REPUTATION MATTERS

How Canadian courts are balancing protection of reputation and freedom of expression.[1]

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[1] A paper presented to the Advocates Club by Daniel J. Reid on September 16, 2013. Portions of this paper are liberally borrowed from a previous publication by the author: "*The Modern-Day Soapbox: Defamation In The Age Of The Internet",* by Bryan G. Baynham Q.C. and Daniel J. Reid, 2009

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It takes 20 years to build a reputation and five minutes to ruin it.

Warren Buffet

I. Introduction

The law of defamation, driven by judge made common law, has evolved over centuries. While people are exceptionally adept at discovering new ways to defame one another, the common law has proven surprisingly adaptive to the modern era. The Supreme Court of Canada has signaled it is alert to changing technologies – it has rendered at least seven decisions concerning defamation law since 2008. There are likely more decisions to come –a number of unresolved issues are working their way through trial courts across Canada.[3]

This paper examines defamation in the modern age, including recent Supreme Court of Canada cases concerning defamation, issues of anonymity, and privacy concerns. This paper includes a brief discussion of emerging areas and unanswered questions concerning defamation and privacy law.

II. Defamation Primer

In order to establish a claim for defamation a plaintiff must establish three things:

(a) the impugned words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person;

(b) the words in fact refer to the plaintiff; and

(c) the words were published, i.e., that they were communicated to at least one person other than the plaintiff.[4]

The threshold test for determining whether words are defamatory is low one. In *Cherneskey v. Armadale Publishers Ltd*., 1 S.C.R. 1067, Dickson J., while dissenting on the issue, which concerned the defence of fair comment, expressed at p. 1095, his view of what constitutes a defamatory statement:

[3] *WIC Radio Ltd. v. Simpson*, 2008 SCC 40; *Quan v. Cusson,* 2009 SCC 62; *Grant v. Torstar Corp.*, 2009 SCC 61; *Bou Malhab v. Diffusion Métromédia CMR inc.,* 2011 SCC 9; *Crookes v. Newton*, 2011 SCC 47; *Breeden v. Black,* 2012 SCC 19; *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18; *A.B. v. Bragg Communications Inc.,* 2012 SCC 46

> The law of defamation must strike a fair balance between the protection of reputation and the protection of free speech, for it asserts that a statement is not actionable, in spite of the fact that it is defamatory, if it constitutes the truth, or is privileged, or is fair comment on a matter of public interest, expressed without malice by the publisher. These defences are of crucial importance in the law of defamation because of the low level of the threshold which a statement must pass in order to be defamatory. The virtually universally accepted test is that expressed by Lord Atkin "after collating the opinions of many authorities" in Sim v. Stretch [(1936), 52 T.L.R. 669.], at p. 671. He stated that the test of whether a statement is defamatory is: "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" In the earlier case of O'Brien v. Clement [(1846), 15 M. and W. 435.] at p. 436 Baron Parke said that, subject to any available defences, "[e]verything printed or written, which reflects on the character of another" is a libel. It is apparent that the scope of defamatory statements is very wide indeed. … This is the reason why most defamation actions centre on the defences of justification, fair comment, or privilege. It is these defences which give substance to the principle of freedom of speech.

Unlike many other torts, defamation claims have a relatively “low” initial threshold – almost any negative statement concerning an individual, corporation or group has the potential to be “defamatory”. In balancing freedom of expression with protection of reputation, courts have avoided raising this initial threshold, instead expanding existing defences (qualified privilege) and creating new ones (responsible communication on matters of public interest).

III. The Importance of Reputation

Unlike the United States, which provides incredibly broad protection for the right to freedom of expression through its codification in the First Amendment, Canadian courts have traditionally afforded robust protection to reputation. A strong statement on the importance of reputation is found in the comments of Cory J in a 1995 case considering whether the common law concerning defamation was displaced by the *Canadian Charter of Rights and Freedoms*:

> Although much as very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to

[4] *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, at para. 28

> be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.
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> ... False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited. ...[5]

The rapid expansion of the internet, surging popularity of social networking services like Facebook and Twitter, and ubiquity of recording and publishing capability on mobile phones has created a situation where everyone is a potential publisher, including those unfamiliar with defamation and privacy law.

This technological advancement has unquestionably improved global access to information that would otherwise remain in the shadows (Wikileaks/Bradley Manning), contributed to popular culture (Gangham Style/cat videos), and shaped the course of global politics (Twitter played a significant role in facilitating the Egyptian revolution).

As tragically demonstrated by recent cases concerning “cyber-bulling”, technology has made it exceptionally easy to irrevocably destroy a reputation, through the spread of defamatory rumors or the publication of supposedly private images.

More Publishers, More Damage and More Cases

In my personal experience, the ease and unprecedented scope of publication arising out modern technology has dramatically increased the number of defamation and breach of privacy inquiries. A comment concerning poor customer service that would have previously been told to a friend over the backyard fence is now an online review viewed by thousands. An intimate photograph provided to a partner is now posted online for comment, along with a name, contact information and other identifying information.

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[5] *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130

Moreover, recent jurisprudence has created a situation in British Columbia and Ontario whereby insurers often find themselves forced to pay for the defence costs for defamation claims. Many insurers had previously denied coverage for many defamation claims under "intentional act" exclusion clauses that are commonly found in CGL and homeowner's policies.

In the recent case of *British Columbia Medical Association v. Aviva Insurance*[6]*,* the insurer attempted to rely on such a clause to deny that it had a duty to defend a claim brought in defamation. The insured argued that it was possible to be found liable for "*defamation simpliciter*", i.e. publishing a false statement without any intent to injure or knowledge of falsity. If the publication was "accidental", it was argued that the intentional act exclusion could not apply.

In *Aviva,* the court held that the insurer was obligated to fund the defence but was not able to direct the defence and the insured was entitled to counsel of its choice. Aviva had reserved its rights, and the court found that where the reservation of rights was with respect to coverage questions which depended upon the insured's conduct at issue in the lawsuit, the insurer was not entitled to exercise any control over the defence. The court further ordered that counsel for the insured was not required to report to Aviva with respect to any matter that touched upon the liability issues. The result that was the insurer was obligation to pay counsel, of the insured's choosing, without being entitled to exercise any right to control the defence of the insured.

A similar argument has been considered and recognized as a possible outcome (although rejected on the particular facts) by the Ontario Court of Appeal.[7] The decision in *Aviva* may have changed the economics of commencing a defamation claim, as the potential availability of insurance likely increases the prospect of an action being commenced in the first instance.

[6] *British Columbia Medical Association v. Aviva Insurance Company of Canada,* 2011 BCSC 1399
[7] *Hodgkinson v. Economical Mutual Insurance Co*., 2003 CanLII 36413 (ON C.A.)

IV. Key Cases

As noted at the outset of this paper, the Supreme Court of Canada has released at least seven decisions concerning defamation since 2008. In doing so, it has attempted to balance an expansion of the "traditional" defenses to defamation to recognize changing modalities of communication while at the same time affirming both the importance and fragility of reputation. Some of these cases are discussed below:

Expanded Defence of Qualified Privilege

WIC Radio Ltd. v. Simpson, 2008 SCC 40

In the recent case of *WIC Radio Ltd. v. Simpson*[8], the Supreme Court of Canada reinvigorated the fair comment defence. In the process it overturned its own 1979 decision in *Cherneskey v Armadale*[9], so that media organizations can publish the opinions of others, without having to agree with those opinions themselves. Justice Binnie, on behalf of the seven member majority, made it clear that the traditional test for the defence does not include a requirement that a court must find "fairness" in the opinion or the person offering it.

If the opinion could honestly be held, fairness is in the ear of the beholder. While fair comment is most frequently invoked by media defendants in defamation actions, it is available equally to all defendants. The test for fair comment can be formulated as follows:[10]

(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 recognizable as comment;

(d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?

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[8] *WIC Radio Ltd. v. Simpson,* 2008 SCC 40
[9] *Cherneskey v. Armadale Publishers Ltd.,* [1979] 1 S.C.R. 1067 (S.C.C.)
[10] *WIC Radio Ltd. v. Simpson,* 2008 SCC 40

(e) even though the comment satisfies the objective test the defense can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

The defence of fair comment arose out of a general recognition of the importance of free speech, and provides a forum for commentary on matters of public importance. The distinction between comment and fact is essential – to utilize the defense of fair comment, the defamatory statement must have a subjective element of opinion. While a comment may include statements of fact, "it must be apparent that the statement is a deduction or conclusion from facts otherwise stated or referred to, and thus (the statement) retains its fundamental subjective character." [11]

Because of the requirement that the comment be (2) based upon true facts, this defence is limited, as the defendant is still required to establish that the facts upon which the statement were made are true. This element of the defence often proves to be the greatest hurdle in fair comment defences.

The third element, that the defamatory statement is on "a matter of public interest," has been interpreted broadly by the courts,[12] and can often be met so long as the defamatory statements are outside clearly private dealings and concern an issue of some general importance or controversy to the public.

Fairness "for the purpose of a fair comment defence is judged by the objective standard whether any fair-minded person could honestly express the opinion in question,"[13] given the truth of the underlying statements of fact. The comment need not be nuanced or intelligent, but simply reflect an opinion that *could* be expressed honestly by a person. Prior to this case, the established law was that the publisher of the allegedly defamatory statements must have had an "honest belief in their comments".

In *Simpson,* a local radio host compared the plaintiff to Hitler, the Ku Klux Klan and skinheads for her opposition to the introduction of materials dealing with homosexuality

[11] Downard, Peter A. *Libel,* (Toronto, Lexis-Nexus Canada Inc., 2003]. At page 114.
[12] Downard, Peter A. *Libel,* (Toronto, Lexis-Nexus Canada Inc., 2003]. At page 121.
[13] Downard, Peter A. *Libel,* (Toronto, Lexis-Nexus Canada Inc., 2003]. At page 122.

into public schools. In expanding the defence of fair comment in *Simpson,* the Supreme Court of Canada recognized that the opinion the plaintiff "would condone violence" by others, was an opinion that *could* honestly have been expressed on the proved facts by a person prejudiced, exaggerated or obstinate in his views (despite the fact it was not proved at trial that the radio host *did* hold that opinion).

Simpson also affirmed the importance of public debate on matters of public interest:

> What is important in such a debate on matters of public interest is that all sides of an issue are forcefully presented, although the limitation that the opinions must be ones that could be "honestly express[ed] . . . on the proved facts" provides some boundary to the extent to which private reputations can be trashed in public discourse.
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> At para. 47

New Defence of "Responsible Communication"
***Quan v. Cusson, 2009 SCC 62/Grant v. Torstar Corp.,* 2009 SCC 61**

In *Grant v. Torstar* and the companion decision of *Quan v. Cusson,* the Supreme Court of Canada recognized a new defence to defamation action: "responsible communication on matters of public interest".

Traditionally, the common law defence of "qualified privilege" was not available to the media or in respect to online publications, as it hinges on a reciprocal duty or interest between the publisher and the reader. A party may rely on qualified privilege as a defence to an action in a circumstance where she published a defamatory statement about a co-worker to a manager seeking input as part of a performance review. Such an "occasion of privilege" would not exist if the hypothetical defendant published the same allegations in a newspaper (to the entire audience of newspaper readers) or online (to the world at large). No such occasion of privilege exists in these circumstances – there is no "special relationship" between the publisher and everyone who reads the article (particularly if the audience is the "entire world").

"Responsible Communication on Matters of the Public Interest" was recognized as a defence to reflect this gap. This new defence, modeled after the U.K. defence of "responsible journalism" is available to publishers reporting on a matter of public interest

who take reasonable steps to ascertain the truth but who may get facts wrong. As described by McLachlin C.J.:

> [53] Freedom does not negate responsibility. It is vital that the media act responsibly in reporting facts on matters of public concern, holding themselves to the highest journalistic standards. But to insist on court-established certainty in reporting on matters of public interest may have the effect of preventing communication of facts which a reasonable person would accept as reliable and which are relevant and important to public debate. The existing common law rules mean, in effect, that the publisher must be certain before publication that it can prove the statement to be true in a court of law, should a suit be filed. Verification of the facts and reliability of the sources may lead a publisher to a reasonable certainty of their truth, but that is different from knowing that one will be able to prove their truth in a court of law, perhaps years later. This, in turn, may have a chilling effect on what is published. Information that is reliable and in the public's interest to know may never see the light of day.

In deciding whether the defence will succeed, the courts look at various issues, including the seriousness of the allegation, the public importance of the matter, urgency, the reliability of the source, whether the plaintiff's side of the story was accurately portrayed and any other relevant circumstances.

While the defence normally applies to the public media, the Court noted that there are many new ways of communicating on matters of public interest which do not involve journalists. Many of these communication methods are now online. The Supreme Court of Canada expressly stated that the defence should be available to anyone who publishes material of public interest in any medium.

Recently, the English Court of Appeal clarified its "responsible journalism defence", holding that the "responsible journalism in the public interest" defence to defamation (the U.K. equivalent of Canada's "communication on matters of public interest" defence) requires that an online archive of a story must be updated to take account of exculpatory developments.

In *Flood v. Times Newspapers Ltd.,*[14], a police officer was accused, in a newspaper article, of taking bribes from Russian exiles with criminal connections. The article was printed in the paper edition of the *Sunday Times*, and was also made available in its entirety online. Approximately a year after the article was first published, a report cleared the police officer of any wrongdoing. In rejecting the "responsible journalism" defence, one of the concurring judges the English Court of Appeal noted that the online article was not changed to reflect the findings of the report:

If the original publication of the allegations made against DS Flood in the article on the website had been, as the Judge thought, responsible journalism, once the Report's conclusions were available, any responsible journalist would appreciate that those allegations required speedy withdrawal or modification. Despite this, nothing was done.[15]

In Canada, the "communication on matters of public interest defence" to defamation is applicable to bloggers and other online publishers. This case raises the question – do bloggers and other online media outlets have an ongoing obligation to update their stories to reflect changing facts?

New Guidelines for "Group Defamation" Claims
***Bou Malhab v. Diffusion Métromédia CMR inc.,* 2011 SCC 9**

In *Bou Malhab v. Diffusion Metromedia CMR inc.,* 2011 SCC 9 the appellants sought compensation for allegedly suffering injury as a result of racist comments made by a radio host concerning Montreal taxi drivers whose mother tongue was Arabic or Creole. At issue was whether a class action brought by drivers who spoke Arabic or Creole should have been dismissed.

The Supreme Court of Canada held the central issue was whether each individual member of the proposed class could show that they had suffered personal injury to their reputation.

[14] *Flood v. Times Newspapers Ltd.,* [2010] EWCA Civ 804
[15] *Ibid.* At para. 78

In determining whether there has been personal injury, Madam Justice Deschamps, writing for the majority, affirmed that the plaintiff must prove "that an ordinary person would believe that [the statements] tarnished the plaintiff's reputation" (para. 57). She instructed that this test similarly applies to impugned statements that are made concerning a group: the plaintiffs must prove that an ordinary person would have believed that each of them sustained damage to their reputation.

Deschamps J. identifies the following factors that are relevant to considering whether the plaintiff has proved personal injury in the context of a group defamation claim: (i) the size of the group; (ii) the nature of the group; (iii) the plaintiff's relationship with the group; (iv) the real target of the defamation; (v) the seriousness or the extravagance of the allegations; (vi) the plausibility of the comments and their tendency to be accepted; and (vii) extrinsic factors (the maker or target of the comments, the medium used and the general context).

Attacks on a doctrine, policy, opinion or religion must be distinguished from attacks on the persons supporting it, since proving personal injury will be complicated in the former situation (at para. 71).

The court concluded its discussion of the factors with these comments:

> [79] Ultimately, the court must not conduct a compartmentalized analysis or seek to find all the relevant criteria. What must be determined is whether an ordinary person would believe that the remarks, when viewed as a whole, brought discredit on the reputation of the victim. The general context remains the best approach for identifying personal attacks camouflaged behind the generality of an attack on a group.

Applying those factors to the facts, Deschamps J. found the group, comprising of Montréal taxi drivers who spoke Arabic and Creole, was of considerable size and heterogeneity. Further the comments were extreme, irrational and sensationalist generalizations about this heterogeneous group. She concluded that an ordinary person would not have formed a less favourable opinion of each Arab or Haitian taxi driver, and the action was dismissed.

Prior to *Bou Malhab*, cases in which the allegedly defamatory statement targeted a "group" rather than an individual member of that group were rare outside of Quebec. Since this decision there have been a three cases in British Columbia in which it was alleged that defamatory statements concerning a group were defamatory of an individual member of that group, with mixed success. In *Mainstream Canada v. Staniford*, 2012 BCSC 1923 (rev'd on other grounds, 2013 BCCA 341) the court found that comments concerning "foreign" and "Norwegian" salmon farmers were defamatory of the plaintiff, and in *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 it was found that statements concerning crisis pregnancy centres did not bring discredit upon the individual plaintiffs (In *Nu Fibre Inc. v. Ishkanian*, 2013 BCSC 1255 there were attachments to the allegedly defamatory emails that directly referred to the plaintiff.)

No Liability for Hyperlinks
***Crookes v. Newton,* 2011 SCC 47**

In *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269, the Supreme Court of Canada examined what constitutes publication in the mass media on the Internet. The case considered whether an article published by the defendant containing hyperlinks to other websites which contained defamatory material amounted to publication by the defendant of the defamatory material.

The court found a mere general reference to a website is not enough to amount to publication. In holding that "hyperlinks are, in essence, references,"[16] Abella J. for the majority noted that an individual who hyperlinks to content has no control over changes to the content: "although the primary author controls whether there is a hyperlink and what article that word or phrase is linked to, inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked."[17]

Accordingly, hyperlinks should be treated as akin to "references" in books, and, without more, do not constitute publication:

[16] *Crookes v. Newton*, 2011 SCC 47, at para. 27

> Although the person selecting the content to which he or she wants to link might *facilitate* the transfer of information (a traditional hallmark of publication), it is equally clear that when a person follows a link they are leaving one source and moving to another. In my view, then, it is the actual creator or poster of the defamatory words in the secondary material who is publishing the libel when a person follows a hyperlink to that content. The ease with which the referenced content can be accessed does not change the fact that, by hyperlinking, an individual is referring the reader to other content.
>
> At para. 29

Despite finding no publication on the particular facts of the case, the reasons of the majority suggest that the hyperlinks will constitute publication if, read contextually, the text that includes the hyperlink constitutes adoption or endorsement of the specific content it links to. Concurring in the result, Deschamps J. observed as follows, at paras. 85-86:

> There appears to be an emerging consensus among the courts and commentators that only *deliberate acts* can meet the first component of the bilateral conception of publication. According to Prof. Brown, "a person must knowingly be involved in the process of publishing the relevant words" (para 7.4 (emphasis added)). In *Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, pleading that the defendants "said and did nothing" (at para. 7) was held to be insufficient to support a finding of publication, because no tortious act had been alleged in relation to their silence (see also *Smith v. Matsqui (Dist.)*, (1986), 4 B.C.L.R. (2d) 342 (S.C.), at p. 355; *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005), at p. 281 ("[a] plaintiff cannot establish [publication] by showing that the defendant silently adopted a defamatory statement"); *Pond v. General Electric Co.*, 256 F.2d. 824 (9th Cir. 1958), at p. 827 ("[s]ilence is not libel"); Brown, at para. 7.3 In *Scott v. Hull*, 259 N.E.2d. 160 (Oh. App. 1970), at p. 162, a U.S. court held that "[l]iability to respond in damages for the publication of a libel must be predicated on a positive act, on something done by the person sought to be charge". I agree with this view.

▶ A deliberate act may occur in a variety of circumstances. In *Byrne v. Deane*, [1937] K.B. 818 (C.A.), the defendants, proprietors of a golf club, were found to have published the words contained on a piece of paper that was posted on premises over which they held complete control. The defendants admitted to having seen the paper, but denied having written it or put it there. Although the words were ultimately found not to be defamatory, Greene L.J., concurring on the

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[17] *Ibid.*

issue of publication, concluded that there are circumstances in which, by refraining from removing or obliterating defamatory information, a person might in fact be publishing it (at p. 838):

> The test it appears to me is this: having regard to all the facts of the case is the proper inference that by not removing the defamatory matter the defendant really made himself responsible for its continued presence in the place where it had been put?
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> ▶ [Emphasis in original.]

The law is far from settled as to what circumstances linking to defamatory material constitutes publication of defamatory content by a defendant. Whether a hyperlink on a website to other documents containing facts upon which the defamatory comment was made is sufficient to ground liability will likely depend on the circumstances of each case. If the defamatory publication advises the reader that a hyperlinked document contains facts upon which the defamatory comment is based and sets out where in the document they are contained, then there may well be a sufficient reference to those facts for "publication" to be established.[18]

New guidelines for jurisdiction for online defamatory material?
Breeden v. Black, 2012 SCC 19* and *Éditions Écosociété Inc. v. Banro Corp.

In *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 and the companion decisions of *Breeden v. Black,* 2012 SCC 19 and *Éditions Écosociété Inc. v. Banro Corp*., 2012 SCC 18 the court considered the doctrine of *forum non conveniens.* Both *Breeden v. Black* and *Éditions Écosociété Inc. v. Banro Corp*., were actions for defamation, and include a discussion of choice of law in the context of multistate defamation claims.

In *Breeden v. Black,* the Supreme Court of Canada affirmed that Ontario had jurisdiction and was an appropriate forum to hear Conrad Black's six libel actions in respect of statements posted on the Hollinger International, Inc. website. The statements had been picked up and republished in Ontario by a number of Canadian newspapers.

In finding that the alleged tort occurred in Ontario, the trial judge pointed to evidence that defendants did target and direct their statements to this jurisdiction, including the

[18] *Mainstream Canada v. Staniford,* 2013 BCCA 341, at para. 45

fact that the press releases posted on the Internet specifically provide contact information for Canadian media, as well as U.S. and U.K. media: the contact information for Canadian media clearly anticipated that the statements would be read by a Canadian audience and invited Canadian media to respond.

In upholding the decision of the trial judge, the Supreme Court of Canada also noted that, while not a resident of the province, Black had significant connections to the province and a reputation in the province. Accordingly, Black's reputation in the province had been damaged:

> The evidence establishing Lord Black's reputation in Ontario is significant. As the motion judge found, while Lord Black is no longer ordinarily resident in Ontario, he spent most of his adult life in Ontario, first established his reputation as a businessman in Ontario, is a member of the Order of Canada, the Canadian Business Hall of Fame and the Canadian Press Hall of Fame, and is the subject of five books written by Toronto-area authors. Lord Black's close family also lives in Ontario. Lord Black's undertaking and the evidence of his reputation in Ontario therefore suggest that, under the "most substantial harm to reputation" approach discussed in *Éditions Écosociété*, Ontario law should be applied to the libel actions. Alternatively, as the alleged tort of defamation was committed in Ontario, under *lex loci delicti*, Ontario law would also apply. In the circumstances, the applicable law factor supports proceedings in Ontario.
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> At para 33

In both *Black* and *Éditions Écosociété* (which concerned publication of a book alleging that the plaintiff had committed human rights violations in Africa) the court commented on the importance of being able to bring an action in the location where the reputational damage occurred:

> The importance of place of reputation has long been recognized in Canadian defamation law. For example, the importance of permitting plaintiffs to sue for defamation in the locality where they enjoy their reputation was recognized by the Ontario High Court in *Jenner v. Sun Oil Co.*, [1952] 2 D.L.R. 526. In that case, McRuer C.J.H.C. found that the plaintiff would not be able to satisfactorily "clear his good name of the

> imputation made against him" other than by suing for defamation in the locality where he enjoyed his reputation — that is, where he lived and had his place of business and vocation in life (pp. 538 and 540).

Éditions Écosociété (
At para 58

While online publications may be available globally, in order for Canadian courts to assume jurisdiction there must be something more than mere availability. A court will likely consider such factors as whether the publication was read in the province, whether the plaintiff had a reputation in the province, and whether the plaintiff's reputation was damaged in the province.

Privacy, Cyber-Bulling and Open Courts
***A.B. v. Bragg Communications Inc.,* 2012 SCC 46**

In *A.B. v. Bragg Communications Inc.*, the plaintiff brought an action seeking disclosure of the identity of the author(s) of an anonymous Facebook profile, which included a photograph of the applicant and other particulars which identified her. The Facebook profile also discussed the applicant's physical appearance, weight, and allegedly included scandalous sexual commentary of a private and intimate nature.

Through her father as guardian, the plaintiff brought an application for an order requiring the Internet provider to disclose the identity of the person(s) who used the IP address to publish the profile so that she could identify potential defendants for an action in defamation. As part of her application, she asked for permission to anonymously seek the identity of the creator of the profile and for a publication ban on the content of the profile. Two media groups opposed the request for anonymity and the ban. The Supreme Court of Nova Scotia granted the request that the Internet provider disclose the information about the publisher of the profile, but denied the request for anonymity and the publication ban because there was insufficient evidence of specific harm to the girl, citing the critical importance of the open court principle and the importance of freedom of expression.

In granting the plaintiff's application, the Supreme Court of Canada noted that, while the open court principle was important, the plaintiff's privacy interests and the importance of

protection of children from cyberbulling were sufficiently compelling in the particular facts of the case to permit the plaintiff to proceed by way of initials:

> [14] The girl's privacy interests in this case are tied both to her age and to the nature of the victimization she seeks protection from. It is not merely a question of her privacy, but of her privacy from the relentlessly intrusive humiliation of sexualized online bullying: Carole Lucock and Michael Yeo, "Naming Names: The Pseudonym in the Name of the Law" (2006), 3 *U. Ottawa L. & Tech. J.* 53, at pp. 72-73; Karen Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 *McGill L.J.* 289, at p. 302.

In citing academic literature on the issue the Supreme Court of Canada noted the particularly harmful nature of online bulling:

> [22] The Report also noted that cyberbullying can be particularly harmful because the content can be spread widely, quickly — and anonymously:
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> > . . . The immediacy and broad reach of modern electronic technology has made bullying easier, faster, more prevalent, and crueler than ever before. . . .
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> > . . . cyberbullying follows you home and into your bedroom; you can never feel safe, it is "non-stop bullying". . . . cyberbullying is particularly insidious because it invades the home where children normally feel safe, and it is constant and inescapable because victims can be reached at all times and in all places. . . .
> >
> > The anonymity available to cyberbullies complicates the picture further as it removes the traditional requirement for a power imbalance between the bully and victim, and makes it difficult to prove the identity of the perpetrator. Anonymity allows people who might not otherwise engage in bullying behaviour the opportunity to do so with less chance of repercussion. . . .
> >
> > . . . The cyber-world provides bullies with a vast unsupervised public playground . . . . [pp. 11-12]
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> [23] In addition to the psychological harm of cyberbullying, we must consider the resulting inevitable harm to children — and the administration of justice — if they decline to take steps to protect themselves because of the risk of further harm from public disclosure.

Whether an adult could bring a defamation action "anonymously" has not, to my knowledge, been at issue in any reported decisions in Canada. However, it is my contention that in circumstances where the defamatory allegations are of a sexual or intimate nature there is a compelling argument to be made that proceeding anonymously is appropriate. In rare circumstances, publication of the identity of the plaintiff would effectively "re-victimize" the complainant. The author has commenced "anonymous" proceedings (with leave of the court) in respect of a case in which graphic sexual images of the plaintiff were disseminated online by the defendant, although the causes of action were not limited to defamation but included breach of privacy under the provincial *Privacy Act* and intentional or negligent infliction of emotional harm.

Bragg Communications also raises the specter of "super-injunctions": a type of injunction in English tort law that prevent publication of the thing that is in issue and also prevents the reporting of the fact that the injunction exists at all. Such injunctions are routinely brought in the U.K. by individuals in the context of "breach of privacy" claims. Due to their very nature media organizations are not able to report who has obtained a super-injunction without being in contempt.

This type of injunction is appears to exist in British Columbia. In *Party A v. Party B*, 2013 BCCA 195, the Court of Appeal published reasons concerning the an ongoing dispute between the parties as follows:

> [1] The appellant is a married businessman. The respondent is an unmarried businesswoman. The two engaged in an affair which was ultimately terminated at the instance of the appellant. During the course of the affair, the parties engaged in activities, the details of which the appellant would prefer to keep undisclosed.
>
> [2] After the affair ended, the respondent made public disclosure of many aspects of the parties' activities. The appellant commenced an action against the respondent alleging breach of confidence and breach of the *Privacy Act*, R.S.B.C. 1996, c. 373, by the respondent. He sought an *ex parte* order to restrain the respondent from further disclosure, and on May 9, 2011, his application was heard, *in camera*, and an order was granted against the respondent by a justice of the Supreme Court (the "First Justice") including the following terms:

1. This Order orders you, among other things, to cease and desist from publishing or disclosing the Private Information as defined below

2. You are at liberty to apply to this Court to set aside or vary this Order upon giving two (2) clear day's notice to the Plaintiff's solicitor of your intention to do so.

3. If you disobey this Order you may be guilty of contempt of Court and may be sent to prison, or fined, or both.

THIS COURT ORDERS that:

4. The Defendant, by herself or by her employee, agents, or otherwise, and any other person with knowledge of the terms of this Order, be and is hereby restrained from disseminating, publishing, or otherwise disclosing any private information about the Plaintiff, his sexual practices, or anything that would connect him to having had a sexual relationship with the Defendant (the "Private Information"), until the trial or other disposition of this proceeding or until further Order of this Honourable Court;

5. The Defendant and any other person with knowledge of the terms of this order shall take any and all steps necessary to cause any dissemination, publication or other disclosure of the Private Information to be terminated forthwith;

6. The Defendant may apply to this Court to set aside or vary this Order upon giving two (2) days' notice to the Plaintiff of her intention to do so;

...

9. The Court file in this action shall be sealed except with respect to the parties and counsel of record, and all of the materials filed and to be filed in these proceedings shall be secured by the Registrar of this Honourable Court, and the public shall not be granted access to the Court file or any materials therein without an Order of the Court;

10. In all pleadings and other materials filed in this action the Plaintiff shall be referred to as Party A and the Defendant shall be referred to as Party B;

11. No person shall publish or otherwise publicly make known information identifying or concerning the parties to or particulars of this action, except the solicitor for the Plaintiff

> who may disclose such information to third parties as necessary to give effect to this Order including the true identities of Party A and Party B;
>
> 12. Every person on whom this Order is served or who has notice of the service of this Order is prohibited from disclosing to or discussing with any other person the existence of these proceedings or the Orders herein. Notwithstanding this, any person on whom this Order is served and any person having notice of it may at any time consult a solicitor for the purpose of obtaining legal advice with respect to these proceedings;

From the published reasons, it appears that there were a number of orders that the parties both sought to appeal to the Court of Appeal. The published reasons deal with an application by one of the parties for a stay of one of these orders pending hearing of the appeal, and for an order to preserve a sealing order and publication ban.

Superinjunctions have been the subject of much debate in the U.K. – it is likely that Canadian jurisprudence in this regard will continue to develop, particularly in light of the recent Ontario Court of Appeal recognition of a right to bring civil action for damages for the invasion of personal privacy in Ontario: *Jones v. Tsige*, 2012 ONCA 32.

V. Unanswered Questions

1. Should "Innocent Dissemination" and "Notice and Takedown" Apply in Canada?

One area of online defamation Canadian courts have yet to fully explore is whether internet Service Providers (ISPs) such as Bell Canada, Shaw Communications Inc., Rogers Communications Inc. and Telus Inc. can be held liable for hosting defamatory content. Unlike the U.K. and the United States, Canada has not established a statutory or common law defence of "innocent dissemination," whereby ISPs are not liable for hosting defamatory content authored by a third party.

In the U.K., one of the earliest cases dealing with online defamation dealt with the issue of whether the host of an online bulletin board could make use of the "innocent dissemination" defence codified in Section 1 of the *Defamation Act 1996.* In *Godfrey v.*

Demon Internet Limited,[19] the English Court of Queen's Bench found the host of a bulletin board service liable for failing to remove defamatory postings once they were made aware of the content. While the host of the bulletin board could have made use of the defence had they been unaware of the content, by failing to act promptly once requested to do so by the plaintiff the host lost the innocence required to rely on the "innocent dissemination" defence. In effect, the court imposed a "notice-and-takedown" requirement on ISPs, and U.K. ISPs now routinely remove defamatory content once they receive notice of it.

In the United States, the protections afforded ISPs are broader. Section 230 of the *Communications Decency Act*[20] provides statutory immunity for online services, including blogs, forums and ISPs, who publish defamatory content, so long as that content is authored by a third party. This immunity applies even if the ISP receives notice of the defamatory material.

Although there are no cases directly on point, it is likely that Canada would follow England's lead in providing a limited defence of "innocent dissemination", provided that the ISP or host removes the offending material on demand.

In the Supreme Court of Canada case of *Society of Composers, Authors and Music Publishers of Canada ("SOCAN") v. Canadian Assn. of Internet Providers*[21], SOCAN sought to impose liability for royalties on various ISPs for copyrighted music downloaded in Canada. The Supreme Court of Canada held in an 8-1 majority that, so long as ISPs acted as a "neutral-conduit" for information, they enjoyed the statutory protection of s. 2.4(1)(*b*) to the *Copyright Act*[22], which provides that persons who only supply "the means of telecommunication necessary for another person to so communicate" are not themselves to be considered parties to an infringing communication.

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[19] *Godfrey v. Demon Internet Limited* [1999], EWHC QB 244
[20] Section 230 of the *Communications Decency Act of 1996* (a common name for Title V of the Telecommunications Act of 1996)
[21] *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45
[22] *Copyright Act*, R.S.C., 1985, c. C-42

Writing for the majority, the Hon. Mr. Justice Binnie cited *Godfrey v. Demon Internet, supra,* and stated the following:

> I agree that notice of infringing content, and a failure to respond by "taking it down" may in some circumstances lead to a finding of "authorization". However, that is not the issue before us. Much would depend on the specific circumstances. An overly quick inference of "authorization" would put the Internet Service Provider in the difficult position of judging whether the copyright objection is well founded, and to choose between contesting a copyright action or potentially breaching its contract with the content provider. A more effective remedy to address this potential issue would be the enactment by Parliament of a statutory "notice and take down" procedure as has been done in the European Community and the United States.[23]

Although the law is not fully developed, there is a strong foundation for the defence of "innocent dissemination" of defamatory material in Canada, and it is therefore unlikely that ISPs would be found liable for third-party content unknowingly made available through their services. In practice, it appears most Canadian companies have adopted a "notice and takedown" approach - in my practice Canadian companies will usually remove allegedly defamatory content authored by their users upon receipt of a demand.

2. Do Different Rules Apply to a "Freewheeling" Internet Debate?

In a somewhat unique decision arising out of Ontario, the Ontario Superior Court of Justice granted an application for summary judgment in a circumstance where both the plaintiff and defendant had been engaged in a heated and acrimonious online debate prior to the plaintiff commencing a lawsuit.

In *Baglow v. Smith*, 2011 ONSC 5131, the plaintiff and defendants had been engaged in a debate over the detention of Omar Khadr in Guantanamo Bay. The defendants posted a lengthy comment on a message board which, *inter alia*, referred to the plaintiff as "one of the Taliban's more vocal supporters", which they refused to remove after receiving a demand from the plaintiff to do so.

[23] *Supra,* note 32

The defendants brought an application for summary judgment, on the basis that the alleged words were not capable of damaging the reputation of the plaintiff and, alternatively, on the basis of fair comment.

In granting the application, the trial judge appeared to create a new defence to defamation actions with respect to “online blogging”:

> [58] Although I am satisfied that the words complained are not capable of damaging the reputation of the plaintiff, I am of the view that there is another contextual factor that would further bolster this conclusion, namely that the alleged defamatory words were made in the context of an ongoing blogging thread over the Internet.
>
> [59] Internet blogging is a form of public conversation. By the back and forth character it provides an opportunity for each party to respond to disparaging comments before the same audience in an immediate or a relatively contemporaneous time frame.
>
> [60] This distinguishes the context of blogging from other forms of publication of defamatory statements. One exception could be the live debate, of which blogging constitutes the modern written form.
>
> [61] I am not suggesting that defamation can never occur in a live debate. I do say however, that the live debate forum should be considered as a contextual factor to determine whether the statement is defamatory in so far as whether it is complete.
>
> …
>
> [63] Given that the plaintiff pleads his belief that “there is a reasonable likelihood of damage to my reputation if it became generally believed that I supported the enemies of the Canadian Forces”, it seems that the tendency of the comment to lower his reputation, particularly when arising in the form of a comment in a debate, could have been quickly nipped in the bud by a simple rejoinder in the fashion described above. This would have had the additional benefit of allowing him to score some points of his own.
>
> [64] More importantly to the issue of context, the blogging audience is expecting and would indeed want to hear a rejoinder of this nature where the parry and thrust of the debaters is appreciated as much as the substance of what they say.
>
> [65] In essence, I am suggesting that the Court, in construing alleged defamatory words in an ongoing debate, should determine whether the

> context of the comment from the perspective of the reasonable reader or listener is one that anticipates a rejoinder, which would eliminate the possible consequence of a statement lowering the reputation of the plaintiff in their eyes.
>
> [66] To some extent the Court is attempting to decide whether the debate should have gone forward, such that walking off the blogging stage, so to speak, is a form of "gotcha" contrary to the rules governing the debate.
>
> [67] I realize that this sounds like a form of defence of mitigation of a defamatory comment. But I see it more as an uncompleted comment, something akin to a plaintiff arguing that he or she has been defamed by a question, when the response was what the audience was expecting.

In overturning the trial judge's decision and directing that the action be set for trial the Ontario Court of Appeal (2012 ONCA 407) noted that there was little judicial consideration of whether different rules apply to the internet:

> [27] In this case, the parties have put in play a scenario that, to date, has received little judicial consideration: an allegedly defamatory statement made in the course of a robust and free-wheeling exchange of political views in the internet blogging world where, the appellant concedes, arguments "can be at times caustic, strident or even vulgar and insulting." Indeed, some measure of what may seem to be a broad range of tolerance for hyperbolic language in this context may be taken from the apparent willingness of the appellant to absorb the slings and arrows of the "traitor" and "treason" labels without complaint.
>
> [28] Nonetheless, although the respondents come close to asserting – but do not quite assert – that "anything goes" in these types of exchanges, is that the case in law? Do different legal considerations apply in determining whether a statement is or is not defamatory in these kinds of situations than apply to the publication of an article in a traditional media outlet? For that matter, do different considerations apply even within publications on the internet – to a publication on Facebook or in the "Twitterverse", say, compared to a publication on a blog?
>
> [29] These issues have not been addressed in the jurisprudence in any significant way.

3. When Does "Publication" Occur Online for the Purpose of Calculating the Limitation Period?

A troublesome issue that arises in online defamation cases is when, if ever, the limitation period begins to run on statements that remain accessible online. Some

jurisdictions, namely a number of American states, have adopted a "single publication rule", under which the limitation period begins to run once a statement is first posted published (including being posted online), and that subsequent sales or deliveries do not constitute a fresh cause of action.[24] Other jurisdictions, including the United Kingdom[25], and Australia[26] have rejected the "single publication rule", holding instead that each subsequent publication represents a fresh cause of action.

In *Carter v. B.C. Federation of Foster Parents Assn.,*[27] the B.C. Court of Appeal wrestled with this issue, and came down in favour of the approach adopted in most Commonwealth jurisdictions: an online publication remains actionable so long as it is published.

In this case, the plaintiff became aware of allegedly defamatory postings about her on an online forum in 2000, but did not commence an action against one of the defendants until more than two years had passed. The trial judge adopted the "single publication rule" and dismissed the action as being limitation barred.[28]

In reversing this decision, the Court of Appeal held that each publication gave rise to a distinct cause of action:

> If defamatory comments are available in cyberspace to harm the reputation of an individual, it seems appropriate that the individual ought to have a remedy. In the instant case, the offending comment remained available on the internet because the defendant respondent did not take effective steps to have the offensive material removed in a timely way. Although, for the reasons noted by the trial judge, legislatures may have to come to grips with publication issues thrown up by the new development of widespread internet publication, to date the issue has not been legislatively addressed and in default of that, I do not consider that it would be appropriate for this Court to adopt the American rule over the rule that seems to be generally accepted throughout the Commonwealth; namely, that each publication of a libel gives a fresh cause of action.[29]

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[24] See for example: *Ogden v Association of the United States Army* (1959) 177 F Supp 498, 502
[25] See for example: *Loutchansky v. Times Newspapers Ltd.*, [2002] Q.B. 783 (C.A.)
[26] *Dow Jones & Company Inc. v. Gutnick*, [2002] HCA 56
[27] *Carter v. B.C. Federation of Foster Parents Assn.,* 2005 BCCA 398
[28] As summarized by the Court of Appeal in *Carter v. B.C. Federation of Foster Parents Assn.,* 2005 BCCA 398 at para. 14
[29] *Ibid.* At para. 20

The “single-publication rule” was recently rejected by the Ontario Court of Appeal: *Shtaif v. Toronto Life Publishing Co. Ltd*., 2013 ONCA 405.

VI. Conclusion

Given the substantial body of common law jurisprudence in this area, it is perhaps surprising how many issues concerning defamation have been considered by the Supreme Court of Canada in the past five years. Despite the above cases, there remain unresolved issues concerning liability for “user content”, limitation periods, privacy, and the nature of online “discussions”. Given the rapid development of technology (Google only launched in 1997) I suspect there will be many more defamation cases heard by the Supreme Court of Canada before the decade is out.

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