CITATION: *Baglow v. Smith*, 2015 ONSC 1175
OTTAWA COURT FILE NO.: CV-10-49803
DATE: 2015/02/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
John Baglow a.k.a. "Dr. Dawg" Plaintiff	Peter Burnet, for the Plaintiff
– and –	
Roger Smith a.k.a. "Peter O'Donnell", Connie Fournier and Mark Fournier	Roger Smith and Connie Fournier, Self-Represented
Defendants	Barbara Kulaszka, for the Defendant, Mark Fournier
– and –	
The Canadian Civil Liberties Association Intervener	Steven G. Frankel, for the Intervenor
	HEARD AT OTTAWA: March 24-28, June 3-4, September 15-18, September 22 and 23, 2014.

REASONS FOR JUDGMENT

POLOWIN J.

Overview

[1] Political debate in the Internet blogosphere can be, and, often is, rude, aggressive, sarcastic, hyperbolic, insulting, caustic and/or vulgar. It is not for the faint of heart. This case is an action in defamation involving political bloggers on the Internet.

[2] The plaintiff, Dr. Baglow, is the owner and operator of an Internet blog site known as "Dawg's Blawg" on which he posts left-wing opinions and commentary on political and public

interest issues, using the pseudonym "Dr. Dawg". However, while he posts his views under the moniker Dr. Dawg, his true identity as John Baglow is not hidden by him and appears to be well known among political bloggers. He has also published opinion pieces in newspapers and is recognized in the political blogosphere for his left-wing beliefs and frequent criticism of right-wing views and policies. Particular to this case it is to be noted that he actively opposed Canada's engagement in the war of Afghanistan and supported the repatriation of Omar Khadr from Guantanamo Bay to Canada on the grounds that he is entitled to be treated as a child soldier and in accordance with the rule of law.

[3] The defendants, Mark and Connie Fournier, are a married couple who moderate a message board on the Internet called "Free Dominion". They describe Free Dominion as a venue for the expression of "conservative" viewpoints. According to the Fourniers, members of Free Dominion generally believe in fewer powers for government, individual freedom and personal responsibility, lower taxes, support for the family unit and with respect to Canada's foreign policy, support for Israel, a friendly relationship with the United States, support for the military, support for the war on terror, and support for activities and concepts that advance freedom and liberty globally.

[4] The plaintiff, on the other hand, describes Free Dominion as an extremely right-wing venue expressing radical or extreme conservative views. He often finds the views expressed there as repellant, noting for example Muslim bashing and homophobia. It is his view that the site takes a position on freedom of speech that champions the rights of holocaust deniers, neo-Nazis, white supremacists and homophobes to spread their hatred unrestrained.

[5] The defendant, Roger Smith, whose pseudonym in the blogosphere is "Peter O'Donnell", is a conservative or right-wing commentator who comments or posts frequently on Free Dominion and other blogs including Dawg's Blawg. On August 10, 2010, Mr. Smith, posting under the pseudonym Peter O'Donnell, posted a lengthy comment on Free Dominion which, among other things, referred to the plaintiff as "one of the Taliban's more vocal supporters". The plaintiff objected to this comment as being defamatory and requested that the defendant Fourniers remove it from Free Dominion, which they refused to do.

[6] In the course of this litigation Dr. Baglow has freely acknowledged that debates on political blogs can be caustic, strident or even vulgar and insulting at times. However, it is his position that Mr. Smith went too far in labelling him as "one of the Taliban's more vocal supporters". It is the position of the defendants, on the other hand, that the words are not defamatory, that they are an expression of opinion only and that if defamatory the defence of fair comment applies. Further, the Fourniers take the position that the impugned words were written, posted and thus published by Mr. Smith. According to the Fourniers they functioned only as the administrators of the forum and should not be considered to have published the impugned words for the purposes of liability for defamation.

[7] This litigation has been hard fought. The defendants brought a motion for summary judgment before Justice Annis, in 2011 (*Baglow v. Smith*, 2011 ONSC 5131, 107 O.R. (3d) 169). The motion for summary judgment was granted. Justice Annis found that there was no genuine issue for trial as to whether the comments were capable of being considered defamatory. Further,

he found that even if there was a genuine issue for trial as to whether the comments were capable of being considered defamatory, the defendants would be entitled to rely on the defence of fair comment. The plaintiff appealed this decision to the Court of Appeal (*Baglow v. Smith*, 2012 ONCA 407, 110 O.R. (3d) 407) and was successful in that appeal. The following was stated at paragraphs 27 – 29:

> 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. The responses may have far-reaching implications. They are best crafted on the basis of a full record after a trial – at least until the law evolves and crystallizes to a certain point – in my view. A trial will permit these important conclusions to be formulated on the basis of a record informed by the examination and cross-examination of witnesses and quite possibly with the assistance of expert evidence to provide the court – whose members are perhaps not always the most up-to-date in matters involving the blogosphere – with insight into how the Internet blogging world functions and what may or may not be the expectations and sensibilities of those who engage in such discourse in the particular context in which that discourse occurs.

[8] While this case was commenced under the Simplified Procedure provisions of Rule 76 of the *Rules of Civil Procedure* (the "*Rules*") evidence was given over 11 days at trial and there were two days for submissions. The battle between the left and the right in the political blogosphere played out in the courtroom, their ideological differences with respect to the issue of free speech an undercurrent throughout. The parties advised that they view the case as precedent setting and that political bloggers require and are waiting for the guidance of the Court. Further, at my insistence, an expert, Dr. Greg Elmer, was appointed to assist the Court pursuant to Rule 52.03 of the *Rules*. In addition the Canadian Civil Liberties Association (the "CCLA") was granted intervener status on consent by Order of Minnema J., dated March 4, 2013.

The Impugned Words

[9] The impugned words were made during the back and forth that arose out of a number of postings written by the plaintiff in August 2010. These posts and the comments that followed will not be set out in detail in these Reasons. Suffice it to say that a chronology of the dialogue deemed more relevant for the purposes of this case is set out below in order to provide the context and tenor of the debate.

[10] On August 7, 2010, conservative blogger Jay Currie speculated on a summer federal election. On August 8, 2010, Dr. Dawg left a comment on the Jay Currie blog stating:

> The sooner, the better. Most of us have had our fill of slack-jawed yokel government. The long-form census is the last straw: pre-scientific mediaeval primitives are destroying our country just as illiterate monks once burned priceless ancient manuscripts to bake bad bread. High time that Harper and his nutbar colleagues are sent packing. Can't wait for the chance to help run him out of town.

[11] On August 8, 2010, Dr. Dawg posted a blog entitled "Off with his head" in which he called for a federal election and referred to supporters of the Conservative government as "yokels with pitchforks", his apparent moniker for those holding right-of-centre views. Under the title is a photograph of Prime Minister Harper wearing a Crown and a chain around his neck bearing the letters "P.M.". Other comments include:

> Pre-scientific mediaeval primitives are running the government and they are wrecking our home and native land....Killing the long-form census is like excising a portion of the brain in order to induce amnesia....It is nothing less than our civic duty to run this horrific gang of subliterate hoodlums out of office, by any means necessary and as soon as possible, to get the hands moving clockwise again.

[12] Mr. Smith, commenting as Peter O'Donnell picked up the "yokels with pitchforks" theme. On August 9, 2010, on the above noted Jay Currie blog, he stated "Speaking on behalf of slack-jawed yokels (he means Western Canadians, right)". He then posted comments on the Jay Currie blog on August 9 and 10, in an exchange with Dr. Dawg, in response to Dr. Dawg's "Off with his head" posting. It is during this exchange that Peter O'Donnell raised the issue of Omar Khadr:

> Yokels with pitchforks....sounds like beer and popcorn to me. Where does Omar Khadr fit into your world view? Now I would say psychopath with a rifle there. But I understand he is on the short list for G-G in 2015 once you get rid of us yokels and such.

[13] On August 10, 2010, on Jay Currie's blog, Peter O'Donnell replied to Dr. Dawg in part:

> …It won't take long for the "yokels with pitchforks" metaphor to jump the shark from being anti-CPC to being anti-Western (which it is probably meant to be anyway, Ontarians always want to run everything in Canada).

[14] To which Dr. Dawg replied:

> No need to weep grievance-mongering tears of woe about the Western Alien Nation. We have sufficient yokels right here in Ontario, thanks. They're the ones who phone up Lowell Green, no slouch in the yokel department himself.

[15] On August 10, 2010, the plaintiff wrote a blog on Dawg's Blawg entitled "The Gitmo Kanga-ruse" in which he calls the trial of Omar Khadr a judicial lynching. He stated:

> And Stephen Harper and his minions, who have been praying for this moment to arrive, will be delighted…Good Luck with that. Parrish (the person presiding at the Khadr trials) is already twisting the hemp in his hands. And our own Prime Minister is part of the mob.

[16] Mr. Smith responded on Dawg's Blawg on August 10, 2010, using the pseudonym "Jolly Old Saint Knickerless". The plaintiff testified that he was aware that Jolly Old Saint Knickerless was another pseudonym for Mr. Smith.

> I find it odd that people who live in large cities often take the side of terrorists who usually do their business there while people who live in rural areas and small towns, places less likely to be targets of terrorists, usually understand that terrorists have surrendered their civil liberties by taking a blood oath to kill soldiers and civilians alike.
>
> In the moral sphere, you seek complicity with the recent murders of American aid workers under the spurious (if outrageous) charge of spreading Christianity, when you sign up to support Omar Khadr. I think such public declarations of support of Al Qaeda and the Taliban amount to treason, given that we are engaged in a war against them. It's really only because the war is contained and not likely to be lost on our soil that these normal laws do not apply, or shall I say, are not being applied. But the government of Canada would be quite within its legal rights to arrest the lot of you for treason.

[17] Further on August 10, 2010, Peter O'Donnell wrote the complained of posting on Free Dominion under the heading "Hey yokels with pitchforks, there is no libertarian base". He stated:

> I think Canada's long-simmering cultural war is about to go viral. I base this on two rather unrelated eruptions of Liberal/progressive angst ("why can't they see that we are their natural superiors?") in the past few days. On Monday, Liberal talking head Scott Reid, commenting on Harper's recent announcements concerning the long-term census, said he was pandering to the libertarian base,

> but that there is no liberation base. I will return to that rather astounding claim but first, the other salvo in the offensive. Dr. Dawg's colourfully illustrated op-ed that describes the conservative base (for which nobody has claimed non-existence) amounts to "yokels with pitchforks". This coming from one of the Taliban's more vocal supporters. I suppose they are super-yokels with Kalashnikovs.

[18] Later in the same posting, he continued:

> Now, as to yokels with pitchforks, just one think about that … we have the pitchforks for a reason, to keep mad dogs at bay. Or Bay and Bloor. We also have virtual control over western Canada where all the money is, so if you elitists down there in Ontari-ari-ario want to retire before you are 87 and avoid a total economic collapse, then it might be smart to stop insulting everyone in western Canada every time you get anxious about having to live in the adult world, and perhaps think less about who we are and more about who you are, as in TRAITORS (collaboration with the enemy being the essential nature of TREASON, and treason being your apparent lack of concern for our national security and the safety of our fighting forces in the field of battle). Or, perhaps you should just ship off to the nearest Al Qaeda training camp like your hero young Khadr did (with his traitor-family's blessing) and take up arms against the hated Western civilization that you so obviously detest.
>
> The full post is attached as an Appendix to these Reasons.

[19] It is at this point that "Ms. Mew" enters the scene. Ms. Mew is another pseudonym used by Dr. Baglow, a not too subtle play on Dr. Dawg. Ms. Mew posted on Free Dominion on August 11, 2010, republishing the alleged defamatory statement and stated, "Baglow has already won one legal action against a similar libelous claim. This will make two."

[20] Peter O'Donnell replied:

> I don't see how it's intellectually consistent to support Omar Khadr and say you're not supporting the Taliban. In any case, as already stated re Warman, I don't recognize the moral authority of the Canadian legal system to interfere in political discussion and I will not pay any libel charges sustained in the now morally bankrupt Ontario court system. I will argue the cases but I would choose other responses than compliance if the verdicts sustain the Orwellian notion that Ontario judges have final say in matters of conscience and deep conviction, because I find this to be entirely opposite to the spirit of the constitution, and in any case, our country needs to be defended at this point in time against internal traitors and communist agitators. We don't want to make the mistake the Russians and the Chinese made in underestimating the power of socialist agitation to destroy freedom.

> I consider it to be very bad form for bloggers to sue other bloggers (or Internet posters) when they sense they are losing an argument. We expect that sort of thing from serial litigators who are not even courageous enough to blog under their own identities, but it breaks the unwritten code of honour when established bloggers do this. The Internet culture of political blogs has always been very free flowing, and this encourages the maximum exposure of the issues. Maximum disruption is something that autocrats and tyrants like to engage in, not civil libertarians, and Dawg styles himself as a liberal civil libertarian.
>
> I would also point out that the one shred of respect I do have for Dawg (whose sock-puppet informs us is Baglow) is that he will debate issues on third-party blogs and not just hide in his own clubhouse the way many liberals do. For example, he made the yokels with pitchforks argument on his own blog, but came over to Jay Currie's blog, where conservative-libertarian thought prevails generally, to argue his points (and take a mighty drubbing for his troubles). I think we need more of that in Canada, liberals in general have a code of silence where certain issues cannot be mentioned in public, and this is what I was getting at above about Scott Reid's assertion, it seemed to be one of those pronouncement that if we say something is so, then it is so.

[21] To which Ms. Mew responded:

> Omar Khadr hasn't been convicted of anything. Supporting due process and the presumption of innocence are apparently the same thing as being a Taliban supporter. I hope Baglow sues your ass, quite frankly. You are utterly out of bounds on this.

[22] Peter O'Donnell then stated:

> I assume it's the groupthink voice (a.k.a thought police) that posted previously as noonespecial or whatever. They are always on the lookout for any public expressions of Banned Thoughts that are not to be heard on the CBC or printed in the Grope and Flail.
> I simply don't care any more about the hurt feelings of Ontario progressives, you have issues, we have tissues.
>
> The false angst about Omar Khadr is disgusting to many Canadians who remember what happened to dozens of our fellow citizens on 9-11 among the large international death toll, and what could easily have happened to any of us if we had been travelling in Bali, London or Madrid. Or Mumbai on business for that matter.
>
> People like the Khadrs relished those scenes and have chosen the path of terrorism, which is a cowardly and profoundly anti-democratic activity -- even the Nazi's had a state and wore uniforms. This new crop of fascists (and that's who you're supporting, my proggy friends, a bunch of Islamo-fascists) don't have the

> courage to wear real uniforms, or fight under any recognized code of military engagement for their demented goals. They choose entirely innocent groups of civilians as their targets.
>
> If that's who you want to associate with, then don't come lecturing me about not being a Canadian, it's not me that's blowing up Canadian soldiers on patrol in Afghanistan. And let us know who you really are if you're such an exemplary citizen, we should have the chance to admire you in all your Torstar glory.

[23] Ms. Mew then "outed" Mr. Smith by stating, "Why don't you do the same, Roger Smith?"

[24] On August 11, 2010, the plaintiff sent an email to the Fourniers stating that he had been libelled as "one of the Taliban's most vocal supporters". He demanded that the post be taken down immediately and a formal written apology offered. He stated that if they did not, he would press the matter further, warning that he had already done so successfully in the past.

[25] The plaintiff's argument with Mr. Smith continued on Dawg's Blawg. On August 13, 2010, Dr. Dawg wrote, "They dare call it treason" with respect to his view on Omar Khadr, in which, among other things, he accused Mr. Smith of McCarthyism. This generated several responses from Mr. Smith, similar to the above, concerning the effect of the terrorist activities of the Khadrs and their kind and equating support for Mr. Khadr with support for the Taliban and "the enemies of our country". In the thread of this posting there is also some discussion of a potential defamation action with Dr. Dawg stating:

> Defamation is defamation. Are you implying that I should just let it go? Publicly calling me a 'vocal supporter of the Taliban?' In the case of Connie and Mark who continue to publish this libel, we can prove malice to the hilt, and it gets easier with every sick post they have subsequently made.

[26] Peter O'Donnell later responded:

> But go ahead and waste your time sueing me. I have nothing you would be interested in having. I'm sure the Bible and the Gulag Archipelago would be useless to you. Beyond that, your earlier actions already ruined my material existence so your just going to end up paying your lawyer thousands of dollars for no apparent reason. Warman's ahead of you in the que anyway, he couldn't take criticism any better than you can.

The Evidence at Trial with Respect to Defamation

Dr. Baglow

[27] Dr. Baglow has a Ph.D in Modern Literature, was a former public servant and an executive vice-president of the Public Service Alliance of Canada. He is presently a consultant in the fields of social and public policy, public sector issues and labour relations. Dr. Baglow

owns Dawg's Blawg, which he started in 2005. He explained that while he has control of the content on his blog, he chooses not to premoderate the comments posted on it. But he can moderate, after the fact and has taken comments down on occasion. There are two or three other individuals who blog on his site. He stated that his site has about 1,000 unique hits a day from visitors to it.

[28] Dr. Baglow explained that he is fairly political, started reading blogs and thought there was room for good left-wing commentary on Canadian politics and culture. He started Dawg's Blawg to advance a left-wing perspective. He chose the name Dr. Dawg as a nom de plume, as he likes dogs and did not want to take himself too seriously. However, he did not choose the name to hide and had no expectation that he would remain anonymous.

[29] Dr. Baglow stated that Dawg's Blawg is an open blog. However, he will not permit racist, anti-Semitic or abusive comments. He will not permit trolling or hate speech. Her explained that a "troll" is a person on the Internet who comes to a site in to pick a fight and is not interested in discussion. Dr. Baglow has the ability to ban commenters and has banned about 30 people, although some try to come back as "sock puppets". He stated that he welcomes people who are not from the "left" as he wants to host decent discussions and is looking for divergent opinions and debate. He stated that "mine is not an echo chamber". Dr. Baglow explained that he likes comments from people he profoundly disagrees with but who can mount a good debate. He stated that Mr. Smith had commented on his site infrequently, Ms. Fournier only once and that Mr. Fournier never did. He stated that he has posted on blogs that do not share his political views such as Jay Currie and Damnation. Dr. Baglow testified that on two occasions he has been accused of making defamatory comments on Dawg's Blawg. He retracted the comments and apologized.

[30] Dr. Baglow explained that he never made any attempt to hide his true identity and that it is well known in the political blogosphere that he is Dr. Dawg. He noted that he has written two dozen articles in the National Post from the left-wing perspective where it is stated "John Baglow who blogs as Dr. Dawg". He also noted that his name has been linked on many occasions to Dr. Dawg in Free Dominion since 2006. (See for example Tab 19, Exhibit 1, Free Dominion post March 11, 2009 by Ms. Fournier, "John Baglow Dr. Dawg laments Obama's support for Israel"). Further, he has posted on Rabble (a left-wing version of Free Dominion) where he has indicated that he is Dr. Dawg. In addition, in 2006, Small Dead Animals, a right-wing blog with a "huge" readership, referred to him as "Dr. Dawg – John Baglow".

[31] Dr. Baglow testified that he views Free Dominion as a radical, extreme conservative site. He sometimes finds it repellant and does not like the tone of it, or the opinions expressed. It is his view that the site takes a position on freedom of speech that champions the rights of holocaust deniers, neo-Nazis, white supremacists and homophobes, to spread their hatred unrestrained. He noted that he strongly supported the section 13 complaint process under the *Canadian Human Rights Act* and noted that this has been a hot button issue in the blogosphere. (As an aside, I note that throughout the trial there was reference to a number of section 13 cases involving hate speech and the debate between the "free speechers" or "speech warriors" and those who believe in reasonable limits on free speech – a debate in which these parties actively

engaged on the Internet). Dr. Baglow testified that he met Ms. Fournier at a Human Rights Tribunal hearing involving Marc Lemire, the last leader of Heritage Front and a neo-Nazi.

[32] Dr. Baglow was referred to a blog that he wrote on Dawg's Blawg entitled "Freedom of Speech" dated September 10, 2009. (Tab 14, Exhibit 1). It referred to an angry email he received from Ms. Fournier who complained about a comment he made on Jay Currie's blog where he suggested that if anyone wanted to come up with evidence that Nazis exist in Canada they should go through Connie Fournier of Free Dominion as she had worked closely with Marc Lemire, the former head of the Heritage Front. Dr. Baglow explained that he was not suggesting that Ms. Fournier was a Nazi, but simply stated that during the Warman and Lemire section 13 Human Rights Tribunal litigation, the Fourniers provided Lemire with computer expertise.

[33] Dr. Baglow was also referred to Tab 26, Exhibit 1, a posting that he made on Dawg's Blawg on March 14, 2010, entitled, "Suck it Up". He explained that he was profoundly offended by a posting on Free Dominion by Ms. Fournier which he found racist. He went "over the top" and called her a stupid name "Free Dominatrix". He stated that it is not his practice to call people names, but sometimes he could not help being "uncivil to the uncivil". He noted that there has been hostility between himself and the Fourniers based on their conflicting views and sometimes it "gets personal". Dr. Baglow also included in the posting a picture of the Fourniers receiving the George Orwell Free Speech Award in 2009, with the notation that past previous honourees included holocaust deniers Ernst Zundel, Malcolm Ross, David Irving and James Keegstra. Dr. Baglow testified that he has posted this picture about half a dozen times.

[34] Dr. Baglow was asked to explain why he did not view the comments of Mr. Smith posted in "They dare call it treason" with respect to him and others, calling them "traitors" and "guilty of treason", as defamation. He explained that he did not think that Mr. Smith's incoherent language would be viewed seriously. He was asked to explain the difference between being called "a vocal supporter of the Taliban" in "Hey yokels with pitchforks, there is no libertarian base" and being a "traitor" or being "guilty of treason" in "They dare call it treason". He explained that Mr. Smith's commentary to stand up for the human rights of Khadr is to stand up for the Taliban and Al Qaeda, is illogical and incoherent. It would be equivalent to saying that treating German POW's under the Geneva Convention was pro-Nazi.

[35] In contrast, the post "Hey yokels with pitchforks, there is no libertarian base", where the impugned words are found, was long and rambling and not about him. The only reference to Dr. Dawg was a "a vocal supporter of the Taliban". No context was provided for this statement.

[36] Dr. Baglow testified he wasn't worried about Mr. Smith's illogical rants in "They dare to call it treason". It was windy stuff. But he was worried about the impugned words in "Hey yokels with pitchforks". He was being called "a vocal supporter of the Taliban" at a time when Canada was at war with Afghanistan. Anyone could have googled Dr. Dawg and immediately determined it was him. It could affect his personal and professional reputation. He stated that there were tough times after 9-11.

[37] Dr. Baglow was referred to a number of posts which I do not intend to detail. Suffice it to say that they indicate the ideological battle going on between the parties over time on various issues, including the issue of free speech. These posts include:

a) Dawg's Blawg "Another Slobbering Threat" December 30, 2010, Tab 31, Exhibit 1

b) Dawg's Blawg "More Speech Warriors Unmasked" November 13, 2011, Tab 40, Exhibit 1

c) Dawg's Blawg "That 'ol Nazi Label" April 5, 2012, Tab 42, Exhibit 1

d) Free Dominion "The Dean Steacy Lawsuit Question" July 12, 2009, Tab 12, Exhibit 1 (where Ms. Fournier called him "the biggest idiot I have ever seen…a dinky little brain")

e) Free Dominion "Well, OK then, who is a neo-Nazi", October 14, 2009, Tab 17, Exhibit 1

f) Free Dominion "Galloway hoping to testify in Federal Court over entry ban" February 11, 2009, Tab 18, Exhibit 1

g) Free Dominion "John Baglow Dr. Dawg Laments Obama's support for Israel" November 3, 2009, Tab 19, Exhibit 1 (where Mr. Fournier calls Dr. Baglow an "anti-Semitic asshole" and an "anti-Semitic bigot")

h) Free Dominion "John Baglow and Michael Murphy, that's holocaust denial!!" November 7, 2009, Tab 20, Exhibit 1

i) Free Dominion "Warman, Kinsella, Dr. Dawg feel Ezra's beserker rage!" February 13, 2010, Tab 23, Exhibit 1

j) Free Dominion "Dr. John Baglow "Dawg" celebrates Israel Apartheid Week" March 1, 2010, Tab 25 Exhibit 1 (where Ms. Fournier refers to Dr. Baglow as a "moron", expressing "odious and bigoted views").

[38] Dr. Baglow testified that he has never supported the Taliban. He views them as an odious, political, jihadist extremist group, a murderous bunch of theocrats, practicing an extreme form of brutality. He referred to blogs that he wrote critical of the Taliban (Tabs 1 and 2, Exhibit 1). However, he also testified that he was not a supporter of Canada's mission in Afghanistan (Tabs 4, 5, 6, 7 and 8, Exhibit 1). He also explained his view on Omar Khadr. It is his view that Omar Khadr is a Canadian citizen and a child soldier. He should be repatriated to Canada and treated in accordance with International Law and the United Nations Rights of the Child Optional Protocol. Child soldiers should be rehabilitated and reintegrated (Tabs 13 and 28, Exhibit 1).

[39] Dr. Baglow testified that the language on Internet blogs can be caustic and polemical. One can expect strength of language and rudeness, but it should not enable false accusations about people. It his view that the political blogosphere allows for rough and tumble debate but should not allow falsehoods that are damaging to people.

[40] Dr. Baglow disputed the defendants' contention that the impugned words grew out of an ongoing debate over three blogs. He stated that there was a discussion with Mr. Smith on Jay Currie's blog. Then Mr. Smith came over to Dawg's Blog where they had an exchange. The post at Free Dominion with the impugned words was made at about the same time. Someone alerted Dr. Baglow to it, otherwise he might not have known about it. Dr. Baglow stated that Mr. Smith's post on Free Dominion was not a part of a conversation. It mentioned him in passing. There was no conversation on Free Dominion when the post was made, nor had he previously discussed Khadr or Afghanistan on Free Dominion with Mr. Smith or anyone else.

[41] When Dr. Baglow saw the post on Free Dominion he reacted with anger. He was horrified and upset. In the heat of anger he posted comments as Ms. Mew. He said he used Ms. Mew to startle. It was a riff on Dr. Dawg. It was Internet snark. He was trying to send a clear message that the line had been crossed. But in retrospect, he was not himself and should have stuck just to emailing the Fourniers. He sent an email to Ms. Fournier about one hour after his first Ms. Mew post.

[42] Dr. Baglow was referred to a number of posts on Free Dominion, written by the Fourniers and Wilderness Voice, after August 10, 2010, about the issues in this case and the litigation. I do not intend to detail these posts. Suffice it to say that they indicate that the litigation itself has been the subjection of discussion on the political blogosphere. These posts include:

a) Free Dominion "FD gets libel notice, but something has that wet-Dawg smell" August 12, 2010, Tab 31, Exhibit 1 (Ms. Fournier)

b) Free Dominion "John Baglow puts on his frilliest Internet dress for FD" August 12, 2010, Tab 33, Exhibit 1 (Mr. Fournier)

c) Free Dominion "SLAPPing the crap out of the conservative blogosphere" November 13, 2011, Tab 39, Exhibit 1 (Ms. Fournier)

d) Free Dominion "That 'ol Nazi Label" (referred to above)

e) Free Dominion "John Baglow – Civil or Criminal Action Next" July 8, 2012, Tab 45, Exhibit 1

f) Free Dominion "Who is or Wants to be Dr. Dawg or John Baglow" July 9, 2012, Tab 46, Exhibit 1

g) Free Dominion "Re: *Warman v. Fournier* and DOES – Day One" September 26, 2013, Tab 49, Exhibit 1

[43] With respect to damages, Dr. Baglow testified that he was upset and angry but now is just angry. He is very concerned that people who did not know him would make judgments against him. He also has professional concerns. He has worked for the Federal Government in the past and is worried he would not get further work from them. However he could not identify any financial loss.

[44] In cross-examination, Dr. Baglow agreed that he has written a lot about Omar Khadr and Afghanistan. He agreed it was a matter of great public interest. He testified that blogs respond generally to what has been reported in mainstream media. His posts are usually op-ed like and this is common with bloggers. He researches on occasion. He stated that he set up his blog as a counterpart to the right-wing. However he likes to host exchanges with both like-minded and not like-minded people. Dr. Baglow agreed that controversy brings readers. He stated that people interested in his blog would be interested in a progressive left-wing take on politics and culture.

[45] Dr. Baglow agreed that a reader of blogs does not expect in-depth reporting. Frequently readers challenge his version of the facts. He stated that he expects readers to challenge him. He agreed that part of the joy of blogging is challenging others. He agreed that for him a blog is a social experience and a gathering place for exchanging ideas where regulars often comment. He stated that people on the right and left would go on to the Jay Currie blog to battle.

[46] Dr. Baglow testified that in his view Ms. Fournier is a "speech warrior", that is, someone who believes in unrestrained free speech. He was directed to his comment on Jay Currie's blog "Hadjis v. Hadjis", September 8, 2009, that anyone wanting to find Nazis should try going through Connie Fournier. He stated that he was not saying or implying that she was a Nazi but simply that she knew Marc Lemire, the former head of the Heritage Front. Ms. Fournier responded to his comment by referring to him as a "hypocritical turd sandwich".

[47] Dr. Baglow was asked about "SLAPP" suits. They are strategic lawsuits against public participation. (A lawsuit that is intended to intimidate and silence critics by burdening them with the cost of a legal defence until they abandon their criticism). He stated that he does not believe in SLAPPs being used to shut people up but that he is tired of defamatory statements being made by people on the right. He was referred to his post on Dawg's Blawg "On Namecalling" September 18, 2009, where he talked about the rough and tumble of the blogosphere. He agreed that in this medium it is easy to read something, get emotional, write and hit send. He testified that he has gotten used to the culture of name-calling in the blogosphere and that unfortunately he did it himself.

[48] Dr. Baglow was referred to his post on Dawg's Blawg "Enabling Bigotry" where he criticized the CCLA for intervening in the "Boisson" case (Reverend Boisson expresses anti-gay views). He agreed he was very upset. He viewed the CCLA as enabling hate. He explained that he does not believe in the right of people to use unrestrained hate speech. He stated that the CCLA does and they have come to the aid of odious people. He strongly disagrees with unrestricted speech that attacks members of our society. Dr. Baglow agreed that this post and the many comments it generated was a good example of what goes on in the blogosphere. Some commenters got angry with him and he defended himself. He received 135 comments on his post. This was the most he had ever received.

[49] Dr. Baglow was directed to his tweets and post relating to Fern Hill's (a blogger as well) comment that people should support both sides financially in this litigation. He admonished Fern Hill to "pick a side". He stated that his case against Free Dominion has not been easy. He felt the "progressives" should support him. He stated that he was not defamed by a neutral party but by a site antithetical to him. He sees this case in the political context. He is strongly situated on the left. They are strongly situated on the right. The defamation did not arise out of thin air.

[50] Dr. Baglow was referred to his post "Off with his head". When asked whether he was trying to be provocative he stated that he did try to be provocative. That is what political polemic is.

[51] Dr. Baglow was directed to Mr. Smith's post "Hey yokels with pitchforks, there is no libertarian base". It was his view that the impugned words mean that he is in Canada, giving explicit vocal support to the enemies with whom Canada is engaged in war. Giving aid and comfort to the enemy. It was his view that most people don't bother reading threads. He did agree that Ms. Mew's comment at 1:56 p.m. on August 11, 2010, reflected his view that support for Khadr is not support for the Taliban. Dr. Baglow stated further that if someone called him a pedophile he wouldn't argue back and forth. He does not care about what is said in a thread. People don't read threads. Mr. Smith made an unvarnished statement. Dr. Baglow stated that he made a couple of comments in the heat of anger as Ms. Mew, not really trying to disguise himself. According to Dr. Baglow, Mr. Smith's statement did not get erased by a little back and forth on what Dr. Baglow's position really is. Dr. Baglow did not agree that republishing the impugned words (as Ms. Mew) and including his real name was amplifying his damages.

[52] Dr. Baglow agreed that he and the Fourniers are ideological enemies. He agreed that he referred to the Fourniers as "numpties". He said that antagonism between them had grown over the years. He stated that the Fourniers wrote posts that were very antagonistic with respect to him in 2009. He stated that they disagreed strongly with the use of section 13 of the *Canadian Human Rights Act*. He stated that his objection to the defendants is on the basis of their ideas and actions. He agreed that he has shown scorn and contempt for their positions.

[53] Dr. Baglow was asked by Ms. Fournier why he only sent the email asking for the impugned words be taken down to her. He stated that he thought she would advise her husband and he did not have Mr. Smith's email address. He was not aware that Mr. Smith was a moderator on Free Dominion and could have deleted his own posts. He explained again why he did not sue Mr. Smith for calling him a traitor. A context had been set out with respect to those comments, which when read showed that Mr. Smith made a fool of himself.

[54] Through Mr. Frankel, counsel for the CCLA, Dr. Baglow explained the difference between a message board and a blog. Free Dominion is more like a message board (I note that the terms "message board" and "forum" were used interchangeably in evidence). When a forum is navigated, one will find a list of subforums. Within subforums there will be a list of conversations (a post followed by comments). In a forum, once a post is made, it will appear at the top of a list. If people don't comment it goes down the list and may even disappear. To get to "Hey yokels with pitchforks, there is no libertarian base" on Free Dominion one has to navigate through a series of headings to get to "Opinions are Like Clymers".

[55] Dr. Baglow agreed that commenters on blogs espouse their views and that Dawg's Blawg is an outlet for his views on social, political and cultural matters. He agreed that he enjoyed the cut and thrust of debate. It is a rough and tumble medium, where language is rude, strong, confrontational and hyperbolic. There is name-calling and the level of sarcasm is extremely high. He also agreed that there are blogs that are more academic and more civil, where you don't expect the same type of language as found on Small Dead Animals or Free Dominion.

[56] Dr. Baglow referred to "Godwin's Law". It is an Internet adage or axiom that "the longer an online discussion grows, the probability of a comparison or mention of Hitler and the Nazis approaches one". Further, he stated that it is generally accepted that the first person who uses a reference to the word "Nazi" or "Nazism" loses the debate.

[57] Dr. Baglow agreed that because of the level of discourse in the political blogosphere, he did not always take everything at face value. He said it had to do with tone, rhetoric and hyperbole. He was referred to a blog where someone called him a "Shill for Hezbollah". He did not take that seriously, but said it was a very silly thing to say within the context. However, if there was an article somewhere where he was simply referred to as a "Shill for Hezbollah", without any colouration or surrounding commentary, he would have taken a very different view of it. Dr. Baglow stated that context is very important. For example, he said that the views of Kathy Shiadle (Five Feet of Fury) are so extreme, ordinary people would not afford her much credibility. However, if she were to make an accusation against him that he was a rapist, a pedophile or a supporter of the Taliban, that would be very different.

[58] Dr. Baglow was directed to the writings he has done for the National Post, "The Full Comment". He stated that they are generally lifted from his blog and rewritten, to make them more "op-ed" like. He would not use language such as "yokels with pitchforks" in those writings. The language is somewhat more measured. Mr. Frankel then took Dr. Baglow through a comparison of what he wrote on Dawg's Blawg, "The elevation of Vic Toews", March 8, 2014. In this blog he stated Mr. Toews "distinguished himself…an ill-conceived liking for torture". Dr. Baglow testified that this was a little overstated but that he had blogged about this before, that is, that Mr. Toews wanted to make the fruits of torture admissible as evidence. He hoped or imagined that his readers would know the context which was really common knowledge. But if he had received a letter from Vic Toews' solicitor saying this was going too far, he would have taken it down.

[59] Dr. Baglow was referred to the impugned words. He confirmed that he did not think the words meant that he participated in active hostilities against the Canadian Forces in Afghanistan but that he gave aid, comfort and encouragement to the Taliban, a people with whom Canada was involved in active hostilities. He was then directed to Mr. Smith's previous comment on his blog the tenor of which was, support for repatriating Omar Khadr to Canada amounts to treason and Dr. Baglow's evidence that these comments were woolly, incoherent and silly. Dr. Baglow was asked whether Mr. Smith's opinion, is one that a Canadian is capable of honestly holding. Dr. Baglow responded that he did not know.

Roger Smith

[60] Mr. Smith has a B.A. in geography and statistics. He was educated as a climate scientist and has done weather forecasting and research, although presently he works at various part-time jobs. He became interested in political blogs and joined Free Dominion in 2005. He has participated in a number of blogs and forums although Free Dominion is his home base as an Internet political enthusiast. He stated that on Free Dominion there are about three dozen subforums. He has started subforums on classical music, weather forecasting and weather events. Mr. Smith is a moderator on Free Dominion. He has the ability to edit, remove or change anything on the forum. Eighty percent of what he posts on Free Dominion concerns politics and religion. Mr. Smith stated that he leans towards libertarian conservative. He described Free Dominion, "The voice of principled conservatism" as a big tent for conservatives.

[61] According to Mr. Smith, most of the members of Free Dominion today are civil libertarians. Civil libertarians believe in the expansion of individual liberties, unlimited freedom of speech and association and small government. But Free Dominion is a good meeting place for social conservatives who are mostly religious people, fiscal conservatives, civil libertarians, law and order conservatives and progressive conservatives or "red tories". There has been a lot of discussion on Free Dominion on the same sex marriage issue, politics in the Middle East and the section 13 human rights debate which has evolved into a discussion of Internet freedom of speech.

[62] Mr. Smith stated that the case turns on conversations that took place on the conservative blogosphere and the plaintiff's blog. It started on Jay Currie's site in "Mid Summer-Election Speculation" on August 8, 2010, where Dr. Dawg referred to Harper and his "nutbar" colleagues, "slack-jawed yokels" and made "prescientific comments". This opened the left-right debate. Peter O'Donnell then spoke on behalf of slack-jawed yokels, at page 2 of the thread on August 9, 2010. On August 8, 2010, Dr. Dawg wrote "Off with his head" on Dawg's Blawg. Mr. Smith pointed to the cross-pollination between Dawg's Blawg and Jay Currie's site. The comments indicate that quite a few people read both. According to Mr. Smith, the discussion built-up on Jay Currie's blog. Dr. Dawg had his say there insulting conservatives and he got it back in same form from John Begley. At 11:33 a.m. on August 9, 2010, on Jay Currie's blog, Mr. Smith (a.k.a. Peter O'Donnell) started to talk about the two themes he was going to talk about on Free Dominion. "Yokels with pitchforks…sounds like beer and popcorn to me" and Omar Khadr. According to Mr. Smith "beer and popcorn" is a generic reference to inopportune political comments.

[63] Mr. Smith then referred to Dawg's Blawg and "the Gitmo Kanga Ruse". Mr. Smith stated that Dr. Dawg has identified himself as someone in the forefront of the movement of progressives to bring Khadr back to Canada to be protected by Canadian justice. From Mr. Smith's perspective the legal situation with respect to this issue is complicated. Mr. Smith replied to this post on Dawg's Blawg as "Jolly Old Saint Knickerless" on August 10, 2010, at 6:48 p.m. In his view he was expressing a widespread conservative viewpoint that if you join a terrorist group you will not be treated like soldiers covered by rules of engagement. The comment indicated that support for Khadr equated to support for Al Qaeda and the Taliban and amounted to treason.

[64] Mr. Smith then posted "Hey yokels with pitchforks, there is no libertarian base" on Free Dominion on August 10, 2010, as Peter O'Donnell. He stated that he was speaking ironically to the readers of Free Dominion. He found it strange that a seasoned liberal (Dr. Dawg) could say there was no libertarian base and he responded to that. He made reference to the BC Human Rights Tribunal Case involving Mark Steyn and Maclean's magazine (concerning the free speech issue). His post also referred to the East-West cultural divide in Canada. It then went on at page 2, paragraph 3 to talk about "TRAITORS" and "TREASON". Mr. Smith stated that what he was trying to say was that in conservative circles there is not a lot of sympathy for Khadr. If you are on his side, you are on the side of his family who are not loyal citizens of Canada. In Mr. Smith's view terrorists should be charged with a crime. His post then went on to talk about the ongoing culture war in Canada. In Mr. Smith's view there is a political correctness ideology that is becoming a religion.

[65] Ms. Mew then commented after Mr. Smith's post. Mr. Smith replied first that it is not intellectually consistent to support Omar Khadr and say you are not supporting the Taliban. He then went on to give his view on "lawfare". He considers it very bad form for bloggers to sue each other.

[66] Mr. Smith testified that what he posted is his honest and sincere opinion. He does believe that Omar Khadr and his family have shown a treasonous view towards Canada. Khadr was no longer acting as a Canadian when he went over to Afghanistan. While he has never thought that the Taliban reflects the views of the left, what he was saying was that if you give aid and comfort to a member of a terrorist organization, you are giving some support to that organization. This is his honest opinion.

[67] Mr. Smith testified that initially he did not known who Ms. Mew was. Ms. Mew had only posted five times previously on Free Dominion, but by 1:36 p.m. he was aware that Ms. Mew was Dr. Baglow's sock puppet. He stated that much of the thread is a discussion of why Ms. Mew came on the site. At 2:43 p.m. Mr. Smith commented again about his view with respect to Omar Khadr. At 3:38 p.m. Ms. Mew specifically referred to him as "Roger Smith". Mr. Smith testified that only seven members of Free Dominion commented on the "Hey yokels with pitchforks" thread.

[68] Mr. Smith described the "maximum disruption" philosophy, a philosophy that has people in court as much as possible, so they cannot do their work. He saw this lawsuit as frivolous and vexatious. He stated that this case is a proxy for the culture war which will never go away. He noted that what goes on the Internet often gets personal but that he tries to stay away from that. He found it ironic that he is a defendant in this case. There are other people who are much more hostile than he is.

[69] Mr. Smith testified that Dr. Baglow never sent him an email asking him to remove the impugned words. Dr. Baglow's counsel sent him a notice of libel 45 days later. He did not remove the impugned words because it was a statement of his honest opinion and that would violate the code of bloggers. Bloggers want to dialogue about complex issues. If you say something that someone disagrees with, legal action is not the way to go.

[70] In cross-examination Mr. Smith was directed to "Mid Summer-Election Speculation" where there was no mention of Khadr or Afghanistan until his comment at 11:33 a.m., "Where does Omar Khadr fit in your world view". He stated that the context of his comment was the "Yokels with pitchforks" theme. This was an example. Mr. Smith agreed that as a moderator at Free Dominion he can delete or edit comments. On routine matters such as spam or spelling he would not communicate with the Fourniers but on bigger issues he would. Initially, he thought Ms. Mew was a friend of Dr. Dawg.

[71] Mr. Smith agreed that his response to Ms. Mew in the "Hey yokels with pitchforks" thread, that Canada needs to be defended against "internal traitors and communist agitators" referred to Dr. Baglow. Mr. Smith would not agree that he knew at that time that Ms. Mew was Dr. Baglow. He stated that he assumed they were part of a group disrupting Free Dominion. Mr. Smith was referred to his comment in "Hey yokels with pitchforks" about an "unwritten code of honour" that bloggers do not sue each other. He testified that he was stating his personal opinion and that almost everyone he has talked to who posts on political forums thinks that lawsuits are wrong and that they will chill discussion. It is his view that people are against "lawfare". Mr. Smith stated that he believes that Dr. Baglow targeted Free Dominion to inconvenience them and that he is collateral damage.

[72] Mr. Smith was asked why he went over to Dawg's Blawg to comment on "They dare call it treason". He said that the main reason was that Dr. Baglow mentioned him by name in the originating post. Mr. Smith saw that as hostile. He made some 20 comments on this post. This long thread was his last attempt to communicate on these issues.

Connie Fournier

[73] Ms. Fournier was trained as a radiographer in the 1980s, then stayed home to raise her children and went back to school in 2007 and became a computer programmer analyst. Prior to going back to school she taught herself how to get around the Internet and create websites. She became interested in politics and how people were using new media to participate in the political process. She and her husband Mark are the moderators and administrators of Free Dominion. It is a message board, a politically conservative venue, which was accessible free of charge to any member of the public. Free Dominion started in January 2001 but was closed to the public after an injunction was granted by Justice Robert Smith in February 2014 in the case of *Warman v. Fournier,* (2014 ONSC 412, 2014 CarswellOnt 857) because it was unclear from his order whether they would be held responsible for an anonymous poster who wrote something.

[74] Members were entitled to post their own opinions directly to the board once they opened an account. Almost all used pseudonyms. Ms. Fournier testified that at the time relevant to this case, Free Dominion was a well-established, high-traffic message board with nearly two million posts and over 3,000 daily visitors. Members discussed political issues from a conservative point of view. She stated that occasionally people got angry but it's not unexpected that people discussing politics would get passionate about it. When fights broke out ("flame wars") she and Mr. Fournier generally took a hands-off approach and allowed posters to work out their differences for themselves.

[75] Ms. Fournier testified that an article's title would initially be seen on the Active Topics page. Ms. Fournier stated that it was her experience that an article had a very short time span to catch a reader's attention after it was opened. A reader might make a comment often agreeing or disagreeing. Every time a comment was made to a thread, the post would move back to the top of the Active Topics page. If no comments were made for a while, the post would move down the page, until it moved off. In her experience as moderator, as more comments were made to a Free Dominion post, more people would click on it to see what others were saying and the initial post became less important as the conversation evolved. There could also be "thread drift", where the initial post was no longer relevant.

[76] Ms. Fournier described Free Dominion as a mainstream political message board. She stated that she is not a white supremacist, nor does she hold racist, homophobic or neo-Nazi views. She noted that Free Dominion has a language filter that blocks distasteful words such as the n-word with asterisk. She stated that they tried to strike a balance between a forum with open discussion and a family friendly atmosphere. As moderators, she and Mr. Fournier had the ability to delete posts from the message board but did so rarely. The ethos of Free Dominion and its members was that open discussion is better than deletion and deletion is only to be a measure of last resort for things such as pornography or trolls.

[77] Ms. Fournier testified that Dr. Baglow is a progressive, left-wing commentator and very antagonistic to the conservative viewpoints held by the members of Free Dominion. She stated that he has regularly expressed his derision, scorn and contempt for her and other members of the political blogosphere. He has called her the "Free Dominatrix", a "numpty" or Mark's "equally thick wife". Ms. Fournier stated that while the plaintiff's real name is known to people who participate extensively in the political blog scene, she did not believe from her experience it would be known by a casual reader without some googling. Until this case started she had met John Baglow only once at a Canadian Human Rights Tribunal hearing. He was introduced to her as Dr. Dawg.

[78] Ms. Fournier testified that when she had to make the judgment call as to whether the impugned words were defamatory, she considered Dr. Dawg's own posts about others as an indication of what he considered to be defamatory in his critical comments of others. Ms. Fournier pointed to Dr. Dawg's comment in the post "Hadjis v. Hadjis" on Jay Currie's site, that if anyone wants to find Nazis they should try going through Connie Fournier as she worked with the former head of the Heritage Front. When Ms. Fournier complained to him about this he responded by posting her private email on his blog and according to Ms. Fournier, ridiculed her. It is Ms. Fournier's view that Dr. Baglow was attempting to smear her simply because she was opposed to section 13 of the *Canadian Human Rights Act*. Ms. Fournier did not sue Dr. Baglow even though he invited her to and instead wrote a post in her own defence on Jay Currie's site.

[79] Ms. Fournier stated that on Free Dominion they had a policy not to interfere in arguments between pseudonymous posters by deleting posts or banning people. They considered a pseudonym to be similar to protective gear that posters wear in the online battle of words. The real person was protected from reputational damage from slings and arrows, by the pseudonym he or she used in the forum. In her experience people who used pseudonyms were more likely to attack harder or respond in a less inhibited manner. If negative comments were made about

someone using their real name, the Fourniers still tried to encourage posters to resolve their differences, but they investigated the situation more closely and deleted the comment or banned the poster if they felt it was necessary.

[80] Ms. Fournier stated that unless a thread was very active with many people posting, it rarely stayed in the Active Topic pages for more than a day or two. At the time the impugned words were posted the site was busy enough that a post without comments scrolled off the Active Topics page within hours. To find a post that had scrolled off, one would have to use a search engine like Google. According to Ms. Fournier, Google was not efficient in archiving Free Dominion threads at that time because Free Dominion's server was overseas.

[81] Ms. Fournier testified that she first became aware of the thread when Dr. Baglow emailed her on August 10, 2010, and complained that the impugned words libelled him. Ms. Fournier investigated the thread. She noted that one person replied to that thread approximately three hours after it was posted and then no one did until Dr. Baglow posted about 27 hours later as Ms. Mew, bumping the thread back to the top of the Active Topics page. Prior to Ms. Mew's post the post would have been difficult to find and was essentially dead. The Ms. Mew post, repeated the impugned words and added Dr. Baglow's name to the thread. Ms. Fournier investigated and confirmed with Jay Currie that Dr. Dawg's IP address was the same as Ms. Mew. She stated that Dr. Baglow had since admitted to making the Ms. Mew posts, but not until they had proof from Jay Currie.

[82] In making the decision to leave the post up, Ms. Fournier stated that they reasoned that anyone who was seriously interested in the reputation of Dr. Baglow would google "John Baglow", not Dr. Dawg and Dr. Baglow's name did not appear in Mr. Smith's post. The Ms. Mew post concerned her because it brought Dr. Baglow's real name into the discussion. If Ms. Mew had not turned out to be Dr. Baglow, she would have removed that post because it identified him. It was her opinion at this point that Dr. Baglow was not genuinely interested in his reputation at all.

[83] Ms. Fournier also testified that after Dr. Baglow complained, she researched the post made by Peter O'Donnell, "Hey yokels with pitchforks" and found his posting to be a very small part of a large, ongoing political argument between Dr. Baglow and Mr. Smith which started off with speculation about a Federal election and ended up with the Taliban and Canada's treatment of Khadr. According to Ms. Fournier this argument had played out largely on Dr. Baglow's blog although it had spilled over to Jay Currie's blog, as well. Neither Ms. Fournier nor her husband participated in this debate.

[84] Ms. Fournier stated that as moderators of a very large, busy political forum she and Mr. Fournier took the deletion of posters comments very seriously. They could not possibly monitor every post made. Because of the political nature of the board, heated debates took place. If they were expected to delete every comment that was complained of, it would kill the discussion on the forum. Therefore, they investigated complaints carefully, but rarely deleted. In this case, they decided to leave the comment up because Dr. Baglow allowed Peter O'Donnell to write similar things on Dr. Baglow's own blog. Those comments remained on Dr. Baglow's blog for months and Dr. Baglow even responded to them there. The comments concerned a

matter of public interest and in the Fourniers' opinion it seemed like a typical fair comment on a political message board given the position of Dr. Dawg regarding Omar Khadr. These views would be well-known to readers of Dr. Dawg. If a reader of the impugned words did not know Dr. Dawg, they would not know who he was in real life either.

[85] Ms. Fournier also noted that in October 2009, Dr. Baglow was involved in a similar situation when he complained that Adrian MacNair had libelled him. Mr. MacNair posted a retraction and an apology for calling Dr. Baglow "an admitted supporter of the Taliban". She regarded the blog that Dr. Baglow wrote after the retraction and apology as ridiculing, bullying and humiliating. They were aware of what Dr. Baglow had done to Mr. MacNair at the time that Dr. Baglow complained about the impugned words. They knew if they apologized he would do the same thing to them. Further, when considering whether the comments were defamatory, she also considered his own posts and his comments about others.

[86] Ms. Fournier testified that on August 30, 2012, they enacted a new policy on Free Dominion that people were not to post articles or links to Dawg's Blawg. They did allow discussions about this case, but they did not want people talking about Dr. Dawg or trying to debate him on their website. Ms. Fournier went on to describe what she sees as a campaign of harassment by Dr. Baglow. It is her view that he is trying to ruin them financially, destroy her reputation and make others afraid to associate with them.

[87] In cross-examination Ms. Fournier explained that as the administrators of Free Dominion, she and Mr. Fournier can choose who can be a moderator. She and Mr. Fournier are the only people who can ban persons from the site. She noted two categories of banning. Trolls are banned (A troll is a person who is trying to get people into a great big fight). The Fourniers have banned people from both the left and right for trolling. But this happens rarely, about once every two months. Spammers are also banned. She and Mr. Fournier have technical responsibility for the site.

[88] Ms. Fournier testified that until 2014 anyone could become a member and post or comment by registering on Free Dominion. They would have to choose a screen name, have a valid email address and accept the terms of service (the site rules). Terms of service basically required members to play nice, use family friendly language, and keep debate civil. There are no releases or disclaimers. Ms. Fournier stated that while Free Dominion is set up as a conservative message board they did want left-wing commentators to participate and debate. They prided themselves on not banning people for their political views. Free Dominion had about 3,000 visitors a day. Visitors would be anyone who came on the site to look ("lurkers"). Ms. Fournier estimated that there were between 100 to 300 commenters a day.

[89] Ms. Fournier testified that if someone says something inaccurate in the blogosphere, or if an issue is controversial people are waiting to tell them they are wrong or to say "show us the facts". According to Ms. Fournier this didn't happen with the impugned words because people treat pseudonyms differently. She stated that if someone says something inaccurate about a person, that person can refute it on the spot and neutralize it. She stated that "we all look after our own reputations". Individuals have the power to refute what is said about them. Dr. Baglow chose not to. Ms. Fournier further stated that lawsuits are dangerous for the blogging

community. This is not traditional media. It is spontaneous and happens in a moment. People are already shutting down their comments section. Forums like Free Dominion are not the CBC or the National Post. They cannot afford legal costs or to pay damages. They do this as a hobby, not a business. If people had not donated to the Fourniers' legal fund, they would have been destroyed years ago.

[90] Ms. Fournier disputes how many people would have known that Dr. Baglow was Dr. Dawg simply by reading Peter O'Donnell's impugned words. It is her view that prior to Dr. Baglow calling her a Nazi there may have been about ten posts where his real name was used on Free Dominion out of 2,000,000. Thereafter there were many posts where she used his real name. She said that he used his pseudonym to call her a Nazi by her real name. He said that she was supporting the National Front. She was being uncivil to the uncivil by using his real name thereafter. Ms. Fournier agreed she called Dr. Baglow, "The thin skinned little weasel" (on Free Dominion, September 22, 2009). She stated that she was very angry at the time with respect to the above noted Nazi comments. She agreed she called him "a freaky little man" (on Free Dominion, November 2, 2009), but stated it was hyperbole. Ms. Fournier was referred to eight posts over eight months where she identified Dr. Baglow as Dr. Dawg. She was asked if someone had put Dr. Dawg in Free Dominion's search engine they would be directed to these posts. She stated that the search engine did not really work.

[91] Ms. Fournier denied that she bears malice against Dr. Baglow. She said that anger is not malice. He made her angry but his specialty is to make people angry. She was asked if the impugned words had been said about someone else, would she have taken them down. She responded, she would not have taken them down if a pseudonym had been used. She felt that the impugned words were mild in the circumstances of the rough and tumble debate on the political blogosphere. Ms. Fournier stated that she did not handle his request to take down the impugned words any differently than other requests. They applied their usual policy concerning pseudonyms. They took into account a number of factors not the least of which, that he chose to put his name on it. She stated that they would have taken the Ms. Mew comment down if it had not been written by Dr. Baglow. Ms. Fournier reiterated her belief that Dr. Baglow was not really concerned about his reputation but with shutting Free Dominion down. Anyone really concerned about their reputation would not tell people to google Dr. Dawg and Free Dominion or make the Ms. Mew post.

[92] Ms. Fournier agreed that Dr. Baglow never called her a Nazi but he said she worked closely with the head of the Heritage Front. It was pointed out to her that she called Dr. Baglow "a turd sandwich" (Jay Currie's Blog, "Hadjis v. Hadjis") and on Free Dominion she referred to "his dinky little brain" ("The Dean Steacy Lawsuit, July 12, 2009). She said this was the normal stuff of the blogosphere.

Mark Fournier

[93] Mr. Fournier testified that he did not read the impugned words before receiving Dr. Baglow's complaint. He said that the "Hey yokels with pitchforks" post did not make sense to him and he thought it may be part of another ongoing debate elsewhere. It was one person's pseudonym insulting another person's pseudonym. Further, it was obvious to him that this was a

comment only and not a statement of fact. It was a typical "flame" comment. He stated that he did not think it was defamatory. It was Mr. Fournier's understanding that a comment cannot be considered defamatory. He saw the complaint from Dr. Baglow as aggressive. However he was troubled by the Ms. Mew comment. He thought that Ms. Mew might be a girlfriend of Dr. Baglow or someone from Dr. Baglow's threads.

[94] Mr. Fournier testified that he then went back to Ms. Mew's first post on Free Dominion. That post read:

> 'Genuine anti-Semites like John Baglow'
> You do realize that this is defamatory and actionable, I trust.
> Lucky for you Baglow doesn't visit here.

[95] Mr. Fournier saw Ms. Mew's posts as almost identical and began to suspect Ms. Mew might be Dr. Baglow or someone from his site. Ms. Fournier contacted Jay Currie and confirmed that Ms. Mew was Dr. Baglow. Further, Mr. Fournier testified that a sock puppet is designed to deceive. According to him there is almost an obligation to out a sock puppet in the blogosphere. In addition, he agreed with Ms. Fournier's post at Free Dominion on August 12, 2010, "FD gets libel notice, but something has that wet Dawg smell" and stood by his post at Free Dominion on August 12, 2010, "John Baglow puts on his frilliest Internet dress". The photo that he included (a photoshopped picture of Dr. Baglow in a corset with stockings) was a typical spoof. According to Mr. Fournier one can find a "bazillion" of these on the Internet.

[96] Mr. Fournier testified that he never believed the impugned words were defamatory and would not have taken the words down for anybody. However, he felt that the Ms. Mew comment added a whole new dimension. It was a game changer. Mr. Fournier felt they were being played, that Dr. Baglow was trying to get damages. It was logical for them to out Dr. Baglow for what he did. Mr. Fournier testified that the emails between Jay Currie and Dr. Baglow on August 11, 2010 ("Like lancing a boil" – Exhibit 10) show Dr. Baglow's state of mind. Dr. Baglow never mentioned suing Mr. Smith. Mr. Fournier felt that Dr. Baglow was trying to bully them.

[97] Mr. Fournier stated that Free Dominion encourages the free flow of ideas. If they had taken down the post, it would destroy the board. He added that it was a serious misrepresentation of their views to suggest that they want unfettered free speech on the Internet. It is their position that defamation law is inadequate to deal with situations like this. It is their position that they should not be responsible for the words of others. They are here because two old guys got into a fight on the Internet and somebody wanted to get into a political fight. Mr. Fournier stated that defamation law has become the new section 13. He stated all he and Ms. Fournier do is provide a place for people to talk. They should not be required to have a battery of lawyers.

Dr. Greg Elmer

[98] Dr. Elmer was appointed by the Court as an expert pursuant to Rule 52.03. He holds a Ph.D in media and communication from the University of Massachusetts Amherst. Dr. Elmer is

currently a Professor of Radio and TV Arts and the Bell Globemedia Research Chair at Ryerson University. His *curriculum vitae* was reviewed and I found him to be an expert qualified in the area of Internet social media, culture and communications, including communications of a political nature.

[99] A number of questions were put to Dr. Elmer which were appended to the order made by the Court on July 16, 2014, appointing him as an independent expert in this matter. Dr. Elmer prepared a report in response. Dr. Elmer indicated that he attempted to use accessible, non-specialist language in the report, but he provided two definitions to assist:

> Platform – to refer to social media sites such as Twitter and Facebook, replacing the more generic term "website"
>
> Actor – to denote an individual who engages in political commentary on various Internet-based platforms and sites.

[100] Dr. Elmer stated that computer mediated communication is a much less formal type of communication particularly when compared to previous analogue forms. The same is true for online political actors on chat rooms, blogs and discussion boards ("BBS"). Short form expressions and acronyms such as ICYMI (In case you missed it) or IMHO (In my humble opinion) are commonly used in posts and comments. Further computer mediated communication is also characterized by its lack of punctuation and use of "emoticons" to denote feelings and moods. Many linguistic conventions and styles on BBSs, chat rooms, et cetera are derivative of early computer hacker language. They are common expressions, phrases and styles used specifically on Internet-based sites and platforms, including those frequented by online political actors.

[101] Dr. Elmer noted that because of the brevity of online communications, an online political actor's choice of words is important. In addition, the lack of non-verbal cues (for example facial expressions that might indicate sarcasm or joking) tend to exacerbate debates over the meaning and intent of specific phrases and words. Misinterpretations are frequent. Dr. Elmer also noted that in chat rooms and blogs, conversations and debates are anchored by typed/written language, and disputes, misunderstandings and claims about positions often refer back (with the help of hyperlinks) to the specific words used in posts.

[102] Dr. Elmer referred to a study of 260 blogs by Zizi Papacharissi. She stated that bloggers, as a group, tended to use not only informal but "whimsical" language. Among her sample study, 54% of the blogs used humour, sarcasm (42%), irony (42%), self-deprecation (39%), jokes (29%) and offensive language (14%). However, in cross-examination Dr. Elmer indicated that this study was based on blogs in general. If the focus had been partisan, political blogs, these forms of communication (for example, sarcasm) would be even higher. He agreed language can be harsher, more vulgar, spirited and personally directed on political blogs and message boards. He also agreed that invective and hyperbole are common.

[103] Dr. Elmer stated that it is common to have large numbers of individuals visit and/or read posts/comments on discussion boards and blogs without ever posting anything ("lurkers"). He

referred to a report prepared by PMB Measurement Bureau which found that the number of Canadians who read blogs on a monthly basis (28% or 7.9 million) is far higher than those who claim to have published a blog (4%) or left comments on a blog (15%).

[104] Dr. Elmer stated that standards of conduct for those who post comments on boards and blogs are often discussed by the participants, owners, and moderators of boards, blogs, and social media platforms. Generally, standards of conduct are either set by the heavier users of a site or more tightly governed by the moderator(s) or owners. Differences are explained by a number of factors including, the historical founding of the discussion board or blog, the constitution of its members or primary users and the specificity of the site's principal set of issues and mission.

[105] Dr. Elmer noted that in the early days of political blogging in Canada (roughly 2004-2009), bloggers would engage in spirited partisan debate. He noted that online political actors expected a more intensely partisan environment during heightened periods of political activity in Canada (for example, election campaigns, political scandals, major international events and conflicts).

[106] Dr. Elmer referred to T. Giasson et al.'s 2012 survey of political bloggers across Canada which found that common expectations among a large cross section of online actors are shared. Bloggers listed "attack and critiquing opponents" as the most common goal of blog posts, followed by the forwarding of a partisan position and defending and promoting the opinions of perceived allies. Dr. Elmer concluded that overall, online political actors are well aware of the confrontational nature of Internet-based political activity and communication. At trial he stated that they expect it.

[107] Dr. Elmer stated that on sites with more active moderators or owners, political speech and activity tends to be more actively policed and regulated or users tend to share a common conception of acceptable language and behaviour. He noted that some sites may post explicit directions for users in order to inform users about what is considered unacceptable behaviour on that specific site. However, he believed generally, that to encourage participation on blogs and boards, moderators tend to limit their interventions to the harshest of conflicts, and only after encouraging users to settle disputes themselves.

[108] It is Dr. Elmer's view that the overall tone and perceived partisanship of a particular blog or board may encourage or discourage individuals from posting or commenting. Many sites have long histories and reputations of fostering political debate, sticking to political positions, or sometimes engaging in harsh language and personal attacks. Individuals may also avoid or conversely, seek out sites that are owned or moderated by groups of online actors, typically sharing a common political viewpoint in the hopes of avoiding or encouraging debate. The "community"-based sites (with multiple participants) can witness sharper exchanges as people seek to cultivate a more visible online presence and reputation. Dr. Elmer stated that the same can be said of individual blogs. People are seeking to establish their own presence and reputation.

[109] A recent survey of political bloggers conducted by Dr. Elmer's research lab and co-author Dr. Ganaele Langlois found that political bloggers were motivated to spend upwards of

eight hours per week on their blogs in the hopes of achieving some political influence. The survey found that individual motivations included a desire to "voice opinions" (61%), seek social and political change (18%), complement the content of mainstream media (18.5%), circulate information (12%) and "fight opposing ideas" (9%). While Canadian bloggers view their goals as "informing their readership" (49%), slightly more saw "debate" as their main goal (51%). According to Dr. Elmer at trial, people want to be heard. Blogs and bulletin boards are sought out by individuals looking for opinion and content not covered, or poorly covered by mainstream media.

[110] Dr. Elmer noted that blogs are archive oriented. Instead of substituting new materials for old ones, as is normally done on regular webpages, postings are added without erasing previous content. The mounting compilation of postings serves as a context for readers of blog sites. He also noted that bloggers and other online actors have distinctly different expectations of social media and web and blog platforms than of mainstream media. He stated that the obvious difference between the nature of discourse in online communication is that such sites offer a 24/7 always-on ability to debate and interact with others. Posts and comments appear in near-real time (except when a moderator's approval is required). The speed of communications facilitates more personal, "life-like" interactions. Dr. Elmer stated that conversations with lags in responses or non-responses can become fodder for ridicule.

[111] In addition, Dr. Elmer indicated that newspapers and the mainstream media are still regarded as professions that conform to generally held practices, ethics and guidelines set by journalist associations, university/college departments and media employers. The same cannot be said of bloggers or other online political actors.

[112] Dr. Elmer noted that bloggers and other online actors often hyperlink to documents, pictures and comments that "speak for themselves". Therefore, unlike mainstream media, there is much less need to provide background and summaries of the issues at hand. As a consequence discourse tends to focus more on opinion, argument, sarcasm and questions.

[113] Dr. Elmer stated that the comments section of sites serve as a key indicator for owners and moderators of their sites' reach, popularity and influence. He referred to Giasson et al.'s blog survey which found that 90% of partisan bloggers stated that comments were an important component of their site. He also stated that more engaged online political actors commonly read and leave comments on other bloggers' sites. He stated at page 9-10 of his report:

> Some bloggers who post on their own blog, with commentary and hyperlinks to other blogger posts (hosted elsewhere) tend to establish more direct conversations and debates. These exchanges (comments left on other bloggers posts, or links to other blogs) are typically meant to solicit responses and exchanges. In my experience, few of these comments, particularly if partisan or personal in nature, are left unanswered. The visibility of such comments demand a response from a blogger. Once again, given that many bloggers seek to cultivate their reputation in and outside of the "blogosphere" as someone with political influence, provocative comments and questions left on a blogger's site become key sites of reputation building. Some mainstream media, particularly on the online…

[114] Dr. Elmer indicated that personal attacks are not uncommon on the Internet especially among those who engage in political debate and discussions. He stated that researchers debate the perception of such attacks. There is little empirical research or surveys on this topic. One researcher, Dr. Michael Keren, argues that personal attacks are frequent, expected and calculated although he qualifies this by restricting his comments to anonymous actors who "do not have to develop their personalities, relate to each other's interests, negotiate compromise, form coalitions, elect officials, fight wars or make peace". Dr. Elmer's research however, points to a more nuanced interpretation of online political communications pointing to the structure of blogs and boards, their ownership, moderation, mission and history, the reputation of the actors in question and the broader partisan environment (elections etc.). In his opinion all these factors need to be considered when trying to determine how readers or actors interpret debates based on fact, and those that engage in personal attacks.

[115] Dr. Elmer stated that conversations and debates on specific topics and among particular actors can easily move from one forum to another. However, when engaged in debate with a particular actor, moving to another platform, for example from a blog to a bulletin board, would likely be interpreted as disengaging from a debate and discussion, or retreating to a more familiar or supportive space. Depending on the familiarity of the actors involved, such movements could easily be noted and read. However, moving a discussion/debate from one platform to another may not be apparent to a broader audience unless it was clearly noted on the site of the first exchange.

[116] With respect to anonymity Dr. Elmer noted a 2004 survey of bloggers by Herring, Scheidt, et al. that full names were found in 31.4% of sites, first names on 36.2% and pseudonyms on 28.7%. With respect to whether a political actor's anonymity affected their perceived credibility, Dr. Elmer stated at page 11-12:

> In my experience, online political actors are more concerned with the contributions of an actor, their treatment of others in the blogosphere, and perhaps most importantly their overall reputation. An actor's history of interactions is a crucial component of online politics, regardless of the status of their personal identification. Credibility is, in short, gained over time. An anonymous actor may take longer to establish this trust and confidence, but so might a named individual who is not well known beyond his or her small community. An anonymous actor who appears just in time for an election campaign, will of course face greater scrutiny – a common occurrence in the blogosphere and elsewhere. Those unfamiliar with the conventions of the blogosphere and elsewhere online however may be more suspicious of anonymous posts, comments, and online actors – such has been the critique of many journalists who have sought to highlight their professional status, responsibility, and accountability to certain standards and ethics in the age of broadening political communications.

[117] In cross-examination Dr. Elmer agreed that once something is posted on social media, unless the person who put it up there, or the moderator takes it down, it is very difficult to

remove. He agreed that there may be significantly more readers (lurkers) than participants. It is extremely difficult to identify who those lurkers are and to determine their characteristics. Dr. Elmer agreed that employers and prospective employers use social media to investigate employees or potential employees and he was aware of cases where employees have been fired or disciplined. He believed that government officials may track social media and that security services use it to obtain information. He agreed that social media has a dark side and can be abused. Dr. Elmer was not familiar with the term "Godwin's Law" but agreed with its premise. He agreed that the blogosphere encourages open threads going on and on and that as a thread goes on temperature rises and the argument becomes more personal. He stated that actors take pride in the number of comments generated by their posts. The number of comments indicates the popularity and importance of the blogger.

[118] Dr. Elmer thought that perhaps 50% of blogs are moderated. Newspapers are very heavy moderators of their blogs. They check for hate speech, obscene language and contentious content. He stated that blog posts are indexed vertically with the most recent viewed first, whereas typically message boards have an indexed main page from which a choice is made. He was familiar with Dawg's Blawg and would classify it as a political blog. He stated that Free Dominion is a typical message board in its format and he would classify it as a political forum. He believed there are some 700 political blogs in Canada although others say there are between 500 to 1,000. He stated that bulletin boards tend to be moderated by more than one person but blogs tend to be run by one person. Generally speaking there are more actors posting on bulletin boards, whereas on blogs there is one actor that is more permanent.

[119] Dr. Elmer stated that brevity is a feature of online discourse. He pointed to the size of computer screens. If too much text is used in a blog post the reader will have to scroll down. Studies have shown that readers do not like to scroll down. Therefore to get the attention of readers the post should be short and punchy. The speed of the technology also lends itself to short forms.

[120] Dr. Elmer agreed that it is more important for posters who are anonymous to establish a reputation. He agreed that if you are not looking at someone face to face when communicating with them, you are more apt to be rude, antisocial or brash. He agreed that journalists use much more formal language. Dr. Elmer agreed that the ethos of the Internet is that information needs to be free. Those who are heavy handed in moderating or rejecting comments will not be well looked upon. He agreed that this applies across the political spectrum. Historically and practically the Internet supports the free flow of information in western democracies.

[121] Dr. Elmer was referred to his comment at page 9 of his report that few partisan or personal comments are left unanswered. He stated that if a commenter challenges an opinion of a blogger, people are waiting to see a rejoinder and expecting a rejoinder. He stated that bloggers want to be heard. It is an egocentric thing. They are seeking to cultivate an audience and enhance their reputation Further, people using pseudonyms want a reputation for their pseudonym.

[122] Dr. Elmer noted the left and right division in the political blogosphere. There are also centrist blogs. He characterized the interaction between left and right as intense and conflicted, with people talking past each other.

[123] Dr. Elmer referred to the indexicality of bulletin boards. A reader will see a list when he/she goes on a bulletin board. It will be a list of threads or a list of forums (based on subjects). The reader may then be faced with subforums. On a subforum there may be a list of threads.

[124] Dr. Elmer agreed that political actors (those who post or comment) will know that the environment is harsh. They know they will encounter humour, sarcasm and irony. Frequent readers will also be aware of the language they can encounter. Community-based sites (including bulletin boards) may have sharper language. Free Dominion is such a community-based site and just the sort of bulletin board where sharp exchange can occur. Frequent readers would know this. He also agreed that the tone of discourse is similar on Dawg's Blawg and frequent readers would know this. Both sites have very strong opinions. Dr. Elmer agreed it would be fair to say that participants in Canadian political blogs and forums expect debate.

[125] Dr. Elmer agreed with the assertion that people who are consuming both mainstream media and new media know that they will not see the same thing, but qualified his answer to apply to those who are frequent users. A person who does not participate at all in social media, but who went on Free Dominion would be surprised. Dr. Elmer agreed that personal attacks, abusive language, vulgar language, hyperbole et cetera would be seen in partisan political platforms, more particularly hyper-partisan ones. The more partisan the more sarcasm, hyperbole et cetera is likely and the more likely to see a comparison to Stalin and Hitler.

[126] Dr. Elmer also agreed it is generally expected that if a comment is made about a person in this milieu, the person will respond. He stated that a frequent reader would expect it. The person who fails to respond loses the debate and will lose reputation as an active blogger. Reputation means that others will look for a person's views or give credence to that person's views.

[127] Dr. Elmer understood "flame wars" to be more personal and less substantive. One blogger can get into an argument with another of a highly personal nature. Personal attacks are not uncommon. However Dr. Elmer did not agree with Dr. Keren that personal attacks are frequent, expected and calculated. It is Dr. Elmer's view that readers expect colourful language and harsh debates but he is not sure personal attacks are expected. Many people are still shocked by personal attacks. However, Dr. Elmer agreed that the frequency of personal attacks increases, the more partisan the blog.

[128] Dr. Elmer was asked to provide his opinion on how readers would respond based on the following assumptions:

a) the allegedly defamatory words were contained in an originating post of a discussion thread;

b) the discussion thread was in a highly partisan political message board;

c) the moderation policy of the message board was to allow anything but the most extreme sort of posts and comments;

d) the message board had always operated in this manner;

e) the very purpose of the message board was to be a venue for open debate;

f) the poster in question was well known for engaging in over-the-top rhetoric, in a disjointed manner.

[129] Based on these assumptions it was Dr. Elmer's view that the readers would likely think that the poster was trying to provoke debate. Dr. Elmer further stated that if the post was disjointed and over the top, the likelihood was that readers would ignore it.

Spoliation

[130] Ms. Fournier has raised, on behalf of the defendants, the issue of spoliation. It is her contention that the plaintiff intentionally, recklessly or negligently caused the comments under his old blog to disappear from public view on or about April 3, 2011, in breach of the *Sedona Canada Principles Addressing Electronic Discovery* and Rule 29.1.03(4). It is her contention that the defendants have thus been prejudiced in the preparation of their case. She stated that it is very difficult for them to show the back and forth that was occurring between Dawg's Blawg and Free Dominion over the years.

[131] I do not intend to review the evidence on this issue in any great detail. The evidence was very technical and very lengthy. Further, this issue has been a distraction from the important issues before the Court. A detailed review of this evidence, which I have thoroughly perused and considered, would be of little assistance to the parties in light of my determination that on the totality of the evidence before me, I cannot find that the plaintiff intentionally, recklessly or negligently caused the comments under his old blog to disappear. In fact, the comments have not actually disappeared (which will be explained below), they have simply disappeared from public view. In any event there is significant evidence before the Court as to the back and forth that was occurring between Dawg's Blawg and Free Dominion over the years.

[132] Dr. Baglow testified on this issue. He has little technical knowledge and deferred to Mr. Bow on technical matters. Mr. Bow provided advice and technical assistance to Dr. Baglow. Dr. Baglow generally explained that in 2010 he was using a system for his blog called Haloscan and that Mr. Bow suggested to him that he move over to Movable Type. Dr. Baglow agreed.

[133] Unfortunately, while Mr. Bow was able to successfully migrate the posts from his "old" blog to his "new blog" (Hereafter, I will refer to Dr. Baglow's old blog and new blog when discussing spoliation) approximately 40,000 comments from his old blog could not be moved. Dr. Baglow testified that he was in despair over this. As was indicated in the evidence in this case, the comment section of a blog is very important to bloggers.

[134] Mr. Bow was called to testify with respect to the issue of spoliation. I found him to be forthright and candid. He did his best to recall what had occurred, noting that this had occurred

some three and a half years previously. He candidly admitted when he "misremembered" a point. Mr. Bow did not get paid for his work in moving Dr. Baglow's blog. He did it *gratis*, although Dr. Baglow now pays him for hosting the site. Suffice it to say he has nothing to gain from this litigation. It is to be noted Mr. Bow is not involved in the left/right battle that has been played out in this case. He is a centrist. In fact, he finds Dr. Baglow's views to be too far left. It is also to be noted that while he has greater technical expertise than Dr. Baglow, he is not an expert in technical matters, as his *curriculum vitae* and background would attest.

[135] Mr. Bow testified that he contacted Dr. Baglow in 2010 and recommended that he upgrade his server. Dr. Baglow was using Google Blogspot at the time. The upgrade would give him a formal domain name and a simple web address. It was Mr. Bow's view that Google Blogspot is not as good a platform as it could be. Mr. Bow used Movable Type as a platform.

[136] Mr. Bow testified that Dr. Baglow had been using Haloscan for his comment section. Haloscan had been bought out by Echo but because of Dr. Baglow's technical ineptitude he never upgraded his old comment section to the new format required by Echo. Echo was bought out by Disqus but because Dr. Baglow had not made the above noted upgrade he was not able to convert those comments to Disqus.

[137] Over a couple of weeks in November 2010, Mr. Bow moved Dr. Baglow's site from http://drdawgsblawg.blogspot.com to http://drdawgsblawg.ca. Mr. Bow set about building the new site using Movable Type and importing the old posts from Blogspot. Unfortunately try as he might he was unable to convert the old comments (that is, the comments from the old posts) over to the new system. Mr. Bow stated that he did not have the conversion programs or the skill to do it.

[138] Therefore the old comments could not be seen by the public on the new blog although the old posts successfully made the migration. Mr. Bow put all of the old comments in an XML file on his hard drive where they still remain today. The plaintiff has provided a copy of the XML file to the defendants during the course of this litigation. Unfortunately while the comments all appear on the XML file they cannot be matched with their original post, nor can it be seen what, with respect to each comment, is being responded to.

[139] An email exchange between the plaintiff and Mr. Bow supports their evidence. On November 16, 2010, Mr. Bow wrote to Dr. Baglow as follows:

> Okay, I've had a chance to look this over. It looks as though exporting from Echo into Movable Type is possible, but cumbersome. We may want to set aside, say, an evening or so where we take the site offline or something so we can be sure to make the change-over without any new posts complicating the process.
> You may not be surprised to learn that Echo does not make it easy to import comments into Movable Type. However, it seems theoretically possible for Echo to import comments into Blogger. Once there and (hopefully) merged with your current posts, export from Blogger to Movable Type comes much easier. But, as you can see, it can be hairy.

> What we need to do now is start backing up. I've already exported your comments into an XML file. We should probably back up Blogger posts as well, so we at least have the data, in case we screw things up.

[140] On November 18, 2010, Mr. Bow wrote:

> Okay, the good news: it looks like we've got Echo synchronizing with Blogger, so from this point on, Blogger has a copy of any new comments that are added, and that makes transferring over to Movable Type easier. The bad news is, it looks like Echo won't synchronize any comments that were made before I upgraded to the new template. But I have a backup of all comments made to that point, and will try the path of transferring them over to Disqus. When that happens, that should be the last we have to deal with Echo, and we can focus on transferring the site from Blogger onto my servers.

[141] On November 19, 2010, Mr. Bow wrote:

> We've reached the point where we can dispense with Echo. You can cancel your membership and walk away, so you don't have to worry about a $10 charge after today. All comments appear to be in Disqus, and new comments are being synchronized with Blogger.
>
> I'm still having some frustrations getting all comments synchronized between Blogger and Disqus, which is frustrating. I'm almost tempted to see if I can just incorporate Disqus into your Movable Type blog, but that just opens up the possibility that your Echo problem will be repeated at a later date.

[142] On November 30, 2010, Mr. Bow wrote:

> I've made no progress on rescuing your old comments. In discussion with Disqus, I fear they are about to say that it's a Blogger problem and not their problem, and I'm not sure what Blogger's going to do. We'll see. They have asked for the Echo import file and I'll send that to them shortly.

[143] On January 5, 2011, Mr. Bow wrote:

> I fear, though, that there's nothing I can really do to get the old comments transferred over. The bulk of them appear to be in a format that neither Echo nor Disqus fully supports, since they're in the old Haloscan format and it wasn't updated. Apparently, this means that while the comments will show up on Disqus, but can't be transferred to Blogger, and that means export and transfer to Movable Type is not easy. This I find to be especially frustrating, since the comments are THERE! I just can't get them to move. As you read in the e-mail, the Disqus support people are considering this matter as a feature request, so we'll see what happens. Possibly, I could try putting a Disqus widget in the older

> comments, so that they show up, or maybe a link to the corresponding Blogger article where the comments can still be seen.

[144] The totality of the evidence supports that the move from the old blog to the new blog had nothing to do with the litigation, that the move was made for valid reasons, that Mr. Bow tried for some time to move the old comments over to the new blog, but that he simply did not have the technical skills to make it happen and that Dr. Baglow was very upset that it did not happen.

[145] The story does not end here. The blog began to experience a significant problem with spam and Mr. Bow assisted Dr. Baglow in dealing with this in March 2011. The spam was interfering with the comments section of Dr. Baglow's new blog. This is evidenced in a series of emails between them from March 2, 2011 (Exhibit 13). On March 2, 2011, Dr. Baglow wrote Mr. Bow, "The spam started up again with a vengeance today. Thirty or so messages. How are they evading Captcha?" On March 30, 2011, Mr. Bow wrote:

> We're fighting a losing battle here in the comment war. Another site I manage, which is on a separate Hostgator installation, has basically had its comments shut down because of the extent of the spam barrage. I've come to the conclusion that we simply don't have the resources to stem the tide. So, what do we do instead?
>
> My preferred solution would be to make it another server's problem, particularly one whose whole mandate is managing comments. The obvious contender is Disqus, which currently holds your old comments. The changeover can be made within an evening, although importing the Movable Type comments would take a little longer. Then we delete the vulnerable scripts from the system, and the comment spam is stopped cold.

[146] Dr. Baglow responded:

> Do we know that the Moveable Type comments can be imported into Disqus?
>
> Because I don't want the same thing happening that happened when I moved over. If this can be done, then please go ahead! But there are many good comments in the current platform.

[147] On April 2, 2011, Mr. Bow wrote:

> I've had a breakthrough regarding importing Movable Type comments into Disqus (indeed, this breakthrough could allow me to import the old Blogger comments into the same platform). I am now in the process of changing over my own blog to the new system, so please have a look and see what you think.
>
> There are some little gotchas that I have to be careful about (which is why I tested on my system and not yours), but it looks like a full conversion will be easy to handle, and we can shut the old Movable Type commenting system down, taking the spambot comments off of our server.

> With that in mind, are you up for it?

[148] On April 3, 2011, at 11:04, Mr. Bow wrote:

> Okay, I logged in as you and looked around. Everything seems to be in order.
>
> I've taken the liberty of adding myself as moderator on your site.
>
> We've now fully imported all the MT comments to Disqus. I just have some template tweaks to make, but as far as I can tell, we're live!

[149] Later on April 3, 2011 at 12:29, Mr. Bow stated in part:

> Look around. See if we can't get the Haloscan comments, currently stored on your Disqus account, to appear on their proper pages, as well (this would be a bonus).

[150] Finally, on May 4, 2011, Mr. Bow wrote:

> I'm looking at the old Disqus comments on Blogger, with an eye to moving them over. I have clicked for an export of the old data, so you should be receiving notification of same soon. Could you forward me the e-mail when it comes?

[151] Thus it appears from the email correspondence that Mr. Bow was continuing in his attempts to have the old comments moved to the new blog until at least May 2011. However, it is to be noted that the old comments did not disappear from public sight on the old blog in November 2010. Mr. Bow agreed that they were still viewable on the old blog after November 2010 (something that Dr. Baglow did not appear to know in his evidence in cross-examination). In fact, Ms. Fournier was able to view the old comments on Dawg's Blawg (on "They dare call it treason") on March 30, 2011, when she was preparing the Statement of Defence. On April 3, 2011, she went back to the plaintiff's blog to try and get a copy of the comments on the "Gitmo Kanga-ruse" post and found they were gone. Ms. Fournier's suspicions were aroused and she believes that the old comments were removed by the plaintiff. The smoking gun for her was the fact that a test comment was left on April 3, 2011, by Dr. Dawg. The IP location was shown to be Kitchener.

[152] In cross-examination Mr. Bow could not remember making the test comment. However at the time of his cross-examination, Exhibit 13 was not before the Court (the emails between him and Dr. Baglow March-May 2011). Had those emails been put to him, his memory could well have been refreshed. In the April 3, 2011, email at 11:04 Mr. Bow stated, "I logged in as you and looked around. Everything seems to be in order". If Mr. Bow was intentionally or recklessly causing the comments to disappear why would his emails to Dr. Baglow indicate that he was still going to try to get the old comments to appear on the new blog, until at least May 4, 2011?

[153] Mr. Bow was asked to explain why the old comments would have disappeared from the old blog after March 31, 2011. He said that he could only speculate that since it was the end of the month, that Google Blogspot may have changed its terms of reference or something so that the formats that Google would accept from Disqus were no longer acceptable. He went on to say that it was his speculation that Google changed its requirements for widgets and so the link between Disqus and Blogspot broke. I have no reason to doubt this explanation, as I stated earlier Mr. Bow impressed the Court in giving his evidence in a candid and forthright manner.

[154] I note that Mr. Bow came back to Court after a break during his cross-examination and advised the Court, without prompting, that he had gone on his computer during the break and found that the old comments were, in fact, in Disqus. He seemed genuinely surprised. If he and Dr. Baglow were intentionally, recklessly or negligently causing the old comments to disappear, why would he have told the Court they still exist in Disqus and why would his emails indicate from November 2010 until May 2011 that he was trying to get the old comments to appear on the new blog? While Ms. Fournier and the other defendants may have their suspicions, I do not.

[155] Finally, I find it perplexing that while Ms. Fournier advised the Court that without the old comments she was not able to properly prepare for her case, in the months after Mr. Bow testified, during the hiatus in the trial, she never requested that Dr. Baglow provide the old comments, as contained in Disqus. She knew she had a right to further discovery as evidenced by her requesting, after Mr. Bow had testified, copies of all emails between Dr. Baglow and Mr. Bow after November 30, 2010, which were provided.

The Case Law

[156] The existing law of defamation was summarized in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640 ("*Grant*") at paragraphs 28 and 29. In order to succeed in a defamation action a plaintiff is required to prove (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 referred to the plaintiff; and (3) that the words were published. If these elements are established on a balance of probabilities, falsity and damage are presumed and the onus then shifts to the defendant to advance a defence in order to escape liability.

[157] The law of defamation involves a delicate balance between two fundamental values: the worth and value of an individual's reputation, which the law of defamation seeks to protect, and the freedom of expression, which the law of defamation inherently limits. The Supreme Court of Canada has recently considered the law of defamation and this balance in three cases: *WIC Radio Ltd. v. Simpson*; 2008 SCC 40, [2008] 2 S.C.R. 420 ("*WIC Radio*"), *Grant* and *Crookes v. Newton*, 2011 SCC 47, [2011] S.C.J. No. 269 ("*Crookes*").

[158] In *WIC Radio* the Supreme Court of Canada dealt with the defence of fair comment. Justice Binnie commenced his reasons by referencing the above noted balance at paragraphs 1 and 2:

> 1. This appeal requires the Court to re-exam the defence of fair comment which helps hold the balance in the law of defamation between two fundamental values,

> namely the respect for individuals and the protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the "very life blood of our freedom and free institutions": *Price v. Chicoutimi Pulp Co.*(1915), 51 S.C.R. 179, at p. 194…
>
> 2. …An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest…

[159] Justice Binnie also noted that Canadian courts have frequently pointed to the need to develop the common law in accordance with *Charter* values, including the law of defamation. He quoted Cory J. in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 ("*Hill*") where the following was stated at paragraph 95:

> Historically, the common law evolved as a result of the courts making those incremental changes which were necessary in order to make the law comply with current societal values. The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.

[160] At paragraph 26 and 27, Justice Binnie distinguished fact from comment. He stated:

> 26. The pleaded innuendo that Simpson was so "hostile toward gay people to the point that she would condone violence toward gay people" (trial reasons, at para. 19 (emphasis in original deleted)) is framed as an inference ("would condone violence") from a factual premise, (i.e. was so "hostile toward gay people". In *Ross v. New Brunswick Teachers' Assn.* (2001), 201 D.L.R. (4th) 75, 2001, NBCA 62, at para. 56, the New Brunswick Court of Appeal correctly took the view that "comment" includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Brown's *The Law of Defamation in Canada* (2nd ed. (loose-leaf)) cites ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. This is particularly so in an editorial context where loose, figurative or hyperbolic language is used (Brown, vol. 4, at p. 27-317) in the context of political debate, commentary, media campaigns and public discourse. See also, R. D. McConchie and D. A. Potts, *Canadian Libel and Slander Actions* (2004), at p. 340.
>
> 27. The respondent on this appeal did not challenge the view that Mair's imputation, that Simpson "would condone violence toward gay people", was a comment not an imputation of fact (Factum, at para. 40). I agree that the "sting" of the libel was a comment and it would have been understood as such by Mair's listeners. "What is comment and what is fact must be determined from the

> perspective of a 'reasonable viewer or reader'" (*Ross*, *per* Daigle C.J.N.B., at para. 62). Mair was a radio personality with opinions on everything, not a reporter of the facts. The applicable defence was fair comment. On that point, I agree with the trial judge.

[161] It was held in *WIC Radio* that to make out the defence of fair comment, the defendant must prove that: (1) the comment is on a matter of public interest; (2) the comment is based on fact; (3) the comment, though it can include inferences of fact, is recognizable as comment; and (4) any person could honestly express that opinion on the proved facts. The plaintiff can, however, defeat the defence by proving that the defendant was actuated by express malice.

[162] With respect to the existence of a factual foundation, Justice Binnie stated that what is important is that the facts be sufficiently stated or otherwise be known to the listeners (here readers) so that they are able to make up their own minds on the merits of the comment. If the factual comment is unstated or unknown, or turns out to be false, the fair comment defence is not available. He stated that a properly disclosed or sufficiently indicated (or so notorious as to be already understood by the evidence) factual foundation is an important objective limit to the fair comment defence. With respect to the requirement of "honest belief", Justice Binnie stated the following at paragraph 40:

> 40. "Honest belief", of course, requires the existence of a *nexus* or relationship between the comment and the underlying facts. Dickson J. himself stated the test in *Cherneskey* as "could any man honestly express that opinion <u>on the proved facts</u>" (p. 1100 (emphasis added)). His various characterizations of "any man" show the intended broadness of the test, i.e. "however prejudiced he may be, however exaggerated or obstinate his views" (p. 1103, citing *Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), at p. 281). Dickson J. also agreed with the comment in an earlier case that the operative concept was "honest" rather than "'fair' lest some suggestion of reasonableness instead of honesty should be read in" (p. 1104).

[163] I note that the defendants rely on the reasons of Justice Lebel in *WIC Radio* in support of their position that the impugned words in this case are not *prima facie* defamatory. Justice Lebel stated the following at paragraphs 68 and 69:

> 68. This test is often construed as setting a low threshold for establishing *prima facie* defamation. *Gatley on Libel and Slander* (10th ed. 2004) ("*Gatley*"), notes that "it may well be the case that the common law takes a rather generous line on what lowers a person in the estimation of others" (p. 18, footnote 32). Dickson J. made a similar point in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067, in referring to the "low level of the threshold which a statement must pass in order to be defamatory" (p. 1095).
>
> 69. The case law generally bears these opinions out. However, courts should not be too quick to find defamatory meaning – particularly where expressions of opinion are concerned. The test is not whether the words impute negative

> qualities to the plaintiff, but whether, in the factual circumstances of the case, the public would think less of the plaintiff as a result of the comment. Relevant factors to be considered in assessing whether a statement is defamatory include: whether the impugned speech is a statement of opinion rather than of fact; how much is publicly known about the plaintiff; the nature of the audience; and the context of the comment. I will demonstrate, based on the first two of these factors in particular, that Mair's comments would likely not have led "right-thinking" members of the public to think less of Simpson.

[164] In *Grant* the Supreme Court of Canada held that the common law of defamation should be modified to recognize a defence of responsible communication on matters of public interest. While this defence has not been raised in this case, for the purpose of the matter at hand I would note that the Court again referred to the balancing of competing fundamental values at paragraphs 1-3:

> 1. Freedom of expression is guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. It 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.
>
> 2. But freedom of expression is not absolute. One limitation on free expression is the law of defamation, which protects a person's reputation from unjustified assault. The 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. However, if the defences available to a publisher are too narrowly defined, the result may be "libel chill", undermining freedom of expression and of the press.
>
> 3. Two conflicting values are at stake – on the one hand freedom of expression and on the other the protection of reputation. While freedom of expression is a fundamental freedom protected by s. 2(b) of the *Charter*, courts have long recognized that protection of reputation is also worthy of legal recognition. The challenge of courts has been to strike an appropriate balance between them in articulating the common law of defamation. In this case, we are asked to consider, once again, whether this balance requires further adjustment.

[165] In *Grant* the Supreme Court referred to *WIC Radio* and stated the following with respect to the defence of fair comment at paragraph 31:

> 31. In addition to privilege, statements of opinion, a category which includes any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof" (*Ross v. N.B.T.A.*, 2001 NBCA 62, 201 D.L.R. (4th) 75 (N.B. C.A.), at para. 56, cited in *Simpson*, at para. 26), may attract the defence of fair comment. As reformulated in *Simpson*, at para. 28, a

> defendant claiming fair comment must satisfy the following test: (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?; and (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was actuated by express malice. *Simpson* expanded the fair comment defence by changing the traditional requirement that the opinion be one that a "fair-minded" person could honestly hold, to a requirement that it one that "anyone could honestly have expressed" (paras. 49-51), which allows for robust debate. As Binnie J. put it, "w[e] live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones" (para. 4).

[166] The Supreme Court also commented on the guarantee of free expression in s. 2(b) of the *Charter*. At paragraphs 47-51 the following was stated:

> 47. The guarantee of free expression in s. 2(b) of the *Charter* has three core rationales, or purposes: (1) democratic discourse; (2) truth-finding; and (3) self-fulfillment: *Irwin Toy Ltd. c. Québec (Procureur general*), [1989] 1 S.C.R. 927 (S.C.C.), at p.976. These purposes inform the content of s. 2(b) and assist in determining what limits on free expression can be justified under s. 1.
>
> 48. First and foremost, free expression is essential to the proper functioning of democratic governance. As Rand J. put it, "government by the free public opinion of an open society … demands the condition of a virtually unobstructed access to and diffusion of ideas": *Switzman*, at p. 306.
>
> 49. Second, the free exchange of ideas is an "essential precondition of the search for truth": *R. v. Keegstra,* [1990] 3 S.C.R. 697 (S.C.C.), at p. 803, *per* McLachlin J. This rationale, sometimes known as the "marketplace of ideas", extends beyond the political domain to any area of debate where truth is sought through the exchange of information and ideas. Information is disseminated and propositions debated. In the course of debate, misconceptions and errors are exposed. What withstands testing emerges as truth.
>
> 50. Third, free expression has intrinsic value as an aspect of self-realization for both speakers and listeners. As the majority observed in *Irwin Toy*, at p. 976, "the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed".
>
> 51. Of the three rationales for the constitutional protection of free expression, only the third, self-fulfillment, is of dubious relevance to defamatory communications on matters of public interest. This is because the plaintiff's

> interest in reputation may be just as worthy of protection as the defendant's interest in self-realization through unfettered expression. We are not talking here about a direct *prohibition* of expression by the state, in which the self-fulfillment potential of even malicious and deceptive expression can be relevant (*R. v. Zundel* [1992] 2 S.C.R. 731 (S.C.C.)), but rather a means by which individuals can hold one another civilly accountable for what they say. *Charter* principles do not provide a licence to damage another person's reputation simply to fulfill one's atavistic desire to express oneself.

[167] In *Crookes* the Supreme Court of Canada held that simply posting a hyperlink to defamatory content does not constitute defamation. Justice Abella stated that a reference to other content is fundamentally different from other acts involved in publication. She stated at paragraph 26:

> 26. A reference to other content is fundamentally different from other acts involved in publication. Referencing on its own does not involve exerting *control* over the content. Communicating something is very different from merely communicating that something exists or where it exists. The former involves dissemination of the content, and suggests control over both the content and whether the content will reach an audience at all, while the latter does not. Even where the goal of the person referring to a defamatory publication is to expand that publication's audience, his or her participation is merely ancillary to that of the initial publisher: with or without the reference, the allegedly defamatory information has already been made available to the public by the initial publisher or publishers' acts. These features of references distinguish them from acts in the publication process like creating or posting the defamatory publication, and from repetition.

[168] Justice Abella noted that hyperlinks are, in essence, references. Inserting a hyperlink gives the primary author no control over the content in the secondary article to which he or she has linked. She stated the following at paragraphs 29-33 and 36:

> 29. 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. (See *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 97-102).
>
> 30. Hyperlinks thus share the same relationship with the content to which they refer as do references. Both communicate that something exists, but do not, by themselves, communicate its content. And they both require some act on the part

of a third party before he or she gains access to the content. The fact that access to that content is far easier with hyperlinks than with footnotes does not change the reality that a hyperlink, by itself, is content neutral – it expresses no opinion, nor does it have any control over, the content to which it refers.

31. This interpretation of the publication rule better accords with our Court's recent jurisprudence on defamation law. This Court has recognized that what is at stake is an action for defamation is not only an individual's interest in protecting his or her reputation, but also the public's interest in protecting freedom of expression: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

32. Pre-*Charter* approaches to defamation law in Canada largely leaned towards protecting reputation. That began to change when the Court modified the "honest belief" element to the fair comment defence in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, and when, in *Grant*, the Court developed a defence of responsible communication on matters of public interest. These cases recognize the importance of achieving a proper balance between protecting an individual's reputation and the foundational role of freedom of expression in the development of democratic institutions and values (*Grant*, at para. 1; *Hill*, at para. 101).

33. Interpreting the publication rule to exclude mere references not only accords with a more sophisticated appreciation of *Charter* values, but also with the dramatic transformation in the technology of communications. See June Ross, "The Common Law of Defamation Fails to Enter the Age of the *Charter*" (1996), 35 Alta. L. Rev. 117; see also Jeremy Streeter, "The 'Deception Exception': A New Approach to Section 2(b) Values and Its Impact on Defamation Law" (2003), 61 U.T. Fac. L. Rev. 79; Denis W. Boivin, "Accommodating Freedom of Expression and Reputation in the Common Law of Defamation (1996-1997), 22 Queen's L.J. 229; Lewis N. Klar, *Tort Law* (4th ed. 2009), at pp. 746-47; Robert Danay, "The Medium is not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation" (2010), 56 McGill L.J. 1; the Hon. Frank Iacobucci, "Recent Developments Concerning Freedom of Speech and Privacy in the Context of Global Communications Technology" (1999), 48 U.N.B.L.J. 189; and *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) at p. 870.

36. The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict

> application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.

[169] The plaintiff relies on the comments of the Ontario Court of Appeal in *Barrick Gold Corp. v. Lopehandia*, (2004) 71 O.R. (3d) 416 (Ont. C.A.) ("*Barrick*") with respect to Internet defamation and damages. These comments are set out at paragraphs 28-34 as follows:

> 28. Is there something about defamation on the Internet – "cyber libel", as it is sometimes called – that distinguishes it, for purposes of damages, from defamation in another medium? My response to that question is "Yes".
>
> 29. The standard factors to consider in determining damages for defamation are summarized by Cory J. in *Hill* at p. 1203. They include the plaintiff's position and standing, the nature and seriousness of the defamatory statements, the mode and extent of publication, the absence or refusal of any retraction or apology, the whole conduct and motive of the defendant from publication through judgment, and any evidence of aggravating or mitigating circumstances.
>
> 30. In the Internet context, these factors must be examined in the light of what one judge has characterized as the "ubiquity, universality and utility" of that medium. In *Dow Jones & Co. v. Gutnick*, [2002] H.C.A. 56 (Australia H.C.) (10 December 2002), that same judge – Kirby J., of the High Court of Australia – portrayed the Internet in these terms, at para. 80:
>
> > The Internet is essentially a decentralized, self-maintained telecommunications network. It is made up of inter-linking small networks from all parts of the world. *It is ubiquitous, borderless, global and ambient in its nature. Hence the term "cyberspace". [FN4] This is a word that recognizes that the interrelationships created by the Internet exist outside conventional geographic boundaries and comprise a single interconnected body of data, potentially amounting to a single body of knowledge.* The Internet is accessible in virtually all places on Earth where access can be obtained either by wire connection or by wireless (including satellite) links. *Effectively, the only constraint on access to the Internet is possession of the means of securing connection to a telecommunications system and possession of the basic hardware* [emphasis added].
>
> 31. Thus, of the criteria mentioned above, the mode and extent of publication is particularly relevant in the Internet context, and must be considered carefully. Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that the defamatory remarks are believed: see *Vaquero Energy Ltd. v. Weir*, [2004] A.J. No. 84 (Alta. Q.B.) at para. 17.

32. These characteristics create challenges in the libel context. Traditional approaches attuned to "the real world" may not respond adequately to the realities of the Internet world. How does the law protect reputation without unduly overriding such free wheeling public discourse? Lyrissa Barnett Lidsky discusses this conundrum in her article, "Silencing John Doe: Defamation and Discourse in Cyberspace", (2000) 49 Duke L.J. 855 at pp. 862-865:

> Internet communications lack this formal distance. Because communication can occur almost instantaneously, participants in online discussions place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. Hyperbole and exaggeration are common, and "venting" is at least as common as careful and considered argumentation. The fact that many Internet speakers employ online pseudonyms tends to heighten this sense that "anything goes" and some commentators have likened cyberspace to a frontier society free from the conventions and constraints that limit discourse in the real world. While this view is undoubtedly overstated, certainly the immediacy and informality of Internet communications may be central to its widespread appeal.
>
> *Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation.* Once a message enters cyberspace, millions of people worldwide can gain access to it. Even if the message is posted in a discussion forum frequented by only a handful of people, any one of them can republish the message by printing it or, as is more likely, by forwarding it instantly to a different discussion forum. And if the message is sufficiently provocative, it may be republished again and again. *The extraordinary capacity of the Internet to replicate almost endlessly any defamatory message lends credence to the notion that "the truth rarely catches up with a lie"*. The problem for libel law, then, is how to protect reputation without squelching, the potential of the Internet as a medium of public discourse [emphasis added].

33. These characteristics differentiate the publication of defamatory material on the Internet from publication in the more traditional forms of media, in my opinion.

> 34. It is true that in the modern era defamatory material may be communicated broadly and rapidly via other media as well. The international distribution of newspapers, syndicated wire services, facsimile transmissions, radio and satellite television broadcasting are but some examples. Nevertheless, Internet defamation is distinguished from its less pervasive cousins, in terms of its potential to damage the reputation of individuals and corporations, by the features described above, especially its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility. The mode and extent of publication is therefore a particularly significant consideration in assessing damages in Internet defamation cases.

[170] Finally, I note that I was directed to one case where a court has considered the nature of online message boards. In *Smith v. ADVFN Plc & Ors* [2008] EWHC 1797 (QB) the plaintiff brought a defamation action in respect of comments left on an Internet bulletin board. A stay of proceeding was subsequently issued and the plaintiff moved to lift the stay. In deciding not to lift the stay, Justice Eady of the High Court of England (Queen's Bench Division) made a number of observations about bulletin board communications. He stated the following at paragraphs 13-15 and 17:

> 13. It is necessary to have well in mind the nature of bulletin board communications, which are a relatively recent development. This is central to a proper consideration of all the matters now before the court.
>
> 14. This has been explained in the material before me and is, in any event, nowadays a matter of general knowledge. Particular characteristics which I should have in mind are that they are read by relatively few people, most of whom will share an interest in the subject-matter; they are rather like contributions to a casual conversation (the analogy sometimes being drawn with people chatting in a bar) which people simply note before moving on; they are often uninhibited, casual and ill thought out; those who participate know this and expect a certain amount of repartee or "give and take".
>
> 15. The participants in these exchanges were mostly using pseudonyms (or "avatars", so that their identities will often not be known to others. This is no doubt a disinhibiting factor affecting what people are prepared to say in this special environment.
>
> 17. …But in the case of a bulletin board thread it is often obvious to casual observers that people are just saying the first thing that comes into their heads and reacting in the heat of the moment. The remarks are often not intended, or to be taken, as serious. A number of examples will emerge in the course of my judgment.

Determination

[171] To prove a case in defamation, a plaintiff must establish only three elements: first, that the words refer to the plaintiff, second, that the words have been published to a third party; and third, that the words complained of are defamatory of the plaintiff, in the sense that the words would tend to lower the reputation of the plaintiff in the eyes of a reasonable person. I turn then to those three elements.

1. The words refer to the plaintiff:

[172] It is the position of the defendants that the impugned words did not refer to Dr. Baglow but to Dr. Dawg, a pseudonym. According to Mr. Fournier it was one person's pseudonym insulting another person's pseudonym. There was no reference in "Hey yokels with pitchforks" to Dr. Baglow, until the Ms. Mew comment. If the reader did not know who Dr. Dawg was, there could be no defamation of Dr. Baglow. According to the Fourniers, the plaintiff's assertion that a reader would take the time to google "Dr. Dawg" was totally speculative.

[173] However, Dr. Baglow (writing as Dr. Dawg) does not attempt to conceal his real identity as John Baglow. He has written some two dozen articles in the National Post Full Comment section from a left-wing perspective, where it is indicated "John Baglow who has been blogging as 'Dr. Dawg' since 2005". Further, he has posted on Rabble (a left-wing version of Free Dominion) where he has indicated that he is Dr. Dawg. In 2006, Small Dead Animals, a right-wing blog with a very larger readership referred to him as "Dr. Dawg – John Baglow". In addition, Dr. Baglow was identified as Dr. Dawg in Free Dominion by the Fourniers some ten times prior to the "Hey yokels with pitchforks" post. In fact, Ms. Fournier "outed" Dr. Baglow herself on Free Dominion apparently because she perceived that he referred to her as a Nazi and was angry.

[174] In my view the plaintiff's position that some commenters and readers of Free Dominion would know that he is Dr. Dawg is supported in the evidence. I am satisfied that the plaintiff has established that the impugned words refer to him.

2. The words have been published to a third party:

[175] In *Crookes* Justice Abella set out what a plaintiff must establish to prove the publication element of defamation at paragraph 16:

> 16. To prove the publication element of defamation, a plaintiff must establish that the defendant has, *by any act*, conveyed defamatory meaning to a single third party who has received it (*McNichol v. Grandy*, [1931] S.C.R. 696, at p. 699). Traditionally, the form the defendant's act takes and the manner in which it assists in causing the defamatory content to reach the third party are irrelevant:

> There are no limitations on the manner in which defamatory matter may be published. Any act which has the effect of transferring the defamatory information to a third person constitutes a publication. [Footnotes omitted.]
>
> (*Stanley v. Shaw*, 231 B.C.A.C. 186, 2006 BCCA 467, at para. 5, citing Raymond E. Brown, *The Law of Defamation in Canada* (2nd ed. (loose-leaf)), at para. 7.3)

[176] The Fourniers concede that they are publishers according to this definition. They state that the forum is the distributor of content generated and posted by third parties, such as Mr. Smith. Mr. Smith is the main or primary publisher, while Free Dominion plays a subordinate role in the dissemination of such user-generated content. They note that publishers in such circumstances have available to them, the defence of innocent dissemination. No such defence has been raised by the Fourniers in this case.

[177] The Fourniers submit that they did not write, edit, modify or in any way participate in the writing or posting of the impugned words or any of the comments in the thread. They submit that they are simply the operators of Free Dominion. It is the message board software that allows users to register. There is no intervention from the operators themselves. Any registered person can post and start a thread.

[178] The Fourniers take the position that holding a message board and its operators liable as publishers for postings by the hundreds of people who post on it daily is an unconstitutional violation of the guarantee of freedom of expression. Operators of forums will be forced to either immediately take down a posting upon complaint or face liability as publishers for writings which they did not write, edit or otherwise have knowledge. Essentially they are requesting this Court to make a finding, as was made by the Supreme Court of Canada in *Crookes*, that the provider of an interactive computer service should not be liable for user-generated content from third parties.

[179] In support of their position the Fourniers point to the importance of the blogging and message board mediums to the democratic process and the flow of information. The Fourniers submit that holding message board operators liable will have a chilling effect on the flow of information and the freedom of expression and debate. Their concern with respect to the chilling effect of holding message board operators liable was reflected in their evidence. They state that they are not the CBC or the National Post. They should not have to have a battery of lawyers.

[180] The Fourniers submit that this Court has the jurisdiction to make incremental changes to the law that give effect to *Charter* values, pointing to the Supreme Court of Canada decision in *WIC Radio*. Reliance is placed on the reasoning of the Supreme Court in *Crookes*. Message board operators are simply facilitating content being made public. The Fourniers make reference to paragraph 21 of *Crookes* "…some acts are so passive that they should not be held to be publication". They note *Bunt v. Tilley*, [2006] EWHC 407 (GB) a decision of the Queen's Bench in England which considered the potential liability of an Internet service provider. The Court

there stated that in order to hold someone liable as a publisher, "[i]t is not enough that a person merely plays a passive instrumental role in the process"; there must be "knowing involvement in the process of publication of the relevant words" (paragraph 23). The Fourniers submit that like a hyperlink, a message board is content neutral.

[181] In addition the Fourniers refer to the statutory regimes in both the United States and the United Kingdom. The United States enacted the *Communications Decency Act*, 47 U.S.C., section 230(c)(I) in 1996. The provision states in part:

> No provider or use of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

[182] This provision was interpreted by the United States Court of Appeals for the Fourth Circuit in *Zeran v. American Online*, 129 F. 3d 327 (1997), as providing an absolute immunity from liability for Internet service providers with respect to defamatory online postings.

[183] England and Wales also addressed this issue with recent statutory amendments to the common law. The *Defamation Act* 2013, Elizabeth II: Chapter 26 came into force on January 1, 2014. It includes a defence for the operator of a website to show that it was not the operator who posted the statement on the website. However that defence would be defeated if it was not possible for the complainant to identify the person who posted the statement, the complainant gave the operator a notice of complaint in relation to the statement and the operator failed to respond to the notice of complaint in accordance with the regulations (section 5(1)(2) and (3))

[184] I note that the CCLA has taken a position on the issue of publication in this litigation that is supportive of the Fourniers. It is the CCLA's position that, consistent with the Supreme Court's decision in *Crookes*, operators and administrators of weblogs, online message boards and similar Internet platforms should not automatically be considered to have published, and therefore held legally responsible for defamatory content created by others. The CCLA points to the dramatic transformation in the technology of communication. Weblogs, message boards and similar Internet platforms have become important vehicles for people to exchange ideas. Holding operators and administrators liable for defamatory content, simply for providing those vehicles, would damage freedom of expression and have a chilling effect.

[185] In Canada, there appears to be only one decision which discusses the liability of online forum owners/operators for defamatory comments posted on their forums. In *Carter v. B.C. Federation of Foster Parents Association*, 2005 BCCA 398, 257 D.L.R. (4th) 133 the defendant Federation sought a summary judgment dismissing the plaintiff's claim for defamation arguing, among other things, that the issue was statute-barred. The Federation operated an online forum in which a defamatory posting regarding the plaintiff had been made. After discovering the posting, the plaintiff urged the board of directors of the Federation to shut down the forum as it was being misused. Sometime later, the plaintiff discovered that the defamatory posting had not been removed, although it was within the Federation's power to do so.

[186] On appeal, the British Columbia Court of Appeal reversed the summary judgment and remitted the matter to trial. An issue before the Court was whether the Federation could be legally considered to be a publisher of the defamatory postings, having not posted them itself. In determining that the Federation was a "publisher" of the defamatory information, the Court of Appeal emphasized that the Federation had obtained actual knowledge of the defamatory posting and that it had been within the Federation's control to remove the posting. Furthermore, the Court of Appeal held that the defence of "innocent dissemination" would not be open to the defendant, as it would be unable to demonstrate that the publication occurred without negligence on its part, given that it had been notified about the posting and its defamatory nature.

[187] In the course of its reasons the Court of Appeal noted that "legislatures may yet 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…" (paragraph 20). While the Fourniers have asked this Court to consider the above-noted statutory provisions with respect to publication, I am mindful that the legislators in this country have not chosen to enact such legislative schemes. It is the common law of defamation and *Charter* values which must be considered.

[188] The Fourniers and the CCLA essentially submit that the reasoning in *Crookes* is applicable to the case hand. However in my view the circumstances are qualitatively different. To compare *Crookes* to this case is, in my view, to compare apples to oranges.

[189] In *Crookes*, the Supreme Court looked at whether a simple reference like a hyperlink, without more, to defamatory information is the kind of act that can constitute publication. Justice Abella noted that referencing on its own does not involve exerting control over the content. She stated that communicating something is very different from merely communicating that something exists or where it exists. She stated that the former involved dissemination of the content and suggests control over both the content and whether the content will reach an audience at all, whereas the latter does not.

[190] Justice Abella stated that hyperlinks are simply references. The content of the secondary article can be changed by whoever controls the secondary page. Moreover the person who makes reference to the hyperlink has no control of the content in the secondary article. She stated that hyperlinks share the same relationship with the content to which they refer as do references. They both communicate that something exists, but do not, by themselves, communicate its content. Both require an act by a third party before he or she gains access to the content. Justice Abella emphasized that a hyperlink is content neutral. It expresses no opinion. She went on to state at paragraph 40:

> 40. Where a defendant uses a reference in a manner that *in itself* conveys defamatory meaning about the plaintiff, the plaintiff's ability to vindicate his or her reputation depends on having access to a remedy against that defendant. In this way, individuals may attract liability for hyperlinking if the manner in which they have referred to content conveys defamatory meaning; not because they have created a reference, but because, understood in context, they have actually

> *expressed* something defamatory (Collins, at paras. 7.06 to 7.08 and 8.20 to 8.21). This might be found to occur, for example, where a person places a reference in a text that repeats defamatory content from a secondary source (*Carter*, at para. 12).

[191] Justices McLachlin and Fish, in joint concurring reasons, follow up on this point. A hyperlink may, in certain circumstances, amount to a publication of defamatory material where the reference to the hyperlink is not "content neutral". At paragraph 48 the following is stated:

> 48. Abella J. concludes that "[o]nly when a hyperlinker presents content from the hyperlinked material in a way that actually repeats the defamatory content, should that content be considered to be 'published' by the hyperlinker" (para. 42). In our view, the combined text and hyperlink may amount to publication of defamatory material in the hyperlink in some circumstances. Publication of a defamatory statement via a hyperlink should be found if the text indicates *adoption or endorsement of the content of the hyperlinked text*. If the text communicates agreement with the content linked to, then the hyperlinker should be liable for the defamatory content. The defendant must adopt or endorse the defamatory words or material; a mere general reference to a web site is not enough. Thus, defendants linking approvingly to an innocent web site that later becomes defamatory would not be liable.

[192] It is the position of the Fourniers that the simple provision of software to enable a message board or forum is equivalent to the provision of a hyperlink. The message board itself, the software, is content neutral. In my view this position is disingenuous and ignores reality. A message board or forum is set up precisely to provide content to its readers. Its whole purpose is to provide content.

[193] The Fourniers are the moderators and administrators of Free Dominion. They decided to set up a politically conservative venue in 2001 on the Internet. It is a message board. The purpose of the Free Dominion message board is to allow conservatively minded individuals to voice their opinions. Its home page states that it is "The Voice of Principled Conservatism". Members discuss political issues from a conservative point of view. The Fourniers are not mere passive bystanders. They make posts themselves and participate in threads.

[194] Moreover, as moderators and administrators, the Fourniers have the ability to control content on Free Dominion. Prior to 2014, anyone could become a member and post or comment by registering on Free Dominion. Potential members were required to accept the terms of service (the site rules). Ms. Fournier testified that terms of service basically required members to "play nice", use family friendly language and keep debate civil. The Free Dominion Registration Form stated "You agree not to post any abusive, obscene, vulgar, slanderous, hateful, threatening, sexually orientated or any other material that may violate any laws...Doing so may lead to you being immediately and permanently banned…" Further it stated, "You agree that Free Dominion have the right to remove, edit, move or close at any time should we see fit."

[195] Ms. Fournier testified that while Free Dominion is set up as a conservative message board, they do want the left-wing to comment/post and debate. The Fourniers pride themselves on not banning people for their political views. She testified that as moderators, the defendants had the ability to delete posts and comments from the message board but did so rarely. The ethos of the message board and its members was that open discussion was better than deletion and that deletion was only to be a measure of last resort. She stated that on Free Dominion they had a policy not to interfere in arguments between pseudonymous posters or commenters by deleting posts or comments and banning people. If negative comments were made about someone using his or her real name, the Fourniers tried to encourage posters to resolve their differences, but they investigated the situation more closely and deleted the comment or banned the poster if they felt it was necessary. I find it interesting to note Ms. Fournier's comment that if Ms. Mew had not turned out to be Dr. Baglow, she would have removed that post because it identified him.

[196] In my view the reasoning in *Crookes* is not applicable to the circumstances that present in this case. Moreover I am mindful, as indicated in the Supreme Court of Canada case law set out above, that the law of defamation involves a delicate balance between two fundamental values: the worth and value of an individual's reputation, which the law of defamation seeks to protect, and the freedom of expression, which the law of defamation inherently limits. The evidence reveals in this case that almost all of the individuals who post or comment on Free Dominion do so anonymously. To adopt the position of the defendants would leave potential plaintiffs with little ability to correct reputational damage and would impair that delicate balance. Therefore I find the impugned words to have been published by both the Fourniers and Mr. Smith.

3. The words complained of are defamatory of the plaintiff:

[197] As set out above, in order to succeed in a defamation action a plaintiff is required to prove that the words are defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person. In *Crookes*, the Supreme Court noted that defamatory meaning may be discerned from "all the circumstances of the case, including any reasonable implications the words may bear, the context in which the words are used, the audience to whom they were published and the manner in which they were presented" (paragraph 39). This trial, and the submissions of the defendants and the CCLA, very much focused on the issue of context.

[198] The defendants refer to a number of principles set out by Professor Brown in *Defamation Law: A Primer* (2nd ed.) in determining whether words are defamatory:

> a) Meaning is the life of language and a false and defamatory meaning is the essence of a claim for defamation. Whether the words are reasonably capable of a defamatory meaning is the threshold inquiry in every action for libel and slander. In order to be actionable, a publication must be reasonably understood in a defamatory sense by those to whom it is published. (p. 47)

b) To be defamatory, the publication must convey some degrading imputation. The question is whether the publication has the tendency to blacken, harm, injure, disparage or adversely affect the reputation of the plaintiff. Does it diminish or lower the opinion, esteem or regard which others have for him, or cause him to be detested or despised, or degrade and disparage him in the eyes of others, or excite adverse or derogatory feelings and opinions about him, and cause him to be shunned and avoided? (p. 29-30)

c) A defamatory communication must be viewed contextually. Words, like people, are judged by the company they keep. Therefore, they must be examined and construed in context and not in isolation. A statement may contain entirely different meanings depending upon the context in which it is used. The language must be given a fair reading in the context of the publication as a whole. (p. 54)

d) The nature of the audience to whom the words are addressed is an important part of the context. It may affect the way in which words…are perceived and understood. (p. 57)

e) The publication must be considered as a whole; a court will not dwell or concentrate on isolated passages in determining whether it is defamatory. It is the broad effect that counts. (p. 57)

f) The defamatory meaning must be objectively determined by reference to the ordinary reasonable person. The court must discover the meaning that the words are fairly calculated to produce or the impression they would engender in the minds of ordinary and reasonable persons. The test…is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. It is the fair and natural meaning given to the words by a reasonable person of ordinary intelligence, drawing on his own knowledge and experience of human affairs. (p. 59)

g) Newspapers, magazines, television, radio, motion pictures and books pose special problems in determining defamatory sense. Where newspapers and magazines are involved, a court will not confine itself to the plain text but will consider its composition, syntax and context, the prominence of its placement in the publication, the positive or negative thrust of the article, any material factual omissions or distortions, and any other facts that reflect upon the author's intent and purpose. Attention must also be paid to any display lines, the layout of the article, the headline that accompanies it, and any graphic language employed to create a strong impression as an attraction to the reader. (p. 68)

[199] The defendants submit that the context in this case is such that the reasonable reader would not think less of the plaintiff as a result of the impugned words. The defendants note that the words were published on a political message board, the purpose of which is to allow people to voice their opinions on politics and social issues, generally from a conservative viewpoint. Further, it is the position of the defendants that readers do not expect to obtain hard news on a political message board but a discussion of current events that are ongoing. The plaintiff himself did not do investigative factual reporting on "Dawg's Blawg" but commented on topical current events. The defendants note the plaintiff's testimony that people wanted "strong commentary". The environment of both Free Dominion and Dawg's Blawg is hyper-partisan, where political opinion is freely expressed. People want the opportunity to opine on various topics and enter into exchanges.

[200] The defendants submit that the impugned words were opinion. They were published in a Free Dominion forum entitled "Opinions are Like Clymers…" alerting readers that the post was an opinion. The title, "Hey yokels with pitchforks, there is no libertarian base" was vague and confusing with no reference to the plaintiff, also alerting readers that what followed was commentary. The defendants further note the context of the impugned words is the fast-paced, hyperbolic world of political blogging and message boarding. The plaintiff himself testified that the medium is one where people speak in a manner that is "very forthright", "rude", "vulgar", "confrontational", with "strong language", "sarcasm", "name calling" and "hyperbole". The defendants submit that a reasonable reader would realize that Mr. Smith was reacting emotionally to the plaintiff's rancorous attack not only on the Harper government, but also its supporters.

[201] In addition, the defendants point to the plaintiff's repeated testimony that the entire post that contained the impugned words was "incoherent", "wooly ranting", "ranting", "running off at the mouth" and "silly". Given that the entire point of defamation law is to determine the meaning and effect of words, the defendants submit that an incoherent post cannot have any meaning and therefore cannot defame the plaintiff.

[202] The CCLA also submits that the broader context is relevant to determining the meaning of the impugned words. It refers to the "rough and tumble" nature of political discourse on the Internet, where sarcasm, hyperbole, profanity, insults and other forms of invective are typical and personal attacks are not uncommon. Dr. Baglow acknowledged that he expects a certain amount of sarcasm, hyperbole and bad language, and from time to time has engaged in it himself. Dr. Baglow referred to Godwin's Law.

[203] The CCLA notes the evidence of Dr. Elmer, where he referred to a study of 260 weblogs (not all of which were political) in the United States which found that 42% used sarcasm, 42% used irony and 14% used offensive language. Dr. Elmer stated that these forms of communication would be even more prevalent on partisan political weblogs. Dr. Elmer's report also stated that "[m]any sites have long histories of…sometimes engaging in harsh language and personal attacks". Further, "'community'-based sites…can witness sharper exchanges as individuals seek to cultivate a more visible online presence and reputation". Dr. Elmer noted

that Free Dominion is precisely the type of community-based site at which such sharper exchanges could occur.

[204] In addition the CCLA notes the comment in Dr. Elmer's report that "blogger discourse tends to focus more on argument, opinion, sarcasm and questions". In his testimony Dr. Elmer confirmed that hyperbole, profanity and personal attacks can be added to this list, and that online actors also frequently compare their opponents' viewpoints to those of odious historical figures. He also agreed that all these forms of communication are even more likely to be used on the more partisan political weblogs and message boards.

[205] The CCLA submits that both participants and frequent readers would be aware of all of this and would not be surprised to see this sort of language on a political weblog or message board. Frequent readers, according to Dr. Elmer, would include not only those who frequently read the weblog or message board in question, but also those who read these types of media more generally.

[206] I am very mindful that political discourse on weblogs and message boards, particularly those which are hyper-partisan, is qualitatively different than political discourse in more "traditional" media like newspapers and television. This is well illustrated when one compares the blog post that Dr. Baglow wrote concerning the Honourable Mr. Justice Victor Toews (who was then the Federal Minister of Public Safety) to the "Full Comment" piece that he wrote on Justice Toews in the National Post. In the blog post, Dr. Baglow stated that "Toews distinguished himself with petty acts of cruelty and an ill-concealed liking for torture" and is a "seasoned bigot and devotee of sudo-politics at its least refined".

[207] I am also mindful that this Court must consider the context in which the words were used and the audience to whom they were published. However, it seems to me that taking the submissions of the CCLA and the defendants to their logical conclusion, little, if anything, could be found to be defamatory on partisan weblogs and message boards. Implicit in their submissions is that based on the rough and tumble nature of these media platforms there would be little, if anything, that would tend to lower the plaintiff's reputation in the eyes of a reasonable reader. However, there is nothing in the law of defamation to suggest that that is the case.

[208] To the contrary, and in this regard I refer to *WIC Radio*, where in the context of a "shock jock" radio show, the defendant Mair compared the plaintiff Simpson to Hitler, the Ku Klux Klan and skinheads. The comparisons implied that Simpson (who opposed any positive portrayal of a gay lifestyle) would condone violence toward gays. Justice Binnie noted that Mair's listeners expect to hear extravagant opinions and, according to his counsel, discount them accordingly. Yet even in the context of a "shock-jock" radio show, where listeners would have that understanding and those expectations with respect to the opinions expressed, the trial judge and eight of the nine judges of the Supreme Court of Canada had no difficulty in concluding that Mair's statements were defamatory.

[209] A number of submissions were made by the defendants about what reasonable readers of Free Dominion would think about the impugned words. (For example, that a reasonable reader would realize that Mr. Smith was reacting emotionally to the plaintiff's attack on the Harper

government and its supporters). However Free Dominion had some 3,000 visitors a day. Visitors would include anyone who came on the site to look (lurkers). Of the 3,000 Ms. Fournier estimated that here were between 100 to 300 commenters a day. While it may be easier to discern the views and sensibilities of those who come on the site and comment, it is difficult to discern much about those who simply lurk.

[210] In fact, Dr. Elmer confirmed in his evidence that it is common to have large numbers of individuals visit and/or read posts/comments on discussion boards and blogs without ever posting anything. He agreed that it is difficult to determine the characteristics of lurkers. While he had conducted some surveys of readers and had some experiential knowledge of them and their opinions, it was not possible for him to make general reliable scientifically objective conclusions about who they generally are and how or what they think.

[211] Further, Dr. Elmer indicated that personal attacks were not uncommon on the Internet especially among those who engaged in political discussions. However, he stated that researchers debate the perception of such attacks. He noted that there is little empirical research or surveys on this topic. While one researcher, Dr. Michael Keren, argues that personal attacks are frequent, expected and calculated (with respect to anonymous actors), Dr. Elmer's research pointed to a more nuanced interpretation. He stated that many people are still shocked by personal attacks.

[212] Prior to hearing the evidence in this case it would have been intuitive to me that people do not believe what they read on the Internet as compared to mainstream media and that people do not lend credibility to those who post anonymously. However, Dr. Elmer's evidence indicated otherwise. Credibility for online anonymous political actors can be gained over time. It is to be noted that Mr. Smith has a long history of posting on Free Dominion as Peter O'Donnell and would be well known to its regular readers.

[213] Much of the defendants' evidence concerning context would have greater weight with respect to whether the impugned words were defamatory if those words took place in the context of a heated debate between Dr. Dawg and Peter O'Donnell in a thread. Instead, the impugned words almost stand alone in a post focusing mostly on other issues. Further, there is no evidence that Dr. Dawg ever posted on Free Dominion. While Dr. Elmer stated that debate on specific topics and among particular actors can easily move from one platform to another, such debate may not be apparent to a broader audience unless it was clearly noted. There is no reference in the post "Hey yokels with pitchforks, there is no libertarian base" to any previous debate between Dr. Dawg and Peter O'Donnell on any platform, with respect to Omar Khadr. While Dr. Elmer opined that if a commenter challenges the opinion of a blogger, people are waiting to see and expecting a rejoinder, no such expectation could exist in the circumstances of this case. Dr. Dawg had never posted on Free Dominion at all, let alone engage with Peter O'Donnell on the site.

[214] The test which must be applied in this case in whether the impugned words would tend to lower Dr. Baglow's reputation in the eyes of a reasonable person (emphasis added). The test has often been construed as setting a low threshold for establishing *prima facie* defamation (*WIC Radio*, paragraph 68). The impugned words referred to the plaintiff as "one of the

Taliban's more vocal supporters". Obviously, these words are reasonably capable of bearing the meaning that Dr. Baglow is or was a supporter of the Taliban. As the Taliban would be viewed by a reasonable person as an Islamist terrorist organization that engages in odious acts, the words are also reasonably capable of bearing the meaning that Dr. Baglow supports Islamist terrorism. The words were published at a time when Canadian Armed Forces were engaged in armed conflict with the Taliban in Afghanistan. The impugned words could reasonably mean that Dr. Baglow has given explicit vocal support to the enemies with whom Canada is at war. The words are defamatory as they would tend to lower Dr. Baglow's reputation in the eyes of a reasonable person.

[215] In summary, I find that the plaintiff has established all three elements with respect to his claim for defamation.

[216] In submissions the Fourniers raised what they termed a technical argument that Dr. Baglow failed to prove the defamatory meanings as pleaded. In paragraph 8 of the Statement of Claim, the following was pleaded:

> The Plaintiff states that the above statement and other statements made prior to, and subsequent to, were false and seriously defamatory of the Plaintiff. The Defendant's statements, in their plain and ordinary meaning, including the express and implied meanings in the full context of the respective comments and debates, meant the Plaintiff is or was a supporter of the Taliban and that the Plaintiff supports Islamist terrorism and is a participant in hostilities against The Canadian Forces.

[217] The Fourniers note that the impugned words do not have the meaning pleaded by Dr. Baglow. More particularly, it is their position that he has not pleaded meanings in the alternative but has pleaded a very extended meaning having three branches, "supporter of the Taliban" and "supports Islamist terrorism" and "is a participant in hostilities against the Canadian Forces". The Fourniers note that Dr. Baglow testified that he does not believe that the words mean that he is a participant in hostilities against The Canadian Forces. The Fournier's rely on *Lawson v. Baines* 2011 BCSC 326, 34 B.C.L.R. (5th) 363 ("*Lawson*") in support of their position.

[218] After this submission was made Dr. Baglow requested an amendment of paragraph 8 of the Statement of Claim to plead in the alternative. Counsel for Dr. Baglow relied on appellate jurisprudence which indicates that pleadings can be amended even at the stage of closing submissions provided that there is no prejudice to the defendants which cannot be compensated by costs. It is submitted that no prejudice was suffered by the defendants.

[219] I agree. This was an eleven-day trial. There was extensive examination and cross-examination of Dr. Baglow. He testified at length about what his concerns were with respect to the impugned words. There was no surprise and the defendants have not demonstrated that they would have adduced any other evidence had paragraph 8 been pleaded in the alternative. They have not demonstrated any prejudice whatsoever. The amendment is therefore granted.

[220] In addition it is my view that the *Lawson* case does not stand for the proposition that a plaintiff is strictly locked in to every word pleaded in a defamation action. At paragraph 35 it is indicated that a plaintiff must prove with respect to inferential meanings, on a balance of probabilities, that the words bear those meanings or meanings substantially similar.

The Defence of Fair Comment

[221] Having found the impugned words to be defamatory, I turn to the defence of fair comment. As set out above, to establish that defence, a defendant must prove that: (1) the comment is on a matter of public interest; (2) the comment is based on fact; (3) the comment, though it can include inferences of fact is recognizable as comment; and (4) any person could honestly express that opinion on the proved facts. A plaintiff can however, defeat the defence by proving that the defendant was actuated by express malice.

[222] It is the position of the defendants that the defence has been engaged in this case and that Dr. Baglow has failed to prove that they were actuated by express malice. Dr. Baglow submits that the impugned words are not comment but instead a direct factual statement of what Dr. Baglow is. Further it is submitted that there is no factual foundation for the statement that Dr. Baglow supported the Taliban. It is submitted that the evidence points to the contrary. Dr. Baglow gave evidence at trial that he views the Taliban as an odious, political, jihadist extremist group, a murderous bunch of theocrats, practicing an extreme form of brutality and he referred to a number of blogs that he wrote critical of the Taliban.

1. The comment is on a matter of public interest:

[223] The first element is easily met in this case. The impugned words concerned a matter of public interest that is, the well-known and controversial case of Omar Khadr and the extent to which legal rights should be extended to him. Canadian public opinion was generally split on this issue as evidenced by an Angus Reid Public Opinion Poll from February 2008 (Exhibit 6, Tab 19). The question posed was whether the Canadian government should actively intervene to secure Omar Khadr's release. The results indicated that 41% agreed, 41% disagreed and 18% were not sure. Dr. Baglow himself recognized the Omar Khadr case as being one of public interest by writing extensively about it. In cross-examination he agreed that the Omar Khadr case and the war in Afghanistan were matters of great public interest.

2. The comment is based on fact:

[224] There are a number of notorious facts with respect to Omar Khadr. It would have been well known that Khadr, a Canadian, had been detained by United States Forces since 2002 at Guantanamo Bay, Cuba, where he faced murder and other terrorism-related charges. Mr. Khadr was taken prisoner in 2002 in Afghanistan as part of military action taken against the Taliban and Al Qaeda forces after the September 11, 2001, terrorist strikes in the United States. He was fifteen years old at the time. The United States alleged that near the end of the battle at which he was taken prisoner, Mr. Khadr threw a grenade which killed an American soldier (This factual background was referred to by the Supreme Court of Canada in *Canada (Justice) v. Khadr* 2008 SCC 28, [2008] 2 S.C.R. 125).

[225] The evidence also indicates that Dr. Baglow wrote extensively on the Omar Khadr case, prior to August 2010. At Tab 17 of Exhibit 6, Dr. Baglow set out some 42 posts from Dawg's Blawg, written from 2008-August 2010, prior to the impugned words being published, touching on the Taliban and Omar Khadr. Dr. Baglow testified about his view on Omar Khadr. It is and was his view that Omar Khadr is a Canadian citizen and a child soldier. He should have been repatriated to Canada and treated in accordance with International Law and the United Nations Rights of the Child Optional Protocol. Child soldiers should be rehabilitated and reintegrated into society. Dr. Baglow also testified that he was not a supporter of Canada's mission in Afghanistan and referred to several Dawg's Blawg posts in this regard. In cross-examination Dr. Baglow agreed that he wrote a lot about Omar Khadr and the war in Afghanistan. His views would have been well-known in the political blogosphere.

[226] In *WIC Radio*, Justice Binnie noted that the facts giving rise to the general dispute between Mair and Simpson were well known to Mair's listening audience. It was found that Simpson's views had a measure of notoriety and were publically known. A similar finding can be made with respect to Dr. Baglow's views on Omar Khadr. Dr. Baglow was notoriously known for taking the position that Omar Khadr should be repatriated to Canada and treated in accordance with international law.

3. The comment, though it can include inferences of fact is recognizable as comment:

[227] It is Dr. Baglow's view that the impugned words are not comment but are simply a statement of fact. It is submitted that the impugned words stand alone, framed in the present tense and are concrete.

[228] In determining whether the impugned words amount to a statement of fact or a comment I am mindful of the dicta of Justice Binnie in *WIC Radio* at paragraph 26. A comment includes a "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof". Further, he noted that there is ample authority for the proposition that words that may appear to be statements of fact may, in pith and substance, be properly construed as comment. He stated:

> This is particularly so in an editorial context where loose, figurative or hyperbolic language is used in the context of political debate, commentary, media campaigns and public discourse. (citations omitted)

[229] In determining whether a statement is a comment, the Court must consider the context in which the impugned words appear. In *Brown on Defamation*, 2nd ed., loose-leaf (Toronto: Carswell, 1999) the following was stated at pages 15-47 and 27-477 to 27-479.

> In determining whether a statement is comment, the words about which the plaintiff complains must be construed as a whole. The court must examine the totality of the circumstances and the context in which the remark was made, including the language used, the medium in which it was circulated, any cautionary terms that were used, and the audience to whom it was published.

> In determining whether a statement is an expression of fact or opinion, a court will consider the communication as a whole, and the context in which it was used. The totality of the circumstances and the context in which it occurs must be examined. This includes both the immediate context and the broader social context and surrounding circumstances in which the statement is made. "Context can be determinative that a statement is opinion and not fact, for the context of a statement may control whether words were understood in a defamatory sense". What might appear on its face to be a statement of fact may, when considered in context, be mere rhetorical hyperbole and not intended to be understood in a literal sense. Such loose, figurative or hyperbolic language may negate the impression that the publisher was stating facts about the plaintiff.

[230] Turning to the context in this case, the impugned words were found in a post on an online political message board established to allow people to voice their opinions on political and social issues, generally from a conservative viewpoint. Free Dominion is called "The Voice of Principled Conservativism", a title which appears on every page. There is ample evidence in the record to establish that Free Dominion was a place where participants exchanged (and visitors read) their often strongly worded opinions. Strong commentary is clearly evident in the Free Dominion posts and comment threads before the Court. Opinions would be set out in a post on various issues and those who choose to do so would counter with opinions of their own in the thread. Debate ensued.

[231] The post "Hey yokels with pitchforks, there is no libertarian base" was found in the Free Dominion subforum entitled "Opinions are Like Clymers" ("Clymer" has been defined to mean asshole), thus clearly indicating to readers that the post would contain opinion. The title of the post was vague and confusing and so would also alert readers that what followed was a commentary and not a factual dissertation. The post itself was rambling if not incoherent, touching on a number of different topics. It was in essence a rant, with Mr. Smith giving his views and opinions on any number of issues, none too clearly. Mr. Smith was railing against cultural elites, Bay and Bloor Street, scientists who believe in global warming, Torontonians, Liberals, the Mark Steyn human rights case, the census, the CBC, and elitists in Ontario. He spoke of a culture war and Western separatism. The post looked at as a whole was clearly commentary.

[232] While the impugned words appear to stand alone in the midst of what can only be termed a rant, there is some reference later in paragraph 8 to "TRAITORS" and "TREASON", and Omar Khadr. This reference was clearly commentary. Further, the words "one of the Taliban's more vocal supporters" (emphasis added) supported that this was commentary. It is a statement that is incapable of proof. As stated in *WIC Radio* what might appear on its face to be a statement of fact may, when considered in context be more rhetorical hyperbole.

[233] An analogy can be drawn here to *WIC Radio*. In *WIC Radio*, Mair's imputation that Simpson "would condone violence against gay people" was held to be a comment, not an imputation of fact. Mair was a radio shock jock with opinions on a variety of matters and not a reporter. In the circumstances, a reasonable listener would have recognized the imputation as comment.

[234] While in isolation the impugned words might appear to be a statement of fact, in pith and substance, in context, they must properly be construed as comment. I have come to this conclusion without consideration of the comments in the thread which followed. I note this because of Dr. Baglow's assertion that people do not read the comments in threads (As an aside, this assertion was not supported in the evidence. The evidence clearly established how important comments are to online political actors. This is where debate rages). Mr. Smith's comments in the thread would further support the finding that the impugned words must be construed as comment.

4. Any person could honestly express the opinion on the proved facts

[235] In *WIC Radio* the Supreme Court stated that the test is whether anyone could honestly have expressed the defamatory comment on the proven facts. The addition of a qualitative standard such as "fair minded" was rejected. Binnie J. quoted with approval from a decision of *the High Court of Australia in Channel Seven Adelaide Pty. Ltd. v. Manock* (2007), 241 A.L.R. 468 at paragraph 3:

> The protection from actionability which the common law gives to fair and honest comment on matters of public interest is an important aspect of freedom of speech. In this context, "fair" does not mean objectively reasonable. The defence protects obstinate, or foolish, or offensive statements of opinion, or inference, or judgment, provided certain conditions are satisfied. The word "fair" refers to limits to what any honest person, however opinionated or prejudiced, would express upon the basis of the relevant facts. (emphasis added)

[236] Justice Binnie also referred to the dissent of Justice Dickson in *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067. He stated the following at para. 40:

> "Honest belief", of course, requires the existence of a *nexus* or relationship between the comment and the underlying facts. Dickson J. himself stated the test in *Cherneskey* as "could any man honestly express that opinion on the proved facts" (p. 1100 (emphasis added)). His various characterizations of "any man" show the intended broadness of the test, i.e. "however prejudiced he may be, however exaggerated or obstinate his views" (p. 1103, citing *Merivale v. Carson* (1887), 20 Q.B.D. 275 (C.A.), at p. 281). Dickson J. also agreed with the comment in an earlier case that the operative concept was "honest" rather than "'fair' lest some suggestion of reasonableness instead of honesty should be read in" (p. 1104).

[237] Justice Binnie concluded at paragraph 62:

> The trial judge did not explicitly apply the "objective honest belief" test to the imputation that Simpson "would condone violence". In my view, however, having regard to the trial judge's reasons as a whole, and considering both the content of some of Simpson's speeches already mentioned, and the broad latitude allowed by

> the defence of fair comment, the defamatory imputation that while Simpson would not engage in violence herself she "would condone violence" by others, is an opinion that could honestly have been expressed on the proved facts by a person "prejudiced ... exaggerated or obstinate [in] his views". That is all that the law requires.

[238] What constitutes "support" can be a wide variety of things. For example, it can mean actual material support or giving aid and comfort to an enemy. The impugned words might be taken to mean that Dr. Baglow's views are tantamount to making common cause with the Taliban. They might also be taken to mean that if his views were given effect the Taliban would be emboldened or encouraged in their cause. An analogy can be drawn here to Jane Fonda's anti-Vietnam war stance and that it emboldened the North Vietnamese in their cause. It was Mr. Smith's honestly held belief, articulated by him on several occasions, that support for Omar Khadr, who was fighting in Afghanistan against the United States amounted to support for the Taliban. I note that others expressed similar views in the comments section to the blog "The Gitmo Kanga-ruse".

[239] While it may not be reasonable to assert that because someone believes that Omar Khadr is entitled to *Charter* or International Law protections that person supports the Taliban, the test is not whether the opinion is reasonable. In my view the test that is, whether anyone could honestly have held the view that support for Omar Khadr could be seen as support for the Taliban, has been met.

[240] As an aside, I note that Dr. Baglow resorted to similar reasoning in his blog post "Enabling Bigotry". In this blog he criticized the CCLA for intervening in the *Boisson* case to support *Charter* rights. He stated that the CCLA intervened in and warmly welcomed an Alberta Court of Appeal's ruling that "in essence upheld the right of bigots to spew homophobic propaganda in the local press". Dr. Baglow testified at trial that he viewed the CCLA as enabling hate. He stated in his post:

> The CCLA stands with the bigots, not with their victims. The rights of homophobes come first. As such, the organization is a willing accomplice in homophobia.

[241] In summary, I find that the defence of fair comment has been established in the circumstances of this case.

Malice:

[242] The defence of fair comment can be defeated by a plaintiff by proving that the defendant was actuated by malice. The case law is clear that a court must find that malice was the dominant motive for the offending publication. The trial judge in *WIC Radio* (*Simpson v. Mair* and *WIC Radio Ltd.*,2004 BCSC 754, 31 B.C.L.R. (4th) 285) refused to find that Mair had acted maliciously, a finding that was never appealed. She stated at paragraphs 78-85:

78 In my view, there is ample evidence of intrinsic malice in this case. "Unwholesome virulence" describes the language of the editorial, with such words and phrases as "menace", "mean spirited", "power mad", "rabble rousing" and "dangerous bigot". What is most offensive about the above-mentioned words "menace" and "dangerous bigot" is that they "bookended" the comparisons with Hitler, the Ku Klux Klan and skinheads, among others. Such language was totally unwarranted given the purpose of the parents' rally and the speech made by Simpson.

79 The language of the editorial as a whole, demonstrates intrinsic malice along with more minor issues, such as Mair's persistent public offence at Simpson's private letter.

80 There were earlier editorials which contain some of the virulent language in this editorial but none as overwhelming in its virulence as the editorial complained of.

81 In determining whether malice can defeat fair comment, the law cautions that the court must be able to find that malice was the dominant motive for the offending editorial.

82 The New Brunswick Court of Appeal decision in *Ross*, *supra* at paras. 113-116, malice sufficient to undermine the defence of fair comment was rejected, even though the defendant had admitted to hating Ross' writing, had made "profane and denigrating" remarks about Ross and had showed a very savage cartoon.

83 The court quoted with approval from *Brown*, *supra*:

> It is the Defendant's primary or predominant motive in publishing the defamatory remark that is determinative. 'Incidental gratification of personal feelings is irrelevant." ... Dislike and ill will may be present but actual malice may be entirely wanting. The fact that a defendant is annoyed, or dislikes the plaintiff, or even contemptuous of him, and takes special delight in offending or embarrassing him, and pleasure in the effect of the publication, or that he was angry and rude, or indignant and resentful, and welcomed the opportunity to expose him, will not defeat a privilege if it is otherwise exercised for a proper purpose.

84 Having considered all the evidence put forward in oral and written submissions on the issue of malice, although I have not attempted to set out all of the arguments and evidence that was put before the court, and having found that Mair was, in fact, actuated by malice, I am unable to find that that this was his predominant or primary motive in publishing the defamatory editorial. I consider

> that Mair was on a "campaign" to expose what Mair believed were Simpson's "irresponsible" statements and speeches against the teaching of tolerance of a homosexual lifestyle in public schools. This, together with the overall content of the defamatory editorial, is evidence supporting a finding that the dominant motive for publishing the editorial was Mair's honestly held opinion. That opinion was that the position taken by Simpson publicly in support of a movement to resist the legitimizing of a homosexual lifestyle, whether taught in schools or in relation to society in general, was a campaign which he considered dangerous to values which he espoused. This was and is an issue of public concern about which reasonable debate is important.
> 85 Thus, the defence of fair comment cannot be defeated by the malice which I find actuated the specific language used by Mair.

[243] Although the finding regarding malice in *WIC Radio* was not appealed to the Supreme Court of Canada, Justice Lebel made the following comment at paragraph 106:

> The requirement that malice be the *dominant* motive for expressing an opinion in order to defeat fair comment helps maintain a proper balance between protecting freedom of expression and reputation. Arguments between ideologically-opposed participants in a public debate often breed bitterness, but such debate remains valuable and worthy of protection in a democratic society.

[244] Dr. Baglow has not raised malice as against Mr. Smith. However, three separate allegations are said to support a finding of malice against the Fourniers:

1) The Fourniers refused to retract the offending post and did not respond to the request to do so.

2) Instead they answered with two posts on Free Dominion:

   - "FD gets liable notice, but something has that Wet Dawg Smell", (August 12, 2010) authored by Connie Fournier
   - "John Baglow puts on hid frilliest internet dress" (August 12, 2010) authored by Mark Fournier

3) The allegations they made with respect to spoliation.

[245] In my view these allegations, even taken together, do not support that malice was the dominant motive for the publication. Firstly, the Fourniers took the time to investigate the request for a retraction. A number of reasons were articulated for their decision not to retract the post which are not indicative of malice. Ms. Fournier testified that if anyone was interested in the reputation of Dr. Baglow, he or she could google Dr. Baglow. Mr. Smith's post would not appear in the results as Dr. Baglow's name was not in the post. Ms. Mew's post concerned her however because it brought Dr. Baglow's real name into the discussion. If Ms. Mew had not turned out to be Dr. Baglow, Ms. Fournier would have removed that post because it identified

him. It was her opinion at this point that Dr. Baglow was not genuinely interested in his reputation at all. Mr. Fournier testified that he felt that they were being played and that Dr. Baglow was trying to bully them. In retrospect, Dr. Baglow testified that he regretted the Ms. Mew post.

[246] Ms. Fournier also testified that she saw the post and found it to be part of an ongoing debate between Dr. Baglow and Mr. Smith. They decided to leave the post up because Dr. Baglow had allowed Mr. Smith to write similar things on Dr. Baglow's own blog. In addition, the comment concerned a matter of public interest and in the Fourniers' opinion it seemed like a typical fair comment on a political message board. Ms. Fournier also considered the nature of Dr. Baglow's own posts and comments about others.

[247] With respect to the two posts referred to above "FD gets liable notice, but something has that Wet Dawg Smell" and "John Baglow puts on his frilliest internet dress", it seems obvious to me that the Fourniers were reacting to the use of the Ms. Mew "sock puppet" which they viewed with some legitimate concern. While the language used indicated their concern and was strong, its dominant motive was not malicious. The picture of Dr. Baglow in drag in Mr. Fournier's was "pure internet snark" similar to posting a photo of Prime Minister Harper with a crown and "P.M." necklace in the Dr. Dawg post "Off with his head". Further, in tone and content it is not dissimilar to anything Dr. Baglow has written about the Fourniers. It is Dr. Baglow who referred to them a "numpties", called Ms. Fournier "Free Dominatrix" and Mr. Fournier's "equally thick wife" and stated in "Hadjis v. Hadjis" that anyone wanting to find Nazis should try going through Ms. Fournier. Dr. Baglow also posted a picture of the Fourniers' receiving the George Orwell Free Speech Award in 2009, with the notation that past previous honourees included holocaust deniers Ernst Zundel, Malcolm Ross, David Irving and James Keegstra, about half a dozen times.

[248] Finally, with respect to the Fourniers pursuing the issue of spoliation, it is understandable that their suspicions would have been initially aroused by the fact that on March 30, 2011, when preparing their Statement of Defence they were able to view the old comments on Dawg's Blawg but were unable to do so on April 3, 2011. There is not a lot of trust between these parties. Thus the plaintiff has not proven that malice was the dominant motive for the publication.

[249] In summary, for the reasons set out above I find the impugned words to have been defamatory. However the defence of fair comment has been made out. The plaintiff's claim is therefore dismissed.

Costs:

[250] I turn now to the issue of costs. Both sides were successful and unsuccessful. While I accepted the plaintiff's claim that the impugned words were defamatory, the defendants successfully asserted the defence of fair comment. The Fourniers did not succeed in their assertion that they should not be found to be publishers for purposes of the law of defamation. The claim of spoliation was not accepted and I note that significant trial time was expended with respect to this issue. Both sides made allegations of malice against the other and again significant trial time was expended with respect to this issue, but I made no findings of malice.

[251] I note that both sides adopted a "no holds barred" approach to this litigation. A trial that was scheduled to take three days took 13 days. It was obviously a matter of principle to all involved. In addition both sides advised the Court throughout the trial that this was a case of first impression. They could point to no case in Canada which dealt with the issue of Internet defamation in the political blogosphere. The parties advised that they view the case as precedent setting and political bloggers require and are waiting for the guidance of the Court. I was left with the clear impression from both sides that guidance from the Court with respect to the application of the law of defamation to the political blogosphere, where debate can be caustic, strident, vulgar and insulting, is required. Because of the issues involved the CCLA sought and was granted intervenor status. There is a public interest element to this litigation.

[252] Further, the Court of Appeal indicated in the appeal of the decision of Justice Annis on the motion for summary judgment in this matter, that the issues that present in this case arise in the novel milieu of Internet defamation in the political blogosphere. The Court of Appeal questioned whether different considerations apply in determining whether a statement is or is not defamatory in this milieu. It noted that these issues have not been addressed in the jurisprudence in any significant way and that the responses may have far-reaching implications.

[253] In my view, in these circumstances, it is appropriate that both sides bear their own costs in this matter. The costs incurred with respect to Dr. Elmer will be split, half to be paid by the plaintiff and half to be paid by the defendants as previously ordered.

[254] Finally, I thank all involved for their assistance and thoughtful submissions.

Madam Justice Heidi Polowin

Released: February 23, 2015

CITATION: *Baglow v. Smith*, 2015 ONSC 1175
OTTAWA COURT FILE NO.: CV-10-49803
DATE: 2015/02/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

John Baglow a.k.a. "Dr. Dawg"

Plaintiff

– and –

Roger Smith a.k.a. "Peter O'Donnell", Connie Fournier and Mark Fournier

Defendants

– and –

The Canadian Civil Liberties Association

Intervener

REASONS FOR JUDGMENT

POLOWIN J.

Released: February 23, 2015