THE LAW
AND
THE MEDIA
IN CANADA

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To my family

PREFACE

I decided to undertake the challenge of writing a book for the media both because of my interest in this area of the law and because of my many friends who are involved with the media. I often heard the complaint that there was no book they could read to become better informed about the legal issues that affected them. I hope this book will assist all of those involved in the media world to make the legal system more comprehensible to them. I know this study has taught me a number of interesting facts about the work of journalists, producers and those who work with the electronic media.

I would like to thank the Canadian Law Information Council for their financial grant and their continued support of this book. The Council has been very active in supporting projects that bring the law in an understandable form to non-lawyers in Canada.

Several research assistants worked with me on this project. I would especially like to mention Michael Lynk from Dalhousie and Robert Giesbrecht from the University of Manitoba. Without their dedication and excellent research this project may never have been completed. Also, to all those journalists, editors, broadcasters and producers who offered valuable comments on the legal problems which were of concern to them, I extend my thanks. It is this sharing information which makes a book worthwhile.

To my typist and good friend Carole Morey I give my thanks. Not only did she type my manuscript, but she also provided excellent editorial comments on the substance of the book. I would also like to thank all my colleagues, friends and family who supported me through this endeavour.

Halifax, 1981

Clare Beckton

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CONTENTS

Preface v

Some Further Readings xi

Chapter 1 AN INTRODUCTION TO THE LEGAL SYSTEM 1

Definitions 1
Systems of Law 2
The Common Law 2
The Civil Law — Quebec 5
Other Sources of Law 6
The Canadian Constitution 7
Division of Power 9
Court Structure and Functions 12
Court Structure 13
Criminal Court Hierarchy 14
Civil Courts 16
Criminal Trials 18
Civil Trials 21
Conclusion 22

Chapter 2 DEFAMATION 23

Introduction 23
Definitions 23
Elements of a Defamation Action 26
The Words Must Be Defamatory 26
The Words Must Refer to the Plaintiff 28
The Defamation Must Be Published 29
Defences 30
Absolute Privilege 31
Qualified Privilege 34
Statements in Furtherance of an Interest 36
Malice 37
Fair Comment 39
Elements of the Defence of Fair Comment 40
The Comment 40
True Facts 42
The Public Interest Requirement 43
Conclusion 44
Justification 45
Consent 47
Apology 48

Chapter 2 DEFAMATION (Continued)

Damages 49
Criminal Libel 50
Seditious Libel 51
Blasphemous Libel 53
Defamatory Libel 55
Defences 56

Chapter 3 JOURNALIST PRIVILEGE 59
Introduction 59
The Common Law Position 60
The Canadian Position 62
The United States Position 63
Conclusion 65

Chapter 4 CONTEMPT 67
Free Press — Fair Trial 67
Introduction and History 67
Fair Trial 68
The Approaches to Guaranteeing a Fair Trial 70
Great Britain 70
The American Approach 71
Press in Canada 79
Contempt of Court 79
Types of Contempt 81
Criminal Contempt 82
Contempt in the Face of the Court 82
Contempt Ex Facie 85
Publications While a Proceeding is Instrumental or Pending 86
Publication Prior to Trial 86
Publication During the Trial 89
Publication After a Trial 93
Obstruction of Justice either by Publication or by Action 94
Scandalizing The Court 96
Civil Contempt 100
Responsibility for Contempt 101
Conclusion 102

Chapter 5 COPYRIGHT 103
Introduction 103
Application of the Copyright Act 104
Elements of Copyright 106
Literary Works 106
Dramatic Works 107
Musical Works 107
Artistic Works 108
Nature of Copyright 109
Infringement of Copyright 111
Other Remedies 115
Photocopying 116
Special Concern of Journalists 117

Chapter 6 PRIVACY AND FREEDOM OF INFORMATION 119
Privacy 119
The Law of Privacy 120
Trespass 121
Wire-Tap 121
Misappropriation 122
Breach of Confidence 123
Privacy Acts 124
New Developments 127
The United States Position 128
Freedom of Information 129
The Canadian System 129
Other Systems 133
New Canadian Legislation 135
Conclusion 140

Chapter 7 OBSCENITY 141
Introduction 141
The Subject Matter and the Harm Feared 143
The Canadian Law 146
The Criminal Code Provisions 147
The Meaning or Elements of s. 159 149
Community Standards 152
Other Criminal Code Provisions 154
Other Obscenity Laws 154
Customs 155
Radio and Television 156
Provincial Statutes 156
Conclusion 158

1

AN INTRODUCTION TO THE LEGAL SYSTEM

The term "defamation" should be very familiar to those who work in the communications industry. Will the cartoon, which seemed so amusing to its creator, turn out to be very expensive when the subject of the cartoon argues that it defames him? What about a statement made by the newspaper concerning the president of a local corporation charged with a criminal offence? The author, the editor and the publisher could find themselves subject to a libel suit or they may be cited for contempt.

These are some of the issues that will be considered throughout the book. Before a discussion of these specific areas of the law, it will be useful to outline the significant features of our legal system, its operation and the principal actors in it.

DEFINITIONS

There are several crucial terms that are used in describing fundamental aspects of our Canadian Legal System. The first two are "common law" and "civil law". Canada is, with the exception of the province of Quebec, a common law state, one of a group of countries which have adopted the common law as it developed in Great Britain. The province of Quebec operates under a system of civil law with respect to its private law concerns. The distinction between the two systems is based upon their origins and their methods of approaching problems. Common law originated in Great Britain and is a mixture of Saxon and Norman law with new developments. On the other hand, civil law evolved in other European countries such as France and is premised upon the early Roman Law. In approach, common law basically begins with individual cases and derives general principles and then proceeds to apply them to individual cases. After the remainder of the significant terms are defined, the developments and approaches of these systems will be discussed in more detail.

A second important distinction is that between private and public law. Private law concerns the legal relations between individuals or corporations and includes matters such as property dealings, contractual arrangements and actions in libel. Public law, on the other hand, involves the rela-

tionship between governments and individuals and includes such areas as criminal law, constitutional law and government administration. These are matters that concern the country as a whole and are not restricted to disputes between individuals.

The final distinction at this point is that between criminal and civil law (which is not to be confused with the civil system). Criminal law can be defined in many ways but it is essentially a prohibition coupled with a penalty. The government determines what actions will be harmful to society and prohibits these under penalty of fine or imprisonment. In Canada much of our criminal law has been embodied in the Criminal Code, although there are also quasi-criminal offences created by Provincial statutes such as Motor Vehicle Act offences and Liquor Act offences. Since these are all instances in which the state is taking action against an individual, criminal law is also public law. Civil law deals with private law disputes or disputes of a non-criminal nature. Civil actions in the courts are pursued to settle all manner of disputes such as personal injuries, contracts, divorce or defamation.

SYSTEMS OF LAW

The Common Law

The common law system is shared by a number of other countries which were originally colonized or settled by Great Britain. When the British colonial influence was withdrawn the common law remained. In addition to Canada, some of the countries which share this system are the United States, Australia, Hong Kong and New Zealand. In these countries although the basic law may share similarities many differences have evolved following the time each acquired the common law.

The common law began its evolution in Great Britain soon after the Norman Conquest of 1066. One of the early Norman Monarchs, King Henry II, is generally regarded as the founding father of the common law. When he acquired the throne, Henry was also faced with the task of trying to meld the existing Saxon law, derived from the German legal systems of Northern Europe, with the Norman law which relied heavily upon the law of the then defunct Roman Empire. The union was at first an uneasy one and was not completed in Henry's day. The evolution of the common law continued over the centuries and in fact is still continuing today.

Henry II did, however, succeed in establishing one of the fundamental institutions of the common law — the judiciary. In Henry's time, as now, the judge played an indispensable role in both the creation and the admini-

stration of the law. Unlike judges in other European legal systems, who were given a set of broad principles to be applied in every situation, the British judge was mandated to examine each particular case to ensure that justice was done. To be sure, there were some basic principles that had general application but these were guidelines rather than rules. The judge was to ask himself: "On the facts of this case, and having regard to the general principles of justice, what is the most equitable solution to the problem?" Often, as the answer to this query would be difficult, the judiciary began to look back at what other judges had decided in similar factual situations. If the cases resembled one another sufficiently, the trial judge could simply follow the principles applied in the earlier case. This practice became known as following precedent. From this analysis of previously decided cases, a set of rules or general principles was developed in the various areas of law which judges and lawyers could use to assist them in resolving a given dispute.

The informal practice of looking back at previous cases developed eventually to the point where the progress became obligatory. Parallel to this was the evolution of a hierarchy of courts. If unsatisfied with the outcome of a trial, a litigant could seek review of the judgment in a higher court. The process of appeal could potentially continue until the highest or final appeal court in the land had reached its decision. This hierarchy will be | discussed more fully later.

As the court structures became more formal and rigid, the application of precedent became more organized. If the court hearing the matter, or a higher court, had decided an earlier case on the same legal point as the one at hand, the trial court was bound by that decision. Thus arose the doctrine of *stare decisis* which essentially requires a court to abide by previously decided cases. More particularly, the doctrine binds the court which made the decision as well as the courts lower in the hierarchy than itself. These decisions will stand unless the court which rendered it later changes its position or a higher court holds that the case was wrongly decided.

The strict application of the doctrine of *stare decisis* is limited to courts within the same hierarchy. Thus a Canadian court is not forced to follow the precedent of an American or British court. However, if there are no decisions of a higher level Canadian court on a particular issue, precedents from other common law countries are helpful and at times persuasive. In particular, the Canadian courts often look to decisions of the British House of Lords, the highest court in Great Britain, when there is no law in Canada on that issue. American Supreme Court decisions are