

# Torys on Litigation and Dispute Resolution

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## Canada's Supreme Court Rules That Hyperlinking to Defamatory Material Is Not Publication

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On October 19, 2011, the Supreme Court of Canada released its decision in *Crookes v. Newton*, in which it considered a threshold issue about defamation in the Internet era.<sup>1</sup> The Court concluded that providing a hyperlink to defamatory material is not publication of the material, a prerequisite to a claim for defamation.

The Supreme Court acknowledged that new online methods of communication pose unprecedented threats to individuals' reputations; however, it also confirmed that the law of defamation evolves to keep pace with "the inherent and inexorable fluidity of evolving technologies."

### Background

The plaintiff sued several parties that he claimed were responsible for a defamatory "smear campaign" aimed at him and other members of the Green Party of Canada. The defendant had a website commenting on free speech, on which he posted an article about the plaintiff's litigation. The defendant added hyperlinks to some of the allegedly defamatory articles, but he did not repeat any of the material linked to. Nor did he say anything on his own website that defamed the plaintiff. Nevertheless, he was sued for defamation on the basis of the links alone.

The British Columbia Court of Appeal ruled that simply providing a hyperlink was not publication. However, it left open the possibility that publication could take place if the link was accompanied by words of encouragement or an invitation to view the material. The Court also suggested that publication would take place if the hyperlinker adopted or endorsed the linked material.

### The Decision

The majority of the Supreme Court rejected the approach suggested by the British Columbia Court of Appeal, instead providing a bright-line test that hyperlinking does not constitute publication of material linked to.

The majority held that to prove publication, the defendant must have "actually expressed something defamatory." The majority described a hyperlink as a mere reference and "content neutral – it expresses no opinion, nor does it have any control over, the content to which it refers." Only where a person "presents content from the

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<sup>1</sup> Torys LLP represented the Canadian Civil Liberties Association, an intervener, in this case.

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hyperlinked material in a way that actually repeats the defamatory content should that content be considered to be 'published' by the hyperlinker."

Permeating the majority's reasons was an understanding of the critical role that hyperlinks play in the proper functioning of the Internet, where hyperlinks are ubiquitous. The Court held that stifling the use of hyperlinks would seriously restrict the flow of information and, as a result, freedom of expression.

The decision is confined to hyperlinks that require the reader to click in order to access the linked content. With an eye to new and developing technology, the Court left open the question of other types of hyperlinks such as those that open material automatically. 