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Canadian v. American Defamation Law: What Can We Learn From Hyperlinks?

By Mitchell Drucker

Introduction

The United States and Canada, both former British colonies, inherited the common law from their colonial forbears. The evolution of that law in the respective judicial systems of these North American neighbors has produced two systems that in some ways are quite similar and in other ways are quite different. The law of defamation is one area where the differences between the current jurisprudence of the two countries are particularly pronounced. Generally, Canadian courts are known to be quite plaintiff-friendly in defamation cases, whereas American legislators have made a concerted effort to ensure that U.S. courts' more defendant-friendly laws are not thwarted by other countries. However, through a series

2. See, e.g., id. (discussing the countries' different approaches to judicial decisionmaking); David Fraser and Alan Freeman, What's Hockey Got To Do With It, Anyway? Comparative Canadian-American Perspectives on Constitutional Law and Rights, 36 BUFF. L. REV. 259 (1987) (examining the "political, cultural and ideological differences" behind the two countries' constitutional systems).
3. See e.g., Charles Tingley, Reputation, Freedom of Expression and the Tort of Defamation in the United States and Canada: A Deceptive Polarity, 37 ALTA. L. REV. 620, 622 (1999) ("the Supreme Court of Canada has explicitly refused to follow the American lead in the libel context.")
4. See e.g., Dan Burnett, Canada should reform its antiquated libel laws, LAWYERS WKLY., Oct. 27, 2006, 12-13 (claiming that Canadian "libel laws are the least protective of free speech in the English-speaking world"); Dean Jobb, Responsible Communication on Matters of Public Interest: A New Defense Updates Canada's Defamation Laws, 3 J. INT'L MEDIA & ENT. L. 195, 198 (2010-2011) ("This feature of Canada's libel laws—a low threshold for establishing defamation, coupled with shifting the burden from the accuser to the defendant—has been criticized as making Canada’s libel laws, like Britain’s, too plaintiff-friendly.")
5. See U.S. Legislation Blocks Enforcement of "Libel Tourism" Judgments, 104 AM. J. INT'L L. 681 (2010). For a more comprehensive discussion of these U.S. legislative efforts, culminating in the SPEECH Act of 2010, see Marissa Gemy, The SPEECH Act Defends the First Amendment: A Visible and Targeted Response to Libel Tourism, 36 SETON HALL LEGIS. J. 409, 432-43 (2011). However, it has also been argued that these efforts were an overreaction because the practical application of
of decisions in the past five years, the Supreme Court of Canada (SCC) has drastically altered Canada’s defamation jurisprudence to give defendants some new defences. Nevertheless, the fundamentals of defamation law in the U.S. and Canada remain quite different; in fact, one of those recent SCC decisions characterized U.S. defamation law as an “extreme[]” among the laws of western countries, and envisioned Canada’s path as avoiding that extreme by pursuing a “middle road.”

In both countries, traditional defamation law has been forced to adapt to the advent of the internet and the proliferation of online communications. This note will explore one particular aspect of the two countries’ internet defamation jurisprudence that, on first glance, appears to be a close similarity. Specifically, the treatment of hyperlinks in the defamation context in Canada and the U.S. in two recent cases appeared to be identical: courts in both countries refused to hold a defendant liable for publishing a hyperlink to defamatory content on a website. However, a comparative analysis of the two opinions illustrates that the SCC’s use of American precedents in reaching its decision actually symbolizes the wide divergence between the two countries on the legal treatment of republication.

This note will first provide, in turn, overviews of both American and Canadian defamation law and will highlight their traditionally different approaches to the issue of republication. In the U.S., defamation defendants in the majority of jurisdictions have been protected by the “single publication rule,” whereas Canadian defendants are subjected to the, albeit somewhat limited, “multiple publication rule.”


publication rule." Subsequently, this note will examine recent cases that have emerged from both countries in which the use of hyperlinks is considered in the context of defamation suits. In the U.S., the Third Circuit Court of Appeals recently addressed the issue in In Re: Philadelphia Newspapers, LLC,11 (hereinafter Newspapers) while the Supreme Court of Canada tackled it head on in Crookes v. Newton.12 Both courts rejected the notion that the sole act of hyperlinking to defamatory content constituted the publication or republication of defamatory content. The Third Circuit explicitly justified its holding as the simple application of the single publication rule to the online world, and the SCC relied on American cases to hold that hyperlinks do not constitute republication of defamatory material. However, this note will argue that the way in which the SCC’s opinion in Crookes utilized American jurisprudence actually emphasizes the difference between the American single publication rule and the Canadian adherence to the multiple publication rule.

I. The Current State of Defamation Law and How We Got There

This section will provide overviews of defamation law in both the U.S. and Canada by briefly discussing defamation’s historical development and the key decisions that have shaped its modern form. While a full discussion of each nation’s defamation jurisprudence is beyond the scope of this note, this section’s purpose is to discuss the general contours of defamation law in each country with a focus on how courts in each country treat the issue of republication.

A. American Defamation Law

The current shape of defamation law in the U.S. owes its form to a series of now famous Supreme Court opinions that began with New York Times v. Sullivan13 that collectively defines the constitutional standards for defamation. However, prior to Sullivan, defamation jurisprudence in the U.S. had been shaped solely by the common law and legislative enactments; it had not yet been impacted by the First Amendment.14 In fact, in 1909 the United States Supreme Court

11. 690 F.3d 161 (3d Cir. 2012).
refused to impose First Amendment restrictions on defamation when it upheld the common law rule of strict liability for libel suits, and it reaffirmed that refusal four more times before Sullivan. Moreover, U.S. defamation law prior to 1964 differed from state to state. Most states operated under the principle of strict liability, with each state then supplying its own variations. Courts generally presumed that any defamatory statements were false, placing the burden on the defendant to prove their truth as a defense.

In 1964, the Supreme Court’s landmark decision in Sullivan constitutionalized the law of defamation, drastically altering the American libel law, American libel law was, in essence, identical to the English common law of libel.

See Peck v. Tribune, 214 U.S. 185, 189 (1909). In reaching its opinion, the Court explicitly referred to the work of prominent British judge Lord Mansfield:

As was said of such matters by Lord Mansfield, ‘Whenever a man publishes, he publishes at his peril.’ The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else.

See Goodale, supra note 14, at 526 (“the Court repeatedly noted in dictum that the Constitution offered no protection to libel defendants.”). In making that claim, Goodale is referring to Near v. Minnesota, 283 U.S. 697, 715; Pennekamp v. Florida, 328 U.S. 331, 348-49 (1946); Chapinsky v. New Hampshire, 315 U.S. 568, 572 (1942); and Times Film Corp. v. City of Chicago, 365 U.S. 43, 48 (1961).


Sack on Defamation §1:2.1 (2012).

Id. at §1:7.

See Goodale, supra note 14, at 525. Goodale explains fair comment as meaning that publishers “were free to print defamatory opinions about matters of ‘public interest’ and ‘public concern’ so long as those opinions did not make or imply any false assertions of fact.” Id.; see also SACK ON DEFAMATION §4:4.

See Sullivan, 376 U.S. 254, 269 (1964) (“libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.”).
landscape of the country's defamation jurisprudence. The *Sullivan* Court held that:

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The Court justified its holding by noting that the protection of the all-important democratic principle of free expression necessitates the allowance of "unpleasantly sharp attacks on government and public officials." The actual malice standard requires defamation plaintiffs to show that the defendant subjectively knew or had significant doubt that the published statements were false. Absent that showing, a defamation plaintiff cannot recover. A decade after *Sullivan*, the Court in *Gertz v. Robert Welch, Inc.* clarified that the actual malice standard applies when the plaintiff is a public official or a public figure, but does not apply when the plaintiff is a private figure. To recover actual damages, private figure plaintiffs need only show some level of fault to be determined by the individual states. However, *Gertz* also established that, regardless of the plaintiff's status, "the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." Therefore, to receive the more lucrative awards that presumed or punitive damages could provide, even private plaintiffs need to show actual malice. In practice, it

22. See Eaton, supra note 17, at 1367-69.
24. *Id.* at 270.
25. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (holding that to find actual malice "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.").
27. As established in *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).
29. *Id.* at 347 (holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").
30. *Id.* at 349.
seems that after Sullivan and Gertz, the vast majority of defamation plaintiffs, regardless of private/public status, are faced with the burden of proving actual malice.\(^{31}\)

Since Sullivan and Gertz, most U.S. defamation jurisprudence has emerged from state courts and lower federal courts,\(^{32}\) with the Supreme Court reaffirming the vitality of Sullivan in 1988 by applying its actual malice standard to public figures’ claims of intentional infliction of emotional distress.\(^{33}\) However, the precise contours of each state’s defamation laws vary above the constitutional floor set by the Supreme Court’s jurisprudence. Generally, a defamation action must contain five elements: (1) false statements of fact, (2) of and concerning a person, (3) that are printed, broadcast, spoken or otherwise published, (4) that are defamatory, and (5) made with some degree of fault.\(^{34}\)

### B. Canadian Defamation Law

Defamation law in Canada is very similar to the status of American defamation law prior to the shift that started with Sullivan in 1964. When the SCC finally had occasion, in 1995, to address the constitutionality of Canadian defamation law,\(^{35}\) it acknowledged that historical vintage by recognizing that “[t]he character of the law relating to libel and slander in the 20th century is essentially the product of its historical development up to the 17th century.”\(^{36}\) In its opinion in that case, Hill v. Church of Scientology of Toronto,\(^{37}\) the

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32. See SACK ON DEFAMATION §1:2.6.
33. See Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988). The Falwell Court “conclude[d] that public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with ‘actual malice.’” The Falwell decision solidified Sullivan by ensuring that the Court “would not permit states to avoid constitutional safeguards by inventing new torts or by calling old ones (libel, slander, or invasion of privacy) by new names, such as ‘intentional infliction of emotional harm’ or ‘outrage.’” SACK ON DEFAMATION §1:2.8.
34. Restatement (Second) of Torts § 558. The Restatement formulates the number of elements in a slightly different way, but these elements are nevertheless all present in the Restatement’s version.
35. See Alderson, *supra* note 14, at 414 (writing, in 1993, that no SCC case had yet presented the issue of defamation’s constitutionality).
37. *Id.*
Court was forced to contemplate the appropriate course for the judiciary in cases between private litigants that challenge the common law as violating the *Canadian Charter of Rights and Freedoms* [hereinafter *Charter*]. The Court found that in such cases where no governmental action was involved, then only *Charter* values, as opposed to *Charter* rights, were at stake. The *Hill* Court ruled that if a court finds that a challenged element of the common law is inconsistent with *Charter* values, then it could be appropriate to incrementally reform the common law by judicial decree.

With that framework for *Charter* analysis set out, the Court then proceeded to examine the common law of defamation in light of the *Charter* values that it implicates. The Court explained that defamation cases inevitably force the balancing of the values of reputation and freedom of expression. The value of free expression is explicitly enshrined in Section 2(b) of the *Charter*, and the Court explained that “[a]lthough it is not mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights.”

In considering whether the state of the common law at that point struck an appropriate balance between those values, the Court rejected the actual malice standard adopted by the U.S. in *Sullivan* by citing to a litany of American academic articles and judicial opinions that criticized the consequences and underlying rationale of that standard. Thus, Justice Cory, writing for the Court, went on to

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38. *Id.* at 94-95.
39. *Id.* at 95-99.
40. *Id.* at para. 100.
41. The complete text of s.2 of the *Charter* is as follows:

Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

42. *Hill*, [1995] 2 S.C.R. 1130, para. 120 (Can.). For a criticism of the *Hill* opinion based in part on the grounds that the Court seemed to value reputational interests more than expressive freedom despite the explicit mention of freedom of expression in the *Charter* and the absence of an explicit mention of reputation, see Cameron, *supra* note 6, at 137-40.
43. *Id.* at para. 137 (“I can see no reason for adopting the [actual malice standard] in Canada in an action between private litigants.”)
44. *Id.* at para. 127-31. The court also cited international courts and academic pieces that criticized *Sullivan*. *Id.* at para. 133-36. However, scholars have pointed out that the Court failed to consider the fact that while the American articles disapproved of *Sullivan* for various reasons,
hold that "the common law of defamation complies with the underlying values of the Charter and there is no need to amend or alter it." Following Hill, the status quo in Canadian defamation law remained intact: the plaintiff’s showing "that the words complained of are: (i) capable of being defamatory; (ii) were published and (iii) refer to the plaintiff" comes with a presumption of falsity and damages. The defendant then carried the burden of proving truth, fair comment, or privilege to escape liability. While the Hill court reached its decision satisfied that it appropriately balanced the two values at stake, commentators have skewered the Court for elevating reputational interests over the freedom of expression.

In 2008, the SCC in WIC Radio Ltd. v. Simpson updated Canada’s common law fair comment defence by expanding it to include statements of opinion made not just with an honest belief, but also any opinion that could possibly be honestly held by any person. As such, the Court moved the defence from a limited subjective standard to a more expansive objective standard. In doing so, the

none of the articles advocated a return to the pre-Sullivan common law standard. See June Ross, The Common Law of Defamation Fails to Enter the Age of the Charter, 35 ALTA. L. REV. 117, 133-34. See also Denis W. Boivin, Accommodating Freedom of Expression and Reputation in the Common Law of Defamation, 22 QUEEN'S L.J. 229, 247 (1996-97) (noting the apparent oversight in Hill’s criticism of Sullivan to consider alternative reforms to the common law other than actual malice).

47. At the time, these were the only defences available. But, as will be explained in the remainder of this section, the SCC has since added more defences to the toolkit of defamation defendants.
48. Hill, [1995] 2 S.C.R. 1130, para. 121 (writing that the values of reputation and free expression are "equally important" and "must be carefully balanced").
49. See, e.g., Cameron, supra note 6, at 138 (2010) (arguing that Justice Cory in Hill "marginalized the expressive activity at stake and enhanced the status of reputation in the process"); Ross supra note 44, at 133 (claiming that "[t]he minimal value attributed to expression in Hill was contrasted with the great value accorded to reputation").
50. [2008] 2 S.C.R. 420 (Can.).
51. See Cameron, supra note 6, at 141 (explaining that prior to WIC Radio, newspaper defendants were forced to either adopt every opinion in a letter to the editor that it published, or not publish the letter at all).
52. WIC Radio, [2008] 2 S.C.R. 420, para. 28 (Can.).
53. Cameron, supra note 6, at 142.
Court again noted that it must balance the individual’s reputation interest and the freedom of expression without establishing a “‘hierarchy’ of rights.”\(^{54}\) However, this time, by expanding the defence, the Court struck a balance slightly in favour of defamation defendants. Importantly, the Court did not shift the burden of proof in defamation cases, as the defendant still faces the presumption of falsity and the requirement to prove the fair comment defence.\(^{55}\)

One year later, in the companion cases of *Grant v. Torstar Corp.*\(^{56}\) and *Quan v. Cusson,*\(^{57}\) the SCC further enlarged the toolkit of defences available to defamation defendants by adopting the defence of “responsible communications on matters of public interest.”\(^{58}\) To successfully invoke this defence, the defendant must prove that (1) the publication pertained to a matter of public interest;\(^{59}\) and (2) the publisher followed a course of responsible communication.\(^{60}\) Noting that “sometimes the public interest requires that untrue statements should be granted immunity,”\(^{61}\) the Court recognized the shortcomings of its post-*Hill* jurisprudence\(^{62}\) and sought to correct

\(^{54}\) *WIC Radio*, [2008] 2 S.C.R. 420, para. 2 (Can.).

\(^{55}\) *WIC Radio*, [2008] 2 S.C.R. 420, para. 28 (Can.).

\(^{56}\) [2009] 3 S.C.R. 640 (Can.).

\(^{57}\) [2009] 3 S.C.R. 712 (Can.).

\(^{58}\) *Grant*, [2009] 3 S.C.R. 640, para. 7 (Can.). The defence is based on the “responsible journalism” defence adopted in the United Kingdom in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, but the SCC noted that since the defence is available not just to journalists, but to all publishers on matters related to the public interest, it is more appropriate to call it “responsible communication on matters of public interest.” See *Grant*, [2009] 3 S.C.R. 640, para. 96-97.

\(^{59}\) *Id.* at para. 126. The Court opted for a broad definition of public interest, writing that the “[p]ublic interest is not confined to publications on government and political matters[.] . . . The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion and morality. The democratic interest in such wideranging public debate must be reflected in the jurisprudence.” See *id.* at para. 106.

\(^{60}\) *Id.* at para. 126. The Court provided a list of eight factors to be considered when determining whether the publisher acted responsibly, one of which is the open-ended factor of “any other relevant circumstances.” See *id.*

\(^{61}\) *Id.* at para. 55 (explaining that this requirement can be justified both by “the importance of robust debate on matters of public interest” or by “the importance of discussion and disclosure as a means of getting at the truth.”).

\(^{62}\) *Id.* at para. 57 (acknowledging that “[i]t is simply beyond debate that the limited defences available to press-related defendants may have the effect of inhibiting political discourse and debate on matters of public
that without compromising the ability of plaintiffs to recover from irresponsible publishers.

In the wake of this decision, the lawyers for the media defendant in Cusson exclaimed that the establishment of the public interest in responsible communication defence constitutes "a major advancement for the freedom of speech in Canada." 63 However, it remains to be seen whether this recent shift in the jurisprudence will yield significant benefit to future defamation defendants. 64 Even if the new defence proves to be a boon to defendants, the strict liability nature of defamation in Canada remains heavily plaintiff-friendly when compared to the fault requirement of the U.S.

C. America's Single Publication Rule v. Canada's Multiple Publication Rule

Applied on their face, the five elements of defamation law in the U.S. could render a defendant that published multiple editions of the same publication (e.g. the publisher of a magazine with a circulation of 500,000), liable to a plaintiff for a cause of action stemming from each published copy. To prevent this unwieldy and undesirable result, 65 most U.S. jurisdictions adhere to the single publication rule, which establishes that "[a]ny one edition of a book or newspaper, or any one radio or television broadcast, exhibition of a motion picture or similar aggregate communication is a single publication." 66 The

importance, and impeding the cut and thrust of discussion necessary to discovery of the truth.").

63. Dearden & Wagner, supra note 46, at 373. Dearden went even further in an interview with the media by saying that had the SCC not taken the steps it did in Grant and Cusson, then Canada's defamation jurisprudence would still be "in the Dark ages." P. McGrath, Canada's Supreme Court establishes new libel defence, THE NATIONAL POST, Dec. 23, 2009.

64. See Cameron, supra note 6, at 148 (arguing that the responsible communication defence does not go far enough because its second step is designed to "make it as difficult as possible for [the defence] to prevail.").

65. See Rinaldi v. Viking Penguin, Inc. 422 N.Y.S.2d 552, 555, judgment modified 73 A.D.2d 43 (1980), order affirmed 420 N.E.2d 377 (1981) ("The purpose of the rule is to prevent a multiplicity of unnecessarily vexatious suits against a publisher, especially after a [publication] has left the possession of the publisher, has been placed in the stream of commerce and is exclusively under control of wholesale distributors and retail outlets.").

66. Restatement (Second) of Torts § 577A. A similar definition of the rule can be found in Note, The Single Publication Rule and Online Copyright: Tensions Between Broadcast, Licensing, and Defamation Law, 123 HARV. L. REV. 1315, 1317 (2010) [hereinafter Tensions] (quoting Van Buskirk v. N.Y. Times Co., 325 F.3d 87, 89 (2d Cir. 2003)) ("The rule provides that 'the publication of a single defamatory
statute of limitations for the defamation cause of action, which is most commonly one year, begins to run at that time of publication. The statute of limitations will start over if republication occurs either (a) to a new group (e.g. in the morning edition of a newspaper and then again in the evening edition); or (b) to the same group but with substantial modification to the content (e.g. revised second edition of a book). In this fashion, the rule protects defendants from the nuisances and complexities of multiple causes of action, but still affords plaintiffs the ability to seek recovery for harm caused.

Though the single publication rule was first developed in the context of traditional print publications, it has since been applied to progressively new mediums of expression, including the internet. For instance, courts in jurisdictions with the single publication rule have routinely held that the continued presence of an article online does not cause an endless retriggering of the statute of limitations until the article is taken down. Rather, the statute of limitations begins to run from the date that the article is first published online. Similarly, just as there was no new publication each time a purchaser bought a copy of a book from a bookstore, there is no new publication each time an online visitor accesses a webpage. As such, U.S. courts seem

item, such as a book or article, even if sold in multiple copies, and in numerous places, at various times, gives rise to 'only one cause of action which arises when the finished product is released by the publisher for sale.' See Tensions at 89 n.8, for a list of other cases that have applied the similar or identical rule. It is important to note, however, that though the multiple issues are treated as one publication for the sake of the plaintiff's cause of action, the plaintiff can recover damages in that cause of action resulting from all audiences that the communication has reached or will reach in the future. See Restatement of Torts §577A Comment on Subsection (4).

67. Tensions, supra note 66, at 1317.
71. See, e.g., Mitan, 243 F.Supp.2d at 724.
72. See, e.g., Nationwide, 512 F.3d at 145. The court here explicitly analogized access to a webpage to a store’s maintenance of a stock of books:

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to be transplanting the protections offered by the single publication rule into the online world.

In addition to the previously discussed aspects of Canadian defamation law that make it more plaintiff-friendly than American jurisprudence, Canada rejects the single publication rule in favour of the multiple publication rule. In Canada, "each sale or delivery of a single copy of a newspaper, magazine or book was a separate publication for which the injured plaintiff had a distinct cause of action." That version of the multiple publication rule was amended slightly by the SCC in *Thomson v. Lambert* where the Court established that because "[t]here can be a potential injustice if a plaintiff is allowed to mount a series of lawsuits based upon a single article, [] the courts have the power using their abuse of process jurisdiction to deal with such a course of action." As such, Canadian courts do restrict the ability of plaintiffs to pursue multiple causes of action against the same defendant based on the same publication.

However, the divergence between Canadian and American courts on this issue manifests itself in the running of the statute of limitations: in the U.S., the cause of action accrues from the time of initial "publication," whereas in Canada, the statute of limitations is refreshed with each new "publication." Thus, Canadian defamation

When a publisher continues to make an allegedly defamatory book available from its stock, courts have held that action does not constitute republication, even though the publisher could have withdrawn the book. Likewise, the continued availability of an article on a website should not result in republication, despite the website's ability to remove it.

73. See J.-G. Castel, *Multistate Defamation: Should the Place of Publication Rule Be Abandoned for Jurisdiction and Choice of Law Purposes*, 28 OSGOODE HALL L.J. 153, 164 n.36 (noting that "[m]any states have adopted a single publication rule in the United States. In Canada this is not the case ... "); see also Brown, *supra* note 10, at 7.12(6)(b) 7-158 - 7-163 (describing and exploring the single publication rule as the American rule that does not apply in Canadian courts).

74. Brown, *supra* note 10, at 7.12(6)(a) (citing Lambert v. Roberts Drug Stores Ltd. (1933) 41 Man. R. 322 (C.A.)). This rule is quite similar to the Canadian rule on repetition: "[e]very repetition of a defamatory statement is a new publication, for which a separate cause of action will lie, even if the defendant is merely repeating or referring to what he or she had said before." Brown, *supra* note 10, at 7.7.

75. [1938] S.C.R. 253 (Can.).


78. In this context, "publication" could be, *inter alia*, the sale of a book, newspaper, or magazine, the broadcasting of a television or radio program, or potentially a visit to a website.
plaintiffs will often have a significantly greater time within which they can recover, whereas American defamation plaintiffs that remain idle for too long will often be left with nothing. In *Carter v. B.C. Fed'n of Foster Parents Ass'n*, the British Columbia Court of Appeals explicitly contemplated the adoption of the single publication rule. The court explained that while Canadian courts have not usually decided directly on the single publication issue, the “clear tendency of the authorities . . . is in favour of the English and Australian position and not in favour of the American position.” Noting that the question of whether to judicially invoke the single publication rule has “a considerable element of policy inherent in it,” the court declined to follow the American rule absent direction from the legislature, thereby affording Canadian defamation plaintiffs the luxury of the perpetual restarting of the statute of limitations.

**II. Hyperlinks: A Newfound Convergence?**

With an understanding of the fundamental differences between American and Canadian defamation law, the proper framework is now in place within which it is possible to appreciate the novelty of the seemingly identical treatment given to hyperlinks in two recent defamation cases. This section will examine each of those cases with the aim of comprehending how the same general result was reached in these two countries with significantly different defamation jurisprudence.

*A. Hyperlinks in the U.S.: In Re: Philadelphia Newspapers*

The defamation claim in the case of *In Re: Philadelphia Newspapers* arose out of the bankruptcy proceedings of a corporate

80. *Id.* at para. 18. The court’s refusal to adopt the single publication rule here was supported by the SCC’s 2012 ruling in *Breeden v. Black*, 2012 SCC 19, (Can.) in which the court, when ruling on a jurisdictional issue, held that republication occurred each time online content was accessed. *Breeden*, 2012 SCC 19 at para. 20.
82. *Id.* Explaining his reasoning, J. Hall wrote for the Court:

> Although, for the reasons noted by the trial judge, legislatures may have to come to grips with publication issues thrown up by the new development of widespread internet publication, to date the issue has not been legislatively addressed and in default of that, I do not consider that it would be appropriate for this Court to adopt the American rule over the rule that seems to be generally accepted throughout the Commonwealth.

group that includes *The Philadelphia Inquirer* newspaper. A charter school group, known as CSMI, filed a tort action as an administrative expense claim against the newspaper company. CSMI alleged that the Inquirer defamed its school group by maintaining a webpage, known as the Charter Page, which contained hyperlinks to allegedly defamatory articles the Inquirer had written about the schools. At issue in this case was whether a post-petition editorial released online by the Inquirer that endorsed the articles and linked to the Charter Page “republished” the allegedly defamatory content that had initially been published pre-petition.

In order for an administrative expense tort claim to be viable, it must be based on post-petition conduct. As such, the mere existence of the pre-petition content would not suffice to support a claim. However, if the hyperlink was found to have republished the article, then the conduct occurred post-petition and the defamation action could stand. Conversely, if the hyperlink did not constitute republication, then the conduct occurred pre-petition and the defamation action would be barred.

While this defamation action arose in the context of a bankruptcy proceeding, the elements of a traditional defamation claim still applied. As such, the Third Circuit framed the question of publication pre- or post-petition as a more familiar issue: was the cause of action prohibited because it was based on conduct that occurred at a time from which the statute of limitations has since expired (pre-petition); or was it allowed because it was based on conduct from which the statute of limitations had not yet expired (post-petition). Thus, the court turned to traditional U.S. rules on publication to determine whether the hyperlink was republished post-petition. The court noted that Pennsylvania follows the “single publication rule,” which proffers that “it is the original printing of the defamatory material and not the circulation of it which results in a cause of action.” However, at the time of this federal appellate

84. Id. at 165.

85. Id. at 172-73. Section 503 of the Bankruptcy code allows for and governs administrative expense claims. The United States Supreme Court in Reading Co. v. Brown, 391 U.S. 471 (1968), established that tort claims are allowable administrative expense claims. See Newspapers, 690 F.3d at 173.

86. Newspapers, 690 F.3d at 165.

87. Id. at 165-66.

88. Id. at 173.

89. See id. at 173-74.

90. Id. at 174.

91. Id. (quoting Graham v. Today’s Spirit, 468 A.2d 454, 457 (Pa. 1983)).
decision, Pennsylvania state courts had not yet had occasion to decide "whether the single publication rule applies to Internet publication."92

Therefore, this court's task was to predict whether Pennsylvania courts would apply the single publication rule in the context of internet publications. The court began its inquiry by noting that other courts to consider the question have applied the single publication rule to internet publications.93 Following those other courts and explaining that it saw no reason to distinguish between print and digital publications on this issue, the court predicted that Pennsylvania courts would apply the single publication rule to internet publications.94

Nevertheless, hyperlinks could be considered an exception to the rule if they were found to republish the material, thereby retriggering the statute of limitations.95 Republication occurs, for instance, when a second edition of a publication is issued or if a publication is reissued with significant edits or alterations.96 However, the court pointed out that "under traditional principles of republication, a mere reference to

92. Newspapers, 690 F.3d at 174.
93. Id. For the general proposition that the single publication rule should apply to the internet, the court cited the cases of Firth v. State, 706 N.Y.S.2d 835 (N.Y. Ct. Cl. 2000), aff'd 775 N.E.2d 463 (N.Y. Cit. App. 2002); Nationwide Bi-Weekly Admin., Inc. v. Belo Corp., 512 F.3d 137 (5th Cir. 2007); Oja v. U.S. Army Corps of Eng'rs, 440 F.3d 1122 (9th Cir. 2006). However, the court failed to mention that the first court to have addressed the question actually ruled that the single publication rule does not apply to the internet, see Swafford v. Memphis Individual Practice Ass'n, 1998 WL 281935, No.02A01-9612-CV-0031 (June 2, 1998). For a law review article arguing that the single publication rule should not apply to the internet, see Odelia Braun, Internet Publications and Defamation: Why the Single Publication Rule Should Not Apply, 32 GOLDEN GATE U. L. REV. 325, 332-37 (2002).
94. Newspapers, 690 F.3d at 174.
96. Id. See also SACK ON DEFAMATION §7:2.1, explaining that:

If a new edition of the work is published, however, even a new edition of the same day's newspaper, a softcover edition of a book originally published in hardcover, rebroadcast of a television program, distribution of a DVD, with additional material, of a theatrically released motion picture, or reprints of one edition of a book, it is ordinarily considered a new publication upon which a separate cause of action may be based and for which the statute of limitations begins to run again.

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an article, regardless how favorable it is... does not republish the material.\textsuperscript{97} The court went further by warning that if posting a hyperlink was considered republication of the content that was linked to, then the important policy objectives of the statute of limitations would be defeated by allowing it to endlessly refresh.\textsuperscript{98} Satisfied that the traditional single publication and republication rules deserved to be applied in the digital era, the court plainly laid out the rule it was adopting: “though a link and reference may bring readers’ attention to the existence of an article, they \textit{do not republish} the article.”\textsuperscript{99}

Subsequently, the court applied this rule to the facts at hand. The court reasoned that though the post-petition article made favourable reference to the pre-petition content and encouraged users to visit the Charter Page, the hyperlink did “not amount to the restatement or alteration of the allegedly defamatory material,” and therefore did not constitute republication of it.\textsuperscript{100} Thus, by applying the traditional American single publication rule to hyperlinks, the court held that a hyperlink is not an adequate basis for the defamation claim.

\textbf{B. Hyperlinks in Canada: Crookes v. Newton}

Seven months prior to \textit{In Re: Philadelphia Newspapers}, the SCC had occasion to examine the question of whether a hyperlink should be considered a publication of defamatory content. The case of \textit{Crookes v. Newton}\textsuperscript{101} involved hyperlinks posted by website operator Jon Newton to articles published on two other websites about the plaintiff Wayne Crookes, an activist with the Green Party of Canada.\textsuperscript{102} After Newton refused Crookes’ requests that the hyperlinks be removed,\textsuperscript{103} Crookes filed a defamation suit against Newton in British Columbia alleging that Newton was liable for defamation because the hyperlinks themselves published the defamatory content.\textsuperscript{104} At both the trial court level and on appeal, Crookes’ defamation action was dismissed by findings that the hyperlinks did not constitute publication.\textsuperscript{105} Crookes appealed those decisions, leading him to the Supreme Court.

\textsuperscript{97.} Id.

\textsuperscript{98.} \textit{Newspapers}, 690 F.3d at 175.

\textsuperscript{99.} Id. (emphasis added).

\textsuperscript{100.} Id.

\textsuperscript{101.} [2011] 3 S.C.R. 269 (Can.).

\textsuperscript{102.} Id. at para. 4-8.

\textsuperscript{103.} Id. at para. 9.

\textsuperscript{104.} Id. at para. 10.

\textsuperscript{105.} Id. at para. 11-12.
The majority opinion by Justice Abella\textsuperscript{106} began by setting out the standard for what constitutes publication in the context of defamation: “a plaintiff must establish that the defendant has, \textit{by any act}, conveyed defamatory meaning to a single third party who had received it.”\textsuperscript{107} However, Abella explained that the common law “innocent dissemination” defence exempts from liability defendants who merely play a passive role in the publication with no actual or constructive knowledge of the defamatory content.\textsuperscript{108}

To further define the contours of the law of publication, the Court cited with approval two American cases, \textit{Klein v. Biben} and \textit{MacFadden v. Anthony} for the proposition that “referring to the [original] article was neither a republication nor a publication of the libel.”\textsuperscript{109} Justice Abella built off of those cases by noting that the lack of control wielded by a hyperlinker over the content of the original publication militates against finding a hyperlink to be a publication. Abella repeatedly compared hyperlinks to references and footnotes in traditional publications,\textsuperscript{110} arguing that the original content is outside the control of the publisher of the reference.\textsuperscript{111} Rather than holding the poster of the hyperlink liable, Abella reasoned that “it is the actual creator or poster of the defamatory words” who should be held liable for defamation.\textsuperscript{112}

Thus, the Court held that “[m]aking reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content.”\textsuperscript{113} However, if a hyperlinker repeats

\textsuperscript{106} Justice Abella's majority opinion was joined by Justices Binnie, Lebel, Charron, Rothstein, and Cromwell. Chief Justice McLachlin and Justice Fish filed a joint concurrence, and Justice Deschamps wrote separately in a concurrence. \textit{See infra}, note 113 for a comparative explanation of these concurring opinions.

\textsuperscript{107} \textit{Id.} at para. 16 (emphasis in original) (citing \textit{McNichol v. Grandy} [1931] S.C.R. 696, at p.699 (Can.)). The court quoted \textit{Brown}, \textit{supra} note 10, at 7.3 to illustrate the expansive range of conduct that could be considered publication, including “dramatic pantomime,” or drawing “someone’s attention . . . to a poster.” \textit{Crookes}, [2011] 3 S.C.R. 269 at para. 19.


\textsuperscript{109} \textit{Id.} at para. 22-25.

\textsuperscript{110} \textit{See id.} at para. 26, 27, 29, 30, 40.

\textsuperscript{111} \textit{Id.} at para. 26.

\textsuperscript{112} \textit{Id.} at para. 29, 41.

\textsuperscript{113} \textit{Id.} at para. 42. Chief Justice McLachlin and Justice Fish wrote in a joint concurrence to express their support for a slightly different standard. According to those two justices, “[p]ublication of a defamatory statement via a hyperlink should be found if the text indicates adoption or endorsement of the content of the hyperlinked text.” \textit{Id.} at para. 48. Justice Deschamps wrote separately, concurring in the result, but arguing against the standard adopted by the Court. Deschamps would
the allegedly defamatory content, then the hyperlinker could be found to have published it.\textsuperscript{114} The Court explained that the protection given to hyperlinkers "accords with a more sophisticated appreciation of Charter values,"\textsuperscript{115} and is therefore consistent with its recent shift toward more defendant-friendly defamation jurisprudence that occurred through \textit{WIC Radio} and \textit{Grant}.	extsuperscript{116} The Court further justified its holding by appealing to the "indispensable" role played by hyperlinks in the functioning of the internet.\textsuperscript{117} While recognizing the danger to reputational interests posed by hyperlinks and online communications generally,\textsuperscript{118} the Court was satisfied that the ability to use hyperlinks was worth protecting.

Applying its newly formed rule to the situation presented by Crookes, the Court reasoned that because "the use of a hyperlink cannot, by itself, amount to publication even if the hyperlink is followed and the defamatory content is accessed, Mr. Crookes's action against Mr. Newton cannot succeed."\textsuperscript{119} Thus, Crookes was attempting to hold Newton liable for content created by another individual to which Newton merely referred via hyperlink. The Court's holding here clearly established that hyperlinks do not publish

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have the Court adopt a standard under which liability would be imposed "[w]here a person deliberately makes defamatory information readily available through the creation of a hyperlink." \textit{Id.} at 101.
\end{flushright}

\textsuperscript{114} Crookes, [2011] 3 S.C.R. 269 at para. 42.

\textsuperscript{115} \textit{Id.} at para. 33.

\textsuperscript{116} \textit{Id.} at para. 32. While the Court writes that its opinion here accords with the balance struck between reputational interests and freedom of expression in \textit{Hill}, \textit{id.} at para. 31, the Court explicitly states its pre-Charter jurisprudence only "began to change when the Court modified the 'honest belief' element to the fair comment defence in \textit{WIC Radio}, and when, in \textit{Grant}, the Court developed a defence of responsible communication on matters of public interest." \textit{Crookes}, [2011] 3 S.C.R. 269 at para. 32.


\textsuperscript{119} \textit{Id.} at para. 44.
the material to which they refer and therefore cannot form the basis for a cause of action for defamation.

C. Preliminary Assessment: A Seeming Similarity

Both *Crookes* and *Newspapers* stand for the general proposition that hyperlinks cannot serve as the basis for the tort of defamation. In *Newspapers*, the Inquirer was found not liable for posting a hyperlink to allegedly defamatory content it had published in the past. Similarly, in *Crookes*, Mr. Newton was found not liable for posting hyperlinks to allegedly defamatory content created by third parties.

While these holdings with regard to hyperlinks are facially similar, the precise factual underpinnings do differ somewhat. In *Newspapers*, the plaintiff's allegation of defamation was rooted in the defendant's hyperlink to a prior article that was also written by the defendant. Thus, the precise question there was whether a hyperlink constituted a republication of content that had already been published by the defendant. Comparatively, in *Crookes*, the plaintiff was attempting to hold the defendant liable for hyperlinking to content created by another author. As such, the precise question in *Crookes* was not whether a hyperlink constituted republication of a defendant's already published content. Rather, the *Crookes* court was considering whether a defendant can be liable for hyperlinking to content that he did not create. Despite these factual differences, the general premise emerging from each case remains the same: a hyperlink is not an adequate basis on which to hold a defendant liable for the publication of allegedly defamatory content.

III. The Supreme Court of Canada’s Use of American Precedent: Revealing a Deeper Difference

As mentioned, the SCC referred with approval to two American cases, *MacFadden v. Anthony* and *Klein v. Biben* to buttress its argument that “a simple reference – like a hyperlink – to defamatory information” does not constitute publication or republication of the

120. Throughout the *Crookes* opinion, the SCC cited and discussed many more than just two American cases, and also cited foreign cases, statutes, and other authorities from other jurisdictions such as Britain and Australia. However, this note will be focused on the divergence between American and Canadian jurisprudence that is represented by the utilization of these two cases.

121. 117 N.Y.S.2d 520 (Sup. Ct. 1952).

122. 69 N.E.2d 682 (N.Y. 1946).

123. Id. at para. 22.
This section will discuss each of those cases in turn. The SCC’s usage of *MacFadden* seamlessly supports its holding in *Crookes*, and thereby points to a similarity between American and Canadian law. However, this section goes on to show that the citation of *Klein* less directly supports the SCC’s primary point in *Crookes*, perhaps even undercutting one of its arguments. This factual difference ultimately, as discussed in Section 5, results in the symbolic power of *Klein’s* presence in a SCC opinion.

**A. MacFadden v. Anthony: A Convincing Authority**

In *MacFadden*, a New York Supreme Court dismissed a defamation suit against the American Broadcasting Company (ABC) and its co-defendants that was rooted in remarks made over the air by an ABC radio commentator. During a broadcast, the commentator made reference to an article that had previously been published in Collier’s Magazine that was allegedly defamatory towards the plaintiff. The plaintiff did not claim that the commentator himself said anything defamatory, nor was it alleged that the commentator repeated any of the defamatory content. Nevertheless, the plaintiff argued that the ABC commentator republished the allegedly defamatory content “by calling his listeners’ attention to this magazine article, albeit without uttering any of the alleged defamatory matter contained in said article.” However, the court held that merely referencing the article, without repeating its content, does not constitute publication or republication of the content.

The factual basis and legal conclusion of *MacFadden* are very similar to those of *Crookes*, and the SCC’s reliance on this case is therefore quite appropriate. In both cases, a plaintiff was attempting to hold the defendant liable for referencing allegedly defamatory content created and published by a third party. The Collier’s magazine article and the third party website articles about *Crookes* were all created by individuals other than the defendant. Just as the SCC in *Crookes* held that a hyperlink was merely a reference which did not constitute a publication, the *MacFadden*...
court held that a reference that did not repeat defamatory content was not a publication.\textsuperscript{133}

The manner in which \textit{MacFadden} has been cited by U.S. secondary literature confirms this similarity. For example, a New York state treatise on defamation utilizes \textit{MacFadden} to show that "[a] mere reference to another writing which contains defamatory matter does not, however, constitute an actionable repetition or republication of the libelous matter."\textsuperscript{134} Indeed, such language is very similar to the language used by the \textit{Crookes} court to reach its conclusion on hyperlinks.\textsuperscript{135} Another treatise employed \textit{MacFadden} to stand for an American equivalent of the "innocent dissemination" defence recognized by the SCC in \textit{Crookes},\textsuperscript{136} writing that "[a] person who repeats defamatory statements can be held liable, unless the statements are repeated in such circumstances as to be justifiable and innocent, as for example . . . a radio broadcast calling attention to a libelous magazine article."\textsuperscript{137} For the SCC, \textit{MacFadden}, though a U.S. case, embodies a natural extension of traditional, pre-digital era Canadian common law principles.\textsuperscript{138} Thus, the SCC's reference to \textit{MacFadden} operates as an efficient augmentation of traditional principles to adjust Canadian defamation law to the age of the internet.\textsuperscript{139}

\textbf{B. Klein v. Biben: A Troubling Authority}

However, a closer analysis of \textit{Klein v. Biben},\textsuperscript{140} the other case cited by the SCC to make its point on republication, hints at an apparent inconsistency in the SCC's holding and ultimately sheds light on the stark contrast between Canada and the U.S. on the issue of the single publication rule. In \textit{Klein}, the Court of Appeals of New York dismissed a plaintiff's defamation complaint against the

\begin{itemize}
\item \textsuperscript{133} \textit{MacFadden}, 117 N.Y.S.2d at 520.
\item \textsuperscript{134} Tracy Bateman Farrell, John Gebauer, Jeanne Philbin, and Susan L. Thomas, 43A N.Y. JUR.2D DEFAMATION AND PRIVACY §85 (2012).
\item \textsuperscript{135} \textit{Crookes}, [2011] 3 S.C.R. 269 at para. 42 ("Making reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content.").
\item \textsuperscript{136} \textit{Id.} at para. 20 (explaining that the "innocent dissemination" defence "protects those who play a secondary role in the distribution system, such as news agents, booksellers, and libraries.").
\item \textsuperscript{137} Lee S. Kreindler, Blanca I. Rodriguez, David Beekman, and David C. Cook, 14 N.Y. Prac., New York Law of Torts §1:44 (2012).
\item \textsuperscript{139} \textit{Id.} at para. 33 (conceptualizing the treatment given to hyperlinks as "accord[ing] . . . with the dramatic transformation in the technology of communications.").
\item \textsuperscript{140} 69 N.E.2d 682 (N.Y. 1946).
\end{itemize}
publisher of *The American Hebrew* newspaper. The newspaper had initially published an allegedly defamatory article about the plaintiff on May 12, 1944 (hereinafter ‘May article’). Subsequently, on June 23, 1944, the same newspaper published another article (hereinafter ‘June article’) which referred to the May article without repeating its allegedly defamatory content. The plaintiff was barred from asserting a cause of action rooted in the May article because of the statute of limitations, but the plaintiff also attempted to use the June article as a basis for defamation. However, the *Klein* court held that the June article’s reference to the May article, without repeating any of its content, did not constitute a republication of the allegedly defamatory article.

The factual pattern of *Klein* appears to be more similar to *Newspapers* than it is to *Crookes* and *MacFadden*. In *Klein*, the plaintiff was attempting to hold the defendant newspaper liable for referring to an article that had been previously published by the defendant. In that sense, the May article in *Klein* is analogous to the Charter Page in *Newspapers* to which the post-petition article referred. Whereas the defendants in *Crookes* and *MacFadden* were alleged to have published content originally created by others, the defendants in *Klein* and *Newspapers* were alleged to have republished content that they themselves had created.

This factual difference between *Crookes* and *Klein* does not mean that the SCC’s reliance on *Klein* was misguided. However, it does weaken the SCC’s comparison of hyperlinks to ordinary references, such as footnotes. As the SCC explains, “[r]eferring on its own does not involve exerting control over the content.” However, in the case of *Klein*, just as in *Newspapers*, the defendants did indeed at one point exert control over the content: they created it. In comparing hyperlinks to references, the SCC wrote that “inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked.” Again, in *Klein* and *Newspapers*, the primary authors, as the creators of the secondary articles, did indeed control the content in the secondary articles. However, this seeming inconsistency does not do much to weaken the

141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Klein*, 69 N.E.2d at 682.
148. *Id.* at para. 27.
SCC’s overall argument; the invocation of Klein for one principle, that references do not republish content, does not mean that the entirety of the Crookes holding must flow from the implications of Klein.

IV. The SCC’s reliance on Klein: Illustrating the American-Canadian Divide

While it does not significantly undermine the SCC’s holding, this difference in factual underpinnings between Klein and Crookes is what, despite the apparent similarity on hyperlinks, elucidates the continuing jurisprudential divide between the two countries. This section will demonstrate that in U.S. defamation jurisprudence, the Klein ruling exemplifies the reach of the single publication rule. Thus, the SCC’s invocation of Klein to support its holding on references, when viewed in light of Canada’s rejection of the single publication rule, emphasizes the extent to which Canadian and American defamation jurisprudence continues to differ.

As stated concisely by the Third Circuit in Newspapers, under the single publication rule, “it is the original printing of the defamatory material and not the circulation of it which results in a cause of action.”149 However, the republication of that defamatory material is an exception to the single publication rule.150 In a New York state treatise, Klein is utilized to show the limits of that exception, and ipso facto, the breadth of the single publication rule.151 The treatise recognizes that “each separate libelous article in a series constitutes a different cause of action, and the publication of a subsequent article does not constitute a republication of the prior libelous articles.”152 However, the treatise uses Klein to show that “[a] reference in a later issue to an earlier libelous article, where there was no repetition of the alleged libelous matter, did not constitute republication.”153 Thus, Klein reinforces the coverage of the single publication rule: the reference in the June article to the May article is treated merely as the circulation of the May article and therefore does not give rise to a new cause of action.

Similarly, in Salyer v. Southern Poverty Law Center, Inc.,154 a federal district court in Kentucky cited Klein for the principle that a

150. Id. at 174. See generally SACK ON DEFAMATION §7:2.1 (2012).
152. Id.
153. Id. at note 8.
reference does not constitute republication. Just as the treatise did, the court in Salyer utilized that principle from Klein to hold that a reference should not constitute an exception to the single publication rule. In that fashion, the Salyer court ensured that the single publication rule would protect defendants from the retriggering of the statute of limitations by mere references.

While Klein has been applied in the U.S. to reinforce the single publication rule and was cited favourably by the SCC in Crookes, Canadian jurisprudence continues to reject the single publication rule. The decision of the British Columbia Court of Appeal in Carter v. B.C. Fed’n of Foster Parents Ass’n exemplifies Canadian courts’ utilization of the multiple publication rule in lieu of the American single publication rule. The Carter case presented two legal issues to the court: (1) does the inclusion of a URL in a printed newsletter constitute publication of the content found at that site? and (2) does the expiry of the two-year B.C. statute of limitations since the time that plaintiff became aware of the online publication bar the defamation action when the publication has remained online?

The Carter court answered the first question in the negative by citing both Klein and MacFadden. Indeed, this portion of the Carter opinion is cited favourably in Crookes. In answering the second question, the Carter court considered the adoption of the American single publication rule, which would have the effect of barring the cause of action. The court characterized the single publication rule

155. Id. at 916.
156. Id. (finding that “a reference, without more, is not properly a republication.”). The Salyer court also dealt with the question of whether a hyperlink constituted a republication. The court held that a hyperlink to an article did not republish the article, and therefore was not an exception to the single publication rule so long as the original content was not altered and the hyperlink itself did not repeat the original content. Id. at 916-18. The court justified its holding by appealing to the policy implications underlying the single publication rule: “to find that a new link to an unchanged article posted long ago on a website republishes that article would result in a continual retriggering of the limitations period.” Id. at 918.
157. Id. at 918.
158. See supra Section 2(iii).
159. 42 B.C.L.R. 4th 1 (Can. B.C. C.A.)
160. Id. at para. 10-13.
161. Id. at para. 14.
162. Id. at para. 12-13.
as "an American rule of law (adopted in many but not all states)."165 The court continued to write that "[a]lthough it is difficult to find an express statement in the Canadian cases about the single publication rule, the clear tendency of the authorities . . . is in favour of the English and Australian [multiple publication rule] and not in favour of the American position."166 As such, the court goes on to allow the defamation action based on the continued existence of the online post even though the statute of limitations would have expired had the digital post been a print publication.167

By examining Carter, it becomes clear how a Canadian court would rule on a case that presented facts that were truly analogous to Klein and Newspapers in the internet age.168 Consider the hypothetical example of a Canadian internet user that writes and posts an allegedly defamatory article. This initial post is equivalent to the May article in Klein. The same user then posts a hyperlink to that article after the statute of limitations for actions arising from the article expired. The hyperlink is equivalent to the June article that makes reference to the May article in Klein. The holding of Crookes that hyperlinks fail to constitute a republication of defamatory content would seem to indicate that the hypothetical plaintiff, just like the plaintiff in Klein, should be barred by the statute of limitations from bringing a defamation action. However, Carter illustrates that Canadian courts' adherence to the multiple publication rule would allow the plaintiff to sue for defamation based on the original article even if the statute of limitations running from the initial publication of the article would have expired. Thus, while the hyperlink may not constitute a republication of the article under Crookes, the original article would nevertheless be susceptible to a defamation action under Carter.

The ultimate implication of the Carter holding and this modern-day Klein equivalent is that Canadian defamation defendants are faced with an endlessly retriggering statute of limitations on their internet publications. In contrast, American defendants can enjoy the benefit of a limited time period in which defamation actions can be

165. Id. at para. 18.
166. Id.
167. Id. at para. 20.
168. The implication drawn from Carter, and reflected in the hypothetical, that the single publication rule has been rejected in Canada is further buttressed by the SCC's 2012 ruling in Breeden v. Black, 2012 SCC 19, para. 20 (Can.) in which the court held that jurisdiction existed in Ontario courts for a defamation cause of action arising from internet content uploaded in the United States because "publication occurred when the impugned statements were read, downloaded and republished in Ontario." Id. at para. 20. In that sense, the SCC held that internet content was republished every time it was accessed by a user.
brought against their online publications. Thus, while the SCC utilized *Klein* to strengthen its argument that hyperlinks should not constitute republications, a further examination of *Klein* reveals that Canadian courts reject much of what it stands for.

Conclusion

This article began by highlighting the general differences between the more plaintiff-friendly defamation jurisprudence in Canada and the pro-speech jurisprudence in the U.S. The treatment of hyperlinks in both countries though, in the recent cases of *Newspapers* and *Crookes*, seemed to point to a similarity that emanated from the SCC’s recent shift in its defamation jurisprudence. However, this note has demonstrated that the SCC’s use of American case law in its *Crookes* decision, while leading to a similar outcome on hyperlinks, actually symbolizes the sharp divergence between the two countries on the issue of the single publication rule.

The SCC invoked *MacFadden* and *Klein* to powerfully establish that hyperlinks do not constitute publication for defamation purposes. Yet, a further investigation as to the status of *Klein* in American jurisprudence reveals that Canadian courts reject the cases that have flowed from it. Further, as shown by the modern-*Klein* hypothetical, Canadian courts would likely reach the opposite outcome of the *Klein* court if the facts of *Klein* were presented today in the context of the internet. In this fashion, the SCC’s use of *Klein* serves as a reminder of the drastic differences that remain between Canadian and American defamation law.

In the future, Canadian defamation defendants, as did the defendants in *Carter*, will likely attempt to push courts to adopt the single publication rule for internet publications. Without the single publication rule, any internet user who posts content online can be held liable for defamation in Canada for as long as that content is available online. Given the resistance of Canadian courts to adopt anything resembling the single publication rule, any future convergence with the U.S. on the single publication rule may, as the court in *Carter* suggested, ultimately depend on legislative action.