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LAW OF DEFAMATION

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Release No. 5, November 2025

This release features updates to the case law and commentary in Chapters 4 (Definitions and Defamatory Imputations), 12 (Absolute Privilege—Executive, Parliamentary and Judicial), 17 (Bringing an Action), 18 (Parties), and 25 (Damages).

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Highlights:

§ 17:38 Generally—Federal and Provincial Jurisdiction—An action for libel and slander is based upon the common law and various provincial statutes. Therefore, since there is no existing body of federal law, the federal courts of Canada do not have jurisdiction to entertain a defamation action¹ even where the C.B.C. is a defendant. While the federal court has exclusive jurisdiction where a federal tribunal is a defendant and the action implicates the official actions of the tribunal and seeks relief against it, an action for defamation which seeks a remedy against members of the tribunal in their individual capacities falls outside the federal court jurisdiction and must be brought in a provincial court. Thus, while an Indian band council is a federal tribunal within the meaning of the Federal Court Act, where an action of defamation is brought against members of the Band Council as individuals, the provincial court, not the federal court, has the appropriate jurisdiction to hear the matter.

§ 17:40 Forum Non Conveniens and Choice of Venue—Even if a court has jurisdiction *simpliciter* to hear an action, it may decline to exercise that jurisdiction based on the doctrine of *forum non conveniens*. The Supreme Court of Canada restated this analysis and its relationship to the jurisdictional and choice of law questions in its decision in *Club Resorts Ltd. v. Van Breda*. It is up to the parties (i.e., the defendant) to raise the question of forum non conveniens; the court should not invoke the principle of its own accord. The burden will be on the defendant to show that the dispute has a real and substantial connection to the alternative forum and why that forum is “clearly more appropriate” to hear the claim. This latter question is based on matters of fairness to the parties and the efficient resolution of the dispute. The court may also consider the “loss of juridical advantage” to the plaintiff if a stay is granted in favour of the alternative forum; however, this factor should not be relied on too extensively, particularly as between Canadian provinces. Further, although the plaintiff may lose its juridical advantage if the matter is tried in an alternative jurisdiction, the defendant may well be at a juridical disadvantage if the matter is retained in the domestic court’s jurisdiction. This means that this consideration is often a neutral factor in the *forum non conveniens* analysis.