

7-1-2010

## Consumer Counter-Advertising Law and Corporate Social Responsibility

Alberto R. Salazar V.  
*York University*

Follow this and additional works at: <https://digitalcommons.law.buffalo.edu/buffalolawreview>



Part of the [Communications Law Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

Alberto R. Salazar V., *Consumer Counter-Advertising Law and Corporate Social Responsibility*, 58 Buff. L. Rev. 977 (2010).

Available at: <https://digitalcommons.law.buffalo.edu/buffalolawreview/vol58/iss4/7>

This Symposium Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact [lawscholar@buffalo.edu](mailto:lawscholar@buffalo.edu).

# Consumer Counter-Advertising Law and Corporate Social Responsibility

ALBERTO R. SALAZAR V.<sup>†</sup>

## INTRODUCTION

Freedom of expression is a fundamental constitutional value. In the marketplace, both corporations and consumers are deemed to have freedom of expression. However, consumer expression may not be as strongly protected as corporate expression. In particular, the law of defamation often imposes unnecessary limitations on consumer expression. As a result, reputation and expression collide and the courts are called on to strike a reasonable balance between these values. Canadian courts tend to favor the protection of reputation over expression, thereby discouraging greater consumer expression and counter-advertising practices. This not only affects free expression itself, but also eliminates the social and economic advantages of having vibrant and responsible consumers. Specifically, chilling consumer expression may erode the possibility that consumers may supervise and control corporate activity through the exercise of their freedom of expression in the marketplace. The lack of responsible consumer counter-advertising practices may facilitate corporate social irresponsibility. In areas such as public health and healthy eating, such irresponsibility coupled

---

<sup>†</sup> Faculty, York University (Toronto, Canada). Ph.D. (Osgoode Hall Law School, York University), Former MacArthur Fellow (University of Oxford, UK), CAPORDE Fellow (University of Cambridge, UK). Email: asalazar@osgoode.yorku.ca. This paper was presented at the conference on Advertising and the Law at the Baldy Center for Law & Social Policy, University at Buffalo Law School, Buffalo, New York, on November 14, 2009. I would like to thank Professor Mark Bartholomew from the University at Buffalo Law School for organizing such a great conference and for inviting me to participate. I am grateful to Mark and all the conference participants for their comments and suggestions that helped me improve this paper. I would also like to express my thanks to Timothy B. Cramer and all other members of the editorial team of the Buffalo Law Review for their excellent editorial work. I am entirely responsible for any mistakes.

with passive consumers may have a negative impact on the battle against obesity and hunger in society.

This Article discusses the legal protection of consumers' freedom of expression as a form of counter-advertising and explores its implications for enhancing corporate social responsibility in Canada. While the Charter of Rights ("Charter") does not apply to private parties, courts are supposed to develop the common law in a manner that is consistent with the fundamental Charter values such as freedom of expression. Yet, courts have traditionally favored the protection of reputation over expression by setting stringent standards for the use of defenses against defamation suits. This has chilled consumer expression, counter-advertising practices, and, more generally, consumer activism, worsening the situation of consumers already compromised by the lack of anti-SLAPP legislation in Canada. Recently, the Supreme Court of Canada introduced a new defense, 'responsible communication on matters of public interest', which represents major progress towards reducing the chilling effects of the common law of defamation. The defense requires that the communication be on a matter of public interest and be made responsibly.<sup>1</sup> It will be argued that when applied to consumer expression, there is still the danger that the standard of diligence required by the new defense may be too high for ordinary consumers and small consumer groups, thereby reinstating the chilling effects on expression and reinforcing both consumer apathy and legal bias against potentially active non-affluent citizens. It is desirable that the application of such a standard is responsive to the real conditions of ordinary consumers.

Such flexible application of the consumer expression defense is important because it will enhance the search for truth, public debate, and democratic governance of the market. In particular, facilitating consumer expression and counter-advertising increases the availability of non-corporate information and the degree of democratic deliberation in the marketplace. It also creates an important oversight mechanism, namely, consumer supervision of corporate activity through counter-advertising, which is likely to enhance the social responsibility of corporations. In the area of food

---

1. See *infra* notes 69-70 and accompanying text.

consumption and healthy eating, the presence of consumer counter-advertising improves the level of legal and social control over aggressive food advertising and growing corporate self-regulation of food advertising, which are often unfriendly to healthy eating. As a result, both the democratic regulation of advertising and the fight against obesity may benefit from a stronger legal protection of consumer expression.

This Article is organized as follows: Part I reviews the Charter's protection of consumer expression, consumer counter-advertising, and the common law of defamation in Canada. It notes that, despite the efforts to correct the chilling effects on freedom of expression, the law of defamation sets out uncertain and costly standards that discourage free expression, thereby in practice favoring the protection of reputation over freedom of expression. It then discusses the new defense against defamation. It will be argued that the standard of diligence that the new defense requires may be too stringent for individual consumers and small consumer groups. Part I thus concludes that it is desirable to avoid this problem in order to encourage consumer expression. Part II examines the implications of a flexible application of the new defense to consumer expression, focusing on corporate governance and corporate social responsibility. It will be claimed that a flexible application of the defense of 'responsible communication on matters of public interest' will ultimately facilitate consumers' supervision of corporate activity and, hence, will promote corporate social responsibility. Part II concludes with a brief analysis of the application of this claim in the area of food advertising and the fight against obesity and unhealthy eating.

## I. FREEDOM OF EXPRESSION, CONSUMER COUNTER-ADVERTISING LAW AND DEFAMATION IN CANADA

### A. *Charter Protection of Consumer Counter-Advertising*

Counter-advertising has received some protection in Canadian law. The Supreme Court of Canada has already recognized the value of consumer counter-advertising and has granted it constitutional protection as a form of freedom

of expression.<sup>2</sup> Section 2 of the Charter thus protects consumer counter-advertising in the same way that commercial expression is granted constitutional protection.<sup>3</sup> Consumers also have the constitutional right to express their views of or disappointments in a product or service, even to the extent that they can engage in consumer activism in the marketplace.<sup>4</sup>

In *R. v. Guignard*, the Supreme Court of Canada dealt with an appeal by a consumer who was convicted for erecting a sign on one of his buildings expressing his dissatisfaction with the services of an insurance company.<sup>5</sup> When Mr. Guignard, the consumer, refused to take the sign down, the respondent charged him with contravening section 14.1.5(p) of the City of Saint-Hyacinthe's planning by-laws, which prohibited the erection of advertising signs outside an industrial zone.<sup>6</sup> The Municipal Court convicted him, finding that the by-law prohibited the type of sign erected and that, although this prohibition infringed upon his freedom of expression as guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms, it was justified by section 1 of the Charter.<sup>7</sup> The Superior Court and the court of appeals upheld the constitutionality of the by-law.<sup>8</sup> The Supreme Court of Canada, however, allowed the appeal and held that section 14.1.5(p) and the definition of the words "enseigne" (sign) and "enseigne publicitaire" (advertising sign) in section 2.2.4 of the by-law were invalid.<sup>9</sup> The Court held, *inter alia*, that the impugned by-law was not justifiable under section 1 of the Charter,<sup>10</sup> and stated that it "severely curtailed [Mr.] Guignard's freedom to express his dissatisfaction with the practices of his insurance company publicly."<sup>11</sup> In its opinion, the Supreme

---

2. *R. v. Guignard*, [2002] 1 S.C.R. 472, 2002 SCC 14 (Can.).

3. *Id.*

4. *Id.*

5. *Id.* at 476.

6. *Id.*

7. *Id.* at 477-78.

8. *Id.* at 478.

9. *Id.* at 489.

10. *Id.*

11. *Id.* at 488.

Court stated that consumers' constitutional right to freedom of expression also involves the right to counter-advertising:

On the other hand, consumers also have freedom of expression. This sometimes takes the form of "counter-advertising" to criticize a product or make negative comments about the services supplied. Within limits prescribed by the legal principles relating to defamation, every consumer enjoys this right. Consumers may express their frustration or disappointment with a product or service. Their freedom of expression in this respect is not limited to private communications intended solely for the vendor or supplier of the service. Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business.<sup>12</sup>

This constitutional right of consumers may comprise diverse means of expression. The forms that counter-advertising may take should be broad enough to allow consumers to express their views. The Supreme Court recognized the problem of the limited financial capacity of consumers, and has thus allowed them to use multiple affordable means of expression that effectively convey their views to the public.<sup>13</sup> This can be particularly empowering for consumers with limited financial resources. The Court clearly approved a large number of inexpensive forms of expression to tackle the problems of affordability and effectiveness of the means of consumer counter-advertising:

[S]imple means of expression such as posting signs or distributing pamphlets or leaflets or, these days, posting messages on the Internet are the optimum means of communication for discontented consumers. The media are still often beyond their reach because of the cost. In *Ramsden v. Peterborough (City)*, this Court stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources. Signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns.

---

12. *Id.* at 484.

13. *Id.* at 485.

. . . A limitation of this nature can in fact deprive that person of the only means of expression that are truly accessible to him or her.<sup>14</sup>

This to some extent tackles the financial and informational barriers that prevent consumers from exercising their right to freedom of expression. The cost of consumer access to the media is often prohibitive. In *Guignard*, the Supreme Court of Canada noticed that problem and allowed consumers to use diverse means of expression.<sup>15</sup> However, the Court held that view in the context of government-citizen relations, and its application may be limited to consumer counter-advertising in connection with government interference. At best, the constitutional protection of consumer counter-advertising only creates a legal incentive and does little to facilitate the actual exercise of freedom of expression. This right may mean little for consumers if they do not possess the resources to finance their acts of expression. The holding of rights requires the holding of capabilities, including the necessary financial capabilities,<sup>16</sup> which are often unequally distributed.<sup>17</sup> Overcoming these barriers to consumers' freedom of expression can be particularly empowering for low-income and minority consumers, as they have become a large section of the obese population and are often targeted by the food industry in their advertising campaigns.<sup>18</sup> For instance, the legal protection of ordinary consumers who use the Internet as a medium to express their opinions about food choices and food corporations' practices helps

---

14. *Id.* at 485 (citation omitted).

15. *Id.*

16. See generally AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

17. See Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 233 (1993) (referring to the problem of lack of resources).

18. See, e.g., Kim D. Raine, *Determinants of Healthy Eating in Canada: An Overview and Synthesis*, 96 CAN. J. PUB. HEALTH (SUPPLEMENT 3) S8, S10-11 (2005) ("Increasingly, the food industry targets marketing messages at young children, perhaps in recognition of their vulnerability to such messages associated with underdeveloped critical consumer conscience."); Andrea Freeman, Comment, *Fast Food: Oppression Through Poor Nutrition*, 95 CAL. L. REV. 2221, 2237-38 (2007) ("Fast food companies have devoted considerable resources to developing marketing strategies aimed specifically at African Americans and Latinos, and it appears that the investment reaps a significant reward.").

mitigate the financial barriers to counter-advertising.<sup>19</sup> Similarly, the constitutional protection of food consumer picketing, boycotting, and leafleting—either by directly persuading fellow consumers not to buy at the place of purchase or through leaflets delivered to the mailbox, placed in newspaper advertisements, sent via email, or plastered on billboards and posters—creates opportunities for inexpensive methods of expression.<sup>20</sup>

However, this constitutional protection of consumer counter-advertising has not had a significant impact. The *Guignard* case involved a government action where the Charter clearly applied to protect the expression of the consumer against interference by the government. In contrast, the Charter is widely believed not to apply in private party litigation where the government is not involved in the restriction of free expression.<sup>21</sup> This deprives consumers' expression of constitutional protection when they have to litigate against private corporations.

Nevertheless, while the Charter does not apply to private litigants relying on the common law and where no act of government is involved, the courts ought to apply and develop the principles of the common law in a manner

---

19. See Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 919, 945-46 (2000) (claiming that the most effective means in the United States for countering the chill of libel suits against ordinary citizens who use the Internet as a medium of expression is the opinion privilege, namely, the privilege for statements that do not imply assertions of objective facts).

20. See R.W.D.S.U., *Local 558 v. Pepsi-Cola Can. Beverages (W.) Ltd.*, [2002] 1 S.C.R. 156, 172-73, 2002 SCC 8 (Can.); U.F.C.W., *Local 1518 v. Kmart Can. Ltd.*, [1999] 2 S.C.R. 1083, 1103 (Can.) (“The distribution of leaflets and posters is typically less expensive and more readily available than other forms of expression. As a result, they are particularly important means of providing information and seeking support by the vulnerable and less powerful members of society.”); *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, 764 (Can.) (“In holding, in *RWDSU v. Dolphin Delivery Ltd.*, . . . that secondary picketing was a form of expression within the meaning of s[ection] 2(b) the Court recognized that the constitutional guarantee of freedom of expression extended to expression that could not be characterized as political expression in the traditional sense but, if anything, was in the nature of expression having an economic purpose.”); *Daishowa Inc. v. Friends of the Lubicon*, [1998] 39 O.R.3d 620, 648 (Ont.) (“[T]here is no reason, in logic or in policy, for restraining a consumer boycott.”).

21. *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 603 (Can.).

consistent with the fundamental values enshrined in the Constitution and, in particular, the Charter.<sup>22</sup> The Charter values should be weighed against the principles that underlie the common law.<sup>23</sup> The development of the common law must therefore reflect the fundamental Canadian value of the right to free expression enshrined in section 2(b) of the Charter.<sup>24</sup> Thus, the fundamental value of freedom of expression should inform the common law in dealing with issues of consumer counter-advertising. Furthermore, the argument for the Charter's application to private disputes involving consumer expression becomes stronger where this expression has a public character or relates to a very important public issue.<sup>25</sup>

Indeed, courts have already recognized that the common law should protect consumer expression. In *Daishowa Inc. v. Friends of the Lubicon*, the Ontario court dismissed an action brought by an international corporation for a permanent injunction restraining the defendants' consumer boycott activities.<sup>26</sup> The company, Daishowa, negotiated a forest management agreement giving it logging rights over disputed lands.<sup>27</sup> A native band claimed right to the land, and wished to block logging until aboriginal land rights had been settled.<sup>28</sup> The defendant group, the Friends of the Lubicon, was a small public interest group based in Toronto that initiated a public boycott campaign of Daishowa's paper products.<sup>29</sup> The group contacted customers of the company and organized informational

---

22. See, e.g., *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 421, 2008 SCC 40 (Can.); *Pepsi-Cola Can.*, [2002] 1 S.C.R. at 167; *Dolphin Delivery*, [1986] 2 S.C.R. at 603.

23. *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1171 (Can.).

24. *Pepsi-Cola Can.*, [2002] 1 S.C.R. at 167.

25. See, e.g., *B.C.G.E.U. v. B.C. (Attorney General)*, [1988] 2 S.C.R. 214, 247-48 (Can.); *Daishowa*, 39 O.R.3d at 647; see also Chris Tollefson, *Strategic Lawsuits Against Public Participation: Developing a Canadian Response*, 73 CAN. BAR REV. 200, 228-29 (1994) (arguing that the Charter may apply to SLAPPs given their public nature).

26. *Daishowa*, O.R.3d at 621.

27. *Id.* at 625.

28. *Id.*

29. *Id.* at 626-27.

pickets at locations where Daishowa's customers refused to join the boycott.<sup>30</sup> For example, the defendants, as consumers, picketed at Pizza Pizza outlets in hopes that their fellow consumers would persuade Pizza Pizza to join the boycott by not buying the company's pizzas.<sup>31</sup> The court stated that this type of consumer expression deserved protection equal to the protection afforded to corporate expression. The court held that:

[M]y conclusion is that if the Canadian Constitution protects a corporation's expression where the context is largely economic, and where one of the consequences of the expression, if accepted by the listener, might well be economic harm to competitors, then the common law should not erect barriers to expression by consumers where the purpose and effect of the expression is to persuade the listener to use his or her economic power to challenge a corporation's position on an important economic *and* public policy issue. The plight of the Lubicon Cree is such an issue, as is Daishowa's connection to it.<sup>32</sup>

The court concluded that consumer boycotts and picketing are forms of commercial expression and should be protected by the Charter.<sup>33</sup> The court found that unlike corporate expression, the public interest served by consumer expression is a ground for applying the Charter and granting constitutional protection to those expressions.<sup>34</sup> In this case, for example, the defendant group was not motivated by economic self-interest, but instead by a desire to disseminate information about a very important public issue.<sup>35</sup> Accordingly, it was not unlawful for the defendant group to express itself in a picketing context in order to enlist consumers in a boycott of the company's products. The presence of a clear public element in a private dispute thus justifies the application of the Charter. In *R.W.D.S.U. v. Pepsi-Cola Canada Beverages*, the Supreme Court also held that picketing, including consumer boycotts

---

30. *Id.* at 627.

31. *Id.* at 632-33.

32. *Id.* at 649.

33. *Id.* at 647-48 ("[T]here is no reason, in logic or in policy, for restraining a consumer boycott."); *see also* *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 574 (Can.).

34. *Daishowa Inc. v. Friends of the Lubicon*, [1998] 39 O.R.3d 620, 647 (Ont.)

35. *Id.* at 649.

unrelated to labor disputes, always involves expressive action.<sup>36</sup> Accordingly, “it engages the high constitutional value of freedom of expression enshrined in s[ection] 2(b) of the Charter.”<sup>37</sup>

While the common law is supposed to develop in a way that is consistent with fundamental Charter values, courts have favored the protection of reputation over expression when deciding defamation lawsuits.

### B. *The Common Law of Defamation and the Lack of Anti-SLAPP Legislation*

Consumer counter-advertising nevertheless has limits. It is generally lawful unless it involves tortious or criminal conduct. Consumer counter-advertising should not exceed the limits imposed by defamation laws. Consumers should not engage in defamatory acts that intentionally seek to damage the commercial reputation of corporations. In *Guignard*, for example, the Supreme Court held that counter-advertising should not exceed the limits imposed by the legal principles of defamation.<sup>38</sup> Similarly, in *Daishowa*,

noted that, while consumer picketing and boycotts may be lawful, expressions containing false statements or grossly unfair accusations of genocide, interpreted according to their plain and ordinary (or usual and common) meaning, are defamatory.<sup>39</sup> It is important to note, however, that economic loss alone is insufficient to support a common law defamation claim.<sup>40</sup> An enterprise may suffer economic loss as a consequence of properly conducted consumer boycotts,

---

36. R.W.D.S.U., *Local 558 v. Pepsi-Cola Can. Beverages (W.) Ltd.*, [2002] 1 S.C.R. 156, 170-72, 2002 SCC 8 (Can.).

37. *Id.* at 173.

38. *R. v. Guignard*, [2002] 1 S.C.R. 472, 484, 2002 SCC 14 (Can.); *cf.* *Home Equity Dev. Inc. v. Crow*, 01/4472, [2002] B.C.J No. 1805 QUICKLAW, at paras. 13-14 (B.C.S.C. July 30, 2002) (holding that the burden is on the applicant in a PPPA action to show that the plaintiff's suit was improper if the plaintiff established a prima facie defamation claim). The European Court of Human Rights has recently reiterated this defamation limit on consumers' expressions. *See Steel & Morris v. United Kingdom*, 2005-II Eur. Ct. H.R. 1, 36.

39. *Daishowa*, 39 O.R.3d at 659, 663.

40. *U.F.C.W., Local 1518 v. Kmart Can. Ltd.*, [1999] 2 S.C.R. 1083, 1113 (Can.).

picketing, or leafleting efforts.<sup>41</sup> In particular, sound consumer boycotts and picketing are lawful activities and do not constitute a tort.<sup>42</sup>

In attempting to strike a balance between freedom of expression and the protection of reputation, courts have been inclined to favor the latter. The law of defamation rests upon a form of no-fault liability.<sup>43</sup> Accordingly, the plaintiff must:

[E]stablish only three things to make out a *prima facie* cause of action, namely, that the words complained of (1) are reasonably capable of defamatory meaning; (2) refer to the plaintiff; and (3) have been published. Liability does not rest upon proof that the statement complained of was untrue or . . . that the defendant was at fault in publishing those words. Nor does the plaintiff have to prove damages. The common law presumes falsity, fault and damages.

Justification, or truth, is a defence to a defamation action. However, as defamatory words are presumed to be false, the defendant bears the onus of proving the substantial truth of the sting, or the main thrust, of the defamatory words. It is no defence for the defendant to show that it followed accepted standards of investigation and verification and formed an honest and reasonable belief in the truth of statements it [communicated].<sup>44</sup>

Another defense frequently invoked is the fair comment defense. This defense:

[R]ests upon the defendant establishing that the statement was (1) a comment, not a statement of fact; (2) based upon true facts; (3) on a matter of public interest; (4) made fairly; and (5) made without malice. . . . As with the defence of justification, however thoroughly the [defendant] may have researched the story and checked its sources, if the facts upon which the opinion is based cannot be proved to be true, the defence of fair comment will be of no avail.<sup>45</sup>

---

41. *Id.*

42. *Daishowa Inc. v. Friends of the Lubicon*, [1998] 39 O.R.3d 620, 650 (Ont.) (discussing the tort of interference with economic interest).

43. *Cusson v. Quan*, [2007] 86 O.R.3d 241, 251 (Ont.).

44. *Id.* at 251-52.

45. *Id.* at 252.

All these difficulties render the defenses against defamation largely ineffective, which in practice results in over-protecting reputation. Indeed, in *Cusson v. Quan*, the Ontario Court of Appeal concluded that “[i]n its traditional formulation, the common law of defamation clearly favors the protection of reputation over freedom of expression.”<sup>46</sup> This is extremely problematic as it chills open debate on matters of public interest. As the Supreme Court of Canada has stated:

[T]he traditional elements of [the] tort [of defamation] may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get “spiked,” [it is contended], because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course “chilling” false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.<sup>47</sup>

Consequently, the Supreme Court of Canada has attempted to correct the problems with the common law of defamation. In *WIC Radio v. Simpson*, the Supreme Court interpreted the fair comment defense so as to make it consistent with the Charter values underlying freedom of expression and reputation.<sup>48</sup> Recognizing the chilling effects of defamation suits on freedom of expression and public debate, the Court modified the fair comment defense, seeking to strike a better balance between free expression and reputation. The modified test states that:

---

46. *Id.* at 252-53. However, the court also notes that “the common law does recognize that in certain situations, protection of reputation must yield to open and free discussion. These occasions attract the protection of either absolute or qualified privilege. Words spoken in Parliament and in the courts attract absolute privilege.” *Id.*

47. *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 437-38, 2008 SCC 40 (Can.).

48. *Id.* at 421.

(a) the comment must be on a matter of public interest; (b) the comment must be based on fact; (c) the comment, though it can include inferences of fact, must be recognisable as comment; (d) the comment must satisfy the following objective test: could any person honestly express that opinion on the proved facts; (e) even though the comment satisfies the objective test [of honest belief,] the defence can be defeated if the plaintiff proves that the defendant was subjectively actuated by express malice.<sup>49</sup>

The defendant must prove the four elements of the defense before the onus switches back to the plaintiff to establish malice.<sup>50</sup> With respect to the fourth element, the objective honest belief test “represents a balance between free expression on matters of public interest and the appropriate protection of reputation against damage that exceeds what is required to fulfill free expression requirements.”<sup>51</sup>

While the Court appears to have strengthened the protection of freedom of expression, *WIC Radio* falls short of neutralizing the chilling effects of the common law of defamation. The low threshold for establishing *prima facie* defamation was not altered. The common law presumptions of falsity, fault, and damages are unchanged. The onus still lies with the defendant to raise an affirmative defense—such as truth, privilege, or justification—many of which set high standards that defendants can rarely meet without considerable expense. Raising this threshold would have made it tougher for plaintiffs to bring a defamation suit and thereby to intimidate potential defendants. In this respect, it is still relatively easy for plaintiffs to bring an action for defamation, and the threat of litigation is likely to chill free expression. Similarly, as LeBel explained in his partially concurring judgment, the objective honest belief requirement places a reasonableness restriction on the opinions a person may legitimately express.<sup>52</sup> Courts have often been “uncomfortable with the idea of limiting fair comment to what is reasonable . . . .”<sup>53</sup> Furthermore, commentators have noted that:

---

49. *Id.* at 443.

50. *Id.* at 455.

51. *Id.* at 453.

52. *Id.* at 466 (LeBel, J., concurring).

53. *Id.* at 474.

It is difficult to discern the presence of an objective honest belief prior to pleading the defence of fair comment at trial. The practical effect of the ambiguity generated by the honest belief requirement is that it dampens the effectiveness of the fair comment defence in neutralizing the chilling effect on expression created by the spectre of a defamation lawsuit.<sup>54</sup>

Needless to say, the need to prove the elements of such a test in a court setting increases litigation costs that defendants bear and further chills free expression.

Moreover, defamation laws have been used strategically to intimidate and silence consumers' expressions of concerns and criticisms of products or corporate practices. This strategic use of defamation law is known as *Strategic Lawsuits Against Public Participation* ("SLAPP"). SLAPP suits are very much a part of Canadian society, and the courts are cognizant of their negative effect on public participation and consumers' freedom of expression.<sup>55</sup> The list of SLAPP suits involving corporate retaliation against Canadian consumers is fairly large.<sup>56</sup> Yet, Canada lacks anti-SLAPP legislation. The only attempt to introduce anti-SLAPP legislation was British Columbia's 2001 Protection

---

54. Matthew Shogilev, *Thawed but Still Chilled: Freedom of Expression in the Aftermath of Simpson v. Mair*, THE COURT, July 16, 2008, <http://www.thecourt.ca/2008/07/16/thawed-but-still-chilled-freedom-of-expression-in-the-aftermath-of-simpson-v-mair/>.

55. While some Canadian courts have emphasized the use of SLAPP suits against governmental participation, SLAPP suits should also encompass suits that limit consumers' right to commercial speech. See *Fraser v. Saanich* [1999] 32 C.E.L.R. (N.S.) 143, 151-52 (B.C.) ("A SLAPP suit is a claim for monetary damages against individuals who have dealt with a governmental body on an issue of public interest or concern. It is a meritless action filed by a plaintiff whose primary goal is not to win the case but rather to silence or intimidate citizens who have participated in proceedings regarding public policy or public decision making."). U.S. courts have clearly adopted a definition that encompasses SLAPP suits that can "effectively limit citizens' First Amendment rights to free speech." See *Kentner v. Timothy R. Downey Ins., Inc.*, 430 F. Supp. 2d 844, 845-46 (S.D. Ind. 2006); *Dickens v. Provident Life & Acc. Ins. Co.*, 11 Cal. Rptr. 3d 877, 882 (App. Dep't Super. Ct. 2004).

56. SUSAN LOTT, PUB. INTEREST ADVOCACY CTR., CORPORATE RETALIATION AGAINST CONSUMERS: THE STATUS OF STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION (SLAPPS) IN CANADA 13-36 (2004), [http://www.piac.ca/consumers/corporate\\_retaliation\\_against\\_consumers](http://www.piac.ca/consumers/corporate_retaliation_against_consumers).

of Public Participation Act, which was repealed shortly after enactment.<sup>57</sup>

Procedural barriers further prevent the protection of consumer counter-advertising from corporate SLAPP suits. Further, the use of possible defenses may be difficult and costly to substantiate in a court setting. For instance, the defenses of fair comment, qualified privilege, and prospect of no success of the libel lawsuit introduced by the short-lived BC 2001 Protection of Public Participation Act<sup>58</sup> were of no significant help to consumers, as consumers were not able to establish these claims during the litigation process.<sup>59</sup> One of the major difficulties that consumers experience is the inability to prove the truthfulness of their statements due to significant financial impediments and lack of access to critical information.<sup>60</sup> The high damage awards faced by consumers who are unable to prove their claims substantially deter future consumer expression and counter-advertising.<sup>61</sup>

The intimidation effect of libel lawsuits may be very effective in silencing consumer expression.<sup>62</sup> The disciplinary and censorship power of libel lawsuits may take several forms. The threat of defamation lawsuits and the likelihood of facing expensive legal fees may dissuade consumers from continuing with the expression of their concerns and the communication of counter-information

---

57. 2001 S.B.C., ch. 32 (B.C.) (repealed 2001).

58. *Id.*

59. *See e.g.* Home Equity Dev. Inc. v. Crow, 01/4472, [2002] B.C.J. No. 1805 QUICKLAW, at paras. 64, 69 (B.C.S.C. July 30, 2002).

60. *Id.* at paras. 70-71.

61. *See* Home Equity Dev. Inc. v. Crow, 01/4472, [2004] B.C.J. No. 177 QUICKLAW, at para. 182 (B.C.S.C. Feb. 3, 2004).

62. During the past three decades, the legal community has documented hundreds of cases in which corporations misused the courts by filing Strategic Lawsuits Against Public Participation, or SLAPPs. *See* John C. Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 400 n.18, 403 (1993); Sharlene A. McEvoy, "The Big Chill": *Business Use of the Tort of Defamation to Discourage the Exercise of First Amendment Rights*, 17 HASTINGS CONST. L.Q. 503, 503-04 (1990); D. Mark Jackson, Note, *The Corporate Defamation Plaintiff in the Era of SLAPPS: Revisiting New York Times v. Sullivan*, 9 WM. & MARY BILL RTS. J. 491 (2001) (arguing that defamation suits brought by corporations should be subject to liability as SLAPP actions).

regarding questionable corporate practices. When this initial threat succeeds, consumers are compelled to retract their comments, change the public statement of their opinions, deliver a public apology, or even cancel public forums dedicated to raising consumer awareness.<sup>63</sup> If the initial threat fails, libel lawsuits force consumers to face corporate plaintiffs in court who are prepared to sustain lawsuits until the final ruling or drop cases strategically when intimidation or exhaustion is accomplished.<sup>64</sup> These lawsuits jeopardize and misallocate the limited financial resources of consumers, divert consumer attention from monitoring consumer markets, and limit consumers' ability to publicize their criticism. According to one victim:

[T]hey were successful in diverting our attention from the forest to the courts. All fundraising efforts after being sued went to the court related costs (transportation, legal costs, etc) instead of the forest protection campaign. Also, our lawyer advised us that the seven of us should no longer talk to the media, so the SLAPP lowered our media presence too.<sup>65</sup>

Perhaps one of the most prominent and relevant Canadian cases in the area of food consumption was the 2002 campaign launched by the Living Ocean Society to discourage the consumption of farmed salmon and encourage consumers to look at other salmon hues.<sup>66</sup> The industry groups threatened the Society with a defamation action, effectively forcing the Society to remove some imagery from the campaign materials to avoid an expensive legal battle.<sup>67</sup>

It is thus desirable to reinstate anti-SLAPP legislation in Canada to prevent the strategic use of defamation laws to silence consumer expression. For instance, the defenses against defamation lawsuits introduced by the short-lived BC 2001 anti-SLAPP legislation should be given fresh legislative consideration.<sup>68</sup>

---

63. LOTT, *supra* note 56, at 27-30.

64. *See, e.g., id.* at 23-24 (discussing the Repap New Brunswick lawsuit).

65. *Id.* at 21.

66. *Id.* at 28.

67. *Id.*

68. This type of legislation has been widely adopted in the last decade. *See, e.g.,* Kathleen L. Daerr-Bannon, *Cause of Action: Bringing and Defending Anti-*

Public pressure on the courts and legislatures to eliminate the chilling effects of the common law of defamation on freedom of expression continues to grow, and calls for reinstating anti-SLAPP legislation in Canada continue to increase. Recently, in *Grant v. TorStar*, the Supreme Court of Canada introduced a new defense against defamation suits—‘responsible communication on matters of public interest’—that is supposed to strike a better balance between the protection of freedom of expression and reputation.<sup>69</sup> The defense only requires that the publication be on a matter of public interest and be made responsibly:

The proposed change to the law should be viewed as a new defence, leaving the traditional defence of qualified privilege intact.

....

. . . [F]irst, the publication must be on a matter of public interest. Second, the defendant must show that publication was responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all the relevant circumstances.

....

In determining whether a publication is on a matter of public interest, the judge must consider the subject matter of the publication as a whole. The defamatory statement should not be scrutinized in isolation.

....

To be of public interest, the “subject matter must be shown to be one inviting public attention, or about which the public, or a segment of the public, has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached.”

Public interest is not confined to publications on government and political matters, nor is it necessary that the plaintiff be a “public figure . . . .”

---

*SLAPP Motions to Strike or Dismiss*, 22 CAUSES ACTION 2d 317 (2003) (highlighting U.S. states that have promulgated anti-SLAPP statutes); see also California Anti-SLAPP Project, Other States: Statutes and Cases, <http://www.casp.net/menstate.html> (last visited Mar. 22, 2010).

69. *Grant v. TorStar*, 2009 S.C.C. 61, 32932, [2009] S.C.J. No. 61 QUICKLAW (Dec. 22, 2009).

....

The judge decides whether the statement relates to a matter of public interest. If public interest is shown, the jury decides whether on the evidence the defence is established, having regard to all the relevant factors, including the justification for including defamatory statements in the article.<sup>70</sup>

Once a statement is determined to relate to the public interest, the following criteria are used to evaluate whether the publisher of the statement was diligent in trying to verify the allegation:

(a) the seriousness of the allegation; (b) the public importance of the matter; (c) the urgency of the matter; (d) the status and reliability of the source; (e) whether the plaintiff's side of the story was sought and accurately reported; (f) whether the inclusion of the defamatory statement was justifiable; (g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ("reportage"); and (h) any other relevant circumstances.<sup>71</sup>

The defense of responsible communication is available to anyone, not just journalists and traditional media:

A second preliminary question is what the new defence should be called. In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established media outlets. I agree with Lord Hoffmann that the new defence is "available to anyone who publishes material of public interest in any medium."<sup>72</sup>

It follows that an individual or group that posts a message, text, or report, for instance, on the Internet regarding a matter of public interest should be able to invoke this defense. In particular, consumers can use the defense to protect their expressions and opinions in the

---

70. *Id.* at paras. 95, 98, 101, 105-06, 128.

71. *Id.* at para. 126.

72. *Id.* at para. 96 (citation omitted).

marketplace. This expands the Charter's protection of consumer expression as stated by the Supreme Court of Canada in *Guignard*.<sup>73</sup> It is then possible to infer that the responsible communication defense, when applied to the market and consumer behavior, may translate into a *public interest responsible consumer defense*. In terms of commercial expression and advertising, this defense offers significant legal protection to consumer counter-advertising practices. In the absence of anti-SLAPP legislation, such defense against defamation suits has the potential to neutralize the chilling effects of the common law of defamation on freedom of expression.

The application of this defense in the area of consumer expression, however, raises some concerns. The second aspect of this defense requires that the publication is responsible, that is to say, the defendant is "diligent in trying to verify the allegation(s), having regard to all the relevant circumstances."<sup>74</sup> If the defense is available to anyone, including consumers, one may wonder if the standard of diligence should be different for individual consumers and consumer associations. The question is important because, unlike for-profit corporations, individual consumers often lack the time, resources, and legal knowledge necessary to make sure that their expressions and critical opinions meet legal standards or escape liability for defamation.<sup>75</sup> It is difficult to imagine that all ordinary consumers will be in a position to know and understand the legal requirements for the use of the defense without paid legal advice. Even so, not all ordinary consumers have the resources, time, and knowledge to comply, for example, with the requirements of seeking the plaintiff's side of the story and confirming the reliability of sources before they

---

73. R v. Guignard, [2002] 1 S.C.R. 472, 484, 2002 SCC 14 (Can.).

74. *Grant*, at para. 98 (QUICKLAW).

75. Jennifer Meredith Liebman, *Defamed by a Blogger: Legal Protections, Self-Regulation and Other Failures*, 2006 U. ILL. J.L. TECH. & POL'Y 343, 365 (noting that, in some cases, victims of online defamation have greater resources to pursue legal action than defendant bloggers). Similar concerns have been raised with respect to freedom of expression in the United States. See Tamara R. Piety, *Against Freedom of Commercial Expression*, 29 CARDOZO L. REV. 2583, 2617 (2008) ("[O]ne might plausibly argue that the current state of affairs is imbalanced in favor of corporate speech even without expansive First Amendment protection for commercial speech simply on the basis of the disparity of resources available.").

communicate their views and opinions to the world. In fact, this legal exercise is likely to chill consumers' expression, as they may fear both the possibility of not meeting the standard and the prospect of engaging in expensive defamation litigation.<sup>76</sup> Only affluent consumers will probably feel confident relying on the defense and communicating their opinions. Small consumer groups and underfunded consumer associations may face similar challenges and, as a result, be deprived of their right to express their views and disseminate information on matters of great importance to the public. While it is desirable that consumers adhere to a standard of diligence, a stringent standard may render the defense of responsible communication ineffective in the marketplace for most consumers.

Therefore, it is desirable that the standard of diligence is not set too high for individual consumers or small consumer groups in order to make the defense truly available to these groups. The standard of diligence that the new defense requires should be sensitive to the limited resources, time, and knowledge that ordinary consumers confront on a daily basis. In requiring that consumers verify the allegations, consideration should be given to what is practically possible for ordinary consumers within the constraints of time, resources, and knowledge, while taking into account the problems of consumerism, consumer apathy, inequality, and cultural diversity. This approach is consistent with the spirit of the Supreme Court's view in *Grant*. In *Grant*, the Court held that the standards to evaluate conduct of non-journalists should not be the journalistic standards:

A review of recent defamation case law suggests that many actions now concern blog postings and other online media which are potentially both more ephemeral and more ubiquitous than traditional print media. While established journalistic standards provide a useful guide by which to evaluate the conduct of journalists and non-journalists alike, the applicable standards will necessarily evolve to keep pace with the norms of new

---

76. The Supreme Court of Canada recognized this general problem with the common law of defamation before *Grant*. See *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 437, 2008 SCC 40 (Can.) ("There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action.").

communications media. For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest.<sup>77</sup>

The need to adjust the standard of responsibility to reflect the conditions of ordinary consumers is legally possible. The jury is allowed to exercise discretion in determining whether the communication was responsibly made, as the factors set out in *Grant* are not exhaustive but instead illustrative and flexible.<sup>78</sup> The jury, for instance, could consider new factors in assessing a consumer's diligence and assign them superior value.

It is thus hoped that in applying the new defense of 'responsible communication on matters of public interest' the courts develop a standard of diligence that is suitable for ordinary consumers and provides reasonable protection to consumer expression. This is extremely important because it will avoid both reinstating the chilling effects on expression and reinforcing consumerism, consumer apathy, and bias against potentially active non-affluent citizens.

## II. CONSUMER COUNTER-ADVERTISING LAW AND CORPORATE SOCIAL RESPONSIBILITY

Despite the efforts of the courts to minimize the chilling effects of the common law of defamation, there is still the danger that consumer counter-advertising may not receive favorable legal treatment in Canada. The fair comment defense is still a high and costly standard to meet and is likely to be ineffective. The defense of 'responsible communication on matters of public interest' is significant progress in the right direction, but it is possible that its application will chill consumer expression. The lack of anti-SLAPP legislation in Canada worsens the under-protection of consumer counter-advertising. This legal framework contrasts with the over-protection of corporate freedom of expression in the form of commercial advertising. Unlike consumer and governmental counter-advertising, commercial advertising has strong constitutional

---

77. *Grant*, at para. 97 (QUICKLAW).

78. *Id.* at paras. 122-23, 128.

protection<sup>79</sup> and corporations' legal rights to bring actions for consumer defamation are clearly established. In this context, the uncertain protection of consumers' freedom of expression appears to affirm a structure of legal rights and legal powers that favors corporate control of consumer information and commercial advertising.

Thus, a flexible application of the standard of responsibility in the area of consumer expression is much needed. Such orientation of the application of the responsible communication defense will encourage consumers to express their opinions and criticisms about a product, service, or corporate behavior without a serious fear of a defamation suit.<sup>80</sup> While the decision of consumers to express their views and become active in the marketplace depends on a number of behavioral and social factors, a flexible application of the defense will create positive institutional incentives for greater consumer expression.

Such an ideal outcome is likely to contribute to the improvement of the welfare impact of the market as well as the mitigation of the democratic deficit in the governance of the economic system. It is obvious that consumer counter-advertising increases the availability of alternative information and helps mitigate important market failures, notably imperfect information and monopoly power. As a result, consumers may be in a better position to freely think, reflect, and make informed choices to stimulate greater competition among corporations that will ultimately enhance social welfare. Similarly, consumer counter-advertising also fosters the exchange of ideas in the marketplace and in public debate. Consumer counter-advertising provides additional information to consumers, the government, and corporations, and presents alternative

---

79. Since 1982, when the Charter came into effect, the Supreme Court of Canada has detailed the extent of this constitutional protection in several important cases. See *R. v Guignard*, [2002] 1 S.C.R. 472, 482-85 (Can.); *RJR-MacDonald Inc. v. Can. (Attorney General)*, [1995] 3 S.C.R. 199, 326 (Can.); *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 241 (Can.); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 967 (Can.); *Ford v. Quebec* [1988] 2 S.C.R. 712, 764-67 (Can.). The constitutional protection of commercial expression in Canada, however, is controversial and has been questioned from different perspectives. See, e.g., ROGER A. SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* (2004).

80. Eugénie Brouillet, *Free Speech, Reputation, and the Canadian Balance*, 50 N.Y.L. SCH. L. REV. 33, 54 (2005).

views of market consumption and consumer choices. This enriches public debate and enhances the freedom of expression of consumers, citizens, and the democratic system at large. This advantage of consumer counter-advertising to further democratize the market is extremely important. It helps correct the imbalances and biases that result from corporate advertising; expensive marketing campaigns often convey a one-sided view that is intended to persuade rather than inform, and tends to monopolize the discourses of market choices.<sup>81</sup>

More specifically, increasing consumer counter-advertising practices following a favorable application of the defense is likely to revitalize an important social control mechanism of corporate activity. Heightened consumer counter-advertising not only increases the availability of non-corporate information and the degree of democratic deliberation in the marketplace, but it also strengthens an important oversight mechanism, namely, consumers' supervision of corporate activity through counter-advertising.<sup>82</sup> Consumers can use their freedom of expression to criticize corporate activity and demand changes in the marketplace. The public interest requirement of the responsible communication defense should encompass those issues and bring them under the protection of the defense. Indeed, in *Grant*, the Supreme Court suggested that "public interest is not confined to publications on government and political matters . . . , nor is it necessary that the plaintiff be a public figure."<sup>83</sup> Free expression "allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic

---

81. *RJR-MacDonald Inc. v. Can. (Attorney General)*, [1995] 3 S.C.R. 199 (Can.); *Boehringer Ingelheim (Can.) Ltd. v. Pharmacia Can. Inc.*, 00-CV-201798, [2001] O.J. 1911 QUICKLAW, at para. 81 (O.S.C.J. May 22, 2001); *Purolator Courier Ltd. v. United Parcel Ser. Can. Ltd.*, 94-CU-81492, [1995] O.J. 876 QUICKLAW, at para. 62 (Ont. Gen. Div. Apr. 3, 1995).

82. See generally *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110 (9th Cir. 2003) (involving Suzuki's litigation against Consumer Reports for publishing a report regarding Suzuki's roll-over statistics); *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), cert. dismissed, 539 U.S. 654 (2003) (involving litigation against Nike in light of media reports critical of Nike's labor practices).

83. *Grant*, at para. 106 (QUICKLAW).

environment.”<sup>84</sup> Thus, stronger legal protection of consumer counter-advertising as a form of freedom of expression promotes consumer expression, which in turn encourages corporate accountability and corporate social responsibility.<sup>85</sup>

It is important to note, however, that the effectiveness of such defense to further democratic governance, the search for the truth and, specifically, corporate social responsibility in the marketplace largely depends on the presence of active consumers. In particular, consumer associations may be more active in expressing concerns and disseminating information. A public interest defense provides the ideal legal protection to consumer associations seeking to communicate critical messages about consumer products and corporate behavior. Yet the number of consumer associations in Canada is not impressive. Furthermore, the recognition of consumer apathy indicates that, at the individual level, consumers are not necessarily interested in expressing opinions. In sum, the defense does not necessarily encounter a favorable institutional environment to actually promote democracy, truth, and social responsibility in the marketplace. Outside the area of freedom of expression and defamation, it is socially desirable to build an institutional framework to encourage consumer activism and the formation of consumer associations if we want to experience the value of freedom of expression via the responsible communication defense in the marketplace.

#### A. *Consumer Counter-Advertising, Obesity and Healthy Eating*

The social value of a lenient application of the responsible communication defense to consumer expression can be illustrated in the area of food consumption and healthy eating. The presence of consumer counter-advertising contributes to the expansion of the legal and

---

84. R.W.D.S.U., *Local 558 v. Pepsi-Cola Can. Beverages (W.) Ltd.*, [2002] 1 S.C.R. 156, 172, 2002 SCC 8 (Can.).

85. See Brenden E. Kendall et al., *Consumer Activism and Corporate Social Responsibility*, in *THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY* 241, 248 (Steve May et al. eds., 2007).

social controls over aggressive food advertising and growing corporate self-regulation of food advertising, which are often unconcerned with healthy eating.<sup>86</sup> Consumer counter-advertising could provide not only greater food information, but also could supervise potentially misleading food advertising, help reconstruct social ideas of public health and nutrition,<sup>87</sup> and improve the social responsibility of corporations. For instance, in 2001, Coca-Cola “withdrew from its nationwide network of exclusive school vending contracts under pressure from consumer advocacy groups concerned about the dramatic rise in childhood obesity.”<sup>88</sup> These kinds of consumer practices may contribute to the fight against obesity and hunger in Canada, problems that are reaching critical proportions, jeopardizing the health of Canadians, and depleting the public funding of the health system.<sup>89</sup> Both the democratic regulation of advertising and the fight against obesity may benefit from stronger legal protection of consumer expression.

*Steel and Morris v. the United Kingdom*, a decision also known as the “*McLibel*” case, offers a good example of the potential of consumers’ expression to enhance corporate social responsibility in the area of food consumption.<sup>90</sup> The “*McLibel*” case began when McDonald’s sued two impecunious members of London Greenpeace for libel because of their distribution of leaflets that protested a number of McDonald’s business practices, primarily related to environmental impact, labor practices, and nutrition.<sup>91</sup> Helen Steel and David Morris refused to apologize and

---

86. See, e.g., Raine, *supra* note 18, at S11.

87. Lawrence O. Gostin, *Law as a Tool to Facilitate Healthier Lifestyles and Prevent Obesity*, 297 JAMA 87, 89 (2007) (arguing that counter-advertising can promote good nutrition and physical activity); Note, *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1161-62 (2003); see also Consumer Justice Ctr. v. Trimedica Int’l., Inc., 132 Cal. Rptr. 2d 191, 193, 195-97 (Ct. App. 2003).

88. Trenton G. Smith, *The McDonald’s Equilibrium: Advertising, Empty Calories, and the Endogenous Determination of Dietary Preferences*, 23 SOC. CHOICE WELFARE 383, 407-08 (2004).

89. STANDING COMMITTEE ON HEALTH, 39TH PARLIAMENT, 1ST SESS., HEALTHY WEIGHTS FOR HEALTHY KIDS, at 1-3 (Can. House of Commons 2007), <http://www.cfn.ca/pdfs/HealthyWeightsForHealthyKids.pdf>.

90. *Steel and Morris v. United Kingdom* 2005-II Eur. Ct. H.R. 1.

91. *Id.* at 9, 13.

McDonald's decided to sue them.<sup>92</sup> Steel and Morris were too poor to hire lawyers, and were clearly not economic competitors of McDonald's.<sup>93</sup> Part of the criticism of the fast food company contained in the pamphlets included the following statements:

What's so unhealthy about McDonald's food?

McDONALD's try [sic] to show in their 'Nutrition Guide' (which is full of impressive-looking but really quite irrelevant facts and figures) that mass-produced hamburgers, chips, colas and milkshakes, etc., are a useful and nutritious part of any diet.

What they don't make clear is that a diet high in fat, sugar, animal products and salt (sodium), and low in fibre, vitamins and minerals – which describes an average McDonald's meal – is linked with cancers of the breast and bowel, and heart disease. This is accepted medical fact, not a cranky theory. Every year in Britain, heart disease alone causes about 18,000 deaths.<sup>94</sup>

On appeal from the United Kingdom's courts, the European Court of Human Rights held that the lack of government aid to consumers to prove the accuracy of their criticism against a corporation is a violation of the human right to freedom of expression as set forth in Article 10 of the European Convention on Human Rights.<sup>95</sup> The court stated that “[i]n conclusion, given the lack of procedural fairness and the disproportionate award of damages, the Court finds that there has been a violation of Article 10 . . . .”<sup>96</sup> It thus became obvious for the court that Steel and Morris were at a disadvantage to defend their allegations and definitively had no matching resources of the kind that McDonald's has to promote and enforce its version of truth.<sup>97</sup>

One important social impact of this case is that it attracted negative publicity, much of which focused on

---

92. *Id.* at 13-14.

93. *Id.* at 14.

94. *Id.* at 10.

95. *Id.* at 38-39.

96. *Id.* at 39.

97. *Id.* at 32.

issues of corporate social responsibility.<sup>98</sup> Consumer expression, as exemplified in the activism of Steel and Morris, raised concerns about a number of food issues and exposed McDonald's business practices to public scrutiny. It is not difficult to imagine that a large number of consumers read Steel and Morris' complaints and re-examined both their decisions to eat at McDonald's and the nutritional value of fast food. At the same time, the fast food industry was called into question as to whether it really contributes to enhancing nutrition and healthy eating in society. It is conceivable that McDonald's gave serious consideration to the need to re-assess its business practices, its corporate social responsibility policies, and the nutritional value of its food options. Consumer expression and counter-advertising thus turned into an oversight mechanism of corporate activity, improving public accountability of the fast food industry and contributing to the promotion of healthy eating.

#### CONCLUSION

This Article has discussed the legal protection of consumers' freedom of expression as a form of counter-advertising, and has explored its implications for enhancing corporate social responsibility in Canada. Courts have traditionally favored the protection of reputation over expression by setting stringent standards for the use of defenses against defamation suits. This has chilled consumers' expression, counter-advertising practices, and, more generally, consumer activism, which are already under-protected as Canada lacks anti-SLAPP legislation. In late 2009, the Supreme Court of Canada introduced a new defense against defamation suits, namely, 'responsible communication on matters of public interest,' which represented major progress towards reducing the chilling effects of the common law of defamation. The defense requires that the communication must be on a matter of public interest and be made responsibly. It was argued that, when applied to consumers' expression, there is still the danger that the standard of diligence the new defense requires may be too high for ordinary consumers and small

---

98. Douglas W. Vick & Kevin Campbell, *Public Protests, Private Lawsuits, and the Market: The Investor Response to the McLibel Case*, 28 J. L. & Soc'y 204, 234 n.100 (2001).

consumer groups, thereby reinstating the chilling effects on expression and reinforcing consumerism, consumer apathy, and bias against potentially active non-affluent citizens. It is desirable that the application of such a standard is responsive to the real conditions of ordinary consumers.

A flexible application of the new defense is important because it will encourage consumer expression and counter-advertising that may become an oversight mechanism, namely, consumers' supervision of corporate activity through counter-advertising. This may in turn enhance corporate social responsibility. In the area of food consumption and healthy eating, the presence of consumer counter-advertising will probably improve the level of legal and social control over aggressive food advertising and growing corporate self-regulation of food advertising, which is often unconcerned with healthy eating.

Further research is needed in several respects. For instance, it is important to give fresh consideration to the need to reinstate anti-SLAPP legislation in Canada, and assess its significance in light of the recently introduced defense of 'responsible communication on matters of public interest.'