

Split on free speech



Photo illustrations Stefania Seccia

Gordon Murray (left) is being sued by The Vancouver Sun, a newspaper Kevin Bent (right) publishes.

The fine line between satire and defamation in Canada

By Andrew Weichel

The morning of December 7, 2007. Retired Simon Fraser University sociology professor Mordecai Briemberg sat packed and ready to leave the country. His son Joshua, who co-ordinates water distribution efforts in Central America, would be expecting his arrival in Nicaragua that evening. Only one item was missing from Briemberg's bundled travel bags: a new laptop scheduled for delivery that afternoon.

A knock. Briemberg stood up from the table where he sat with his wife and shuffled to the door. He was met by a plainclothes man with a clipboard.

"Mordecai Briemberg?" he asked.

"That's me," Briemberg said, signing for his delivery. "I don't see my laptop."

The man was confused; there was no laptop. He extended his arm and instead handed Briemberg a sealed envelope.

"I'm here to deliver your writ of summons."

As the deliveryman drove off, Briemberg opened the ominous envelope to unsettling news: At 70 years old he was being sued by one of the largest and most powerful media conglomerates in Canada.

I have been assured by a very knowing American of my acquaintance in London, that a young healthy child well nursed is at a year old a most delicious, nourishing, and wholesome food, whether stewed, roasted, baked or boiled...

—Jonathan Swift, *A Modest Proposal*

A, E, I, O, U, and sometimes Y? Consonant or vowel? Make up your mind, we're at war.

—Stephen Colbert, *The Colbert Report*

From Jonathan Swift's ironic proposal to end Irish peasants' starvation in the 1700s to Stephen Colbert's modern characterization of Bill O'Reilly-style political punditry, centuries of effective popular satire have cemented the form's place in social criticism.

Once exclusively defined as a literary device, satire's provocative mix of mockery and critique is no longer bound to any medium—visual arts, film, TV, and particularly the increasingly popular "fake news" genre all employ satire and parody to skewer everything from sacred cows to vapid socialites. Some

comment on broad social issues, like the satirical 2006 Onion newspaper article that grazed on America's immigration debate as well as globalization ("Illegal Immigrants Returning To Mexico For American Jobs"), while others aim at more direct targets—among them, specific corporate brands and logos.

While the former subdivision of satire may have managed to endure historically even under fascist regimes (Russian playwright Mikhail Bulgakov's satirical anti-revolutionary productions were mystifyingly awarded the full support of Stalin himself), the difficult-to-define rights of the more direct targets leaves the latter form's future lingering in a grey area of Canada's legal system.

The evening of June 6, 2007. Palestine Media Collective supporters gather outside of the Roman coliseum-inspired architecture of the Vancouver Public Library for a rally. Stacked in piles on the ground were copies of what at first glance appeared to be *The Vancouver Sun*. After inspecting the headlines, however, they proved to be anything but. Morecai Briemberg bent down and picked one up.

*CELEBRATING 40 YEARS OF
CIVILIZING THE WEST BANK
STUDY SHOWS TRUTH BIASED
AGAINST ISRAEL*

Taking an armful of papers, Briemberg headed home for the night. He had decided to take the papers to a SkyTrain station near his house in Burnaby the next morning to distribute to commuters.

And that's what he did.

In a recent *Walrus* article titled *The Last Laugh: Why Canadian Satire Can't Measure Up to Stewart and Colbert*, Rebecca Addelman compares the current success—and general relevance—of American comedy shows such as *The Daily Show* and *The Colbert Report* to our own comparatively lame fare like *This Hour Has 22 Minutes*. Indeed, anyone familiar with our southern neighbour's satirical programming would have to concede the recently retired Royal Canadian Air Farce to be milquetoast in comparison. Addelman, a Canadian-

born, California-based comedienne herself, argues our nation's strict libel laws stifle the humourist, and she's not alone.

While some—generally, the person or persons making potentially insulting statements—frame the debate as a matter of free speech, others—typically the victim or victims of a scathing insult—opt to frame it as defamation. Who's right? Is it an individual's right to make fun, or to not be made fun of? While such a conflict between individuals may be open to legal interpretation case by case, our legislation is much more succinct when dealing with corporate interests—specifically pertaining to trademarked logos. Whereas the U.S. Trademark Act contains two "fair use" provisions that distinguish "parodying, criticizing, or commenting" from infringement, Canada's Trade-mark Act lacks a specific provision for humour or social commentary. Instead, Section 22 states that if any trademarked intellectual property is used in a way that depreciates the value of the "goodwill attaching thereto" the logo, legal action is warranted.

In 1996 this led Canada's federal court to rule in favour of tire manufacturer Michelin over its employees, who had used the Michelin Man mascot on union protest posters. Thirteen years later, that legal precedent, which has been accused of penalizing satirical criticism, may be paired and strengthened.

I decided to distribute them because they were funny," Briemberg says. "And they provoked people to think again about the kind of media they're getting here."

The decision would lead him to be accused of trademark infringement by none other than Canwest Mediaworks Publications, owner of 10 major Canadian daily papers including the *National Post*, *The Province*, and the *Sun*. Despite the size of the satirical publication (two pages), the phony-baloney names on the bylines (Cyn Sorsheep and P. Rupa Ghanda) and the ridiculous headlines, the unaltered masthead of *The Sun* provided grounds for Canwest to pursue legal action.

For his part in the paper's distribution, Briemberg's name was included on the writ along with the printer, three Jane



Illustration by Alex Cho

Does and three John Does—blank slates to be filled in as evidence was collected. Following protest support through the Seriously Free Speech Committee—which counts prominent dissidents Noam Chomsky, Naomi Klein and Linda McQuaig as honorary members—and the unveiling of the real culprits behind the parody paper, Briemberg's name was eventually dropped.

The sour taste, however, remains. "We're often very smug about how we're so much better than the Americans," Briemberg says. "But I don't know."

If anyone in Canada can sympathize with satire-borne legal woes, it's Michael Bate. Publisher of the now-de-

funct Ottawa edition of Frank magazine, Bate spearheaded the publication's move from the Maritimes to the nation's capital 19 years ago. He also headed the modest, yet influential magazine through a myriad of legal troubles—and even willfully courted a few of them. When Canwest decided to sue Mordecai Briemberg, for instance, for distributing the fake Sun newspaper, Bate published the front page of the controversial paper on Frank's cover.

Like Addelman, Bate faults Canadian legislation for the satirist's difficulties. Trademark law aside, Bate says that libel laws in Canada unfairly default with the plaintiff. Instead of being innocent until proven guilty, if a Canadian humourist

is accused of defamation it's his or her responsibility to prove that the joke was based on fact.

"All you need to do in Canada to get a libel suit going is to get your feelings hurt. You call your lawyer and start the meter running," Bate says.

In order to deal with the constant stream of complicated legal struggles, Bate decided to take sole responsibility for the authorship of each article published in Frank by providing his own byline for his reporters' stories.

"The trouble is if you put someone's name to it then they're liable as well and nobody will write for you. In theory, I was the author of everything. I edited everything, so I was the author, so I was the target for the suits; the magazine, the holding company and me," Bate says. "And I had no assets so there was nothing they could get."

Former CTV political pundit Warren Kinsella, and journalist-cum-senators Pamela Wallin and Mike Duffy have all taken legal action against Frank, though only Duffy's case advanced far enough to even settle out of court—which is not to say each case wasn't stress-inducing.

After nearly two decades of taking sole responsibility for the magazine's content, Bates, currently penning his memoir tentatively titled *The Frank Diaries*, is burnt out.

"In retrospect of doing that for 20 years, I can't recommend that for satirists or for future Frankians," Bate says. "It's a nerve-racking way to run a publication."

Now that his name, along with his wife Carel Moisewitsch's, appears openly on the Canwest writ in place of Briemberg's, Gordon Murray has no qualms about taking responsibility for the Vancouver Sun parody.

"I did it," Murray confesses. "I designed it and wrote it."

Donning a black t-shirt with an upside-down Canadian flag that reads "Canadian holocaust", a reference to the exploitation of Canada's aboriginal population, it's clear that Gordon Murray is no stranger to controversy. After observing ongoing mass-media coverage of the Israel-Palestine conflict, which Murray perceived to be biased toward Israel, he and Moisewitsch made the decision to produce a parody.

"[Canwest's] The National Post specifically has been studied, and their coverage of the death of children, Israeli children versus Palestinian children, showed that they were 80 times more

likely to report the death of an Israeli child," Murray says. "When the bias is that outrageous, it's difficult to talk about it in academic terms. Satire seemed to be a good way to deal with some of the issues."

Despite their current candour, Murray and Moiseiwitsch left their names off the original parody paper, leaving the Sun no easy recourse—and no responsible party to communicate with—when it was distributed.

"Knowing that Canwest is very litigious, we knew there was a possibility that they would try to take legal action. We did it anonymously, and that was one of the reasons; we didn't want to get involved in a SLAPP suit. The other being to focus on the issues, and let the parody speak for itself without getting involved with the personalities behind it," Murray says. "It's kind of impossible now, but that was the original intention."

SLAPP suits, or strategic lawsuits against public participation, began in the 1980s as a corporate reaction to environmental groups that were speaking out against logging and urban development. SLAPP suits, according to their detractors, are not necessarily filed in the interest of collecting monetary damages; they may be filed with the simple intention of siphoning the resources of an opposing interest, a method available only to the wealthy and powerful, and most effective against groups or individuals with limited resources.

Today, 24 states in the U.S. have "anti-SLAPP" legislation in place to prevent these lawsuits from seeing trial.

"B.C. in fact had such legislation. It was passed in April of 2001 by the NDP government, and repealed in August 2001 by the incoming Liberal government," Murray says.

"It was their very first act."

Clean cut, confident and sharply dressed in suit and tie, Kevin Bent seems yanked off the cover of GQ magazine—and like the perfect natural counterpoint to Murray. Bent is the president and publisher of Pacific Newspaper Group, which puts out both the Sun and The Province—the two largest papers in competition (more or less) for Vancouver's readership. His perspective on the lawsuit is, of course, as contrary to Murray's as their appearances.

"This has been spun from their angle as a Canwest and Vancouver Sun issue in a sense, that this is about Canwest taking the pro-Israeli stance

versus the pro-Palestinian stance. This Seriously Free Speech group has been suggesting that we haven't been fair, balanced and accurate in our coverage of what's happening in the Middle East. And it's not about that at all. In my mind it has nothing to do with that. This is trademark infringement."

Bent compares the Sun to a Coke or Nike product, where the consumer's trust in the brand is paramount.

"I came from another industry that made packaged goods and if anyone tried to damage our reputation, damage our product offering, essentially hurt the equity that we've spent a hundred years building in our brand, then we would take it seriously."

According to Bent, people had been opening street corner coin boxes and wrapping the fake paper around real editions of the Sun, which—despite the obvious pun bylines and the extreme content of the parody—caused confusion among a number of readers as to whether they were reading a Canwest product.

"People actually did call me and e-mail me and said, 'I can't believe you guys are putting out this garbage. I don't know if it's you guys or if it's somebody else, but you know, you shouldn't stand on the sidelines.' And this wasn't one or two e-mails, this was quite a few.

"We're all for satire and parody, but when it harms a business that's when it crosses a line. It has harmed our business, and we've got work to do in that area."

While asserting that Middle East coverage was inconsequential to Canwest's lawsuit, Bent still refutes Murray's claims of bias.

"They're clearly off-base in suggesting that Canwest or the Sun or any of our products are slanted towards one direction or another from a coverage perspective. The newsroom's task is and always has been to be fair and accurate, and if there was anyone giving any directive to me or to Patricia [Graham, editor-in-chief] or to Valerie [Casselton, executive editor] or to anybody, we'd have a revolt on our hands," Bent says. "That's not the way to run a strong media company in today's environment."

On the phone, speaking in a strong Slovak accent, University of British Columbia Russian literature and satire specialist Peter Petro is amiably eccentric. When the question of satirical defamation is raised, he muses on hurt feelings.

"How do we know that mocking is hurting the reputation of someone? How

can you prove that? I have been mocked a million times for example by my wife, and I am not hurt by that at all," Petro says. "It's for the better; she's trying to set me right. She's sort of frustrated, and maybe when she makes fun of me she's going to achieve her purpose better than when she says it straight."

When speaking about the current lack of legal protection for satirists, however, Petro's tone becomes noticeably sombre.

"Well, not protected in my mind equals not allowed. I'm not an idiot to write a satire and find myself punished, or lose my job. So it's no good to say that it's not protected," Petro said. "I think what we have to say is that satire is not allowed in Canada, because that is the consequence of not being protected."

Satire dramatizes better than any other use of it the inherent contradiction of free speech: that it functions best when what being said is at its most outrageous.

—Tony Hendra, satirist

Canada's trademark law prohibits anyone from making "a false or misleading statement tending to discredit the business, wares or services of a competitor." Did Murray and Moiseiwitsch mean to discredit the Sun with their parody? In a word, yes; it's at the very least a discernable criticism. Whether Murray and Moiseiwitsch, who did not profit from the faux-paper's distribution financially, can be credibly considered "competitors" is for the judge to decide.

What's evident is that Canada's trademark law in no clear terms even addresses the possibility of parody, a confusing scenario compounded by the parallel murkiness of Canada's laws regarding free speech. The Canadian Charter of Rights and Freedoms merely states that freedom of thought, belief, opinion and expression are guaranteed "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

What's missing is a sturdy legal precedent to either bar or embrace satire and deem it defamatory or protected, respectively.

For Murray and Moiseiwitsch's trial, however, the question of satire is moot. The judge has barred any mention of biased reporting from their statements of defence, asserting that Canwest's trial is to be determined on the grounds of trademark infringement alone. ■