

Criticizing companies via social media and digital platforms: an alternative forum of justice for consumers?

RESEARCH REPORT

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About Option Consommateurs

Option consommateurs is a non-profit association whose mission is to help consumers and defend their rights.

Option consommateurs informs consumers who have a disagreement with a merchant, through consultation on budgeting and through information sessions on debt, consumer law and privacy protection. Each year, we produce research reports on important consumer issues. We also intervene with policy-makers and the media to denounce unacceptable situations.

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Summary

The instantaneous sharing of information and opinions made possible by digital technology is an undisputed game-changer in the consumer universe. Consumers can now easily share their experiences as customers with each other, which tends to promote informed consumer choices. Their ability to communicate their opinions online is protected by the law that guarantees freedom of expression. However, some companies attempt to restrict this expression, invoking their right to safeguard their commercial reputation. There has been an increase in recent years in the number of defamation lawsuits brought against consumers who have used digital platforms to criticize their products or services.

Faced with this clash between two fundamental rights—on the one hand the freedom of expression of the consumer, and on the other, the company's right to protect its reputation—judges must strive to achieve a fair balance. The defamation suits brought by companies, however, seem ill-adapted to the current widespread use of social media and digital platforms as a form of expression. The consumer's freedom of expression occupies only a marginal place among the legal criteria applicable to defamation. Also, companies are awarded damages, which may entail exorbitant sums for consumers, without clear proof of the damage suffered. The responsibility of the company itself for the deterioration of its reputation, as the result, for example of poor customer service or the poor quality of the goods offered, is conspicuously absent from the debate.

Courts are also reluctant to consider online reviews as serving the public interest. However, the participants in our focus groups assert that their main motivation for posting an online review is to warn other consumers and encourage companies to abandon their bad practices. Moreover, the use of digital platforms can sometimes constitute an alternative forum of justice for consumers who are unaware of the protections and remedies offered in consumer law or who repeatedly encounter problems of access to justice.

The terms of use of digital platforms provide few protections to users. Disclaimers on the platforms concerning published content place full responsibility on the consumer. The paucity of guidelines for monitoring content and removing posts constitutes a powerful tool for censoring consumers. The participants interviewed admitted that they do not always take the trouble to read these terms of use, which are often very complex, and that they do not understand the legal principles governing defamation proceedings.

The aim of this report, therefore, is to inform consumers about the risks associated with online reviews and better define the guidelines within which they are allowed to express their opinions about a company. It proposes a more harmonious reconciliation between the consumer's freedom of expression, society's interest in discussing experiences in consumer law, and the company's right to preserve the reputation it deserves. Finally, it is important to emphasize the need to inform the public about their rights and remedies in consumer law and about the alternative methods of settling disputes available in the event of a defamation suit brought by a company.

Introduction

The Internet has made it possible for anyone to don the guise of a vigilante and to express their opinion on just about anything. We need only think about those sites that allow us to evaluate the performance of our teachers,¹ our employers,² or even a former spouse.³ In addition to these examples, there are, of course, the sites for rating products and services that have gained in popularity in recent years and that allow consumers to comment on the services provided by a company.⁴

Online reviews are firmly integrated within the habits of today's consumers, who use them as a guide to their purchases in various activity sectors; they appear to consider these opinions to be as reliable as personal recommendations from friends or family members.⁵ A study carried out in the United States showed that in 2022, 98 % of consumers had used the Internet to find information on local businesses.⁶ Generally speaking, an online review means a "[...] review of a product or service by a consumer, not necessarily the purchaser, based on usage or consumption [...]."⁷

As a corollary, consumers in turn want to contribute to these information bases for the benefit of other consumers and are increasingly using sites for evaluating products and services and social media sites to rate and comment on their experience. While in 2006 it was estimated that almost all of the interactions on online review platforms involved only about 1 % of users,⁸ the most recent data shows a dramatic increase in this phenomenon. In fact, a study conducted in 2018 indicates that 32 % of Québec adults reported having posted a positive or negative comment about a brand or company,⁹ while a 2022 study found that 70 % of Canadian

¹ The Rate My Teachers and Rate My Professors sites allow to evaluate teachers and professors.

² The Rate My Employer site allows to rate employer.

³ The site The Ex-Boyfriend List allows Internet users to share their experiences about someone they have dated.

⁴ In the context of this research, the term "company" refers to anyone who provides a good or a service. This can be either a merchant, within the meaning of consumer protection laws, or a professional.

⁵ According to a study, 46 % of consumers believe online business reviews are as trustworthy as personal recommendations from a friend or family member: Sammy PAGET, *Local Consumer Review Survey 2023*, Bright Local, 2023, online: <https://www.brightlocal.com/research/local-consumer-review-survey/>.

⁶ Sammy PAGET, *Local Consumer Review Survey 2023*, Bright Local, 2023, online: <https://www.brightlocal.com/research/local-consumer-review-survey/>.

⁷ Howard J. Deane, *Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews*, 2016, p. 43. It should be noted that the Consumer Code in France in its article D111-16 defines an online opinion as being "[...] the expression of the opinion of a consumer on their consumer experience thanks to any element of 'assessment, whether qualitative or quantitative,' whether or not the consumer has purchased the good or service in question." [TRANSLATION], online: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000035724929/2021-11-30/.

⁸ Howard J. Deane, *Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews*, Consumers Council of Canada, 2016, p. 21.

⁹ CEFRIQ, *L'usage des médias sociaux au Québec*, vol. 9, no 5, 2018 edition, p. 5, online: <https://transformation-numerique.ulaval.ca/enquetes-et-mesures/netendances/lusage-des-medias-sociaux-au-quebec-2018/>.

consumers surveyed had posted online reviews in the past two years¹⁰. In the United States, 95 % of consumers surveyed posted a review online in 2022 or were considering doing so¹¹.

Also, for some consumers, the forum provided by these digital platforms¹² offers the possibility of taking justice into their own hands, by publicly denouncing situations they consider to be unfair. However, “[w]hile this trend dates back several years, it has increased considerably since the emergence of social networks”¹³ [TRANSLATION]. Consumers are also more likely to share negative experiences.¹⁴ In a study of Québec adults in 2021, 76 % said they had observed an increase in negative comments on social media.¹⁵

Considering that 86 % of consumers claim they would be less likely to buy from a company that received negative reviews,¹⁶ which can have negative repercussions for businesses. The ability to conduct independent research before doing business with a company and to share information and experiences with other consumers has naturally changed the balance of power between companies and their customers, who now have access to a significant amount of information.¹⁷ This new power worries many companies, who fear that consumers are using these tools to manipulate reviews.¹⁸ Small businesses likely feel more threatened by negative reviews than large ones and are more inclined to react strongly when they feel they are being criticized wrongly or unfairly, since bad reviews can have a greater impact on them, given their generally smaller volume of activity.¹⁹

This attempt to redress the informational asymmetry between consumers and merchants and “[t]he very significant impact of social networks, has led some companies to manage the risk to their reputation in a somewhat drastic, even abusive, manner, sometimes by resorting to

¹⁰ Tessa ANAYA, *How do online user reviews influence consumers in Canada ?*, Capterra, 2022, en ligne : <https://www.capterra.ca/blog/2985/user-reviews-study>.

¹¹ Sammy PAGET, *Local Consumer Review Survey 2023*, Bright Local, 2023, online: <https://www.brightlocal.com/research/local-consumer-review-survey/>.

¹² In this report, the term platform or digital platform applies both to product and services review sites and to social media used by consumers to give their opinion on a company.

¹³ Marc Lacoursière, “Les voies de justice du consommateur,” in Pierre-Claude LAFOND, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Editions Yvon Blais, 2018, p. 243, at page 246.

¹⁴ Howard J. Deane, *Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews*, Consumers Council of Canada, 2016, p. 35.

¹⁵ CEFRIO, *Actualité en ligne, réseaux sociaux et balados*, vol. 12, no 8, 2021 edition, p. 18, online: <https://transformation-numerique.ulaval.ca/enquetes-et-mesures/netendances/actualites-en-ligne-reseaux-sociaux-et-balados-2021/>.

¹⁶ Cassandra Burke Robertson, “Online Reputation Management in Attorney Regulation,” (2016) 29: 1 *Geo J Legal Ethics* 97, p. 105.

¹⁷ Julie Hunter and Mark Wilson, “Cross-border Online shopping within the EU - learning from consumer experiences,” *ANEC, the European consumer voice in standardisation*, 2015, p. 5.

¹⁸ Howard J. Deane, *Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews*, Consumers Council of Canada, 2016, p. 37.

¹⁹ Howard J. Deane, *Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews*, Consumers Council of Canada, 2016, p. 53.

threats of legal action”²⁰ [TRANSLATION]. As a result, online criticism has become increasingly litigious in recent years, with consumers being sued for defamation by companies that consider that their comments have damaged their reputation.

Apart from the significant financial consequences for consumers resulting from these lawsuits, defamation suits also put the fundamental rights of each of the parties involved in direct opposition. A dichotomy therefore arises between the consumer's freedom of expression and the company's right to defend its reputation. However, as the Supreme Court of Canada pointed out, the challenge in defamation cases lies in the fact that there is no precise measuring instrument that can determine the point at which a balance between these two rights “since that which belongs to the former is generally taken away from the latter.”²¹

The aims of this report are first, to better understand and document the consequences of publishing online reviews, especially the legal consequences for consumers who attempt to express their opinions about their purchases and the difficulties they have experienced with the company, and second, to arrive at a more complete picture of the behaviour and knowledge of consumers about this practice.

We will therefore attempt to document consumers' perceptions and knowledge of online reviews. For example: Are consumers aware of the risks they expose themselves to when they post comments online, either on social networks or on sites for rating products and services? What results do they hope to achieve? What are the major sites and social media platforms used for evaluating products and services and what are the conditions of use? How might the notion of public interest serve as a defense for a consumer being sued for an online review as opposed to sharing similar information via traditional media and with journalists? To what extent do online reviews offer a viable alternative avenue of justice for consumers anxious to assert their rights?

To answer these various questions, we will first analyze the conditions, limits and prohibitions that consumers encounter when attempting to exercise their freedom of expression (**Part I**). We will then study the factors in favour of recognizing the consumer's freedom of expression in the context of online reviews (**Part II**). Ultimately, our research will provide possible solutions and recommendations with the aim of better reconciling the consumer's freedom of expression and the company's right to reputation, while taking into account the importance of sharing information in making informed consumer choices and serving the public interest.

²⁰ Marc Lacoursière, “Les voies de justice du consommateur” in Pierre-Claude LAFOND, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Editions Yvon Blais, 2018, p. 243, at page 265.

²¹ *Bou Malhab v. Metromedia CMR Broadcasting Inc.*, 2011 SCC 9, paras. 16 and 19.

Methodology

In order to answer our various research questions, we have opted for an approach that is both legal and empirical.

For the legal component, we began by studying Canadian provincial and federal legislation and regulations applicable to defamation and to the operators of online platforms. As a complement to this study, we compared the situation in Canada with certain interesting developments in the United States, the European Union, the United Kingdom, and Australia.

We also identified legal decisions on defamation rendered by Canadian courts in the context of consumer law. Since this phenomenon is relatively recent, the period chosen for the search for decisions was from January 1, 2018 to December 31, 2021. A total of 43 decisions were analyzed, from six (6) Canadian provinces.²² These decisions were listed using online databases.²³ When relevant to our subject, however, decisions of principle by provincial courts of appeal and the Supreme Court of Canada were analyzed regardless of when they were rendered. This pan-Canadian jurisprudential study assisted us in identifying the parameters guiding the courts in a defamation lawsuit brought by a company.

For the contractual sources, we conducted a thorough review of the terms of use of six (6) products and services review sites: Amazon, Google, RateMDs, Tripadvisor, Trustpilot and Yelp, and six (6) social media²⁴ sites: Instagram, Facebook, LinkedIn, TikTok, Twitter and YouTube. Although some of the companies selected have the same owner and similar policies, we considered them to be separate entities since they require separate consumer consent.²⁵ For the purposes of our research, we selected platforms in business sectors in which consumers use post reviews most frequently.²⁶ This exercise was intended to determine whether there were any observable distinctions in the terms of use of review sites for products and services and those of social media, as well as in the level of liability of the operators of these platforms.

For the empirical component, we conducted six (6) online focus groups in four (4) Canadian provinces: two (2) groups in Québec, two (2) groups in Ontario, one (1) group in Western Canada and one (1) group in the Maritimes. In total, there were 40 participants in the focus groups.²⁷ Participants were selected to be representative of the Canadian population based on

²² The decisions analyzed are from the following provinces: Alberta, British Columbia, Ontario, Quebec, New Brunswick and Saskatchewan. No decision on the subject has been listed in Manitoba, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

²³ Using the CanLII full-text legal database, the following terms were used: defamation, reputation, statement, consumer, damages.

²⁴ Social media are digital platforms that allow users to create and share online content and profiles, and to interact with other users, online: <https://www150.statcan.gc.ca/n1/pub/36-28-0001/2021003/article/00004-eng.htm>.

²⁵ This is notably the case of Facebook and Instagram, which belong to the company Meta.

²⁶ The results obtained from the focus groups and the literature search helped us to select the platforms most popular with Canadian consumers.

²⁷ The focus groups were conducted in the summer of 2022 by the firm BIP, which recruited consumers who had expressed opinions on social media or product and services review sites over the past three years, in connection with

current demographics. The aim of this approach was to gather qualitative information on consumers' experiences, behaviour and knowledge of online reviews.

To complete our analysis, we sought the expertise of various actors in the field of human rights and freedoms, information technology and social media law, as well as representatives of industry²⁸ and journalists.²⁹ We interviewed Benoit Duguay, Full Professor at the School of Management Sciences at UQAM and researcher and Chair in Public Relations and Marketing Communication; Marianne Chouinard, Business Resources Team Leader (position held at the time of the interview) at the Canadian Federation of Independent Business; Yany Grégoire, Full Professor in the Department of Marketing at HEC Montréal and chairholder of the Omer DeSerres Chair of Retailing; Louis-Philippe Lampron, Full Professor of Rights and Freedoms at the Faculty of Law of Université Laval; Sébastien Parent, assistant professor in Labour Law in the Department of Industrial Relations at Université Laval; Florence Reinson, Director of Journalistic Ethics and Deontology at the Quebec Press Council, Pierre Trudel, Full Professor at the Faculty of Law's Centre de recherche en droit public (CRDP) at Université de Montréal, and Nicolas Vermeys, Full Professor at the Faculty of Law of Université de Montréal, Director of the Centre de recherche en droit public (CRDP) and associate Director of the Cyberjustice Laboratory.

The data yielded by these various research methods have been grouped and presented by theme to ensure that this report reads as smoothly as possible.

dissatisfaction or a problem experienced with a company. The discussion guide for these groups can be found in Appendices 1 (French) and 2 (English).

²⁸ With the exception of the Canadian Federation of Independent Business, none of the business groups we contacted responded to our request.

²⁹ With the exception of the Press Council, none of the representatives of the journalistic community from whom we requested an interview responded to our request.

Part I. A loss of freedom of expression for the consumer

“Reputation is an idle and most false imposition, oft got without merit and lost without deserving.” – William Shakespeare³⁰

Freedom of expression “is essential to the functioning of our democracy, to seeking the truth in diverse fields of inquiry, and to our capacity for self-expression and individual realization.”³¹ However, freedom of expression, like any fundamental right, is not absolute. Indeed, “[i]n any society, the rights of one will inevitably come into conflict with the rights of others,”³² which is why they should “[...] be limited in the interest of preserving a social structure in which each right may receive protection without undue interference with others.”³³ Limits may therefore be placed on the exercise of freedom of expression in order to preserve the right to reputation, which protects the reputation of any person against unjustified attacks.³⁴ The Supreme Court of Canada has repeatedly stressed the importance it attaches to the right to the protection of reputation in our society.³⁵ In addition, the reputation of the individual is intimately linked to the right to privacy, as recognized in Section 8 of the *Canadian Charter of Rights and Freedoms*³⁶ (hereinafter “Canadian Charter”) as well as personal dignity, a value inherent in the protections conferred by the Charters.³⁷ The right to safeguard one’s reputation is also protected in Québec, both by The *Charter of Human Rights and Freedoms*³⁸(hereinafter “Québec Charter” or “Chrf”) and the *Civil Code of Québec*³⁹ (hereinafter “Civil Code” or “CCQ”).

In light of these teachings, it should be remembered that the consumers’ freedom of expression grants them the right to express themselves and to criticize a company’s products and services, but, as a corollary, companies have the right to ensure that their reputation is not damaged with impunity by malicious comments.

³⁰ *Othello* (1604).

³¹ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 1.

³² *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, p. 554.

³³ *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 SCR 536, p. 554.

³⁴ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 2.

³⁵ See in particular: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 and *R. v. Lucas*, [1998] 1 SCR 439.

³⁶ *Constitution Act 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

³⁷ *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, para. 48; Denis W Boivin, “Accommodating Freedom of Expression and Reputation in the Common Law of Defamation” (1997) 22: 2 *Queen’s LJ* 229, p. 238; Christian Brunelle, “La dignité dans la Charte des droits et libertés de la personne : de l’ubiquité à l’ambiguïté d’une notion fondamentale,” (2006) 66. 5 *R. du B.* 143, 146, 153, 155, 162 and 163.

³⁸ *Charter of Human Rights and Freedoms*, CQLR c C-12, s. 4.

³⁹ *Civil Code of Québec*, CQLR c CCQ-1991, arts. 3 and 35.

In other words, “[t]he law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other’s reputation.”⁴⁰ In the context of online criticism, consumers’ freedom of expression will be restricted both by limits set by a company’s right to reputation (**Chapter 1**) and by limits of a contractual nature (**Chapter 2**).

Chapter 1. Limits to the right to corporate reputation

In the same way as any individual, companies, as legal persons, have the right to the protection of their reputation.⁴¹ Thus, a company that considers that a review published online by a consumer has damaged its reputation may bring a defamation suit. Before pursuing such a remedy, however, certain conditions must be met (1.1). In addition, certain parameters established by the courts during these disputes will guide the exercise of the consumer’s freedom of expression (1.2).

1.1 Conditions for bringing a defamation suit

In analyzing the conditions giving rise to a defamation suit, it will be necessary to take into account the current context of defamation in the age of the Internet (1.1.1) as well as the specific applicable rules, depending on whether the provincial law falls under civil law (1.1.2) or common law (1.1.3).

1.1.1 Defamation in the Internet age

Over time, the outlines of the notion of defamation have essentially been drawn by case law and doctrine:

“Generally speaking, it is held that defamation “consists in the communication of spoken or written remarks that cause someone to lose in estimation or consideration, or that prompt unfavourable or unpleasant feelings toward him or her.”⁴²

A defamatory statement is therefore one that has the effect of damaging the reputation of a person by lowering them in the esteem of members of society.⁴³ Thus, “[w]ords may be defamatory because of the idea they expressly convey or by the insinuations that may be inferred from them.”⁴⁴ Under both civil law and common law, the defamatory nature of remarks

⁴⁰ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 2.

⁴¹ *9353-0913 Quebec inc. c. Paré*, 2019 QCCQ 4324, para. 43; Emmanuelle Saucier *Tout tient dans la façon de le dire – un guide sur la diffamation*, Éditions Yvon Blais, 2009, p. 8.

⁴² *Prud’homme v. Prud’homme*, 2002 SCC 85, para. 33; *Canadian Broadcasting Corporation v. Radio Sept-Îles inc.*, 1994 CanLII 5883 (QC CA), p. 14.

⁴³ *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, paras. 67 and 68.

⁴⁴ *Prud’homme v. Prud’homme* 2002 SCC 85, para. 34.

is analyzed according to an objective standard, namely that of a sensible and reasonable person. “In other words, we must ask whether an ordinary person would believe that the remarks made, when viewed as a whole, brought discredit on the reputation of another person.”⁴⁵

The type of media employed (social networks, websites, newspapers, radio, television, etc.) scarcely affect the definition or meaning of the term defamation.⁴⁶ Therefore, defamatory statements disseminated online, also known as cyberdefamation, will be assessed in the same way as those disseminated through traditional media or verbally.⁴⁷

The courts have made a point of cautioning against the use of such media, recalling that they “are not a platform where you can say anything about anyone without incurring liability”⁴⁸ [TRANSLATION] particularly because of their great effectiveness as a means of communication and the instantaneous and boundless dissemination that results.⁴⁹ A judge of the Court of Québec recalled, in this regard, that:

“It is one thing to make defamatory comments about someone, but it is quite another to choose to disseminate them on social networks such as Facebook, because of the particular and well-known way in which these communication tools operate [...].”⁵⁰ [TRANSLATION]

The Supreme Court of Canada also recognized that because of the power this medium exerts, the Internet can be an extremely effective means of spreading defamatory statements.⁵¹ This means that online platforms do not give people carte blanche to say whatever they like, and anyone who uses this type of forum must be aware that the content published may be a source of defamation and that their liability is then likely to be engaged.⁵²

However, in many cases, the impression of anonymity created by the Internet can generate a false sense of security among users, who do not always realize the extent of the possible consequences of posting a comment online, as illustrated by the comments of some participants during the focus groups:

“It is anonymous then there is no risk.” West, Maritimes

⁴⁵ *Prud’homme v. Prud’homme* 2002 SCC 85, para. 34.

⁴⁶ *Corriveau c. Canoe Inc.*, 2010 QCCS 3396, para. 40, conf. par 2012 QCCA 109; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-295. 1.

⁴⁷ *Crookes v. Newton*, 2011 SCC 47, para. 16; *Corriveau c. Canoe Inc.*, 2010 QCCS 3396, para. 40, conf. par 2012 QCCA 109; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-295. 1.

⁴⁸ *9184-8630 Quebec Inc. c. Bouchard*, 2019 QCCS 219, para. 79.

⁴⁹ *9329-6481 Quebec inc. c. Ouimet*, 2020 QCCS 3472, para. 74.

⁵⁰ *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ, para. 59.

⁵¹ *Crookes v. Newton*, 2011 SCC 47, para. 37.

⁵² *9329-6481 Quebec inc. c. Ouimet*, 2020 QCCS 3472, para. 74; *Peterson v. Deck*, 2021 BCSC 1670, para. 34.

In short, while cyberdefamation can increase the extent of the harm suffered due to its ability to reach a large audience, the fact remains that in order to decide whether or not the remarks are defamatory, it will be necessary to rely on the rules applicable in each province.

1.1.2 The applicable regime in Quebec

In Québec, there is no special regime for defamation.⁵³ The protection of the right to safeguard one's reputation and the recourse to obtain cessation of an infringement of this fundamental right and to obtain compensation for the prejudice suffered are found in the *Charter of Human Rights and Freedoms*,⁵⁴ while the rules allowing the author of defamatory statements to be held liable remain governed by the civil liability regime within the meaning of Article 1457 CCQ.⁵⁵ Civil actions based on a defamation suit therefore constitute an amalgam of the remedies found in the Québec Charter and the Civil Code.⁵⁶ The absence of a specific defamation regime has led some authors to question the possibility of striking a balance between these rules in a context where fundamental rights arising from a quasi-constitutional law are at issue.⁵⁷

According to the current state of the law, a company wishing to sue a consumer for defamation will have to demonstrate, on a balance of probabilities, three elements: injury, a wrongful act, and a causal connection between the last two elements.⁵⁸

Fault is assessed according to the criterion of the reasonable person. The court must ask itself whether a person who is informed, diligent and attentive to the rights of others would have acted in the same way.⁵⁹ In general, doctrine and case law agree that fault can result from two types of conduct, one malicious, the other negligent:

“[TRANSLATION]The first is an act in which the defendant, knowingly, in bad faith, with intent to harm, attacks the reputation of the victim and tries to ridicule or humiliate him or her, to expose the victim to the hatred or contempt of the public or a group [...]. The second results from conduct in which there is no intent to harm, but in which the defendant has nonetheless interfered with the

⁵³ *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, para. 22.

⁵⁴ *Charter of Human Rights and Freedoms*, CQLR c C-12, art. 49 para. 1.

⁵⁵ *Prud'homme v. Prud'homme* 2002 SCC 85, para. 32. More specifically, the Supreme Court likens the infringement of a fundamental right to a civil fault, the right to compensation for which depends on proof of the constituent elements of civil liability set out in s. 1457 CCQ: *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, [1996] 2 SCR 345, paras. 120, 121 and 124.

⁵⁶ *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9, para. 23.

⁵⁷ Mariève Lacroix, “Une conceptualisation novatrice de la diffamation en droit privé à la lueur de la *Charte des droits et libertés de la personne* et du *Code civil du Québec*” (2016) 93 *R du B* can 675; François Hénault, *La conciliation de la Charte des droits et libertés de la personne et du Code civil du Québec en matière de diffamation*, Master's thesis, Quebec, Faculty of Graduate Studies, Université Laval, 2017, p. 103; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux* 9th edition, 2020, 1-264.

⁵⁸ *Civil Code of Québec*, CQLR c CCQ-1991, art. 1457; *Prudhomme v. Prud'homme* 2002 SCC 85, para. 32.

⁵⁹ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-301.

reputation of the victim through the defendant's temerity, negligence, impertinence or carelessness [...]."⁶⁰

Once this fault has been established, it will be necessary to demonstrate the presence of injury. Although discretionary, and leaving a fair amount of leeway to the trial judge, the assessment of injury depends on various factors, such as "[...] the seriousness of the act, the intention of the author, the dissemination of the defamation, the condition of the parties, the scope of the defamation on the victim and their relatives and the duration of the attack and its effects [...]."⁶¹
[TRANSLATION]

Defamation generally gives rise to non-pecuniary damages when it involves "[...] repairing the humiliation, contempt, hatred or ridicule generated by the objectionable remarks"⁶²
[TRANSLATION]. The highest court in the land mentioned, in this regard, that the assessment of non-pecuniary damages is more a philosophical and social exercise than a legal and logical one.⁶³ This probably explains why case law often only awards nominal compensation for non-pecuniary damages.⁶⁴ To this may be added pecuniary damages, in a context where the plaintiff has suffered economic damage resulting from the statements made by the defendant.⁶⁵

In Québec, Articles 49 Chrf and 1621 CCQ also allow punitive damages to be awarded in the event of intentional and unlawful interference with a right recognized by the Charter.⁶⁶ Courts generally reach such a decision when they come to the conclusion that the remarks were made for the specific purpose of harming the plaintiff.⁶⁷ The objective in such a case is no longer to compensate the victim; rather, it is "[...] more adequately protecting people's reputations by making people aware that some form of fine can be imposed if their behaviour is outrageous"⁶⁸
[TRANSLATION]. The emphasis here is that such conduct is not to be tolerated and that it warrants punishment for its author.

Moreover, when the defamation has been performed via the Internet, the court will have the discretion to award not only damages, but also to order that the defamatory material be removed by the author of the contentious remarks.⁶⁹ Of course, it would be difficult, if not impossible, to prevent the post from being shared by other users. The judge may, in addition,

⁶⁰ *Prudhomme v. Prud'homme* 2002 SCC 85, par. 35; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-297.

⁶¹ *9080-5128 Quebec inc. c. Morin-Ogilvy*, 2012 QCCS 1464, para. 82.

⁶² *Metromedia CMR Montreal Inc. c. Johnson*, 2006 QCCA 132, para. 98; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, para. 46.

⁶³ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229, p. 261; *G & B Maternity c. Claveau*, 2019 QCCQ 48, para. 156.

⁶⁴ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-610. 01.

⁶⁵ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-604.

⁶⁶ In this case, it is the right to the protection of one's reputation, art. 4 Chrf

⁶⁷ Note that a legal person can claim punitive damages: *Hôtel Clarendon inc. c. Lessard*, 2021 QCCQ 7581, para. 92; Christian BRUNELLE and Melanie SAMSON, "La mise en œuvre des droits et libertés en vertu de la Charte québécoise," in Collection de droit 2022-2023, Quebec Bar School, vol. 8, *Droit public et administratif*, Montreal, Editions Yvon Blais, 2022, p. 109, pp. 112 to 116.

⁶⁸ *9190-6206 c. Lagha*, 2018 QCCQ 8361, para. 68.

⁶⁹ Vincent Karim, *Les obligations*, 5th ed., vol. 1, Montreal, Wilson & Lafleur, 2020, para. 3322.

require an execution in kind from the author, which would take the form of a retraction of their remarks or of drafting a letter of apology.⁷⁰

1.1.3 The legal framework in the common law provinces

Unlike Québec, the common law provinces have specific defamation laws.⁷¹ However, the wording of these laws is increasingly outdated since their provisions laws are generally focused on cases of defamation in the print or broadcast media.⁷² Under common law, anyone wishing to assert that he has been the victim of defamation is required to prove three things:

“(1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff’s reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff.”⁷³

In general, there is defamation:

“a) If the literal meaning of the words complained of are defamatory; b) If the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the “legal” or “true” innuendo meaning) is defamatory; or c) If the inferential meaning or impression left by the words complained of is defamatory (the “false” or “popular” innuendo meaning).”⁷⁴

As soon as these conditions are met, the plaintiff will be deemed to have discharged their burden and there will be a presumption that the statements are false and prejudicial.⁷⁵ Although the plaintiff does not have to establish that the defendant intended to harm them, they must still establish that the defendant intended to disseminate the remarks or that they were disseminated through negligence.⁷⁶

⁷⁰ Vincent Karim, *Les obligations*, 5th ed., vol. 1, Montreal, Wilson & Lafleur, 2020, para. 3322.

⁷¹ *Defamation Act*, RSPEI 1988, c D-5; *Defamation Act*, RSNS 1989, c 122; *Defamation Act*, RSNL 1990, c D-3; *Defamation Act*, RSA 2000, c D-7; *Libel Act*, LRTN-O. 1988, c D-1; *Libel Act*, LRTN-O. (Nu) 1988, c D-1; *Libel Act*, RSO 1990, c L. 12; *Libel Act*, LRY 2002, c 52; *Libel Act*, CCSM, c D20; *Libel Act*, LRN-B. 2011, c 139; *Libel and Slander Act*, RSBC 1996, c 263; *The Libel and Slander Act*, RSS 1978, c L-14. With the exception of Ontario, British Columbia, and Saskatchewan, Canadian provinces no longer distinguish between “libel” and “slander”: these are two forms of defamation. While the first refers to written defamation, the second refers more to verbal defamation. This distinction has an impact on the burden of proof since in a slander case, the claimant must demonstrate that the comments caused them particular harm.

⁷² Law Commission of Ontario, *Defamation in the Internet Age: Consultation Paper*, Toronto, 2017, p. 20.

⁷³ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 28.

⁷⁴ *Lawson v. Baines*, 2012 BCCA 117, para. 13

⁷⁵ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 28. Note that in provinces that still distinguish between libel and slander, damage is only presumed for libel.

⁷⁶ Law Commission of Ontario, *Defamation in the Internet Age: Consultation Paper*, Toronto, 2017, p. 50.

The burden of proof in a defamation suit in common law is therefore the opposite of that defined in Québec civil law. While in civil law, good faith is presumed and it is up to the plaintiff to demonstrate the wrongful conduct of the defendant, the strict liability regime in common law instead presumes malice on the part of the author of the remarks as soon as the plaintiff succeeds in demonstrating that they are defamatory in nature.⁷⁷ Here, liability therefore does not depend on any fault whatsoever on the part of the defendant, but is inferred from the very existence of the defamation itself. Certain authors have criticized this approach, suggesting that a fourth criterion, requiring the demonstration of unreasonable behaviour, be added to the three criteria for defamation.⁷⁸

That said, certain means of defense may be invoked so that the author of the remarks may avoid conviction.⁷⁹ Among these are the defense of justification, fair comment and the defense of responsible communication concerning matters of public interest as well as absolute⁸⁰ and relative⁸¹ immunity.

As for damages, three types of compensatory damages are recognized: general, increased (or aggravated) and special.⁸² General damages are presumed, without the need to prove actual harm, when defamation is established and none of the defenses apply.⁸³ These damages are intended to compensate the plaintiff for the harm done to their reputation and the suffering occasioned by said defamation.⁸⁴ To do this, the factors taken into account are the same as those established in Québec civil law. In the case of a legal person, these damages are intended to compensate for the harm done to its commercial reputation.⁸⁵

Although there is a presumption of damage, there is no presumption that the harm suffered was substantial. It follows that proof of harm will nevertheless be necessary to support a substantial award of damages.⁸⁶ Courts may also award nominal damages in cases when the plaintiff technically wins the case, but the court wishes to signal its disapproval.⁸⁷

⁷⁷ *Prudhomme v. Prud'homme* 2002 SCC 85, para. 57.

⁷⁸ Raymond E. Brown, *The Law of Defamation in Canada*, vol. 2, Scarborough (Ontario), Carswell, 1994, pp. 1-40; Dennis W Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation" (1997) 22: 2 *Queen's LJ* 229, pp. 286-288.

⁷⁹ Although not transposable into Quebec civil law, these defenses may still be considered in the contextual analysis of the wrongdoing: *Prudhomme v. Prud'homme* 2002 SCC 85, para. 60.

⁸⁰ Since we found no application in the context of our research, we shall not discuss absolute immunity.

⁸¹ François Hénault, *La conciliation de la Charte des droits et libertés de la personne et du Code civil du Québec en matière de diffamation*, Master's thesis, Québec City, Faculty of Graduate Studies, Université Laval, 2017, pp. 66 to 68.

⁸² *Paramount v. Kevin J. Johnston*, 2019 ONSC 2910, para. 66.

⁸³ *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, para. 32, conf. para. 2019 ONCA 141.

⁸⁴ *Lee v. Lee*, 2000 BCSC 1770, para. 20.

⁸⁵ *Lee v. Lee*, 2000 BCSC 1770, para. 20; *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, para. 109.

⁸⁶ *Acumen Law Corporation v. Nguyen*, 2018, BCSC 961, para. 23.

⁸⁷ Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, Toronto, Irwin Law, 2000, pp. 281 and 285. For example, see *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961, paras. 36 to 39. In this decision, in order to demonstrate its disapproval of the plaintiff's action, the court awarded him the sum of \$1.

Aggravated damages will be awarded in defamation cases where the conduct of the defendants has been particularly outrageous and oppressive, and increases the humiliation and anxiety of the plaintiffs.⁸⁸ To award these damages, it will be necessary to conclude that the defendant was motivated by genuine malice, and thus increased the injury suffered by the plaintiff.⁸⁹ Technically, a legal person such as a company could not be awarded damages of this type since they are meant to compensate for hurt feelings.⁹⁰

In certain situations, special damages may be awarded if they are the direct, immediate result of defamation. Further proof is necessary in such cases. For example, the loss of a business opportunity due to defamatory statements may be compensated by damages of this type.⁹¹ It follows that a company should not be awarded special damages, unless it can demonstrate a real financial loss.⁹²

Rather than compensatory damages, nominal damages may be awarded:

“[w]hen the intentional conduct of the defendant results in neither gain for itself nor genuine loss for the plaintiff. The purpose of this remedy, therefore, is not to compensate or make restitution, but simply to point out the violation of a right.”⁹³ [TRANSLATION]

Just as in Québec civil law, punitive damages in common law are intended to punish the author of the defamatory statements. They represent a means for the court to express its indignation at the conduct of the author of the remarks.⁹⁴

In short, these are the principles applicable to the defamation suits we have just examined that will be used by decision-makers in disputes involving online criticism of a company. The next section will also focus on the parameters established by the courts with regard to the criteria formulated by consumers on online platforms.

⁸⁸ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 188.

⁸⁹ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 190.

⁹⁰ *Walsh Energy Inc. (The Energy Centre) v. Better Business Bureau of Ottawa-Hull Incorporated/Bureau d'éthique commercial d'Ottawa-Hull Incorporée* (Better Business Bureau Serving Eastern and Northern Ontario and the Outaouais), 2012 ONSC 5819 para. 45, conf. par 2018 ONCA 383. Note that some judges still seem to award these kinds of damages to a company: see *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, para. 130.

⁹¹ For example, see *Libel and Slander Act*, RSO 1990, c. L. 12., s. 16.

⁹² *Walsh Energy Inc. (The Energy Centre) v. Better Business Bureau of Ottawa-Hull Incorporated/Bureau d'éthique commercial d'Ottawa-Hull Incorporée* (Better Business Bureau Serving Eastern and Northern Ontario and the Outaouais), 2012 ONSC 5819, para. 45, conf. par 2018 ONCA 383.

⁹³ Louise Bélanger-Hardy and Denis Boivin, *La responsabilité civile délictuelle en common law*, Éditions Yvon Blais, 2005, p. 395.

⁹⁴ *Paramount v. Kevin J. Johnston*, 2019 ONSC 2910, para. 79.

1.2 Parameters guiding consumer freedom of expression

Although none of the consumers we met during our focus group sessions admitted having received a formal notice or legal proceedings following the publication of a negative review, a significant increase in legal action against consumers for criticism leveled at companies has been observed in recent years. It seems that companies are judicializing the phenomenon of online criticism in an attempt to preserve or restore their reputation.⁹⁵

Of course, it is the courts that will have the ultimate responsibility for determining whether the consumer has actually exceeded their freedom of expression by defaming the company. In this regard, each criticism formulated remains a case in point, especially since certain divergences can be observed in the way these disputes are dealt with, depending on whether they are adjudicated under civil or common law. It is nonetheless possible to identify certain trends common to both systems in terms of the parameters established by the courts in a defamation suit brought by a company.

Malice is undoubtedly the most common ground on which the courts conclude that there has been defamation. A comment made for the sole purpose of annoying and harassing, or otherwise injuring or punishing someone, will generally amount to malice.⁹⁶ In the more specific case of defamation by a consumer against a company, we have listed certain factors that will be taken into account by the decision-makers. Among the factors used to determine the legality of the statements made by the consumer, the courts will take into consideration the presence of abusive language or personal attacks (1.2.1), the use of digital platforms for personal interest (1.2.2), the organization of a smear campaign and the dissemination of false statements (1.2.3) as well as the duration and scope of the publication (1.2.4). In general, such proceedings risk having serious financial consequences for the consumer who has not complied with the parameters listed above (1.2.5).

1.2.1 Abusive language and personal attacks

The focus group participants generally considered the words they use to criticize companies to be respectful and courteous. Some consumers, however, acknowledged expressing their frustration and exasperation with the company in their comments. However, the choice of terms used is of capital importance in the assessment of the criteria used to determine defamation. For instance, terms such as “thief,”⁹⁷ “crook,”⁹⁸ or “fraud”⁹⁹ were deemed to constitute contemptuous remarks, intended to discredit the company in the eyes of

⁹⁵ This observation stems from the recent case law we have studied. This trend can be observed more generally in relation to online denunciation: Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-292.

⁹⁶ *Zoutman v. Graham*, 2019 ONSC 2834, para. 101, conf. par 2020 ONCA 267.

⁹⁷ *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361, paras. 23 and 24.

⁹⁸ *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 24; *J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet*, 2019 CanLII 31631 (ON SCSM), para. 6.

⁹⁹ *Salon Karo Pro Koiffe c. Lafferrière*, 2019 QCCS 4352, paras. 15 and 16. In another case, the defendants published a review in which they stated that the company really liked to “screw” people: *9353-0913 Québec inc. c. Paré*, 2019 QCCQ 4324, para. 13.

the public and to cause a loss of esteem or consideration.¹⁰⁰ After all, “[...] an honest person doesn't want to do business with a thief”¹⁰¹ [TRANSLATION]. Implying or insinuating that a company engages in illegal, dishonest or fraudulent activities will also have the effect of damaging the image of the company, through the defamatory and tendentious nature of such remarks.¹⁰²

Moreover, the decision-makers will have to rely in their analysis on the natural, everyday meanings that the impugned words evoke in the mind of the reader,¹⁰³ instead of trying to deduce the meaning that the author actually wanted to give them. For example, in a decision in which a consumer tried to justify the use of the words *cheat* and *deceive* as meaning that she had not been satisfied with the services provided, and not as meaning that they were fraudulent, the court considered it to be more of a statement purporting to be a fact as opposed to a subjective comment or personal impression.¹⁰⁴

However, there is a nuance that deserves to be considered here. On rare occasions, based on the credibility of the author and the exaggerated content of their remarks, the courts have nevertheless considered that the derogatory remarks did not have the effect of reducing or affecting the esteem or reputation of the plaintiffs, since anyone endowed with a modicum of discernment would have attached no importance to them.¹⁰⁵ This is reminiscent of the reasoning adopted by the majority of the Supreme Court in the *Bou Malhab* case, in which the statements made by the defendant were so implausible and outrageous that no reasonable person would have believed them.¹⁰⁶ Of course, this does not mean that a consumer must exaggerate their remarks in the hope of obtaining a favourable verdict, especially since in the majority of cases, particularly outrageous and malicious remarks will be severely sanctioned.

Beyond the use of abusive language, the use of personal attacks and insults¹⁰⁷ will also be severely punished by the courts¹⁰⁸ and cannot be deemed to be a matter of public interest.¹⁰⁹

¹⁰⁰ 9190-6206 *Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 38; *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, para. 106; *Salon Karo Pro Koiffe c. Lafferrière*, 2019 QCCS 4352, para. 27; *J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet*, 2019 CanLII 31631 (ON SCSM), para. 25.

¹⁰¹ 9190-6206 *Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 37.

¹⁰² *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, paras. 106 and 107; *White c. Zed*, 2018 NBBR 176, para. 17, conf. par 2019 NBCA 86; 9184-8630 *Quebec inc. c. Bouchard*, 2019 QCCS 919, para. 41; *Salon Karo Pro Koiffe c. Lafferrière*, 2019 QCCS 4352, para. 26; *Ayotte c. Chiaramonte*, 2019 QCCS 851, para. 34; *Slater Vecchio LLP v. Arvanitis*, 2019 BCSC 1156, para. 24; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, paras. 20 to 22: Note that in this decision, although the defendant was sued in their own name, they had hired the plaintiff to carry out repairs in their business; *Chase v. Anfinson*, 2018 BCSC 856, para. 78. In this decision, the use of the terms “crook,” “thief” and “fraudster,” even though they constitute strong language, were part of the interpretations that could be given to the plaintiff's conduct. It should be noted that in this decision, it was the company that was prosecuted for posting comments online about a consumer who had not paid him for the services rendered.

¹⁰³ *White c. Zed*, 2018 NBBR 176, para. 17, conf. par 2019 NBCA 86; *Zoutman v. Graham*, 2019 ONSC 2834, para. 69, conf. par 2020 ONCA 267; *Mantin v. Smith Lyons LLP*, 2003 CanLII 22736 (ON CA), para. 10.

¹⁰⁴ *Niu v. Cao*, 2020 ONSC 5407, paras. 30, and 93 to 96.

¹⁰⁵ *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961, paras. 13, 14, 15 and 37; 910938 *Ontario Inc v. Moore*, 2020 ONSC 4553, paras. 37 and 38.

¹⁰⁶ *Bou Malhab v. Metromedia CMR Broadcasting Inc.*, 2011 SCC 9, para. 90.

¹⁰⁷ For example, calling attendants idiots, morbidly obese, or piles of shit, or making Islamophobic attacks or sexual impropriety; see the following decisions on the subject: *White c. Zed*, 2018 NBBR 176, para. 12, conf. par 2019 NBCA 86; *Huff v. Zuk*, 2019 ABQB 691, paras. 37 and 38, conf. par 2021 ABCA 60; *Paramount v. Kevin J. Johnston*, 2019 ONSC

Also, particular attention will be given to comments directly attacking the integrity and professionalism of those for whom such qualities are of paramount importance, including physicians, dentists, lawyers, real estate brokers, etc.¹¹⁰

It is therefore important to distinguish comments that aim to criticize the company as a legal person from comments that attack the natural persons who are employed by it.¹¹¹ It is not uncommon to see a lawsuit initiated by both the company and its managers, when the latter also consider that their personal reputation has been tarnished by the comments made.¹¹²

On this point, France proposes a distinction when the criticism directly targets the company or a member of personnel, as opposed to criticism aimed only at a product or service offered by the company. In the first case, the criticism will fall under the offense of defamation, subject to criminal law,¹¹³ whereas in the second, it would be qualified as denigration subject to common law.¹¹⁴ Could this distinction inspire Canadian courts to reduce the consumer's liability when the comments are aimed solely at the company's products and services?

1.2.2 Use of digital platforms for personal interest

While in some circumstances evidence of malice is to be found in the statements themselves, in other cases it must be inferred from the defendant's conduct. Malice stems from any indirect motive or ulterior purpose other than a sense of duty.¹¹⁵

In some cases, the consumer's post will be driven by feelings of revenge or anger,¹¹⁶ while in other cases, they will simply seek to express their displeasure and dissatisfaction with the

2910, para. 19; *Ayotte c. Chiamonte*, 2019 QCCS 851, para. 6; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, para. 9.

¹⁰⁸ *White c. Zed*, 2018 NBBR 176, para. 17, conf. par 2019 NBCA 86; *Paramount v. Kevin J. Johnston*, 2019 ONSC 2910, para. 51; *Ayotte c. Chiamonte*, 2019 QCCS 851, para. 40; *Huff v. Zuk*, 2019 ABQB 691, paras. 65 and 75, conf. par 2021 ABCA 60.

¹⁰⁹ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 105; *Paramount v. Kevin J. Johnston*, 2019 ONSC 2910, para. 61; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, para. 19.

¹¹⁰ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR, 1130, para. 118; *Ayotte c. Chiamonte*, 2019 QCCS 851, paras. 22 and 34; *Zoutman v. Graham*, 2019 ONSC 2834, para. 70, conf. par 2020 ONCA 267; *Slater Vecchio LLP v. Arvanitis*, 2019 BCSC 1156, para. 24; *Tremblay c. Gordon*, 2020 QCCS 1166, para. 32, 33 and 65; *Niu v. Cao*, 2020 ONSC 5407, para. 154; *Peterson v. Deck*, 2021 BCSC 1670, para. 48.

¹¹¹ A judge of the Court of Quebec pointed out that targeting a company, without naming specific individuals would not be enough for these people to obtain compensation: *Hôtel Clarendon inc. c. Lessard*, 2021 QCCQ 7581, para. 98.

¹¹² For examples where a lawsuit was brought by both the company and the directors, see in particular the following decisions: *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961; *Produits et excursions de pêche Bruno Morency inc. c. Côté*, 2018 QCCQ 10700; *Salon Karo Pro Koiffe c. Lafferriere*, 2019 QCCS 4352; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744; *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555.

¹¹³ *Law on the Freedom of the Press*, July 29, 1881, art. 29 para. 1. The offense of defamation is punishable by a fine of 12,000 euros which may go up to €45,000 and one year's imprisonment when the remarks are racist, sexist, homophobic or handiphobic. This offense is time-barred three months after the publication in question.

¹¹⁴ *Civil Code*, art. 1240. This will be the case in particular when the comment causes harm to the products or services or the brand image, resulting in a negative influence on clientele. The limitation period is 5 years.

¹¹⁵ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 145.

company.¹¹⁷ In this regard, some of the participants in the focus groups claimed that online criticism had a therapeutic effect, allowing them to express their frustration, particularly in situations in which they considered that the company had disrespected them or had been dishonest:

"I was frustrated and angry and wanted to express my feelings. I wanted to get my feelings heard and get my frustration out." West

Generally speaking, customers are more likely to seek revenge when they feel betrayed.¹¹⁸ Rather than seeking redress, the aggrieved customer will seek justice by inflicting a cost on the offending company, for example, by attempting to damage its image.¹¹⁹ However, in the eyes of the courts, this form of expression is not in the public interest.¹²⁰ Some decisions point out that social media should not become a public forum for a venting one's emotions or simply getting something off one's chest.¹²¹ A judge of the Superior Court of Ontario pointed out that if the consumer had limited his remarks to his experience or to the competence of the company, his online publication would probably not have constituted defamation.¹²² However, in this case, it was found that the statement was untrue, hurtful and probably motivated by personal disappointment, which led the Court to conclude that the company's reputation had been damaged.¹²³

Some consumers will even go so far as to explicitly acknowledge in their comments that their goal is to put pressure on the company in order to reach a settlement.¹²⁴ On this point, all of the

¹¹⁶ 9190-6206 Quebec inc. c. Lagha, 2018 QCCQ 8361, para. 45; Slater Vecchio LLP v. Arvanitis, 2019 BCSC 2369, para. 38; 910938 Ontario Inc v. Moore, 2020 ONSC 4553, para. 37; Tremblay c. Gordon, 2020 QCCS 1166, para. 17.

¹¹⁷ 9190-6206 Quebec inc. c. Lagha, 2018 QCCQ 8361, para. 45; Hee Creations Group Ltd. v. Chow, 2018 BCSC 260, para. 95; White c. Zed, 2018 NBBR 176, para. 11, acc. per 2019 NBCA 86; New Dermamed Inc. v. Sulaiman, 2018 ONSC 2517, para. 34, acc. per 2019 ONCA 141; Salon Karo Pro Koiffe c. Lafferrière, 2019 QCCS 4352, para. 9; Canadian Thermo Windows Inc. v. Seangio, 2021 ONSC 6555, para. 30; Peterson v. Deck, 2021 BCSC 1670, paras. 59 and 60.

¹¹⁸ Acts of betrayal include situations in which customers believe that companies have lied, tried to exploit them, broken their promise or leaked confidential information: Yany Gregoire and Robert J. Fisher, "Customer betrayal and retaliation: when your best customers become your worst enemies," (2008) 36: 247, p. 250.

¹¹⁹ Yany Gregoire, "Comment reconnaître et gérer les conciliateurs et les justiciers du web ?" 2018, p. 102.

¹²⁰ Hee Creations Group Ltd. v. Chow, 2018 BCSC 260, para. 101; Zoutman v. Graham, 2019 ONSC2834, para. 101, conf. par 2020 ONCA 267; 9184-8630 Quebec inc. c. Bouchard, 2019 QCCS 919, para. 46; Luc Crawford Design Inc., et al v. Mullooney et al., 2021 ONSC 7849, para. 60.

¹²¹ 9190-6206 Quebec inc. c. Lagha, 2018 QCCQ 8361, para. 44; Hee Creations Group Ltd. v. Chow, 2018 BCSC 260, para. 132; Zoutman v. Graham, 2019 ONSC 2834, para. 108 and 109, conf. par 2020 ONCA 267; G&B Maternity c. Claveau, 2019 QCCQ 48, para. 148. On the question of malice, a court found that, despite the fact that the comments were driven by the defendant's frustration, they could nevertheless be justified by the fact that the defendant had not been paid by the plaintiff: Chase v. Anfinson, 2018 BCSC 856, para. 138.

¹²² J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet, 2019 CanLII 31631 (ON SCSM), para. 44.

¹²³ J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet, 2019 CanLII 31631 (ON SCSM), para. 44 See also paragraphs 50 to 56 of the decision Tremblay c. Gordon, 2020 QCCS 1166 in which the judge arrives at a similar reasoning.

¹²⁴ 9184-8630 Quebec inc. c. Bouchard, 2019 QCCS 919, paras. 10 and 45; Blanchet c. Puribec Inc., 2019 QCCQ 3141, para. 46; 9353-0913 Quebec inc. c. Paré, 2019 QCCQ 4324, para. 22; Luc Crawford Design Inc., et al v. Mullooney et al., 2021 ONSC 7849, paras. 50 to 52.

participants interviewed were of the opinion that online criticism is an excellent way of solving a problem since it is sometimes the only way to put pressure on a company.

Certainly, social media should not become a substitute legal forum in which everyone settles their accounts publicly or attempts to obtain justice on their own. The courts will not hesitate to admonish consumers who have chosen to take this route to seek justice and settle their disagreement with a merchant.¹²⁵ In this regard, the Court of Québec points out that:

“The parties and witnesses must be aware of the seriousness of any act performed on the Internet, even if it seems trivial at first glance, both in terms of damage to the reputation of a third party [or] in any form of tribunal conducted in the public square rather than under the benevolent eye of the Courts, which ensure that the rules of law and natural justice are respected.”¹²⁶
[TRANSLATION]

Although legal decisions on defamation are made primarily by civil courts, defamatory comments posted online could also fall under the *Criminal Code*,¹²⁷ whose defamatory libel provisions¹²⁸ also protect a person's reputation. Under the *Criminal Code*, anyone who intends to extort money, who publishes or threatens to publish a defamatory libel may be guilty of extortion by libel.¹²⁹ A consumer who publishes a review online, with the aim of taking the law into their own hands, therefore not only risks seeing their remarks deemed defamatory, on the grounds that they are malicious and serve purely personal interests, but also exposes themselves to criminal prosecution if they attempt to obtain reimbursement or compensation under threat of publishing a review or if they demand such a sum in exchange for its withdrawal.

1.2.3 Smear campaigns and false statements

In principle, calling for a boycott is a lawful exercise of freedom of expression, unless it amounts to defamation.¹³⁰ Thus, it may be perceived as illegal to encourage other people to

¹²⁵ 9190-6206 *Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 34; *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, para. 102.

¹²⁶ *Blanchet c. Puribec Inc.*, 2019 QCCQ 3141, para. 152.

¹²⁷ RSC 1985, c C-46.

¹²⁸ According to s. 298(1), defamatory libel is “matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.” In the Ontario court case of *R. v. Simoes*, a consumer who had posted unfavourable reviews of an Ottawa restaurant was subjected to retaliation by the restaurant owner, who began a campaign of harassment by creating a false profile of the consumer on a dating site and sending obscene e-mails to her employer. The restaurant owner was convicted of defamatory libel under Article 298 of the *Criminal Code* and sentenced to imprisonment. The Ontario Court of Appeal upheld the conviction, but reduced the length of the jail sentence to 90 days to be served intermittently: 2014 ONCA 144.

¹²⁹ *Criminal Code*, RSC 1985, c C-46, s. 302.

¹³⁰ *HMX Publishing Inc. v. Le Clerc*, 2000 CanLII 17732 (QC CS), para. 16; *Poseidon Quebec Inc. c. Office*, 2022 QCCQ 4665, para. 172.

share a comment or to encourage them to criticize the company or not to do business with it.¹³¹ For example, encouraging friends to give a company only one star on its Facebook page was judged to be unacceptable behaviour and maneuvering.¹³² In the same vein, posting comments on the company's Facebook page or questioning its customers could be judged an aggravating factor, insofar as this maneuver is intended to directly discourage the company's customers from doing business with it.¹³³

In addition, when the posting was performed knowing that it was false or with reckless indifference as to whether it was true or false, a finding of malice may be made.¹³⁴ It should be noted that in the common law provinces, the defense of justification (or truth) is usually the best defense against a defamation suit.¹³⁵ Civil law, on the other hand, is not interested in the veracity of statements, in the sense that the civil liability of their author may be engaged despite the truthfulness of the message. This observable distinction between Québec law and the laws in force in other Canadian provinces may be a source of confusion for consumers. Indeed, the vast majority of participants in the Québec focus groups were of the opinion that true statements cannot give rise to defamation.

The fact remains that in practice, it is a difficult defense to adopt successfully considering the difficulty of proving the truth of an assertion.¹³⁶ We must not lose sight of the fact that online reviews most often include a subjective component, i.e. a consumer's appreciation of the quality of a good or service purchased. What may seem true to one consumer may not be so to another. Be that as it may, in the context of the Internet, where information circulates and spreads so rapidly, and where it is so difficult to assess its credibility, the mere existence of the comment will often achieve the effect intended by its author, whether it is true or not. Accordingly, "[...] whether the message conveyed is well-founded or not, the interpretation made of it by the people who read it leaves indelible marks in many cases"¹³⁷ [TRANSLATION].

1.2.4 Duration and scope of dissemination

In the context of online criticism, the criteria for assessing the harm suffered remain the same as for other sources of defamation.¹³⁸ However, more importance is given to two criteria

¹³¹ *G&B Maternity c. Claveau*, 2019 QCCQ 48, paras. 116, 117 and 141; *Salon Karo Pro Koiffe c. Lafferrière*, 2019 QCCS 4352, para. 10; *Ventilation Daniel Martel inc. v. Cossette*, 2021 QCCQ 744, para. 23.

¹³² *Blanchet c. Puribec Inc.*, 2019 QCCQ 3141, paras. 153 and 162.

¹³³ *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 58; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, paras. 30 and 48.

¹³⁴ *White c. Zed*, 2018 NBBR 176, paras. 22 and 23, conf. par 2019 NBCA 86; *G&B Maternity c. Claveau*, 2019 QCCQ 48, para. 125; *Zoutman v. Graham*, 2019 ONSC 2834, para. 97, conf. par 2020 ONCA 267; *Huff v. Zuk*, 2019 ABQB 691, para. 174, conf. par 2021 ABCA 60: note that in this decision, it is a question of one professional suing another. *9353-0913 Quebec inc. c. Paré*, 2019 QCCQ 4324, paras. 40 and 49; *Tremblay c. Gordon*, 2020 QCCS 1166, para. 62

¹³⁵ *White c. Zed*, 2018 NBBR 176, para. 15, conf. par 2019 NBCA 86.

¹³⁶ Sheryl N. Hamilton and Sandra Robinson, *Law's Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, p. 70.

¹³⁷ Vincent Karim, *Les obligations*, 5th ed., vol. 1, Montreal, Wilson & Lafleur, 2020, para. 3310.

¹³⁸ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-612.

specific to defamation on the Internet, namely the duration and the scope of the dissemination.¹³⁹

Generally, judges will take into account how many people accessed the post as well as how many days it was publicly available. Accordingly, “[...] defamatory statements disseminated to tens of thousands of listeners generally merit greater compensation than those communicated to a restricted group of readers”¹⁴⁰ [TRANSLATION]. However, if the post in question was only available for a short time and didn't receive any likes, comments, or shares, the prejudice suffered would be mitigated.¹⁴¹ Conversely, a post accessible to a large number of listeners over a long period of time will have the effect of increasing the degree of prejudice experienced.¹⁴² Posting the comment on multiple platforms and sharing it to an exaggerated degree may be indicative of malice and result in larger damages.¹⁴³

Be that as it may, and although it may spin out of control, the dissemination of remarks on social networks does not exempt the victim from proving the alleged harm.¹⁴⁴ Indeed, mere knowledge of the comments on a company's website, in the absence of concrete proof of harm, should not be sufficient to convict the author of the comments. We have previously indicated that the civil liability regime in Québec law under which defamation suits are adjudicated, requires proof of prejudice suffered in order to engage the defendant's liability and to order them to pay damages.

1.2.5 Heavy financial consequences for the consumer

Just as the participants in the focus groups underestimated the consequences of a lawsuit resulting from their comments on the Internet, they also did not consider availing themselves of the legal remedies available under consumer law to resolve their disputes with companies. Some believed that the compensation to be gained from litigation is not sufficient to justify taking legal action against the company:

“It costs a lot of money and time.” West

¹³⁹ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-612.

¹⁴⁰ *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, para. 34.

¹⁴¹ *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 59; *J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet*, 2019 CanLII 31631 (ON SCSM), para. 47; *Tremblay c. Gordon*, 2020 QCCS 1166, paras. 70 to 73 and 79; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, para. 35; *Clarendon Hotel Inc. c. Lessard*, 2021 QCCQ 7581, paras. 82 and 83; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, para. 52.

¹⁴² *Ayotte c. Chiaramonte*, 2019 QCCS 851, para. 35; *Salon Karo Pro Koiffe c. Lafferrière*, 2019 QCCS 4352, para. 13; *Holden v. Hanlon*, 2019 BCSC 622, para. 324; *G&B Maternity c. Claveau*, 2019 QCCQ 48, paras. 161 and 162; *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, paras. 29 to 32.

¹⁴³ *Ventilation Daniel Martel inc. c. Cossette*, 2021 QCCQ 744, para. 48.

¹⁴⁴ *Lapierre c. Sormany*, 2012 QCCS 4190, para. 120. Note, however, that under common law, there is a presumption of damages.

Also, in some situations, such as poor customer service, legal recourse just does not seem appropriate. The use of online reviews then becomes an attractive avenue, seemingly free of charge and instantly accessible for denouncing or resolving a contentious situation with a company. However, consumers often underestimate the risk of defamation actions that could result from online reviews. In fact, except in Québec, where consumers seem more aware of the dangers associated with posting negative comments, participants from other Canadian provinces spontaneously declared that there was no risk. Rather, the participants we met with seemed more concerned about the harm their comments could cause to their personal reputations than that of the company:

“Our posts leave traces on the Internet that could one day harm us in our careers.” Québec
[TRANSLATION]

The fact remains that Canada has seen an upswing in defamation claims in recent years. Damages awarded to companies may entail considerable sums for a consumer,¹⁴⁵ causing them a great deal of stress and anxiety. In this regard, it should be remembered that there is currently no ceiling on the amount of the fine that consumers may have to pay.¹⁴⁶ It therefore seems essential to us to properly inform consumers about the financial consequences to which they are exposed upon posting an opinion online.

In the case of a company, the damages claimed will generally be aimed at compensating for the harm caused to business reputation,¹⁴⁷ such as loss of revenue and clientele. Criticisms that attack the skills, knowledge, abilities or even the judgment of professionals will tend to result in higher damages, given the degree of integrity and reliability expected from such people.¹⁴⁸

It should be noted, moreover, that a legal person will not be permitted to invoke feelings (such as sadness or stress) in order to justify the award of damages,¹⁴⁹ whereas natural persons working within the company who are directly targeted by the defamatory remarks will be able to invoke this type of prejudice.

¹⁴⁵ Sheryl N. Hamilton and Sandra Robinson, *Law's Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, p. 87. Except for Ontario and Prince Edward Island, the Small Claims Courts of the various provinces do not have jurisdiction to hear an action for defamation, which no doubt contributes toward explaining the size of the amounts in dispute.

¹⁴⁶ Nicolas Vermeys, “La justice... par les médias sociaux,” in Pierre-Claude Lafond, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, pp. 43- 59. In *Snyder v. Montreal Gazette Ltd.*, [1988] 1 SCR 494, the dissenting judge at the time proposed a \$50,000 cap for non-pecuniary losses due to damage to reputation. In *Hill*, however, the Supreme Court of Canada unanimously rejected the imposition of a cap on reputational damage: see paragraphs 167-173.

¹⁴⁷ *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260, para. 109.

¹⁴⁸ See the following decisions in which considerable sums were awarded to professionals: *White c. Zed*, 2018 NBRR 176, para. 37, conf. par 2019 NBCA 86; *Zoutman v. Graham*, 2019 ONSC 2834, paras. 114 and 126, conf. par 2020 ONCA 267; *Huff v. Zuk*, 2019 ABQB 691, para. 278, conf. par 2021 ABCA 60; *Houseman v. Harrison*, 2020 SKQB 36, para. 42; *Peterson v. Deck*, 2021 BCSC 1670, paras. 106 and 114.

¹⁴⁹ *9329-6481 Quebec inc. c. Ouimet*, 2020 QCCS 3472, para. 66.

Even though the courts recognize that compensation should be less when it is awarded to a legal person,¹⁵⁰ the amounts that consumers are required to pay for having defamed a company are sometimes significant. Between 2018 and 2021, these amounts were as high as \$25,000 in Québec¹⁵¹ and \$115,000 in other Canadian provinces.¹⁵² Such sums inevitably entail heavy financial consequences for convicted consumers, especially since some may already be vulnerable financially. However, the Supreme Court of Canada has already stressed that protection against economic damage should not come at the expense of the fundamental freedom of expression, especially since there is no general right protecting against economic harm.¹⁵³

From a comparative perspective, it is interesting that the UK's *Defamation Act 2013* overturned the common law presumption of harm, introducing a requirement of serious harm in its Section 1. Paragraph 2 of this section specifies that harm to the reputation of a body that trades for profit does not constitute serious harm, unless it has caused or is likely to cause that body serious financial loss.¹⁵⁴ The state of New South Wales in Australia introduced a similar provision in 2021 into its defamation law.¹⁵⁵ There seems to be a certain desire gradually asserting itself among legislators to take into account the specific context of defamation in cases when the remarks target a company.

From another perspective, we must not lose sight of the fact that, faced with the numerous obstacles that arise during a lawsuit, many consumers who receive a formal notice or legal claim will choose to withdraw their comments, simply because they lack the resources to fight a legal battle against the company:

"It's a bit like David against Goliath." Québec
[TRANSLATION]

This is also the reality described by Professor Nicolas Vermeys:

“The consumer who is convinced they are entitled to publish a microblog or post other comments via social media must either agree to remove the comments to avoid trouble, or accept the fact that they are letting themselves in for a legal

¹⁵⁰ *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, para. 39; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-611.

¹⁵¹ *Ayotte c. Chiaramonte*, 2019 QCCS 851.

¹⁵² *Hee Creations Group Ltd. v. Chow*, 2018 BCSC 260.

¹⁵³ *SDGMR, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, para. 72.

¹⁵⁴ The Supreme Court of the United Kingdom has interpreted this provision as requiring proof of serious harm as a precondition for a statement to be found to be defamatory: *Lachaux v. Independent Print Ltd*, [2019] UKSC 27.

¹⁵⁵ *Defamation Act 2005* No 77, s. 10A, online:

<https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2005-077>. Note that this provision has also been adopted in most Australian states.

saga that will prove costly even if they ultimately win their case”.¹⁵⁶
[TRANSLATION]

In our view, this way of proceeding not only jeopardizes the consumer’s freedom of expression, but also undermines the *raison d’être* of online reviews. It testifies to the importance of adequately protecting consumers against costly and unjustified lawsuits.

Chapter 2. Contractual limitations

In the Chapter 1, we examined the legal limitations confronting the consumer when they post a review online. Added to these are certain contractual limitations to which the consumer commits themselves, either by accepting the conditions of use of the digital platforms they use to criticize a company (2.1), or directly through a sales or service contract of the company itself (2.2). These contractual sources restrict the type of commentary that can be published about the company.

2.1 Terms of use of online platforms

Generally, anyone who wishes to have an account on social media or on a product and services review site, will be required, upon registering, to accept the platform’s terms of use.¹⁵⁷ However, while this formality is required in order to access the platform, it is clear that very few consumers take the trouble to read the terms carefully. Every one of the participants we met during the focus groups admitted that they had not read the terms of use of the platforms or that they had simply skimmed through them. In their opinion, these conditions are written so as to ensure they are not read:

“It’s the Wild West.” Québec
[TRANSLATION]

What is more, on the vast majority of platforms, consumers wishing to obtain relevant information on functionalities will not only have to consult the terms of use, which sometimes stretch over several pages, but will also have to consult the relevant sections of the company’s website to find the community’s general guidelines.¹⁵⁸ These include rules on prohibited content (2.1.1), content monitoring (2.1.2) and the liability of intermediaries (2.1.3).

¹⁵⁶ “Nicolas Vermeys, “La justice... par les médias sociaux,” in Pierre-Claude Lafond, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, p. 43, on page 61.

¹⁵⁷ On the RateMDs platform it is possible to leave a comment without having a user account. However, only people with an account can edit or delete their rating or comment.

¹⁵⁸ For example, on Amazon, in addition to the Terms of Service, the consumer should consult the General Community Guidelines, which explain what is permitted or prohibited. On RateMDs, much useful information can be found in the Frequently Asked Questions (FAQ) section. In addition to its General Terms and Conditions, Trustpilot provides Terms of Use for reviewers.

2.1.1 Prohibited content

Most platforms encourage both positive and negative reviews, while emphasizing that these must be phrased in respectful language. On each platform, therefore, consumers will be able to find a section defining prohibited content or activities, one of which is defamatory content.¹⁵⁹

However, very few platforms focus on defining what actually constitutes defamatory content. On Tripadvisor it says: “Statements that are true or that reflect an honest opinion (e.g. negative reviews) are not usually themselves a basis for defamation.”¹⁶⁰ On Facebook and Instagram, defamation is defined as “[...] a false statement of fact that harms someone’s reputation,”¹⁶¹ while on YouTube it says:

“Defamation laws [...] usually concern content that damages the reputation of another person or business. Although the definition of defamation varies around the world, in general, defamation is any untrue statement that is harmful to someone's reputation or causes someone to be shunned or avoided”.¹⁶²

On the RateMDs website, it states that it is possible to be sued for defamation after posting a rating.¹⁶³ The consumer is then directed to a Wikipedia page on defamation.¹⁶⁴ The Trustpilot platform is content to remind consumers that a negative opinion is not necessarily defamatory.¹⁶⁵

The major problem with these definitions lies in the fact that they revolve mainly around the concept of defamation that prevails in American law. However, since the rules are not the same in Canadian law, this could be misleading for consumers who consult this information.¹⁶⁶ The terms used are also quite vague and do not provide clear guidelines on what to do or what to avoid from the consumer’s point of view.

In addition to defamatory comments, inappropriate behaviour such as intimidation, harassment, and the use of hateful or violent comments are prohibited on all review sites and social media. With regard to inappropriate behaviour, YouTube prohibits comments that are made with the malicious intent to cause harm to others, or fraudulent or deceptive activities that result in actual harm.¹⁶⁷

¹⁵⁹ Twitter and TikTok do not appear to refer directly to defamatory content, but nonetheless prohibit inappropriate behaviour such as harassment and hateful conduct.

¹⁶⁰ <https://www.tripadvisor.ca/pages/noticetakedown.html>.

¹⁶¹ <https://facebook.com/help/3894625317215414>; https://fr.facebook.com/help/instagram/514061992847324?cms_id=514061992847324.

¹⁶² <https://support.google.com/youtube/answer/6154230?hl=en&co=GENIE.CountryCode%3DDUS>.

¹⁶³ <https://www.ratemds.com/about/faq/>.

¹⁶⁴ <https://en.wikipedia.org/wiki/Defamation>.

¹⁶⁵ <https://legal.trustpilot.com/for-businesses/guidelines-for-businesses>.

¹⁶⁶ Note that under the rules applicable in Quebec law, false statements do not necessarily constitute a fault (supra 1.1.2).

¹⁶⁷ <https://support.google.com/youtube/answer/7650329?hl=en>.

Finally, all the platforms whose terms of use were analyzed prohibit misinformation, i.e. false or misleading statements intended to deceive people.¹⁶⁸ For example, making inaccurate statements about the quality of a good or service or omitting facts or information in order to mislead other users could be considered to be false or misleading.¹⁶⁹ In this regard, it should be remembered that the courts also penalize false statements and those made with the intention of causing harm (*supra* 1.2.3).

2.1.2 Monitoring content

In addition to prohibited content, all of the platforms analyzed have rules in place regarding the monitoring and removal of posted content. In general, the platforms will neither control nor verify, beforehand, the accuracy of the content generated by users, relying on the integrity of their members. On this point, Section 27 para. 1 of the *Act to establish a legal framework for information technology* (hereinafter “AELFIT”) does not require the intermediary to actively monitor hosted content.¹⁷⁰ This concept also appears in the *Canada-United States-Mexico Agreement*.¹⁷¹ However, the platforms undertake to take the necessary measures in the event of a user reporting defamatory content, some platforms even having a specific procedure for notifying users of such content.¹⁷²

Among the terms of use, the platforms specify that they reserve the right to delete or modify content they deem abusive or illegal, or to suspend or terminate an account that violates the terms of use or the guidelines. In most cases, before taking such steps, the user will receive prior warning, and will have an opportunity to correct the situation. In addition, it will be possible in certain cases to appeal the decision.¹⁷³

Ultimately, control of defamatory content is exercised further downstream, after the review has been posted by the user. As regards the opaque process by which the platform decides whether or not to delete a comment, this can be a powerful tool for censoring consumers.

¹⁶⁸ <https://support.google.com/local-guides/answer/7400114?hl=en#zippy=%2Cmisinformation>.

¹⁶⁹ <https://support.google.com/local-guides/answer/7400114?hl=en#zippy=%2Cmisinformation>.

¹⁷⁰ According to this provision, “A service provider, acting as an intermediary, that provides communication network services or who stores or transmits technology-based documents on a communication network is not required to monitor the information communicated on the network or contained in the documents or to identify circumstances indicating that the documents are used for illicit activities.”

¹⁷¹ *Canada-United States-Mexico Agreement* (CUSMA) - Chapter 19 - Digital Trade, art. 19.17.

¹⁷² We found this type of procedure on Tripadvisor, Facebook, Instagram and LinkedIn in particular. It also specifies on LinkedIn that this procedure may vary from one country to another, considering that the laws on defamation and prejudice are not the same everywhere.

¹⁷³ This will notably be the case with Google, Tripadvisor, Trustpilot, Twitter, LinkedIn, YouTube, TikTok, Facebook and Instagram.

2.1.3 The liability of intermediaries

Both on review sites and on social media, the terms of use include limitation of liability clauses. In general, these clauses have the effect of releasing the platform from any liability resulting from the content published by a user. This includes situations involving lost profits, revenue, business opportunities, customers, etc.

In this respect, the LinkedIn platform expressly mentions that it is exempt from any liability for damage to reputation resulting, for example, from offensive or defamatory statements.¹⁷⁴ It adds that each user is responsible for the content of their posts, including any harm caused to third parties.¹⁷⁵ Twitter similarly warns its users of the risks to which they are exposing themselves, in the following terms:

“You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate, or in some cases, postings that have been mislabeled or are otherwise deceptive. All Content is the sole responsibility of the person who originated such Content.”¹⁷⁶

In other words, under the rules applicable to the platforms, only the user is responsible for the content they publish. In addition, some platforms include indemnification clauses in their terms of use, under which the user of the platform undertakes to compensate them in the event of a lawsuit resulting from a violation of the terms of service.¹⁷⁷ This is particularly true of the Google platform, which, in the conditions it imposes on users, stipulates as follows:

“To the extent allowed by applicable law, you’ll indemnify Google and its directors, officers, employees, and contractors for any third-party legal proceedings (including actions by government authorities) arising out of or relating to your unlawful use of the services or violation of these terms or service-specific additional terms. This indemnity covers any liability or expense arising from claims, losses, damages, judgments, fines, litigation costs, and legal fees.”¹⁷⁸

From a strictly contractual standpoint, a certain homogeneity can be observed as regards the liability of intermediaries, which is limited to the greatest possible extent by the conditions of use agreed on by consumers. However, the legal validity or enforceability of such clauses remains subject to review by the courts. In this regard, legal doctrine points out that the intermediary's liability will vary according to the level of control they have over the content.¹⁷⁹

¹⁷⁴ <https://www.linkedin.com/legal/user-agreement>.

¹⁷⁵ <https://www.linkedin.com/help/linkedin/answer/a519782/publishing-platform-guidelines?lang=en>.

¹⁷⁶ <https://twitter.com/fr/tos>.

¹⁷⁷ We have identified a number of such clauses, notably at Google, Amazon, Trustpilot, Tripadvisor, Yelp, Instagram, Facebook, YouTube and TikTok.

¹⁷⁸ <https://policies.google.com/terms?hl=en-US>.

¹⁷⁹ Vincent Karim, *Les obligations*, 5th. ed., vol. 1, Montréal, Wilson & Lafleur, 2020, para. 3314.

Generally speaking, an intermediary who acts as a publisher¹⁸⁰ and controls both the content posted online and its distribution, may be held liable, as opposed to an intermediary who merely acts as a content contributor or host.¹⁸¹

In Québec, anyone seeking compensation from the intermediary must establish the fault of the latter,¹⁸² just as they must when it comes to the civil liability of the author of the remarks. However, AELFIT Section 22 para. 1 grants a certain immunity to the intermediary by specifying that the latter “[...] is not responsible for the activities engaged in by a service user [...]”¹⁸³ This immunity is tempered by para. 2 of the same section, which specifies that, once it becomes aware of the illicit nature of the activity, the service provider may incur responsibility if it does not act promptly to block access to the documents, or otherwise terminate the activity.¹⁸⁴

Similarly, under common law,¹⁸⁵ no person shall be held liable for publishing any defamatory libel, provided that their participation in such publication is purely administrative or mechanical.¹⁸⁶ The intermediary may still waive their liability when they become aware of the defamatory libel provided that they take the necessary measures to withdraw the publication within a reasonable time.¹⁸⁷

¹⁸⁰ “As a general rule, a party is deemed to be the publisher if they know the substance of the content to be published,” [TRANSLATION] and if it has the power to choose what will be disseminated and to whom: “Plateformes nocives, La responsabilité des intermédiaires Internet et le droit canadien,” *Les amis*, September 2020, p. 22; Nicolas W. Vermeys, “Chronique - La diffamation sur Internet : à qui la faute?,” *Repères*, 2007, p. 3. For example, the administrator of a Facebook page was held liable when she authorized the publication of a defamatory message: *Arsenault c. Dufour*, 2020 QCCQ 13357 para. 50. In this case, the judge specified that even though the defendant was not the author of the defamatory remarks, she was the person who allowed them to be published, which made it possible to hold her liable for the defamation.

¹⁸¹ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-300. In the case *Lehouillier-Dumas c. Facebook Inc.*, 2021 QCCS 352 4 at para. 65, the judge states that “[a] platform manager is not considered a broadcaster and incurs no liability for defamation committed by a user, unless the defamatory nature has been denounced and demonstrated to them” [TRANSLATION] See also: *Weaver v. Corcoran*, 2015 BCSC 165, para. 284 (overturned on other grounds, 2017 BCCA 160).

¹⁸² In order to establish fault, various factors are taken into account, including the degree of control over the content: *Corriveau c. Canoe Inc.*, 2010 QCCS 3396 conf. par 2012 QCCA 109; Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-300. 1. It should be noted that the rules set forth in the LCCJTI are complementary to the general civil liability regime.

¹⁸³ More specifically, it states that “A service provider, acting as an intermediary, who provides document storage services on a communication network is not responsible for the activities engaged in by a service user with the use of documents stored by the service user or at the service user’s request.”

¹⁸⁴ Similarly, *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000* regarding certain legal aspects of information society services does not impose increased surveillance on intermediaries, but does require them to take steps to remove or restrict access to illegal content as soon as they become aware of it, on pain of incurring liability.

¹⁸⁵ This is the “defense of innocent dissemination”: Ryan Savage, “Between a Rock and a Hard Place: Defamation and Internet Service Providers,” (2002) 2 *Asper Rev of Int’l Bus and Trade Law*, pp. 107-121.

¹⁸⁶For example, printers, Internet service providers, distributors: Peter A. Downard, “Halsbury’s Laws of Canada – Defamation” LexisNexis, 2018.

¹⁸⁷ Ryan Savage, “Between a Rock and a Hard Place: Defamation and Internet Service Providers,” (2002) 2 *Asper Rev of Int’l Bus and Trade Law* p. 107, at page 118. For example, in a decision in which the operators of a site had been made aware of the presence of a defamatory libel on their site and had been given a reasonable period of time to remove it, but had failed to do so, the defense of innocent dissemination could not be used: *Tamiz v. Google Inc.*, [2013] EWCA Civ 68, paras. 27-35.

This means that the responsibility of intermediary platforms will depend not only on the knowledge and control exercised over the content published, but also on the speed with which content flagged as illegal is removed. In certain situations, the illegal nature of content seems rather clear and obvious, yet it is not always easy to determine what constitutes defamatory content. Differences can also be observed in the internal procedures set in place by the platforms for withdrawing content reported as defamatory.

While Trustpilot undertakes to remove content that might damage a person's reputation or cause financial loss to a business,¹⁸⁸ LinkedIn, for its part, specifies only that the laws on defamation and reputational harm are not the same everywhere and that in many cases, it will not be able to act on a defamation notice since a court order will be required.¹⁸⁹ Other platforms state only that a content will not be removed based solely on individual opinions or views or because the person reporting the content considers the review to be subjectively unfair.¹⁹⁰

In the opinion of Professor Pierre Trudel, the intermediaries' best approach would be to first obtain independent confirmation of the illicit nature of a document before intervening to censor the information.¹⁹¹ This approach would be more respectful of consumers' freedom of expression and the public's right to information.¹⁹² Indeed, "since the liability of intermediaries can too easily be called into question, they could be tempted, in order to protect themselves, to automatically censor every message that posed a risk"¹⁹³ [TRANSLATION]. At the other extreme, if they evade all responsibility, relying on the fact that they exercise no control over the posts, they will have no incentive to do what is needed to stop the illicit activities of their users.¹⁹⁴ Be that as it may, it would no doubt be appropriate to clarify the scope of AELFIT Section 22 in order to clarify the role and responsibility of intermediaries when faced with a request to withdraw a comment on the grounds that it is defamatory.

In other legal systems, such as France, the UK, Germany and India, platforms may benefit from a certain immunity as long as they respect certain conditions.¹⁹⁵ The United States, for its part, operates under a regime of quasi-absolute immunity, by virtue of Section 230 of the *Communications Decency Act*, which expressly exempts websites that host information provided by Internet users from any liability, even when they choose to delete posts.¹⁹⁶ Also, in their

¹⁸⁸ <https://legal.trustpilot.com/for-reviewers/guidelines-for-reviewers>.

¹⁸⁹ <https://www.linkedin.com/help/linkedin/answer/a1339420/notices-regarding-content-posted-on-the-linkedin-website?lang=en>. Such court orders are required the United States, in particular.

¹⁹⁰ This type of mention is found on Twitter and RateMDs in particular.

¹⁹¹ For example, by obtaining an independent legal opinion from a neutral expert: "La responsabilité civile sur Internet selon la Loi concernant le cadre juridique des technologies de l'information." *Centre de recherche en droit public*, Faculté de droit, Université de Montréal, 2008, p. 14.

¹⁹² Pierre Trudel, "La responsabilité sur internet en droit civil québécois," *Centre de recherche en droit public*, Faculté de droit, Université de Montréal, 2008, p. 22.

¹⁹³ Pierre Trudel, "La responsabilité sur internet en droit civil québécois," *Centre de recherche en droit public*, Faculté de droit, Université de Montréal, 2008, p. 3.

¹⁹⁴ Pierre Trudel, "La responsabilité sur internet en droit civil québécois," *Centre de recherche en droit public*, Faculté de droit, Université de Montréal, 2008, pp. 3 and 4.

¹⁹⁵ In these national spaces, there are notice and take-down procedures.

¹⁹⁶ At the time of writing, the validity of this provision is being debated in the Supreme Court of the United States. United States Supreme Court.

terms of use, most platforms have choice of forum clauses stipulating that all disputes must be resolved in the United States, thereby posing an additional challenge for any company wishing to sue a digital platform.¹⁹⁷

With a view to providing a framework for online platforms and the content circulating on them, France and the UK have recently issued various measures and guidelines aimed at better defining the role that platform operators will have to play. For example, France has made changes to its *Consumer Code* by adopting three decrees, which require that operators of online review platforms must now provide users with fair, clear and transparent information on the methods of posting and processing online reviews. Companies covered by these decrees will also have to provide specific information on how their online review service functions, on their procedures for monitoring content and their methods for informing consumers that their posts have been refused.¹⁹⁸

The *Online Safety Bill*,¹⁹⁹ which was derived from the guidelines in the *Online Harms White Paper*²⁰⁰ issued by the UK government in April 2019, aims particularly at making social media companies more responsible for the safety of the users of their platforms. One projected measure in the bill is the imposition of “duties of care” aimed at protecting users against illegal content. Platforms would also be required to abide by their terms of service, subject to criminal penalties, and they would have to set in place an appeals process for users whose content has been removed. In addition, the bill provides for the creation of a regulatory body that will have the power to enforce the new rules and impose fines on companies that violate them.

The European Union also intends to update its e-commerce directive of 2000, under the aegis of the *Digital Service Act*,²⁰¹ which will harmonize the legal framework applicable to illegal online content as well as the obligations of content hosts. This law is aimed in particular at combatting illegal content and offering greater transparency with regard to their content moderation decisions. Intermediaries will have to comply with new obligations, which will be proportional to the nature of their services, their size and their weight, as well as the risks and societal damage they may cause.²⁰²

¹⁹⁷ The validity of forum selection clauses has been addressed in the following decisions: *Busch v. Yelp Inc.*, 2019 BCSC 1746; *Belley c. Facebook inc. (Metaplatforms Inc)*, 2021 QCCS 5475; *Giustra v. Twitter*, 2021 BCSC 54 (appeal dismissed, 2021 BCCA 466). It should be noted that in these cases, the relationship between the company and the platform was of a commercial nature. The situation might be different in the case of a consumer, for whom a forum selection clause could be ineffective: *Douez v. Facebook*, 2017 SCC 33, para. 33.

¹⁹⁸ These are Decree no. 2017-1434 of September 29, 2017 “relating on information obligations of digital platform operators,” Decree no 2017-1435 of September 29, 2017 “relating to the determination of the connection threshold above which the operators of digital platforms must establish and make available to consumers good practices guidelines aimed at strengthening the fairness, clarity and transparency of the information provided to consumers,” as well as Decree no. 2017-1436 of September 29, 2017 “relating to information obligations concerning online consumer reviews.”

¹⁹⁹ <https://bills.parliament.uk/publications/49376/documents/2822>. At the time of writing, the bill was being considered by the House of Lords: <https://bills.parliament.uk/bills/3137>.

²⁰⁰ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973939/Online_Harms_White_Paper_V2.pdf.

²⁰¹ <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>.

²⁰² Very large platforms and very large search engines will therefore be subject to stricter requirements. This law will come into force in February 2024, except for very large online platforms and very large search engines, which will be subject thereto as of 2023.

In short, while the conditions of use of review sites and social media sites are similar in several respects, there is still a lack of uniformity in the way that withdrawal requests for defamatory remarks are processed. This can no doubt be explained by the lack of a framework to regulate the role and obligations of platform operators. In this respect, Canada seems to be lagging behind the legislation that is in force in other countries or is currently under study. With the exception of some products and services review sites that provide tips on how to write a review,²⁰³ it also seems to us that a consumer who chooses to share their experience on a products and services review site benefits neither from a more appropriate framework or from better protection than if they had posted their comment on social media.

2.2 The consumer's waiver of freedom of expression

We have seen that review sites and social media have introduced several rules governing the comments disseminated via their platforms that allow them to intervene, to monitor and to remove comments perceived as inappropriate. However, it may happen in certain situations that the consumer is deprived of the possibility of expressing themselves on these platforms since they have previously waived their freedom of expression (2.2.1) directly in the sales or service contract they concluded with the company (2.2.2).

2.2.1 The possibility of waiving a fundamental freedom

Under certain conditions, the law recognizes the possibility of waiving various protections emanating from the rights and freedoms set out in the Canadian Charter or in the Québec Charter.²⁰⁴ In this respect, it has been ruled that it is possible to waive one's freedom of expression.²⁰⁵ However, "[t]o be valid, the waiver must be clear, unequivocal, informed, free and voluntary"²⁰⁶ [TRANSLATION]. In addition, certain factors must be taken into account such as "[...] (1) the nature of the right or freedom in question; (2) the possibility for this claimant to waive that right or freedom; (3) the manner in which the plaintiff waived it; (4) the extent to which the plaintiff was able to waive it; and (5) the effect of the waiver"²⁰⁷ [TRANSLATION]. The validity of such a clause will be assessed on a case-by-case basis by the courts, which must ensure that the clause was neither illegible nor ambiguous and that the person was able to fully understand the consequences of this waiver.

²⁰³ For example, providing helpful and constructive feedback, being specific and honest, giving as many details as possible about the experience (best and least liked), etc. We found such mentions on sites such as Amazon, Tripadvisor, Trustpilot and Yelp.

²⁰⁴ Karine Millaire, "La renonciation aux droits et libertés et le consentement libre et éclairé : fondements, exigences et incertitudes," (2020) 78 R. du B. 39, p. 43.

²⁰⁵ *Digital Shape Technologies Inc. c. Walker*, 2018 QCCS 4374, par. 32.

²⁰⁶ *Digital Shape Technologies Inc. c. Walker*, 2018 QCCS 4374, par. 31.

²⁰⁷ *Digital Shape Technologies Inc. c. Walker*, 2018 QCCS 4374, par. 31. See also *Northcrest Syndicate v. Amselem*, 2004 SCC 47, paras. 96, 99, 100 and 101 and Karine Millaire, "La renonciation aux droits et libertés et le consentement libre et éclairé : fondements, exigences et incertitudes," (2020) 78 R. du B. 39, p. 47.

Free speech waiver clauses will often take the form of non-disparagement clauses. So far, non-disparagement clauses²⁰⁸ have mainly been incorporated into employment contracts concluded between an employee and an employer. This type of clause nevertheless seems to be gradually showing up in consumer contracts, despite the absence of an obligation of loyalty and of a relationship of subordination towards the company on the part of the consumer.

For example, a consumer wishing to do business with a company could be obliged to sign a sales or service contract that includes a clause by which they undertake to the company not to post comments online or to comment on their purchasing experience. If they fail to fully respect this commitment, they will have to compensate the company in accordance with the terms of the contract. In such a case, the consumer will be obliged to compensate the company, not for the comments made, but for not having respected their commitment.

In the United States, this type of clause has also been seen in contracts concluded with companies.²⁰⁹ In Canada, in response to a number of complaints about this type of clause, Ontario considered in 2020 adding a provision to its *Consumer Protection Act*, which would have had the effect of offering protection against contractual clauses limiting consumers' right to make fair comments.²¹⁰ Even though the courts may accept a waiver of the freedom of expression, the fact remains that it is still necessary to take into account the particularities of consumer law and the vulnerability of consumers, before ruling on the legality of a waiver clause.

2.2.2 The validity of a waiver in a sales or service contract

As stated previously, certain criteria must be met for a waiver to be valid. One of these, the free and informed nature of the waiver, is decisive. However, the particularity of non-disparagement clauses in consumer contracts lies in the fact that the consumer is asked, even before they have been able to benefit from the good or service, and before they have been able to assess its quality, to undertake not to comment on their experience. In such a case, it is questionable whether the waiver can be truly free and informed, since situations that might give rise to criticism do not yet exist. Furthermore, can we really speak of a voluntary waiver when it is required by a clause incorporated into a contract whose terms the consumer is often unable to negotiate? In *Godbout v. Longueuil (City)*,²¹¹ the Supreme Court of Canada states that in cases when the holder of the right in question has no choice but to waive it in order to conclude a contract, it is impossible to assert that they have truly done so voluntarily.

Since it ultimately comes down to restricting the exercise of a fundamental freedom, a company wishing to incorporate this type of clause within a consumer contract should at the very least be able to demonstrate that the clause serves a legitimate and important purpose and meets the

²⁰⁸ Non-denigration clauses make it possible to determine in advance the penalty for breach of the agreement.

²⁰⁹ Clay Calvert, "Gag Clauses and the Right to Gripe: *The Consumer Review Fairness Act of 2016 & State Efforts to Protect Online Reviews from Contractual Censorship*," 24 *Widener L. Rev.* 203 (2018).

²¹⁰ <https://www.ontario.ca/page/consultation-strengthening-consumer-protection-ontario>. To date, it should be noted that no such provision has been added to Ontario's *Consumer Protection Act*.

²¹¹ [1997] 3 SCR 844.

proportionality test.²¹² This is also what is required by French law with regard to this type of waiver clause, when it specifies that “[...] restrictions may be placed on freedom of expression in order to protect the reputation and rights of others, provided that such restrictions are proportionate to the aim pursued”²¹³ [TRANSLATION]. We find it difficult to imagine a situation in which a company could comply with these criteria and be able to justify that such a clause has a legitimate purpose. It should be remembered in this regard that protection against economic harm should not be given predominance over the values expressed in the guarantees enshrined in the Charters, among which is freedom of expression.²¹⁴ As for the proportionality criterion, a total ban on speaking out against a company also seems clearly disproportionate.

Furthermore, certain elements specific to consumer law make the validity of a clause preventing the consumer from expressing their opinion equally suspect. These include abusive clauses in consumer or membership contracts in Québec and the rule of iniquity in common law, which have the effect of excessively and unreasonably disadvantaging a party.²¹⁵ This would be the case, for example, with a clause “[...] which so departs from the fundamental obligations arising from the rules normally governing the contract that it changes the nature of the contract [...]”²¹⁶ It is also possible for a consumer to request the nullity of the contract or the reduction of the obligations arising therefrom, if there is a disproportion between the respective services of the parties or even when the obligation placed on the consumer is excessive, abusive or exorbitant.²¹⁷

It would therefore be interesting to see how the courts would apply these principles in the event of a consumer trying to invalidate a non-disparagement clause incorporated within a contract by the company, especially if the company asks the consumer to waive their right to speak, a fundamental right in our society, without offering them anything in return. In fact, the company does not promise to offer exceptional service or to compensate the consumer if a problem arises as a result of the transaction. It simply asks them to give up their freedom of expression in order to be able to contract with it, with no corresponding obligation on its part.

In order to resolve any ambiguity regarding the validity of this type of disclaimer, Alberta has incorporated into its consumer protection legislation a provision prohibiting the merchant from including within a contract a clause preventing the consumer from posting a negative review about the business or the transaction.²¹⁸ Similarly, in the United States, the *Consumer Review Fairness Act* of 2016²¹⁹ forbids companies to include contractual provisions prohibiting or punishing negative customer reviews. Adding this type of provision to consumer protection laws could be an interesting solution for every Canadian province and would clear up any confusion as to whether or not a company should be allowed to include this type of clause.

²¹² This is the test provided for in article 9. 1 Chrf when there is an infringement of a fundamental right or freedom.

²¹³ *Cass. Soc.*, January 14, 2014, no. 12-27. 284.

²¹⁴ *SDGMR, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, para. 72.

²¹⁵ For more information on the subject of abusive clauses, see in particular the text by Sébastien Grammond, “La règle des clauses abusives sous l’éclairage du droit comparé,” vol. 51, No. 1, March 2010, pp. 83 to 116.

²¹⁶ *Civil Code of Québec*, CQLR c CCQ-199, art. 1437.

²¹⁷ *Consumer Protection Act*, CQLR c P-40. 1, ss. 8 and 9.

²¹⁸ *Consumer Protection Act, RSA 2000*, c C-26. 3, s. 183. 1 (1).

²¹⁹ <https://www.congress.gov/bill/114th-congress/house-bill/5111/text>.

Beyond the validity of such a clause, the fact remains that almost all of the focus group participants said that they would not agree to do business with a company that asked them not to publish negative reviews. In their opinion, such a practice would mean that the company had something to hide, especially since it would interfere with their freedom of expression:

“Seems like they have something to hide.” Maritimes

Rather than incorporating a clause in the contract prohibiting consumers from expressing themselves, some companies will directly pressure consumers to withdraw their comment after it is posted by threatening to cease respecting their obligations towards them, such as their obligation to honour the warranty for the product or service. It goes without saying that this practice is illegal, and the courts make a point of recalling this explicitly:

“[...] the defendant cannot make its obligation to repair the furniture conditional on the removal of the posted comments. As seller, it must meet its obligations, despite the plaintiff’s criticism of the service provided.”²²⁰ [TRANSLATION]

Several consumers we met also maintained that they would be reluctant to withdraw a comment at the request of a company since it is a question of a right and also of integrity:

“I won’t allow them to silence me because it is my right to write a review.” Ontario

Ultimately, a company that persists in pursuing such a course runs the risk of not only ending up before the court to justify the legality of the clause, but also of losing the consideration of its potential clientele.

We have seen in this first part that the consumer’s freedom of expression can be compromised in many ways and that those who wish to post an opinion about a good or service offered by a company find their way barred by numerous obstacles. First of all, our analysis of the legal framework has made it possible to establish the various criteria that must be satisfied for there to be defamation, as well as the complexity involved in applying these to a specific case. In this regard, we have seen that the rules applicable in Québec civil law and in common law, although similar in certain respects, each have significant pitfalls. While the laws on defamation stemming from British law seem largely ill-adapted to the new reality of defamation on the Internet, a defamation lawsuit under the Québec civil liability regime attaches very little importance to the need to reconcile the fundamental rights of each party, namely, the company’s right to reputation and the consumer’s freedom of expression. This can arguably be explained by the fact that “[law] making frequently happens at a slower pace than the development of new technologies and platforms [...]”²²¹

²²⁰ *Bouchard Dupont c. Poitras Meubles & Design inc.*, 2020 QCCQ 6607, paras. 31 and 32.

²²¹ Sheryl N. Hamilton and Sandra Robinson, *Law’s Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, p. 23.

Subsequently, our study of case law allowed us to establish the parameters guiding the courts in a lawsuit brought by a company against a consumer in the more specific context of online criticism. This provided an opportunity to observe how particularly sensitive decision-makers are to malicious comments, sometimes even going so far as to condemn the whole of a consumer's speech, as soon as a fragment of it is tinged with inappropriate or malicious comments. This in turn restricts consumers' freedom of expression, which is often overshadowed by the need to protect the reputation of the company. The size of the sums awarded as damages, even when there is no tangible evidence of harm to the company, is quite revealing in this respect, and raises fears of considerable fears for consumers' debt and financial security.

Finally, in addition to the many limitations imposed by defamation lawsuits, there are also contractual limitations, which may derive from the terms of use of digital platforms and the user's right to monitor their posts, or from the waiver of their right to express their opinion in the contract they concluded with the company.

The Supreme Court of Canada has often pointed out that defamation should evolve in step with society's values and the importance given to freedom of expression. In fact:

“[w]hether a statement is defamatory may depend in the circumstances of publication and will vary with time, place and context. What is considered defamatory may change with the “temper of the times and contemporary opinion, so that what may be actionable in one age may not be in another”.²²²

The reality is that people are from now on going to be speaking out more and more on the Internet to denounce practices they consider reprehensible. This practice adopted by consumers has also been adopted by several companies that encourage their customers to share their opinions for marketing purposes. When analyzing defamatory statements, decision-makers must therefore take into account the specific context in which online criticism and the sharing of information between consumers take place. It is certainly an illusion to think that any negative criticism will inevitably lead consumers to lose consideration and esteem for a company, especially since consumers do not necessarily believe everything they read.²²³ It is therefore essential not to lose sight of these considerations specific to online reviews, if we are to restore to consumers the freedom of expression that is their right.

²²² Jonathan Kroft, Nicole Watson and Baillie Chisick, “Canadian defamation law: changing world, changing rules,” (2012) *Ann. Rev. Civil Lit.*, p. 31, at page 36. See also: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, para. 16 and *Bou Malhab v. Metromedia CMR Broadcasting Inc.*, 2011 SCC 9, para. 1.

²²³ Law Commission of Ontario, *Final Report, Defamation Law in the Internet Age*, March 2020, p. 21.

Part II. Freedom of expression regained for the consumer

*I disapprove of what you say, but I will
defend to the death your right to say it.*
– S. G. Tallentyre²²⁴

Freedom of expression plays a fundamental role in the development of our free, democratic society. It protects not only accepted opinions, but also those that are challenging and sometimes even disturbing.²²⁵ It has been instituted “[...] to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.”²²⁶ Freedom of expression is also constitutionally protected under Section 2(b) of the *Canadian Charter of Rights and Freedoms*.²²⁷ Québec²²⁸ and Saskatchewan²²⁹ also protect this right through quasi-constitutional legislation.

This freedom of expression takes on its full meaning in the context of online reviews, since “[...] 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.”²³⁰

Moreover, in a defamation action, “what is at stake [...] is not only an individual’s interest in protecting his or her reputation, but also the public’s interest in protecting freedom of expression.”²³¹ Even recently, in *Ward*, the highest Canadian court recalled that freedom of expression was not elevated to the rank of fundamental freedom “[...] to encourage censorship.”²³²

It is therefore essential to protect the content of freedom of expression in consumer law (**chapter 1**) and, where applicable, to ensure that the rights and remedies offered to consumers fulfill this function (**chapter 2**).

²²⁴ Often wrongly attributed to Voltaire, this quote comes from: S. G. Tallentyre, *The Friends of Voltaire*, London, Smith, Elder & Co., 1906, p. 199.

²²⁵ *R. v. Sharpe*, 2001 SCC 2, para. 21.

²²⁶ *Irwin Toys Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 968.

²²⁷ *Constitution Act 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

²²⁸ *Charter of Human Rights and Freedoms*, CQLR c C-12, art. 3 and 44.

²²⁹ *The Saskatchewan Human Rights Code*, SS 1979, c S-24. 1, s. 5.

²³⁰ *R. v. Guignard*, 2002 SCC 14, para. 23.

²³¹ *Crookes v. Newton*, 2011 SCC 47, para. 31.

²³² *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, para. 5.

Chapter 1. The protected content of freedom of expression in consumer law

While it may happen that reviews posted online by consumers go beyond what is authorized by freedom of expression, it should be borne in mind that online business reviews also serve the public interest. Accordingly, negative reviews, when expressed honestly and fairly, should not result in successful legal action simply because the person being reviewed disagrees with the content.²³³ Online reviews not only allow consumers to make informed consumer choices (1.1), but can also serve to strengthen or enhance the reputation of a company (1.2).

1.1 Informed consumer choices

With the advent of social media and review sites, traditional word of mouth has gradually given way to electronic feedback, in the form of written comments. Consumers now rely on these platforms and peer reviews to judge the reliability of a company and the quality of its services. Consumers' ability to share their buying experience with each other has altered the balance of power between companies and customers, allowing customers make informed consumer choices before contracting with a company:

"It is constructive when it is done right on a platform that helps businesses and has a lot of values like Google reviews." Ontario

While in some cases, consumers will be able to serve the public interest by posting their own comments directly (1.1.1), they will sometimes turn to journalists to tell their story for them (1.1.2). Considering the importance that consumers attach to their freedom of expression, any company that seeks to silence a consumer at all costs exposes itself to sanctions, particularly in cases of abusive prosecution (1.1.3).

1.1.1 The notion of public interest

Online reviews provide such a vital source of information prior to purchasing products goods or services that 67 % of consumers say they would simply refuse to buy a product if they could not find a review about it.²³⁴ According to those who post such reviews, one of the main motivations for doing so is the desire to warn other consumers and protect them against abusive practices by a company.

"It is important because the reviews can help other people be aware of what they are buying."
Ontario

²³³ *Luc Crawford Design Inc., et al v. Mallowney et al.*, 2021 ONSC 7849, para. 59.

²³⁴ Howard J. Deane, Strengthening the marketplace through a Consumer Protection Framework for consumer online reviews, Consumers Council of Canada, 2016, p. 37.

However, to be considered of public interest, it is not enough that a subject interests the public, it must be of significant concern to citizens, because it affects their welfare.²³⁵ In other words, the dissemination of information must respond to a social utility²³⁶ and be beneficial and profitable to a large number of individuals.²³⁷ In this regard, the courts have consistently asserted that issues relating to consumer protection, such as sharing experiences about the quality of a good or service offered, fall within the public interest.²³⁸ This means that posting negative remarks about a company should not be liable to prosecution, as long as it is done honestly, based on facts, and in the public interest.²³⁹

To the extent that a comment relates to a matter of public interest, it is possible for the consumer being sued to invoke the Defense of Fair Comment.²⁴⁰ This defense will, however, be rejected if the plaintiff establishes that the comment was made maliciously.²⁴¹ In addition, the Defense of Fair Comment will not be available if the defendant's statement constitutes an assertion of fact and not a comment or if it can be interpreted as a comment but the underlying facts are not demonstrated.²⁴² Thus, a criticism of a service offered, based on a subjective opinion of the service, may be protected by the Defense of Fair Comment, provided that the facts on which the criticism is based are founded.²⁴³

Although this defense is not strictly speaking applicable in Québec civil law, the fact remains that in practice, Québec courts will be able to take into account the criteria of the Defense of Fair Comment in determining the wrongful nature of the comments.²⁴⁴ This defense is seldom

²³⁵ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 105; Sheryl N. Hamilton and Sandra Robinson, *Law's Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, pp. 14 and 15.

²³⁶ *Canadian Broadcasting Corporation v. Radio Sept-Iles Inc.*, 1994 CanLII 5883 (QC CA) p. 21.

²³⁷ For the public interest criteria, see decision 9329-6481 *Québec inc. c. Ouimet*, 2020 QCCS 3472, para. 44.

²³⁸ The issue of public interest in terms of consumer protection has been addressed in particular in the following decisions: *Gestion finance Tamalia inc. c. Garrel*, 2012 QCCA 1612, para. 53; *Level One Construction Ltd. v. Burnham*, 2018 BCSC 1354, para. 179, lower by 2019 BCCA 407; *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, paras. 25 to 27, conf. para. 2019 ONCA 141; *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, paras. 31 and 32.

²³⁹ *Peterson v. Deck*, 2021 BCSC 1670, para. 90.

²⁴⁰ See *Wic Radio Ltd. v. Simpson*, 2008 SCC 40, para. 28. "To assert this defence, the following requirements must be met: (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 the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice."

²⁴¹ In this regard, malice includes spite or ill will, but can also be established by showing that a comment was made with an indirect motive or ulterior purpose, dishonestly, or knowingly or with a reckless disregard for the truth: *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 145.

²⁴² *Level One Construction Ltd. v. Burnham*, 2018 BCSC 1354, para. 96, inf. par 2019 BCCA 407. "For example, if a statement refers to facts about a person's conduct and it is concluded from those facts that the conduct is 'degrading,' the statement about the conduct is clearly commentary. However, if the remarks only assert that the person has adopted degrading conduct, without being accompanied by facts, this affirmation will be one of fact and not of opinion": [TRANSLATION] Christian Leblanc, "La défense de commentaire honnête en droit civil québécois," dans *La diffamation : deuxième colloque*, Éditions Yvon Blais, vol. 16, 2013, p. 151.

²⁴³ *New Dermamed Inc. v. Sulaiman*, 2018 ONSC 2517, para. 47, conf. par 2019 ONCA 141.

²⁴⁴ *Prud'homme v. Prud'homme* 2002 SCC 85, para. 63; *Genex Communications inc. c. Association québécoise de l'industrie du disque, du spectacle et de la vidéo*, 2009 QCCA 2201, para. 31; Christian Leblanc, "La défense de commentaire honnête en droit civil québécois," dans *La diffamation : deuxième colloque*, Éditions Yvon Blais, vol. 16, 2013, p. 160.

invoked by Québec consumers who are sued for defamation. Also, the right of any person to be informed of a matter of public interest is guaranteed by Section 44 of the Québec Charter, in the chapter on economic and social rights.²⁴⁵

This concern for protecting speech on issues of public interest is also reflected in various policies of digital platforms. For example, the company Meta has made commitments in terms of freedom of expression by virtue of which it wants consumers to be able to express themselves openly on subjects that are important to them. Content that goes against Facebook or Instagram standards may even be published, as long as it is deemed relevant and in the public interest. In deciding the latter, the positive impact of the content on the public interest will be weighed against its possible harm to the person concerned.²⁴⁶ The same observation is to be found on Twitter, which has exceptions when it comes to the public interest. It considers content to be acceptable “[...] if it directly contributes to understanding or discussion of a matter of public concern.”²⁴⁷ The LinkedIn site expressly provides an exception to the notion of public interest, stating: “We do allow for disagreements, commentary or criticism on policies and matters of public interest or organizations as long as they do not insult or vilify.”²⁴⁸ On the other hand, tolerance seems higher towards public figures: “Members may express heightened negative criticism and disapproval towards public figures, such as politicians, celebrities, prominent business leaders, or other individuals voluntarily in the public eye.”²⁴⁹

Ultimately, the concept of public interest not only serves as an important defense for consumers who publish or consult reviews online, but also helps to strike a balance between protecting the reputation of an individual or a private entity and freedom of expression, thereby offering every citizen the opportunity to make comments or offer criticism about topics of interest to society.²⁵⁰

1.1.2 Using journalists to publish the message

Freedom of the press is at the heart of liberty of expression and plays an essential, invaluable role in our society:²⁵¹

“The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make informed assessment of the issues which may have a significantly affect their lives and well-being”.²⁵²

²⁴⁵ This provision states that “every person has a right to information to the extent provided by law.”

²⁴⁶ <https://transparency.fb.com/policies/community-standards/> ;
https://help.instagram.com/477434105621119/?helpref=hc_fnav&cms_id=477434105621119.

²⁴⁷ <https://help.twitter.com/en/rules-and-policies/public-interest> : Currently only tweets by officials and government officials are subject to an exception.

²⁴⁸ <https://www.linkedin.com/help/linkedin/answer/a1342756?lang=en>.

²⁴⁹ <https://www.linkedin.com/help/linkedin/answer/a1342756?lang=en>.

²⁵⁰ *Société TVA inc. c. Marcotte*, 2015 QCCA 1118, paras. 104 and 105 (application for leave to appeal dismissed, 2016 CanLII 13757 (SCC)).

²⁵¹ Section 2(b) of the *Canadian Charter of Rights and Freedoms* also guarantees freedom of the press; *Gilles E. Neron Communication Marketing inc. v. Chambre des notaires du Québec*, 2004 SCC 53, para. 48.

²⁵² *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1991] 3 SCR 459, p. 475.

In a survey carried out in 2006, 43 % of citizens admitted that they would prefer to speak out on a television program such as *La Facture* or *JE* rather than in a courtroom.²⁵³ For similar reasons, consumers may prefer to use journalists and traditional media to raise public awareness about situations they have experienced with a company and thereby reach a larger audience, rather than rely on review sites or social media. According to one focus group participant, public affairs programs are a better way to expose companies and are more likely to influence them to change their behaviour than online reviews.

In this regard, the role of traditional media “[...] consists in informing the public by treating the subject with objectivity, by presenting it in an impartial and fair manner and by respecting the applicable journalistic standards, after conducting a professional investigation”²⁵⁴ [TRANSLATION]. The media, just like journalists, must therefore meet standards of objectivity, skill and social utility,²⁵⁵ or be exposed to legal action.²⁵⁶ Certain tools and guidelines have, incidentally, been created to guide journalists in their work.²⁵⁷

In Québec, except for certain rules applicable to newspapers covered by the *Press Act*,²⁵⁸ the media and journalists are not subject to a specific liability regime other than civil liability.²⁵⁹ Any fault committed by a journalist or a media company will be assessed taking into account professional journalistic standards and will be compared to the methods that a reasonable, competent, and honest journalist would have used.²⁶⁰ The content of the report, the methodology used and the context to which it belongs will also be examined.²⁶¹ Québec civil law imposes an obligation of means on journalists and the media, not an obligation of result.²⁶²

²⁵³ Marie-Claude Malbœuf, “Près de la moitié des Québécois ne font pas confiance aux tribunaux,” *La Presse* [Montreal] (January 5, 2006).

²⁵⁴ *Société TVA inc. c. Marcotte*, 2015 QCCA 1118, paras. 104 and 105 (application for leave to appeal dismissed, 2016 CanLII 13757 (SCC))

²⁵⁵ *Girard c. Canadian Broadcasting Corporation*, 2008 QCCS 30, para. 67.

²⁵⁶ For examples of judgments in which media and journalists have been prosecuted, see the following decisions: *Gestion finances Tamalia inc. c. Garrel*, 2012 QCCA, 1612; *Société TVA inc. c. Marcotte*, 2015 QCCA 1118, (application for leave to appeal dismissed, 2016 CanLII 13757 (SCC)); *Lalli c. Gravel*, 2021 QCCA 1549 (application for leave to appeal dismissed, 2022 CanLII 51803 (SCC)); *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26 (application for leave to appeal dismissed, 2021 CanLII 61399 (SCC)); *2504027 Ontario Inc. o/aS-Trip! v. Société Radio-Canada (SRC) et al.*, 2021 ONSC 3471.

²⁵⁷ For example, the *Code of Journalistic Ethics* in Canada, the *Guide de déontologie des journalistes* in Quebec, the rules of the Conseil de presse du Québec, the *Code of Ethics for Journalism* in Alberta. In general, these guides deal with the obligation of journalists to verify the veracity of the facts they broadcast, not to exaggerate or mislead the public, etc.

²⁵⁸ CQLR c P-19. This law constitutes an exception to common law and aims to protect the freedom of expression of newspaper owners and journalists. To do this, it provides for a shorter limitation period of three months and the possibility of withdrawal. It also allows a right of reply for the person referred to in the article. Note that this law does not apply to an article published on a streaming news website: *Guimont c. Bussièrès*, 2019 QCCA 280 (application for leave to appeal dismissed, 2021 CanLII 129758 (SCC)).

²⁵⁹ Pierre Trudel, “La faute journalistique en droit civil,” *Revue juridique Thémis*, Université de Montréal, 49-3, 2015, para. 637, at page 651.

²⁶⁰ Gilles E. Neron. *Communication Marketing inc. v. Chambre des notaires du Québec*, 2004 SCC 53, paras. 61 and 62.

²⁶¹ *Prud’homme v. Prud’homme*, 2002 SCC 85, para. 83.

²⁶² Pierre Trudel, “La faute journalistique en droit civil,” *Revue juridique Thémis*, Université de Montréal, 49-3, 2015, para. 637, at p. 653.

Consumers who use the media to denounce a situation or communicate information on a subject of public interest will not be held liable, unless it can be shown that they did so with the intention of harming the company, for example by reporting false information.²⁶³

Under common law, the defense of qualified privilege applies whenever a person who communicates information has a legal, social or moral interest or obligation to transmit it to another person who has a reciprocal interest in receiving it.²⁶⁴ This might, for example, be the case of a journalist who, in the public interest, publishes information that may have an impact on the reputation of a company, but which he honestly believes to be true.²⁶⁵

In *Grant*, the Canadian Supreme Court introduced a new defence, namely the Defense of Responsible Communication on Matters of Public Interest. This defense differs from the Defense of Fair Comment in that it targets statements of fact rather than comments. It is tested in two stages:

“First, 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”.²⁶⁶

To guide the analysis, a number of factors may be taken into account.²⁶⁷ It is interesting to note that this means of defense is not only available to journalists, but to anyone who issues a publication on a matter of public interest, regardless of the medium used.²⁶⁸ Thus, a consumer being sued by a company could technically invoke this defense if they meet these application criteria.

In the opinion of the highest court in the country, this new defense would be more suited to the context of cyberdefamation, given the fact that:

“[...] 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”.²⁶⁹

²⁶³ *Société TVA inc. c. Marcotte*, 2015 QCCA 1118, para. 110 (application for leave to appeal dismissed, 2016 CanLII 13757 (SCC)).

²⁶⁴ *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, para. 143.

²⁶⁵ *Prudhomme v. Prud'homme* 2002 SCC 85, para. 50.

²⁶⁶ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 98.

²⁶⁷ The following factors will be taken into account: “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 sources; 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”); (h) any other relevant circumstances”: *Grant v. Torstar Corp.*, 2009 SCC 61, para. 126.

²⁶⁸ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 96.

²⁶⁹ *Grant v. Torstar Corp.*, 2009 SCC 61, para. 96; See also Sheryl N. Hamilton and Sandra Robinson, *Law's Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, p. 75.

As with the Fair Comment Defense, this defense will not apply if the comments were made with malicious intent. Once again, although this defense is not directly applicable in Québec law, it is similar to the reasoning applicable in civil law, which considers the reasonableness of the conduct.²⁷⁰

In short, both consumers and journalists have the opportunity to inform the public about matters of public interest. Of course, the work required to produce the information is different in each case. While consumers will generally tell their story from their personal point of view, journalists, for their part, will be required to treat the subject with objectivity and to inform the public in a fair and impartial manner.²⁷¹ Be that as it may, the information transmitted by these two groups contributes to the public interest, and it is therefore up to the courts to protect such speech. The protection against malicious prosecution, which we will examine shortly, constitutes another means available to the courts to discourage companies from attempting to silence anyone who criticizes their conduct.

1.1.3 Protection against malicious prosecution

Currently, three Canadian provinces have adopted provisions regarding “strategic lawsuits against public participation,” popularly known as “SLAPPs.”²⁷² These are legal proceedings that are often initiated to discourage and intimidate individuals or organizations engaged in public denunciation on collective issues.²⁷³ Some go so far as to compare SLAPPs to a covert form of legal intimidation aimed at limiting and neutralizing freedom of expression.²⁷⁴ The objective of SLAPPs is therefore not so much to win the case on the merits of the dispute, but rather to create fear in the person being sued and thereby hope to silence them.²⁷⁵ The most common SLAPP situations occur in the context of defamation suits.²⁷⁶

²⁷⁰ François Demers, “Décisions d’intérêt rendues en 2009 en droit de la diffamation. La liberté d’expression a un prix” (2010) 22-2 C.P.I., 250.

²⁷¹ *Société TVA inc. c. Marcotte*, 2015 QCCA 1118, par. 74, 2015 QCCA 1118, paras. 74, 75 and 85 (application for leave to appeal dismissed, 2016 CanLII 13757 (SCC)); *Lalli c. Gravel*, 2021 QCCA 1549, para. 59 (application for leave to appeal dismissed, 2022 CanLII 51803 (SCC)).

²⁷² Such bills have been tabled in Nova Scotia and New Brunswick, but have not been adopted.

²⁷³ Ministère de la Justice Du Québec, *Les poursuites stratégiques contre la mobilisation publique – les poursuites-bâillons (SLAPP)*, Committee report to the Ministre de la Justice, Montreal, 2007, p. 7; Alexandra Pasca, “Les poursuites-bâillons : frontière entre liberté d’expression et droit à la réputation,” *Lex Electronica*, vol. 14, no 2, 2009, p. 2.

²⁷⁴ Alexandra Pasca, “Les poursuites-bâillons : frontière entre liberté d’expression et droit à la réputation,” *Lex Electronica*, vol. 14, no 2.

²⁷⁵ Alexandra Pasca, “Les poursuites-bâillons : frontière entre liberté d’expression et droit à la réputation,” *Lex Electronica*, vol. 14, no. 2, 2009, p. 6.

²⁷⁶ Alexandra Pasca, “Les poursuites-bâillons : frontière entre liberté d’expression et droit à la réputation,” *Lex Electronica*, vol. 14, no. 2, 2009, p. 2. For examples of judgments in which consumers have invoked the SLAPP provisions, see in particular the decisions: *9227-2202 Québec inc. c. Kelly*, 2017 QCCQ 14883; *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587; *Niu v. Cao*, 2020 ONSC 5407; *Chic Marie Inc. c. Dangoisse*, 2021 QCCQ 11468 (application for leave to appeal dismissed, 2022 QCCA 131); *Peterson v. Deck*, 2021 BCSC 1670.

In Québec, under Articles 51 and 52 of the *Code of Civil Procedure*²⁷⁷ a judicial claim or pleading may be declared abusive when it has the effect of limiting freedom of expression in a context of public debate.²⁷⁸ Article 52 para. 1 reverses the burden of proof, by requiring the plaintiff to demonstrate that their recourse is justified in law and that is not being exercised in an excessive or unreasonable manner. Thus, it would be up to the company to demonstrate that its claim against the consumer is justified and not abusive. In order to assess whether or not action is abusive in nature, the weakness of the grounds on which it is based as well as the seriousness of the claim are two particularly important factors.²⁷⁹ Faced with such a claim, the court must however “[...] exercise great caution so as not to unduly deprive a party of the fundamental right to apply to the courts, as provided for in Section 23 of the *Charter of Human Rights and Freedoms*”²⁸⁰ [TRANSLATION].

In Ontario, it is Section 137.1 of the *Courts of Justice Act*²⁸¹ that creates a pre-trial procedure. This makes it possible to dismiss claims attacking statements related to matters of public interest. The aim is to “encourage individuals to express themselves on matters of public interest”²⁸² by discouraging “the use of litigation as a means of unduly limiting expression on matters of public interest”²⁸³. This seeks to strike a balance between the right to freedom of expression and damage to reputation caused by allegedly defamatory statements.²⁸⁴ In 2020, the Supreme Court of Canada had the opportunity, in the case of *1704604 Ontario Ltd. v. Pointes Protection Association*,²⁸⁵ to explain the criteria governing the application of Section 137.1 of the Act. A motion under this provision places the initial onus on the defendant, in this case the consumer, to convince the judge that the proceeding arises from a matter of public interest. The notion of public interest must here be interpreted broadly and involve matters for which the public has substantial concerns.²⁸⁶ Decisions have acknowledged that online reviews about businesses serve an important function, since members of the public have an interest in knowing about the companies that provide services to them.²⁸⁷

Once this aspect has been demonstrated, the burden is then placed on the shoulders of the plaintiff, i.e. the company, which must then convince the judge that its claim is substantially well-founded, that the defendant has no valid defense, and that the public interest in allowing

²⁷⁷ CQLR c C-25. 01.

²⁷⁸ In *Acadia Subaru c. Michaud*, 2011 QCCA 1037, para. 72 (application for leave to appeal dismissed, 2012 CanLII 704 (SCC)), the Court of Appeal considered that comments relating to the products or services offered by merchants form part of “the public interest.”

²⁷⁹ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-240. See also the following for a more exhaustive list of criteria: Raphaël LESCOP, “Attention ! Votre poursuite vise-t-elle à bâillonner?” in *La Diffamation : deuxième colloque*, Editions Yvon Blais, 2013, p. 45.

²⁸⁰ 9227-2202 *Quebec inc. c. Kelly*, 2017 QCCQ 14883, para. 33.

²⁸¹ RSO 1990, c C. 43.

²⁸² *Courts of Justice Act*, RSO 1990, c C. 43, s. 137. 1(a).

²⁸³ *Courts of Justice Act*, RSO 1990, c C. 43, s. 137. 1(c).

²⁸⁴ *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, para. 11.

²⁸⁵ 2020 SCC 22.

²⁸⁶ *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 26.

²⁸⁷ There have been several recent decisions that address the issue of whether online reviews of businesses may constitute a matter of public interest in the context of s. 137.1 of Ontario’s *Courts of Justice Act*: *Bradford Travel and Cruises Ltd. v. Viveiros*, 2019 ONSC 4587, paras. 31-32; *Niu v. Cao*, 2020 ONSC 5407; *910938 Ontario Inc. v. Moore*, 2020 ONSC 4553, paras. 19-21; *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, para. 89.

the proceeding to continue outweighs the public interest in protecting the expression in question.²⁸⁸ The heart of the analysis lies at this stage of the inquiry, which serves as “ [...] a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue.”²⁸⁹

Moreover, it is often at this last stage of the analysis that the plaintiff’s burden fails. This means that insofar as the company is unable to demonstrate that it is suffering significant harm as a consequence of the comments made by the consumer, the defamation suit must be dismissed at this stage. In our view, this approach strikes a balance between the right of consumers to speak and the right of companies to protect their reputation in situations in which the harm suffered is significant.

In March 2019, the *Protection of Public Participation Act*²⁹⁰ (hereinafter “PPPA”) came into effect in British Columbia. The purpose of this law is to protect public participation in matters of public interest. The PPPA is modeled on Ontario legislation and has virtually identical rules. Section 4 of the PPPA creates a pre-trial procedure that allows a defendant to apply to the court for an order to dismiss a claim that arises in the public interest. The first step places the onus on the defendant to show on a balance of probabilities that: 1) the proceeding arises from an expression made by the applicant; and 2) the expression relates to a matter of public interest.²⁹¹ In this context, the notion of public interest must be given a broad and liberal interpretation.²⁹² If the defendant satisfies the first step, then the onus will be on the plaintiff to demonstrate that the proceeding should not be dismissed, by convincing the court that there are grounds to believe that the proceeding has merit, that it has a prospect of success and that the defendant has no valid defense.²⁹³

Although the SLAPP provisions are frequently invoked in Ontario and in many cases lead a company’s defamation suit to fail, they seem, for some unknown reason, to be underused in Québec and British Columbia by consumers being sued.²⁹⁴

Regardless of the form these provisions take, they clearly demonstrate the importance that society places on freedom of expression, particularly when matters of public interest are the subject of the expression and when the benefits of the expression outweigh the harm incurred to a company.²⁹⁵

²⁸⁸ 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 18.

²⁸⁹ 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 62.

²⁹⁰ SBC 2019, c 3.

²⁹¹ *Protection of Public Participation Act*, s. 4 (1).

²⁹² 1704604 *Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, para. 28.

²⁹³ *Protection of Public Participation Act*, s. 4 (2).

²⁹⁴ Among our sample, the provisions against SLAPPs have been invoked only once in Quebec and British Columbia: *Chic Marie inc. c. Dangoisse*, 2021 QCCQ 11468 (application for leave to appeal dismissed, 2022 QCCA 131); *Peterson v. Deck*, 2021, BCSC 1670.

²⁹⁵ *SDGMR, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, para. 36.

1.2 Possible reconciliation with the right to reputation

While negative reviews can affect any type of business, it is usually smaller businesses and professionals that are most deeply affected by negative reviews. Some consumers interviewed during the focus groups also admitted being more hesitant to post a negative review against a smaller business, because of the harm it could do to them.

This concern to protect smaller companies is reflected in certain legislation, notably in Australia, which stipulates that a company cannot bring a defamation suit if it has more than 10 employees.²⁹⁶ Among the reasons given to justify this choice was that the ability of companies to bring a defamation suit gave them an unfair advantage. It will be recalled, in this regard, that the *Defamation Act* was conceived to protect the reputation of individuals, not that of companies, especially since the latter have the possibility of protecting their reputation and mitigating any damage that could result from defamatory statements through public relations and advertising campaigns.²⁹⁷

In other words, consumers are not the only ones who can influence the image of companies, as companies also have a role to play in the management of their online reputation (1.2.1). Moreover, the law does not confer on companies the right to acquire a good reputation (1.2.2).

1.2.1 Online reputation management

By posting reviews online, consumers play an integral role in corporate marketing.²⁹⁸ Some companies have understood this and do not hesitate to solicit the opinions of their customers as part of their advertising strategies, sometimes going so far as to offer them incentives to do so.²⁹⁹ In a survey conducted in 2022, 80 % of consumers were encouraged by local businesses to post a review, and 26 % were asked to do so in exchange for a discount. This figure is up 11 % from the previous year.³⁰⁰ While positive reviews can provide effective, low-cost advertising to help build a customer base, businesses are far from enthusiastic about negative reviews.

However, companies that invite customer feedback should not expect to receive only positive reviews.³⁰¹ What is more, their success in business depends essentially on public opinion, and as

²⁹⁶ *Defamation Act 2005*, Part 2, Section 2, article 9. A company could still bring an action for injurious falsehood, i.e. a false statement about it published to a third party, which is express in malicious manner and which causes real harm to the company.

²⁹⁷ Peter Coe, "An analysis of three distinct approaches to using defamation to protect corporate reputation from Australia, England and Wales, and Canada," (2021) 41-1 *Legal Studies*.

²⁹⁸ Cassandra Burke Robertson, "Online Reputation Management in Attorney Regulation," (2016) 29: 1 *Geo J Legal Ethics*, p. 97, at page 103.

²⁹⁹ For example, free gifts, coupons, loyalty points, refunds, etc. Several platforms prohibit the solicitation of opinions in exchange for incentives; otherwise, the assessment may be deleted.

³⁰⁰ Sammy PAGET, *Local Consumer Review Survey 2023*, Bright Local, 2023, online: <https://www.brightlocal.com/research/local-consumer-review-survey/>.

³⁰¹ *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961, para. 34.

such, they are somewhat akin to public figures, who must expect to be subject to criticism.³⁰² And as the highest court in the land noted, “[w]hoever seeks notoriety, or invites public attention, is said to challenge public criticism; and [s]he cannot resort to the law courts, if that criticism be less favorable than [s]he anticipated.”³⁰³

In addition, it must be said that criticism is rarely foreign to the behaviour of companies and the way they deal with complaints from dissatisfied customers. In this regard, research into online reviews has found that the overwhelming majority of those who posted online first attempted to resolve their issue through internal company channels.³⁰⁴ This finding also emerged during the focus groups:

“I called them a few times, but they only helped me when I posted a review.” Québec
[TRANSLATION]

Some participants even went as far as to acknowledge that if they had received a favourable response from the company, they probably would not have felt the need to post a review. So customers will usually post negative reviews when there is a failure in customer service and the company does not respond to their complaint satisfactorily. In these circumstances, posting a review appears to be the ultimate way to reach the company and have one’s voice heard.³⁰⁵

In general, what consumers want is to get a positive response or even an apology from the company. We understand why consumers, in their online reviews, so often express a feeling of betrayal, which results from the lack of seriousness accorded to their problems.³⁰⁶ In this context, it is quite permissible to wonder who is really responsible for the deterioration of the company’s reputation. Is it the consumer, who expresses his dissatisfaction based on a bad experience with a company? Or might it not be the company that shows so little concern for its customers’ satisfaction by offering them poor customer service or products?

The Yelp platform agrees, offering the following advice to businesses: “Your best bet to get positive, unbiased reviews about your business is by providing a high quality, memorable customer experience—without any expectation or encouragement of a review in return[...].”³⁰⁷ Similarly, one focus group participant noted:

“If you are open about your business and someone writes a bad review, you will address that issue and resolve it.” Ontario

³⁰² François HÉNAULT, *La conciliation de la Charte des droits et libertés de la personne et du Code civil du Québec en matière de diffamation*, Master’s thesis, Quebec, Faculty of Graduate Studies, Université Laval, 2017, p. 101.

³⁰³ *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, para. 57 quoted from *Macdonell v. Robinson* (1885), 12 OAR 270, p. 272.

³⁰⁴ Yany Grégoire, Thomas M. Tripp and Renaud Legoux, “When Customer Love Turns into Lasting Hate: The Effects of Relationship Strength and Time on Customer Revenge and Avoidance,” (2009), *Journal of Marketing*, vol. 73, para. 18 on p. 19.

³⁰⁵ Yany Grégoire, Thomas M. Tripp and Renaud Legoux, “When Customer Love Turns into Lasting Hate: The Effects of Relationship Strength and Time on Customer Revenge and Avoidance,” (2009), *Journal of Marketing*, vol. 73, para. 243 on p. 263.

³⁰⁶ Marc Lacoursière, “Les voies de justice du consommateur,” in Pierre-Claude LAFOND, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, p. 243, at page 263.

³⁰⁷ https://www.yelp-support.com/article/Don-t-Ask-for-Reviews?l=en_US.

To be frank, in many cases, companies will not be completely unaware of the negative reviews they receive or the reputation that gave rise to them. Note also that Canadian law does not guarantee the right to benefit from a good reputation, as we will discuss in the next section.

1.2.2 Not right to a good reputation

We have seen that companies have an undeniable role to play in developing and safeguarding their commercial reputation. This is also reflected in the legal protection of reputation, as the courts pay particular attention to the company's previous reputation when assessing damages.³⁰⁸ The quality of the reputation enjoyed by the plaintiff before the remarks were published will be a considerable factor to be taken into account and may, in certain cases, justify a reduction in the quantum of the damages claimed.³⁰⁹ This may apply, for example, if the company is the target of other negative reviews.³¹⁰

Indeed, it should not be forgotten that the reputation "[...] that is called into question in a defamation proceeding is the one that the person targeted by the remarks really possesses, and not the one they might expect or the one they deserve"³¹¹ [TRANSLATION]. In other words, no one should get damages for a reputation they do not deserve.³¹²

Moreover, the court does not have the power to restore the image of a company whose reputation has been tarnished by its own actions. It can only note the presence or absence of defamation and, if necessary, grant the appropriate damages to compensate for the prejudice suffered.³¹³ In this regard, it should be remembered that charters and laws do not guarantee the right to obtain a good reputation. They only offer the possibility of safeguarding what has been honestly acquired, and not of benefiting from an irreproachable reputation that is undeserved.

In our view, a distinction must also be drawn between a company's commercial reputation and its reputation in the legal sense. For example, a consumer who, in good faith, gives a single star to a company certainly risks affecting the latter's popularity from a commercial point of view. On this point, we should note that 87 % of consumers claim they would not consider dealing

³⁰⁸ *Peterson v. Deck*, 2021 BCSC 1670, para. 107.

³⁰⁹ Jean-Louis Baudouin, Patrice Deslauriers and Benoit Moore, *La responsabilité civile, Volume 1 – Principes généraux*, 9th edition, 2020, 1-611.

³¹⁰ *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361, para. 53; *Acumen Law Corporation v. Nguyen*, 2018 BCSC 961, para. 31; *J. Mao Dentistry Professional Corporation (Aba Dental Clinic) v. Boulet*, 2019 CanLII 31631 (ON SCSM), para. 47; *910938 Ontario Inc v. Moore*, 2020 ONSC 4553, para. 36; *Canadian Thermo Windows Inc. v. Seangio*, 2021 ONSC 6555, paras. 127 and 128.

³¹¹ Florence Fortier-Landry, *La diffamation sur Internet : Actualiser la responsabilité en droit civil et en common law au Canada*, Master's thesis, Montreal, Faculty of Graduate Studies, Université de Montréal, 2013, p. 36.

³¹² Sheryl N. Hamilton and Sandra Robinson, *Law's Expression: Communication, Law and Media in Canada*, LexisNexis, 2019, p. 70.

³¹³ For example, see decision *9190-6206 Quebec inc. c. Lagha*, 2018 QCCQ 8361 in which, at para. 77, the judge concludes his reasons by declaring: "[t]he role of the Court is not to promote the publicity of [...], but simply to ascertain whether there is fault, damage and causal link, and to compensate the plaintiff accordingly." [TRANSLATION]

with a company with an average rating of less than 3 stars.³¹⁴ However, there is no legal basis for the right to obtain a perfect score after each transaction.

Indeed, the commercial reputation of a company is essentially built on the experiences and interactions it accumulates with each client.³¹⁵ A correlation has also been observed between reputation and consumer satisfaction.³¹⁶ Thus, “[...] reputation corresponds to the values attributed (such as authenticity, honesty, responsibility and integrity) to a company by an individual [...]”³¹⁷ [TRANSLATION]. Accordingly, it is the businesses themselves that are primarily responsible for the commercial reputation they build and maintain with consumers. This does not mean that a consumer’s testimony of a negative experience legally damages the reputation of the company within the meaning of the criteria applicable to defamation. After all, a negative review is not synonymous with a defamatory review.

In addition, the way companies react to a negative review will often have a greater impact on their reputation than the review itself.³¹⁸ A study found that 88 % of consumers will be less likely to buy from a company that ignores online customer complaints.³¹⁹ Companies would therefore be well advised to prioritize an approach based on openness and dialogue with consumers rather than opting for a repressive approach.³²⁰ It also seems to us that by taking the matter to court, the company runs the risk of focusing even more attention onto the contested criticism and seeing it end up in a publicly accessible judgment.

What is more, companies can also use these reviews to improve the quality of the products and services they offer. For many of the participants interviewed, online reviews offer image-conscious companies an opportunity to take the necessary steps to improve. So it may well be that a consumer’s right to speak their mind is not necessarily irreconcilable with protecting a company’s reputation.

³¹⁴ Sammy PAGET, *Local Consumer Review Survey 2023*, Bright Local, 2023, online: <https://www.brightlocal.com/research/local-consumer-review-survey/>.

³¹⁵ Philippe Boistel, “La réputation d’entreprise : un impact majeur sur les ressources de l’entreprise,” *Management & Avenir*, 2008/3 (no 17), para. 9, p.10.

³¹⁶ Philippe Boistel, “La réputation d’entreprise : un impact majeur sur les ressources de l’entreprise,” *Management & Avenir*, 2008/3 (no 17), para. 9, p. 18.

³¹⁷ Philippe Boistel, “La réputation d’entreprise : un impact majeur sur les ressources de l’entreprise” *Management & Avenir*, 2008/3 (no 17), para. 9. pp. 9 and 10.

³¹⁸ Cassandra Burke Robertson, “Online Reputation Management in Attorney Regulation,” (2016) 29: 1 *Geo J Legal Ethics*, para. 97, p.100.

³¹⁹ Yany Grégoire, Audrey Salle and Thomas M. Tripp, “Managing social media crises with your customers: The good, the bad, and the ugly,” (2015), *Business Horizons*, vol. 58, p. 173.

³²⁰ Jonathan Kroft, Nicole Watson and Baillie Chisick, “Canadian defamation law: changing world, changing rules,” (2012) *Ann. Rev. Civil Lit.*, para. 31, p. 66.

Chapter 2. Consumers' rights and remedies

Once the importance of freedom of expression has been recognized, it is not only necessary to protect consumers' specific right to speak, but also to ensure the effectiveness of their rights and remedies under consumer law (2.1). Alternative mechanisms also deserve to be put in place, such as online dispute resolution (2.2).

2.1 The effectiveness of legislative protections underlying online reviews

Since the right to criticize a company derives from freedom of expression, a right fundamentally acknowledged and protected by the Charters, it would also benefit from being established and explicitly spelled out in laws relating specifically to consumer rights (2.1.1). Also, consumers sometimes resort to online reviews due to their lack of knowledge of the protections specific to consumer law, hence the importance of properly informing consumers (2.1.2).

2.1.1 Protecting the consumer's right to criticize

Already in 2002, the highest court in the land recognized that through freedom of expression, consumers enjoy the possibility of criticizing a product or commenting negatively on the provision of services:

“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. [...] This type of communication may be of considerable social importance, even beyond the merely commercial sphere”.³²¹

This right to criticize has subsequently been reaffirmed by certain legislative texts that adapt its application to the context of online reviews. For example, under Article 10 of the *European Convention on Human Rights*,³²² which guarantees everyone the right to freely express their opinions, Internet users are constitutionally protected and have the right to post negative opinions on the Internet.³²³ In Alberta, no action can be taken for damages resulting from the

³²¹ *R. v. Guignard*, 2002 SCC 14, para. 23.

³²² *Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, ETS No. 5 (entered into force September 3, 1953) [European Convention on Human Rights], online: https://www.echr.coe.int/documents/convention_eng.pdf.

SA, “Diffamation et dénigrement sur internet, comment se protéger ?,” *CGV-EXPERT*, April 12, 2022, online: <https://www.cg-expert.fr/prestation-redaction-conditions-generales/diffamation-denigrement-internet-protoger>.

publication of a negative review, unless the remarks are malicious, vexatious or harassing or made in bad faith.³²⁴

Some jurisdictions in other countries set legislative provisions in place aimed at protecting consumers' right to criticism and limiting the situations likely to give rise to a defamation suit. In this regard, it should be recalled that the laws of the United Kingdom and Australia have been amended to specify that a defamation suit may not be brought unless the damage is serious.³²⁵ In addition, Australia prevents companies with more than 10 employees from undertaking a defamation action.³²⁶

For the consumers we met, the right to criticize a company remains essential, since it provides a forum for collectively raising their voices against companies, which occupy a position of strength.

Given the importance of this right to criticize, we believe that this protection should be the subject of a legislative provision adapted to the context of consumer law in all Canadian provinces, thereby ensuring that consumers' right to post negative reviews is explicitly recognized.

2.1.2 Lack of knowledge of the protections specific to consumer law

Almost none of the respondents interviewed during the focus groups believed that they could have solved the problem that gave rise to their comment other than by resorting to online criticism, or by taking legal action against the company:

"It's the only way to express yourself when you had bad service." Ontario

Consequently, consumers unaware of their rights tend to turn to online notices to settle their disputes, as illustrated by the comments of one participant:

"The normal manufacturer's warranty had expired, the extended warranty had expired, in my head, I had no recourse." Québec

[TRANSLATION]

In a similar vein, a couple sued for defamation declared in court that because of the difficulty in obtaining a reimbursement of their subscription fees, "[...] the only recourse available to them to get the plaintiff's representatives to react was to post those remarks on Facebook"³²⁷ [TRANSLATION]. However, in the vast majority of cases, the complaints that gave rise to the criticism, whether due to false representation, to a failure to deliver, to the product not

³²⁴ *Consumer Protection Act*, RSA 2000, c C-26. 3, s. 183. 1 (2).

³²⁵ *Defamation Act 2013*, s. 1(2), online: <https://www.legislation.gov.uk/ukpga/2013/26/contents/enacted; Defamation Act 2005, Part 2, s.2, s. 10A, online: https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2005-077>.

³²⁶ *Defamation Act 2005*, Part 2, s.2, s. 9.

³²⁷ *9353-0913 Quebec inc. c. Paré*, 2019 QCCQ, 4324, para. 3.

complying with the description in the contract or its projected lifespan, could have justified taking legal action against the company. In this particular instance, consumers should more accurately be seen as victims of a violation of the protections conferred by consumer law rather than as defendants of an infringement of the company's rights.

This demonstrates that, despite the introduction of laws designed to protect consumers, these legislative protections will have very little effect if those for whom they are intended have a serious lack of knowledge of their rights and remedies. It is therefore essential to properly educate consumers about the protections available to them so that they can use online reviews wisely and avoid seeing them as a replacement for the normal legal channels.

2.2 Alternative dispute settlement online

The available legal avenues for resolving online review disputes present a number of major hurdles for the consumer, not the least of which are the costs, delays and stress that legal proceedings can entail. On the company's side, the judicialization of disputes also has undesirable effects, such as the media visibility that may result from a court case and the wider dissemination of the comment that it wishes to see removed from the web. Also, the nature of the rights at stake makes it imperative to act quickly to see that these rights are protected. Indeed, comments posted on the web can quickly go viral and be seen and shared by many others.

In this regard, Online Dispute Resolution (ODR) is proving to be an interesting alternative to a traditional legal proceeding.³²⁸ According to the United Nations Commission on International Trade Law, the term 'online dispute resolution' means " [...] a 'mechanism for resolving disputes through the use of electronic communications and other information and communication technology.'"³²⁹ Moreover, "[...] because it utilizes technology, it makes it possible, on the one hand, to combat the imbalance of power between consumers and merchants, and on the other, to provide access to justice when other routes leading to it prove to be impracticable"³³⁰ [TRANSLATION].

In the case of disagreements resulting from online criticism, online dispute resolution could therefore be an avenue to prioritize, especially since the cause of the action originated online. Among the various online settlement tools that can be deployed, we will analyze the use of mediation (2.2.1) and the creation of a dispute resolution tribunal in matters of defamation (2.2.2).

³²⁸ In this regard, see: Cléa Iavarone-Turcotte, *La résolution en ligne des conflits de consommation à l'aune de l'accès à la justice*, Montreal, Éditions Thémis, 2015.

³²⁹ UNCITRAL - United Nations Commission On International Trade Law, *Technical Notes on Online Dispute Resolution from the United Nations Commission on International Trade Law*, (2017), p. 4, online: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf.

³³⁰ Cléa Iavarone-Turcotte, *La résolution en ligne des conflits de consommation à l'aune de l'accès à la justice*, Montreal, Éditions Thémis, 2015, p. 60.

2.2.1 Mediation

In an attempt to improve the efficiency and accessibility of justice, private methods of dispute prevention and resolution³³¹ have become more widely available in several domains in recent years.³³² One example of this is the Parle Consommation platform in Québec, which, since 2016, has allowed consumers and merchants to resolve disputes quickly and free of charge online and if necessary, offers the possibility of calling on a mediator.³³³ Certain areas of law or certain types of cases have even gone so far as to impose mediation.³³⁴ Unfortunately, developments in this area have not as yet extended to the realm of online defamation and criticism, despite the fact that the literature on the subject suggests using private modes to settle defamation.³³⁵

By way of illustration, the UK has introduced the *Pre-action Protocol for Media and Communications Claims*.³³⁶ All defamation suits are required to follow this protocol, which is designed to help resolve the dispute without going to court. The protocol also specifies that legal proceedings must be used only as a last resort and that the parties must examine whether an alternative dispute resolution method could help settle the dispute without initiating legal proceedings.³³⁷ Although the parties are not obliged to use these alternative means, the courts may impose additional costs if a party's refusal is considered unreasonable.³³⁸

Mediation consists traditionally of a process by which a neutral and impartial third party, who has no decision-making power, assists the parties in reaching a mutual settlement of their dispute by proposing or suggesting an appropriate solution.³³⁹ Whereas the courts are perceived as a form of justice through confrontation, mediation opens the way for justice by consensus.³⁴⁰ The participants we met in the focus groups were almost unanimous in agreeing that direct contact with the company was the best way to resolve a dispute.

³³¹ Negotiation, mediation, arbitration and conciliation are some of the private modes of dispute prevention and resolution.

³³² Marc Lacoursière, "Les voies de justice du consommateur," in Pierre-Claude Lafond, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, para. 243, at p. 45.

³³³ <https://www.opc.gouv.qc.ca/en/opc/parle/description/>.

³³⁴ Union Des Consommateurs, *Online justice as a solution to barriers to access to justice?*, 2022, p. 89.

³³⁵ Law Commission Of Ontario, Final Report, *Defamation Law in the Internet Age*, March 2020; Emily B. Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes," (2018) 56.1 *Osgoode Hall Law Journal*.

³³⁶ *Pre-action Protocol for Media and Communications Claims*, online: https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def.

³³⁷ *Pre-action Protocol for Media and Communications Claims*, s. 3.8.

³³⁸ *Pre-action Protocol for Media and Communications Claims*, s. 3.8.

³³⁹ For a definition of mediation: <https://www.tpsgc-pwgsc.gc.ca/biens-property/sngp-npms/bi-rp/conn-know/reclam-claims/definition-eng.html>.

³⁴⁰ Marie-Hélène Fortin, "L'expérience de la plateforme PARLE à l'Office de la protection du consommateur : une voie simplifiée de résolution des différends en ligne," in Pierre-Claude Lafond, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, para. 63, on p. 67.

One of the major advantages of mediation is that it permits the formulation of personalized solutions adapted to the needs of each of the parties. For example, the consumer could undertake to retract or modify their statements, and the company, for its part, could agree to correct the situation or adopt new policies. It might also resolve the dispute that gave rise to the criticism. Several participants met during the focus groups also admitted that they would agree to withdraw their comments if the company solved the problem, offered them compensation or even provided a truly satisfactory explanation to justify their behaviour. Mediation is a more flexible and informal process than appealing to the courts, which can only intervene within a specific legal framework and award damages where appropriate. This is all the more pertinent when one takes into account that people who sue for defamation are not necessarily seeking damages.³⁴¹

Another benefit of mediation is that it allows the mediator to provide relevant information to the parties in the dispute. This would present an opportunity to better inform consumers and businesses about the concept of defamation, as well as its risks and consequences. It should be remembered that this is an area in which there is a particular need for education, not least because of the lack of awareness of the risks associated with online criticism.

Because it offers a confidential, rapid environment that is more suited to the needs of the parties, mediation seems to us to be a promising avenue that could allow consumers and businesses to arrive at a mutually satisfactory solution. While some focus group participants were skeptical about the relevance of using a mediator,³⁴² a very large majority, mainly from the provinces of Québec and Ontario, said they were open to and in favour of the possibility of mediation with the company. Of course, if mediation fails, recourse to the courts must remain an option. This could be achieved through the creation of an online dispute resolution tribunal.

2.2.2 Online defamation dispute resolution tribunals

Online tribunals offer several undeniable advantages, such as providing specialized services more quickly and in more flexible way, while reducing economic and geographical barriers.³⁴³ In addition, due to its structure, an online tribunal is often in a better position to facilitate the provision of technical-legal solutions.³⁴⁴

Currently, only two Canadian provinces have set up online tribunals. In 2012, British Columbia created the Civil Resolution Tribunal (CRT), the first tribunal in Canada permitting the resolution

³⁴¹ Law Commission of Ontario, Final Report, *Defamation Law in the Internet Age*, March 2020, p. 11.

³⁴² Among the reasons cited by the participants are the fear that the mediator will be paid by the company and therefore be biased, the costs associated with mediation, the belief that the situation must be very serious to justify calling call on a mediator, and the feeling that a mediator can do no more than company's customer service department.

³⁴³ Emily B. Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes," (2018) 56. 1 *Osgoode Hall Law Journal*, para. 162, at p. 202.

³⁴⁴ Emily B. Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes," (2018) 56. 1 *Osgoode Hall Law Journal*, para. 162, at p. 199.

of certain disputes online.³⁴⁵ The parties are first invited to negotiate with each other. If no agreement can be reached, a mediator will try to help them to do so. If an agreement still seems not to be possible, a member of the tribunal may ultimately render a decision on the claim. In 2017, Ontario created *The Condominium Authority Tribunal* (the CAT) an online condominium dispute resolution system governed by the *Condominium Act*.³⁴⁶ Here too, the process begins with negotiation between the parties, proceeds through the mediation stage and is finally directed to a member of the CAT, who can hold a hearing and render a decision.

A similar structure could be designed for defamation litigation. Following a consultation involving many interested parties, the Law Commission of Ontario, in a report published in 2020, acknowledged that the creation of an online defamation dispute tribunal would facilitate informal resolution of disputes.³⁴⁷ Moreover, the creation of a specialized court would not only ensure that this type of case is handled expeditiously, but would also offer greater flexibility to the parties involved. It would also make it possible to train decision-makers specialized in the area of defamation. An online defamation tribunal could therefore be of great benefit in resolving disputes arising from online reviews, particularly in a context where it is imperative to intervene quickly to protect everyone's rights.

In closing, whether through the establishment of alternative dispute resolution mechanisms, such as mediation or the creation of an online defamation dispute tribunal, it is important to put in place mechanisms that allow the parties to quickly and effectively resolve disagreements arising from online reviews. Considering the importance of the fundamental rights at stake, recourse to the traditional courts must nevertheless remain available to parties who so wish. In addition to the vital need to improve access to justice, there is of course the importance of educating the parties on their rights and remedies as well as on the risks associated with online criticism.

³⁴⁵ Although initially this was intended only for disputes related to condominiums, in 2015 the scope of jurisdiction was first expanded to cover all claims of \$5,000 or less, then a second time in 2019 to include damages sustained in an accident involving a motor vehicle and disputes related to cooperative societies and associations. However, this court does not have jurisdiction to hear claims involving libel, slander or malicious prosecution, online: <https://www2.gov.bc.ca/gov/content/justice/about-bcs-justice-system/legislation-policy/legislation-updates/civil-resolution-tribunal-act>.

³⁴⁶ The CAT deals with cases related to condominium issues, such as disputes involving pets, vehicles, parking and storage, etc. In 2022, the jurisdiction of the TAC was expanded to include “disputes regarding nuisance, inconvenience or unreasonable disturbance,” including disputes regarding noise, odor, light, vibration, smoke and vapor, as well as “disputes relating to the provisions in the incorporation documents of a condominium corporation,” concerning these nuisances and the compensation related to these disputes, online: <https://www.condoauthorityontario.ca/cat-jurisdiction-expansion-and-consultation/>.

³⁴⁷ Regarding the establishment of an online dispute resolution tribunal for defamation, see in particular: Law Commission Of Ontario, Final Report, *Defamation Law in the Internet Age*, March 2020, c IX, “Online Dispute Resolution,” and Emily B Laidlaw, “Re-Imagining Resolution of Online Defamation Disputes,” (2018) 56. 1 *Osgoode Hall Law Journal*, p. 197 et seq. According to the model proposed by the Law Commission of Ontario, in the event that the negotiation failed, arbitration would be available to the parties.

This second part has shown that, in addition to providing a means for consumers to exercise the right to freely express their opinions, online reviews also perform a useful function for society by transmitting information of public interest. In fact, the desire to alert other consumers is one of the main motivations for consumers to publish a review. Journalists and the media can also contribute on occasion by reporting on situations experienced by consumers.

Furthermore, online reviews have a major impact on the commercial reputation of companies and can greatly influence their popularity and be used as a powerful advertising tool. Since the law does not confer on companies the right to a good reputation, they undeniably have a role to play in preserving their image, in particular by taking into consideration the interests and needs of their customers.

In light of the above, it is important that the consumer's right to criticize be recognized and protected, in particular through the establishment of protections against malicious lawsuits and, where appropriate, through dispute resolution mechanisms.

Conclusion and recommendations

Social media and digital platforms make it possible to share opinions and information instantaneously. Increasingly, consumers are turning to digital platforms to denounce certain company practices, or to express their dissatisfaction or recount a negative experience following a transaction. The main objectives of this research were, on the one hand, to analyze the behaviour and knowledge of consumers with regard to posting online reviews and its attendant risks, and, on the other, to study the consequences of the growing tendency among companies to judicialize the phenomenon.

This research has demonstrated that for many consumers, online reviews represent an alternative route to justice in situations where recourse to the courts seems simply unsuitable or inaccessible, especially because of the costs and time associated with such a procedure. Also, lack of knowledge of the remedies available in consumer law, combined with lack of information about the risks associated with online reviews, are important factors in encouraging consumers to turn to what they perceive as a form of instant justice via digital platforms.

Online reviews not only allow consumers to individually assert their rights with companies, but also have a collective dimension, that of public interest, by notifying other consumers of certain problems experienced with a company or the questionable practices it adopts. From another perspective, customer reviews published online also have the potential to create awareness and bring about change in the practices of the companies they target. We can therefore agree that:

“[t]he consumer society is entering a new era: that of social responsibility. [...] The social responsibility we are talking about here is increasingly akin to social justice, sometimes in parallel to the legal system, which is being abandoned

because of its image of apparent slowness, in favour of a new tribunal, one that is more popular, but is not without its risks”.³⁴⁸ [TRANSLATION]

At the present time, the risk of defamation lawsuits is the most important issue faced by consumers who post content on digital platforms. This can no doubt be explained by the semblance of anonymity created by the Internet, which gives rise to a false sense of security among consumers. They are not always aware of the limitations to their right to speak their minds. Added to this is the lack of uniformity, transparency and accessibility of the terms of use of digital platforms which, with varying degrees of severity, prohibit the posting of certain types of comments. It should be noted on this point that France and the United Kingdom have amended their legislation in order to strengthen the obligations of platforms concerning the transparency and clarity of the information they provide. Most of the platforms studied nevertheless give themselves the power to remove any content they deem inappropriate, which may be seen as beneficial if it produces a safer environment for users. However, in the absence of external controls, such a procedure for removing comments is an infringement of the consumers’ freedom of expression. Nevertheless, platform operators on the whole have very limited liability under the applicable terms of use.

In addition, the legal framework applicable to defamation seems ill-suited to the reality of cyberdefamation. In the absence of specific laws establishing what the consumer wishing to express their opinion online is permitted or forbidden to say, is up to the courts to establish, on a case-by-case basis, the parameters of consumers’ freedom of expression. It appears, based on the recent case law we have analyzed, that online criticism characterized by wrongful and malicious behaviour will generally be sanctioned by the courts. Personal attacks, the use of abusive language or misleading statements, the organization of a smear campaign or the defense of a strictly personal interest are all indicators that will lead the courts to conclude that consumers have engaged in wrongful speech.

However, the Supreme Court of Canada’s guidelines on defamation call for a balance to be struck between freedom of expression and the right to reputation. It seems that the decisions handed down in which an online review was at issue accorded very little importance to the fundamental freedom of expression to which every consumer has the right, even in the absence of tangible proof of damage to the company’s reputation. However, even a “minimal” infringement³⁴⁹ of the rights of one party or the negligible interests it asserts should not outweigh a real and substantial infringement of the rights of the other party.³⁵⁰ In other words, the consumer’s right to speak should prevail in situations when the company is unable to prove actual damage such as a reduction in its profits or lost clientele. In this regard, the United Kingdom and Australia have amended their legislation to include the need to demonstrate proof of serious harm.

³⁴⁸ Luc Thibaudeau, “Le droit préventif et la protection des droits des consommateurs,” in Pierre-Claude Lafond, *Les voies de justice du consommateur : actes du colloque de la Fondation Claude Masse du 9 novembre 2017*, Montreal, Éditions Yvon Blais, 2018, para. 163, at p. 229.

³⁴⁹ *Northcrest Syndicate v. Amselem*, 2004 SCC 47, para. 84.

³⁵⁰ *Northcrest Syndicate v. Amselem*, 2004 SCC 47, paras. 84 and 87.

We must not lose sight of the fact that online reviews can have a strong social utility and help consumers make informed consumer choices. In this, the courts have ruled that matters concerning consumer protection are of public interest. In an effort to protect this type of speech, the laws of Québec, Ontario and British Columbia include provisions against abusive prosecution aimed at silencing those who speak out on matters of public interest. However, except in Ontario, we note that these provisions are very seldom invoked by consumers being sued.

Beyond the current approach adopted by the courts, which remains unfavourable to the cause of consumers, contractual clauses can still restrict the freedom of expression of consumers. Indeed, some companies include non-disparagement clauses in the consumer contract, in order to pre-emptively control consumers' voices by prohibiting them from publishing any online opinion about the company. Although the legality of this practice is questionable and this type of clause may be considered abusive, Alberta is the only Canadian province to prohibit non-disparagement clauses in its legislation. From a marketing perspective, the use of this type of clause by a company could quite simply dissuade consumers from doing business with it. We have seen, in this regard, that companies are not totally dissociated from the image and reputation they build with consumers. In some circumstances, their reactions to an online review will have a greater impact on their business reputation than the reviews themselves.

Despite the apparent dichotomy of these two human rights, the freedom of expression of consumers and the right to reputation of companies are not necessarily irreconcilable. Consequently, this research encourages the courts to strike a better balance between the rights of each. In addition, we propose that alternative measures to litigation be introduced in cases of dispute between a consumer and a company. In this regard, we have found that online mediation and tribunals show great promise toward achieving this objective, by not only finding solutions to the underlying difficulties that led the consumer to post a review online, but also by responding to the consequences suffered by the company as a result of the negative post.

Legislative intervention also appears essential in order to regulate the phenomenon of online criticism, especially in view of the risk of defamation lawsuits for consumers and the sums in dispute, which are likely to take a heavy toll on their personal finances. Clear parameters should be established to enable consumers to express themselves without fear of reprisal, while protecting the reputation of companies against illicit attacks. Among other things, a lawsuit should only be admissible when it is clear that the unfavourable remarks constitute an unlawful exercise of freedom of expression and that they cause significant economic harm to the company. Conversely, completely censoring consumers as soon as the comment is not favourable to the company, seems to us to be a liberticidal business strategy, which permits a company to artificially preserve an irreproachable reputation while showing little concern for customer satisfaction.

In conclusion, we hope that this research report will serve to raise awareness among the various actors involved of the issues raised by this phenomenon as well as the behaviours needing to be adopted to ensure the sustainability of online reviews, which have offer undeniable advantages for both consumers and for businesses.

Recommendations to federal and provincial governments:

- Option consommateurs recommends modernizing defamation laws to take into account the digital context and the phenomenon of online reviews.
- Option consommateurs recommends amending consumer protection laws to add a provision prohibiting businesses from including a clause in a consumer contract preventing the consumer from posting a negative review about the business or the transaction.
- Option consommateurs recommends amending consumer protection laws to include a provision prohibiting an action for damages resulting from the publication of a negative review, unless the comments are malicious, vexatious or harassing or otherwise made in bad faith and cause serious financial loss to the business.
- Option consommateurs recommends requiring operators of digital platforms to provide users with accessible, clear and transparent information on the procedures for posting and processing online reviews.
- Option consommateurs recommends clarifying the role and responsibility of digital platform operators when reporting defamatory content.
- Option consommateurs recommends favouring recourse to mediation and studying the possibility of setting up an online defamation tribunal.
- Option consommateurs recommends organizing campaigns to raise awareness among consumers and companies about the phenomenon of online criticism, as well as the risks of defamation and related marketing practices.

Recommendations to platforms:

- Option consommateurs recommends presenting accessible, readable and understandable information concerning the rules applicable to online reviews and defamatory content.
- Option consommateurs recommends disseminating information to consumers on the challenges involved in publishing reviews online and providing them with advice on how to publish a review.
- Option consommateurs recommends, in the event that a post is reported, calling upon a neutral, impartial third party to assess the legality of the post, while allowing the user to give their version of the facts.
- Option consommateurs recommends collaborating with governments to put in place mechanisms able to detect problematic publications on digital platforms.

Recommendations for businesses:

- Option consommateurs recommends that companies use online reviews to improve the quality of the products and services offered.
- Option consommateurs recommends that companies promote dialogue with consumers in the event of a disagreement resulting from an online review.

Recommendation to consumers:

- Option consommateurs recommends that consumers inform themselves of the rights and remedies available in consumer law before considering posting an online review.
- Option consommateurs recommends that consumers attempt to resolve the problem with the company before resorting to an online review.
- Option consommateurs recommends that consumers inform themselves about the risks associated with online reviews.
- Option consommateurs recommends that consumers avoid posting online comments that are meant to be harmful, personal attacks, insults, smear campaigns, false and misleading statements, as well as the use of abusive or foul language.
- Option consommateurs recommends that consumers, when posting an online review, relate their personal experiences in respectful, constructive and nuanced language in the public interest.

Appendix 1 – Discussion guide (French version)

Introduction (5 min)

PRÉSENTATION

- Présentation de l'animateur.
- Confidentialité. Aucune mention d'aucun nom dans notre rapport; les réponses demeurent confidentielles et anonymes.
- Les informations recueillies ne serviront qu'aux fins de l'étude.

RÈGLES DE DISCUSSION

- Enregistrement.
- Vérifier la fonction main levée, Parler une personne à la fois.
- Importance de la spontanéité et des opinions personnelles.
- Pas de mauvaise réponse.

CONTEXTE ET OBJECTIF DE LA RENCONTRE

Tout au long de la rencontre, nous parlerons de la publication de critiques à une entreprise sur les médias sociaux (ex. Facebook, Twitter, Instagram, YouTube, TikTok, etc.) ou sur les sites d'évaluation de biens et de services (ex. Google, Yelp, Trust Pilot, Rate MDs, etc.). Cette critique peut par exemple, être liée à une insatisfaction, une mauvaise expérience, un différend ou problème vécu avec une entreprise ou un professionnel, autant en ce qui a trait à la qualité du bien acheté ou du service obtenu que du service à la clientèle offert.

Cumul: 5 min

BLOC 1 – Expérience des consommateurs (55 min)

Pour commencer, nous allons faire un premier tour de table pour que vous puissiez vous présenter et nous donner, de façon générale, sur quoi et pourquoi vous avez pris le temps de formuler une critique.

- Combien de fois avez-vous publié des critiques négatives contre des entreprises ?
- Quels sont les médias sociaux ou sites d'évaluation de biens et services utilisés ?
- Qu'est-ce qui vous a motivé à publier une critique ?
Ne pas lire – sonder par la suite
 - Par vengeance ou colère ?
 - Pour exprimer son insatisfaction ?
 - Pour faire pression sur l'entreprise afin de régler un différend ?
 - Pour faire valoir ses droits ?
 - Pour mettre en garde les autres consommateurs contre l'entreprise ?
 - Pour d'autre(s) raison(s) ? Lesquelles ?
- Avant de publier la critique, aviez-vous effectué des démarches auprès de l'entreprise ?
Si oui
 - Qu'aviez-vous fait ?
Exemples au besoin :
 - Appeler le service à la clientèle
 - Parler à un supérieur
 - Envoi d'une lettre ou d'une mise en demeure
 - Quelle a été la réponse de l'entreprise ?
Exemples au besoin :
 - Refus de régler la situation
 - Solution insatisfaisante
 - Aucune réponse de l'entreprise
Si non
 - Pourquoi ne pas avoir fait de démarche avant ?
- Quel (s) type(s) d'entreprise(s) était visé par votre commentaire (domaine d'activité, taille) ?

- Qu'aviez-vous écrit comme commentaire ?
 - Employez-vous un langage courtois ou un langage que vous considérez comme plus direct dans vos publications sur les entreprises ? Qu'est-ce qui motive votre choix ?

- L'entreprise a-t-elle donné suite à votre commentaire ?
 - Qu'est-il arrivé ? Comment avez-vous réagi ?
Ne pas lire – sonder par la suite
 - L'entreprise vous a-t-elle mise en demeure de retirer votre commentaire ?
 - L'entreprise a-t-elle intenté des procédures judiciaires contre vous ?

- À votre avis, auriez-vous pu régler autrement la situation à l'origine de votre critique ?
 - Comment ?

- À votre connaissance, auriez-vous pu entreprendre des procédures judiciaires contre l'entreprise pour régler la situation à l'origine de votre critique ?
 - Pourquoi ne pas l'avoir fait ?

- Avez-vous déjà voulu publier un commentaire négatif sur une entreprise, mais y avez renoncé, car vous aviez des craintes de le faire ? Pourquoi ? Quelles étaient ces craintes ?

- Avez-vous déjà regretté avoir publié un commentaire négatif ? Pourquoi ?

Cumul: 60 min

BLOC 2 – Opinion sur la problématique du recours aux critiques en ligne (20 min)

Les prochaines questions viseront à connaître votre opinion sur le phénomène des critiques en ligne.

- Pensez-vous que le recours aux critiques en ligne est une bonne façon de régler un problème avec une entreprise ?
 - Si oui, dans quelles circonstances est-ce approprié ?
 - Sinon, pourquoi ?

- Selon vous, est-ce que le recours aux critiques en ligne règle mieux le problème que le recours aux tribunaux judiciaires ? Expliquez.

Ne pas lire – sonder par la suite

 - Plus rapide que le système judiciaire
 - Plus accessible
 - Plus dissuasif
 - Moins coûteux

- Si une entreprise vous demandait de retirer le commentaire que vous avez publié contre elle, à quelles conditions accepteriez-vous de le faire ? Pourquoi ?

- Accepteriez-vous tout de même de faire affaire avec une entreprise si elle vous demandait de vous engager à ne pas publier de commentaires en ligne contre elle ? Pourquoi ?

Cumul: 80 min

BLOC 3 – Connaissances à l'égard des risques encourus (25 min)

Nous allons à présent parler des risques reliés à la publication de critiques en ligne.

- Selon vous, y a-t-il des risques associés à la publication de critiques en ligne ?
 - Si oui, lesquels ?
 - Sinon, pourquoi ?

- Selon vous, y a-t-il des limites à ce qui est permis d'écrire sur une entreprise ?
 - Si oui, quelles sont-elles ?
 - Sinon, pourquoi ?

- Selon vous, les conditions d'utilisation des médias sociaux ou des plateformes d'évaluation encadrent-elles ce qu'on peut y dire sur une entreprise ?

Exemples au besoin :

 - Responsabilité à l'égard du contenu publié (se dégage de toute responsabilité)
 - Contenus interdits (diffamatoire, violent, etc.)
 - Politique d'avis et de retrait relative au contenu illégal (se réserve le droit de retirer un contenu)
 - Avez-vous déjà lu ces conditions d'utilisation ? Est-ce qu'elles sont faciles à voir, à trouver ?
 - Que pensez-vous que ces conditions d'utilisation prévoient ?

- Selon vous, une entreprise pourrait-elle prendre des mesures de représailles contre une personne qui a publié un commentaire négatif contre elle ?
 - Si oui, lesquelles ?
 - Sinon, pourquoi ?

- À votre avis, l'entreprise pourrait-elle entreprendre des procédures judiciaires contre vous à la suite d'une critique publiée en ligne (ex. pour obtenir des dommages-intérêts) ?
 - Est-ce qu'une critique pourrait donner lieu à des poursuites criminelles ?
 - Comment réagiriez-vous si vous étiez poursuivi par une entreprise ?

- Quelles sont selon vous des situations qui pourraient être considérées par les tribunaux comme portant atteinte à la réputation d'une entreprise ?

(Ne pas lire – sonder par la suite)

 - Partager une critique négative rédigée par quelqu'un d'autre
 - Attribuer une note à l'entreprise sans laisser de commentaire (ex. attribuer une étoile)
 - Publier des propos qui sont vrais
 - Publier une critique négative après avoir été sollicité par l'entreprise pour l'évaluer

Cumul: 105 min

BLOC 4 – Conclusion (10 min)

- Depuis le début de la rencontre, votre opinion générale sur la publication de critiques négatives sur les médias sociaux et sur les sites d'évaluation de biens et de services a-t-elle changé ?

- De quelles façons devraient être réglées les mésententes entre un consommateur et une entreprise suite à la publication d'une critique en ligne ?
 - En cas de mésentente, seriez-vous prêt à recourir à un médiateur pour éviter le recours aux tribunaux ? (Intervention d'un tiers pour essayer de trouver une entente commune)

- Voulez-vous ajouter quelque chose ?

*****L'animateur prend connaissance des questions/commentaires des observateurs. *****

Merci de votre participation!

Cumul: 115 min

Appendix 2 – Discussion guide (English version)

Introduction (5 min)

INTRODUCTION

- Moderator's presentation
- Confidentiality. No mention of anyone's name in the report, only ideas and observations.
- Information is only used for the purpose of this study.

RULES

- Recording.
- Verify the use of hand raise
- Importance of spontaneity and personal opinions. Consensus is not an objective; we are looking for a variety of reactions.
- No bad answers, no good answers, never feel awkward if you don't know an answer...It helps us whenever we realize that you don't know something.

CONTEXT AND OBJECTIVES

Today, we are going to talk about comments, ratings and criticism published on social media or websites aimed at publishing reviews about businesses.

(e.g., Facebook, Twitter, Instagram, YouTube, TikTok, etc.)

(e.g., Google, Yelp, Trust Pilot, Rate MDs, etc.).

These comments can be related to :

- A dissatisfaction
- A poor experience
- A disagreement
- A problem

They can also be related to

- The quality of the product or service
- Or customer service.

Cumul: 5 min

BLOC 1 – Consumer experience (55 min)

Now, I would like you to introduce yourselves...

Tell me:

- In which city you live and what is your occupation ?
- Briefly tell me what the purpose of your comment was
- Why did you take the time to make that comment ?

- How many times have you published negative comment towards businesses ?

- What websites did you choose to make your comment ? Why did you choose this website ?

- What made you want to publish a comment ?
 - Do not read –*
 - Revenge, anger
 - Dissatisfaction
 - To pressure the company in resolving the disagreement
 - To assert your rights
 - To warn other consumers
 - For other reasons (which ones)

- Before publishing your comment, did you take steps to communicate with the company you had a difficulty with ?

If so

- What did you do ?

Examples if needed:

- Contacted customer service
- Talked to a superior
- Sent a formal notice

- What was the company's response ?

Examples if needed:

- No willingness to solve the situation
- Unsatisfactory solution
- No reaction from the company

If not

- Why didn't you take any actions ?

- What type of business was your comment intended for (sector, size) ?

- What did you write specifically ?
 - How would you describe the language that you used? Courteous, calm, more direct...
 - Why did you use that language ?

- Did the company react to your comment ?
 - What happened ? How did you react ?

Do not read

- Did the company officially requested that you withdraw your comment ?
- Did the company start legal proceedings against you ?

- In hindsight, could you have resolved the situation another way ?
 - How ?

- In your opinion, could you have taken legal procedures against this company ?
 - If yes, why did not you do it ?

- Have you ever wanted to publish a comment about a company but changed your mind ? Why did you ? What were your concerns ?

- Have you ever regretted publishing a negative comment ? Why did you regret it ?

Cumul: 60 min

BLOC 2 - Opinions about online negative comments (20 min)

The next questions will be about your opinions about online negative comments.

- Do you think resorting to online comment is a good way to solve a problem with a business ?
 - If so, in which circumstances is it appropriate ?
 - If not, why ?

- Is resorting to comments online better than going to the legal way ? Please explain.
Do not read–
 - Faster than the legal system
 - More accessible
 - More dissuasive
 - Less costly

- If a company asked you to withdraw your comment, under what conditions would you do so ? Why ?

- Would you accept to do business with a company if they required you to commit to never publish a negative comment about them ? Why ?

Cumul: 80 min

BLOC 3 - Knowledge of the risks involved (25 min)

We will now talk about the consequences of making negative comments online.

- According to you, are there any risks associated with publishing negative comments online ?
 - If so, which ?
 - If not, why ?

- Do you think that there are limitations to what you are allowed to write about a business?
 - If so, what are they ?
 - If not, why ?

- In your opinion, the terms of use in social media or review websites cover what you can say about companies on their platforms ?

Examples if needed:

- Not responsible for the content that is published
- Forbidden content
- Right to withdraw content if not appropriate

- Have you ever read the terms of use ? Were they easy to find ?
- What do you think these terms of use include about making negative comments?

- In your opinion, do you think a company could take retaliatory action against a person who publishes a negative comment ?

- If so what are they ?
- If not, why ?

- Do you think a company can take legal actions against a person following a negative comment published about them ?

- Could this action be brought to criminal court ?
- How would you react if you were sued by a company about which you had written a negative comment?

- What do you think could be situations that could be considered as damaging for the reputation of a company ?

Do not read –

- To share a negative comment written by someone else
- Give a low rating without leaving a comment
- To publish content that is true
- To publish a negative comment after being solicited for a rating

Cumul: 105 min

BLOC 4 – Conclusion (10 min)

- Since the beginning of our discussion, has your general opinion about publishing negative comments changed ?

- How should disagreements between consumers and companies be solved following the publication of negative comments online ?
 - In case of disagreements, would you open to use the services of a mediator to avoid going to court ?

- Do you have anything to add?

***** The moderator collects the last questions from the observers. *****

Thank you!

Cumul: 115 min