliberate lie or made with reckless indifference to the truth. We should adopt the same approach to public debate in Canada.

Currently, the burden of proof is on the person being sued to show that defamatory statements are true. The ordinary rule in civil cases is that the person suing must prove that a wrong has been committed, and it should apply to the "truth" issue in all defamation cases.

In awarding damages, judges and juries should have the authority only to compensate the injured party, rather than punishing the writer or publisher. Judges should have the authority to rein in jury awards that are excessive.

Courts should be authorized to order new kinds of remedies. These would be designed to help out the injured party without bankrupting or intimidating the defendant. For example, courts should be able to order a newspaper to give an injured party ample space to publish a reply, or to print the court's own finding that the newspaper has been unfair. But courts should not be authorized to order retractions or apologies. It would be oppressive to order someone to make abject statements they do not believe.

Non-malicious defamation cases should be directed to less expensive and less formal forums. The law could encourage newspaper, magazine and book publishers to set up complaint mechanisms. The government would say that if people wounded by a story have access to an adequate complaint process, they would not be able to go to court. "Adequate" would be defined as including a guarantee that a dissatisfied complainant can ultimately have recourse to speedy, inexpensive and impartial arbitration.

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