

Turmel v CBC (Dragons' Den) - Enforceability of Depiction Releases

July 12, 2011 by Bob Tarantino

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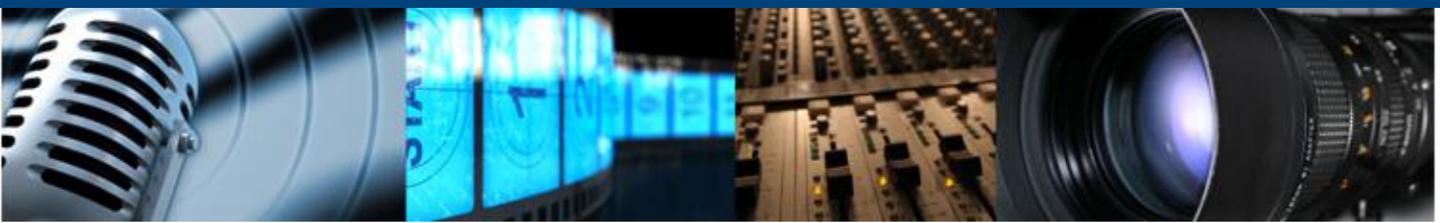
The Toronto Star is reporting that oral arguments in the appeal of the Turmel v CBC (Dragons' Den) decision are currently underway ("Brantford entrepreneur claims 'Dragons' defamed him"). The Turmel decisions are valuable for Canadian entertainment lawyers because they are among the few reported decisions which consider the enforceability of depiction releases for television programs.

Some background: Turmel appeared on an episode of the CBC television program Dragons' Den - a "reality TV show" which, per the Wikipedia entry, features "entrepreneurs pitching their business ideas in order to secure investment finance from a panel of venture capitalists". Turmel was unhappy with the manner in which he was depicted on the show, and sued the CBC for defamation. He actually sued twice: the first action (2010 ONSC 5318) (which we'll refer to as the Lofchik decision, after the judge hearing the case), which the plaintiff filed after the episode was first broadcast, was dismissed following the defendant's application for summary judgment; the second action (2011 ONSC 2400) (which we'll refer to as the Arrell decision), which was essentially identical to the first, was brought after the CBC had re-broadcast the same episode and was, as with the first action, dismissed after the defendant brought an application for summary judgment).

The plaintiff's claims were dismissed on a variety of grounds: he had failed to provide the notice required by the Libel and Slander Act (Ontario); the second action was res judicata; and, most importantly for our purposes, both the Lofchik decision and the Arrell decision held that the "consent" (or depiction release) which was signed by Turmel was binding on him and, in the words of the Arrell decision, was "a complete bar" to the lawsuit.

In addition to signing the depiction release, the plaintiff had also been given a "Contestant Guide" which set out various elements of the show. The Guide, coupled with the consent/depiction release which Turmel signed, included a number of critical clauses which buttressed the defendant's argument:

- the Guide said that "anything that is discussed on camera can be broadcast on the show"
- there was "no guarantee" that a participant would appear on the show or be chosen to receive investment funds from the panel of entrepreneurs
- from the Guide: "a pitch may take on a life of its own - anything goes"
- per the Arrell decision, the depiction release expressly stated that the CBC had "sole and exclusive rights to the taping and to edit and use it in any way or anytime it wished"



- the depiction release included an express acknowledgment that the participant might be portrayed in "...disparaging, defamatory, embarrassing or of an otherwise unfavourable nature which may expose [the participant] to public ridicule, humiliation or condemnation"
- the depiction release also included a complete waiver and release of claims ("The plaintiff also agreed pursuant to paragraph 27 of the consent not to sue for any loss or damage no matter how caused")

Both the Lofchik and Arrell decisions indicated that the plaintiff had been provided with the Guide prior to his participation, had been provided with the depiction release prior to his participation, told to read it carefully, given time to review it (and even to have his own lawyer review it). Also of significance was the finding in the Arrell decision that "[n]o evidence ha[d] been led that [the depiction release] was in any way unconscionable and like Justice Lofchik I find as a fact it was not" - it will be interesting to see if the issue of unconscionability is raised on appeal, since one of the lingering issues about depiction releases is whether they constitute "contracts of adhesion" (since they are effectively provided on a "take or leave it" basis, with no opportunity to negotiate terms).

The Ontario Court of Appeal decision in *Turmel v CBC* will be an important one in the Canadian entertainment lawyer's little corner of the legal universe: it will represent the first, to my knowledge, instance of appellate consideration in Canada of the enforceability of depiction releases. If the Court of Appeal holds the release to be unenforceable against the plaintiff, it will require some serious reassessments of contracting practices in the industry; but if the Court upholds the lower court decisions, it will provide authoritative confirmation of the general practice of relying upon signed depiction releases.

UPDATE (July 13, 2011): I have been reliably informed that the Ontario Court of Appeal has dismissed the appeal from the bench. The Court's reasons for the dismissal confirm that, because the plaintiff voluntarily appeared on the show and was given an opportunity to read the depiction release and raise any concerns about it (which he declined to do), the depiction release was not unconscionable; because the depiction release contained a waiver of any right to relief, his claims were barred. As I mentioned in the last paragraph, above, this is a positive decision for producers' counsel.

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