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# Where Do We Go from Here? Reflections on the LCO's Consultation and Conference

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# Where Do We Go from Here? Reflections on the LCO's Consultation and Conference

## **Abstract**

This is a report on the Law Commission of Ontario's one-day conference on defamation law and the Internet by the conference rapporteur. After reviewing the topical nature of the event (including its relationship with debate on defamation law in Ontario and elsewhere), this article discusses the position of defamation in a wider legal landscape. Points include the relationship between defamation and privacy, the impact of data protection, and the appropriateness of procedures. Then, the impact of technological change is assessed, referring to the liability of intermediaries, the enforcement of decisions, and the degree to which online communication can support a diverse range of voices and perspectives. Concluding remarks encompass the significance of human rights law, the reconsideration of conceptual and doctrinal frames for defamation, and the use of new technologies to address issues of reputation and responsibility.

# Where Do We Go from Here? Reflections on the LCO's Consultation and Conference

DAITHÍ MAC SÍTHIGH\*

This is a report on the Law Commission of Ontario's one-day conference on defamation law and the Internet by the conference rapporteur. After reviewing the topical nature of the event (including its relationship with debate on defamation law in Ontario and elsewhere), this article discusses the position of defamation in a wider legal landscape. Points include the relationship between defamation and privacy, the impact of data protection, and the appropriateness of procedures. Then, the impact of technological change is assessed, referring to the liability of intermediaries, the enforcement of decisions, and the degree to which online communication can support a diverse range of voices and perspectives. Concluding remarks encompass the significance of human rights law, the reconsideration of conceptual and doctrinal frames for defamation, and the use of new technologies to address issues of reputation and responsibility.

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IN THIS ARTICLE, THE READER WILL FIND SOME HIGHLIGHTS from the Law Commission of Ontario's ("LCO") one-day conference, "Defamation Law on the Internet: Where Do We Go From Here?" held in Toronto on 3 May 2018.<sup>1</sup> The author, who presented an initial version of these observations as the final speech of the day, neither intends to offer a definitive view nor attempts to answer the questions upon which the Commission consulted. Instead, the goal is to convey a sense of the debates that took place not just from the stage, but also from the floor (though audience comments are not attributed). The event was attended by legal practitioners, researchers, students, journalists, and members of the general public.

The major themes are found in the program for the day, reflecting some of the trickiest issues already outlined by the LCO in its extensive consultation paper.<sup>2</sup> In the morning, two panels discussed defamation reform in general and assessed the harms and values underpinning the cause of action.<sup>3</sup> In the afternoon, we looked at two further aspects of defamation (intermediaries and remedies) in more detail.<sup>4</sup> In between, a lunchtime panel assessed a range of tricky issues in

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1. See "Defamation Law on the Internet: Where Do We Go From Here?" (3 May 2018), online: *Law Commission of Ontario* <[www.lco-cdo.org/wp-content/uploads/2018/03/LCO-Defamation-Law-Conference-Program-FINAL1.pdf](http://www.lco-cdo.org/wp-content/uploads/2018/03/LCO-Defamation-Law-Conference-Program-FINAL1.pdf)> [perma.cc/6BPS-5K5T] ["Conference Program"] (the agenda for the day). The conference was co-chaired by the Law Commission of Ontario and Professors Jamie Cameron and Hilary Young.
  2. Law Commission of Ontario, "Defamation in the Internet Age: Consultation Paper" (Toronto: LCO, November 2017).
  3. See "Conference Program," *supra* note 1 at 2-3. See especially Jamie Cameron, Brian MacLeod Rogers & Andrew Scott, "Rethinking Defamation Law: The Setting for Reform" (Panel delivered at the Law Commission of Ontario's Defamation Law and The Internet: Where Do We Go From Here? conference, Toronto, 3 May 2018), online (video): *LCO* <[s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4](https://s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4)>; Jane Bailey, Andrew Kenyon & Randall Stephenson, "The Harms and Values Underlying Defamation Law in the Internet Age" (Panel delivered at the Law Commission of Ontario's Defamation Law and the Internet: Where Do We Go From Here? conference, Toronto, 3 May 2018), online (video): *LCO* <[s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4](https://s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4)>.
  4. See "Conference Program," *supra* note 1 at 3-4. See especially Bram Abramson, Christina Angelopoulos & Hilary Young, "Responsibility for Defamation and the Problem of Intermediaries" (Panel delivered at the Law Society of Ontario's Defamation Law and the Internet: Where Do We Go From Here? conference, Toronto, 3 May 2018), online (video): *LCO* <[s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4](https://s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4)>; Ethan Katsh, Emily Laidlaw & Darin Thompson, "Resolving Online Defamation in the Internet Age" (Panel delivered at the Law Commission of Ontario's Defamation Law and the Internet: Where Do We Go From Here? conference, Toronto, 3 May 2018), online (video): *LCO* <[s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4](https://s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4)>.

the field, with a particular emphasis on practical dimensions and experiences; this discussion covered jurisdiction, anonymity, and voluntary removal.<sup>5</sup> Shorter narrative accounts of each panel were published by an excellent team of student volunteers, who played an important role in the day's proceedings.<sup>6</sup>

In Part I, the timeliness of the conference is considered. In Part II, we look at the discussion on defamation within a wider legal landscape, including its relationship with other causes of action. The importance of technological change (or lack thereof) is reviewed in Part III, as is the informative discussion of 'counter speech' at the conference. Part IV concludes.

## I. DISCUSSING THE NEED FOR REFORM

The LCO's conference came at a crucial point in the debate on Internet communications. Recent months have been characterized by renewed attention being paid to the duties and responsibilities of large enterprises in the IT and communications sectors. It was noted in an article in *The Economist*, even before revelations concerning Facebook and Cambridge Analytica, that 2018 could be the year of a regulatory and legislative "techlash," bringing new attention to the power exerted by the likes of Google and Amazon and whether said power might be checked by the exercise of powers under, for instance, competition law.<sup>7</sup> The conference itself took place while the city of Toronto was celebrating the documentary format by way of the twenty-fifth iteration of the Hot Docs Festival.<sup>8</sup> We gathered on the eve of World Press Freedom Day, a UN-led effort to emphasize the role of the press and the importance of freedom of expression.<sup>9</sup>

5. See "Conference Program," *supra* note 1 at 3. See especially Kathy English, Paul Schabas & Maanit Zemel, "Front Line Issues" (Panel delivered at the Law Commission of Ontario's Defamation Law and the Internet: Where Do We Go From Here? conference, Toronto, 3 May 2018), online (video): *LCO* <s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4>.
6. Law Commission of Ontario, "Conference Blogs" (2017), online: <www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/defamation-law-and-the-internet-where-do-we-go-from-here/conference-blogs> [perma.cc/X5WC-GT2E].
7. See *e.g.* "Internet firms face a global techlash," *The Economist* (10 August 2017), online: <www.economist.com/international/2017/08/10/internet-firms-face-a-global-techlash> [perma.cc/AD9S-V8U9]; "The techlash against Amazon, Facebook Google—and what they can do," *The Economist* (20 January 2018), online: <www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do> [perma.cc/LDN9-3CEM].
8. See generally Hot Docs, "Welcome to Hot Docs," online: <www.hotdocs.ca>.
9. See generally United Nations, "Press Freedom Day," online: <www.un.org/en/events/pressfreedomday>.

The interaction between news, ‘fake news,’ and defamation—yesterday and today, in order to understand tomorrow—was one of the themes that clearly framed the day. Randall Stephenson’s article revisited conceptual understandings of justifications for freedom of expression and the implications of such justifications for defamation law, emphasizing the gap between Meiklejohn’s valorization of self-governance and Blasi’s alternative approach of stressing the ‘checking function’ of the press (including, for instance, the recognition of information asymmetry and accountability).<sup>10</sup> Many speakers sought to highlight and problematize the conceptual context of defamation law. Jamie Cameron traced the role of concepts such as dignity, including its presentation as a justification for defamation law (*i.e.*, reputation) for *Charter* purposes in Canadian case law and how it has been overvalued as such.<sup>11</sup> She called attention to the need to contextualize theorizing the problems of libel law to the Internet, citing Robert Post’s social concept of civility as an example.<sup>12</sup>

Participants also noted the range of questions arising in courts, legislatures, and wider debate, which offered important insights for the LCO’s reform efforts. As Andrew Scott argued, defamation reform has a number of major modes in a common law context: Judicial development of the law (helpfully, Brian Rogers traced the slow development of Canadian defamation law in a *Charter* context from *Hill v Church of Scientology* onwards) and selective or comprehensive restatement or amendments of the law by statutory means.<sup>13</sup> Of course, law reform commissions can influence both, as the recent experience with privacy law in New Zealand has shown.<sup>14</sup>

In the courts, debate pertaining to defamation law reform is framed by a number of ongoing issues. Scott highlighted the forthcoming UK Supreme Court hearing of *Lachaux v Independent Print*, where the notable provisions of the *Defamation Act 2013* on a ‘serious harm’ threshold are likely to be defined

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10. Randall Stephenson, “Restoring Accountability in Freedom of Expression Theory: Public Libel Law and Radical Whig Ideology” (2019) 56 Osgoode Hall LJ 17. See also Bailey, Kenyon & Stephenson, *supra* note 3.

11. See Cameron, Rogers & Scott, *supra* note 3.

12. Jamie Cameron, “Networking the Law of Defamation” (24 May 2018), online: *Centre for Free Expression at Ryerson University* <cfe.ryerson.ca/blog/2018/05/networking-law-defamation>.

13. See Cameron, Rogers & Scott, *supra* note 3. See also *Hill v Church of Scientology*, [1995] 2 SCR 1130; Andrew Scott, “O! They Have Lived Long on the Alms-Basket of Words...” (2019) 56 Osgoode Hall LJ 80.

14. *C v Holland* [2012] NZHC 2155 at paras 83-88. For an example of the information applied in the case, see New Zealand Law Commission, *Invasion of Privacy: Penalties and Remedies: Review of the Law of Privacy, Stage 3*, Report 113 (Wellington: NZLC, January 2010).

more closely—especially in terms of whether the legislature intended to make a major break with the prior law on harm.<sup>15</sup> Noting that it had been two decades since the landmark exploration of the relationships between jurisdiction, defamation, and the Internet in the Australian proceedings in *Dow Jones v Gutnick*, Paul Schabas discussed then-pending Supreme Court of Canada case *Haaretz.com v Goldhar*, where the Court considered the application of the real and substantial connection test to the online publication of news, restoring to legal debate the vexed question of ‘libel tourism’ (claimants seeking the most hospitable destination in which to initiate an action) and the reach of domestic courts in an international communications system.<sup>16</sup>

What, then, for the legislator with an interest in the reform of defamation law? A number of speakers drew upon the recent comments of New South Wales judge Judith Gibson, who had written a critical account of legislative inattention to defamation law across Australia, highlighting various inconsistencies and intervening developments within the current law (*e.g.*, remedies, defences, and the growth in use of social media).<sup>17</sup> The unfinished business of law reform is found in Scotland, for instance, where the Scottish Law Commission has prepared a draft Bill drawing upon the earlier reform project in England and Wales that culminated in the *Defamation Act 2013* (one of the most cited pieces of legislation throughout the day).<sup>18</sup> A report on similar themes, though with

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15. See Cameron, Rogers & Scott, *supra* note 3; *Lachaux v Independent Print*, [2017] EWCA Civ 1334, leave to appeal to UKSC granted (hearing set for 13 November 2018 under the following Case ID: UKSC 2017/0175); *Defamation Act 2013* (UK), c 26, s 1.

16. See English, Schabas & Zemel, *supra* note 5; *Dow Jones & Co Inc v Gutnick*, [2002] HCA 56; *Haaretz.com v Goldhar*, 2018 SCC 28. In *Haaretz.com v Goldhar*, the Supreme Court stayed the action on the grounds that Israel, not Ontario, was clearly the most appropriate forum for the dispute. Interestingly, the LCO’s work is referred to in both Justice Wagner’s concurring opinion and in the dissenting reasons by Chief Justice McLachlin and Justices Moldaver and Gascon (*ibid* at paras 144, 203).

17. JC Gibson, “Adapting Defamation Law Reform to Online Publication,” *Gazette of Law & Journalism* (21 March 2018), online (pdf) <glj.com.au/wp-content/uploads/2018/04/Gibson-DCJ-defamation-law-reform.pdf> [perma.cc/NZ8Q-HX8L].

18. Scottish Law Commission, *Report on Defamation*, SCOT LAW COM No 248 (Edinburgh: SLC, December 2017) (The Honourable Lord Pentland, Chairman) at 101. After the conference, the Scottish Government announced that further consultation would take place in advance of legislation. See also Letter from Annabelle Ewing to Lord Pentland (6 June 2018), online (pdf): *Scottish Law Commission* <scotlawcom.gov.uk/files/2415/2870/8097/Response\_from\_the\_Scottish\_Government\_to\_Report\_on\_Defamation\_No\_248\_.pdf> [perma.cc/5DG8-RZM8].

distinctive recommendations, has also been prepared in Northern Ireland, though implementation is presently unlikely due to overall political conditions.<sup>19</sup>

The European Commission has recently shown greater interest in the selective revisiting of its legal framework for electronic commerce (through guidance and recommendations, for now), which touches upon defamation law through its particular concern with the liability and responsibility of Internet intermediaries.<sup>20</sup> Stephenson recalled Van Vechten Veeder's 1903 critique of the aggregation of defamation law without legislative intervention.<sup>21</sup>

In this context, it should also be noted that the conference saw a number of important pieces of empirical and comparative evidence being presented or referred to. Kathy English's work in documenting requests to unpublish material contributes to a discussion of the scope and scale of the phenomenon, especially as the procedures for making similar requests under European law become more widely known.<sup>22</sup> In earlier work, Andrew Kenyon showed how a rigorous tracking of the development of new case law after Australia's unification of defamation law can assist in an understanding of the effects of legal tests and defences in the field.<sup>23</sup> Hilary Young's quantitative exploration of Canadian defamation cases was also referred to by a number of speakers; findings included a higher rate of liability in digital (*i.e.*, email and web) cases than those occurring offline and new insights on the award of damages across two ten-year periods.<sup>24</sup>

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19. Northern Ireland, Department of Finance, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance*, by Andrew Scott (Belfast: Department of Finance, 19 July 2016) (report submitted in June 2016, subsequently published with additional consultation information under the heading "Review of the law of defamation") [*Reform of Defamation Law in Northern Ireland*].
  20. European Commission, *Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online*, C(2018) 1177 (Brussels: European Commission, 1 March 2018) at 2-3.
  21. Randall Stephenson, *A Crisis of Democratic Accountability: Public Libel Law and the Checking Function of the Press* (Oxford: Hart Publishing, 2018) at 1. Stephenson makes this point in more detail in his book, which opens with an extended discussion of Van Vechten Veeder's critique of defamation law. For Van Vechten Veeder's original critique, see "The History and Theory of the Law of Defamation" (1903) 3 Colum L Rev 546.
  22. See English, Schabas & Zemel, *supra* note 5.
  23. See Andrew Kenyon, "Six Years of Australian Uniform Defamation Law: Damages, Opinion, and Defence Meanings" (2012) 35 UNSWLJ 31. See also Bailey, Kenyon & Stephenson, *supra* note 3; Andrew Kenyon, "Defamation, Privacy and Aspects of Reputation" (2019) 56 Osgoode Hall LJ 59 [Kenyon, "Aspects of Reputation"]
  24. See Hilary Young, "The Canadian Defamation Action: An Empirical Study" (2017) 95 Can Bar Rev 591.

Conference participants also discussed further research needs. Jane Bailey's work with Valery Steeves, commissioned by the LCO, made distinctive use of focus groups as an aid to the understanding of perceptions of defamation law and related legal remedies.<sup>25</sup> Darin Thompson, in discussing the development of the BC Civil Resolution Tribunal, highlighted the data that could emerge from the new online system and how it can be reviewed both as part of an improvement process and to highlight the use (and non-use) of the system by different types of applicants.<sup>26</sup> Interestingly, on the other side of the Atlantic, a key concern for the user group established as part of the new Media and Communications List for media and communications proceedings in the High Court of England and Wales is the reliability of statistical information on such proceedings.<sup>27</sup>

In an introductory address, Lorne Sossin (former Dean of Osgoode Hall Law School) recalled the establishment of the Law Commission of Ontario in its current form and how responding to technology and digital transformations was a key part of the case for a partnership approach and the ongoing review of the law.<sup>28</sup> One might also add, however, that although many troubling uses of online communications were discussed over the course of the day, the fact that the LCO's own work was published online has had the more welcome result of capturing the attention of readers well beyond Ontario. As noted above, the reform of defamation law in England and Wales primarily worked within one particular paradigm of revisiting the balance between the interest of claimants and defendants; it is only now that a wider understanding of what was not done has become clear.<sup>29</sup> The LCO's project is, quite rightly, already being pointed to as a new way of reviewing defamation law.<sup>30</sup>

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25. Law Commission of Ontario, *Defamation Law in the Age of the Internet: Young People's Perspectives*, by Jane Bailey & Valerie Steeves (Toronto: LCO, 15 June 2017). See also Bailey, Kenyon & Stephenson, *supra* note 3.

26. Katsh, Laidlaw & Thompson, *supra* note 4.

27. Paul Magrath, "Media litigation: user group meeting – 15 February 2018" (16 February 2018), online: *Transparency Project* <[www.transparencyproject.org.uk/media-litigation-user-group-meeting-15-february-2018](http://www.transparencyproject.org.uk/media-litigation-user-group-meeting-15-february-2018)> [perma.cc/UD4P-YMNV].

28. Lorne Sossin, Address (Address delivered at the Law Commission of Ontario's Defamation Law and the Internet: Where Do We Go from Here? conference, Toronto, 3 May 2018), online (video): *LCO* <[s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4](https://s3.amazonaws.com/peachslmvideos/pID-487/260611-1525458593-high.mp4)>.

29. It was noticed by some at the time, though. See e.g. Alastair Mullis & Andrew Scott, "Tilting at Windmills: The Defamation Act 2013" (2014) 77 *Mod L Rev* 87.

30. Michaela Whitbourn, "NSW pushes for historic overhaul of defamation laws," *The Sydney Morning Herald* (7 June 2018), online: <[www.smh.com.au/national/nsw/nsw-pushes-for-historic-overhaul-of-defamation-laws-20180607-p4zk0k.html](http://www.smh.com.au/national/nsw/nsw-pushes-for-historic-overhaul-of-defamation-laws-20180607-p4zk0k.html)> [perma.cc/F79W-6KVV].

## II. DISCUSSING THE NEED FOR DEFAMATION

Although every project must have reasonable parameters, it has become clear that the questions being asked by the LCO do call for debate on whether defamation law is the right way to resolve certain issues and wrongs.

Bailey's empirical work with Steeves, presented at the conference and, as already noted, published in full by the LCO (which commissioned it), elicited certain critiques of the way in which defamation law emphasizes falsity and individual reputation, making it an imperfect fit for certain contemporary phenomena, such as the non-consensual disclosure of intimate images.<sup>31</sup> Moreover, as Kenyon argues, defamation law as it stands is better described as protecting aspects of reputation, rather than reputation itself.<sup>32</sup> Both points also illustrate the complex area outlined by David Mangan in another paper commissioned by the LCO, where he observed that the development of a cause of action for privacy, while still at a relatively early stage in Ontario, would mean that the aims of defamation, privacy, and other causes of action ought to be spelled out in considerably more detail.<sup>33</sup> At the launch of the LCO's consultation paper in November 2017, the present author highlighted the innovative approach now being taken in New Zealand, which is referred to in the LCO's consultation paper.<sup>34</sup> In New Zealand, the *Harmful Digital Communications Act 2015* promulgates a set of principles regarding harmful digital communications, including, for instance, the disclosure of sensitive personal facts or making a false allegation.<sup>35</sup> Complaints are handled by a prescribed complaints body (NetSafe) in the first instance, with the role of the courts being reserved for remedies, such as correction, a right of reply, takedown orders, and more. The Act does not repeal any aspect of defamation or privacy law, but instead offers a new type of action without reference to existing doctrines, albeit specific to the online context.

One particular manifestation of overlapping causes of action, which earlier defamation reform projects have not really faced in any meaningful way, is the

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31. Bailey & Steeves, *supra* note 25 at 40ff.

32. Kenyon, "Aspects of Reputation," *supra* note 23 at 60. See also Bailey, Kenyon & Stephenson, *supra* note 3.

33. David Mangan, "The Relationship Between Defamation, Breach of Privacy, and Other Legal Claims Involving Offensive Internet Content" (Toronto: LCO, July 2017) at 56.

34. "Defamation in the Internet Age: Consultation Paper," *supra* note 2 at 98.

35. *Harmful Digital Communications Act 2015* (NZ), 2015/63, s 6.

increasing role played by data protection law.<sup>36</sup> Data protection law, including the high-profile reform instrument of the General Data Protection Regulation in the European Union (which came into force just after the conference), identifies principles for the processing of personal data (*e.g.*, transparency and purpose limitation) and requires a legal basis for processing (such as, though not limited to, consent).<sup>37</sup> In particular, the emphasis upon relevance supplementing accuracy was, as pointed out from the floor by a number of participants, characteristic of the data protection field, and so potentially controversial as a departure from the assumptions embedded in defamation law. Scott pointed to the normalization of resorting to data protection arguments in public figure claims against the media in UK jurisdictions, while Kenyon recalled how Australian defamation had once required defendants to go beyond demonstrating the truth of a statement and identify a relevant public interest.<sup>38</sup> Of course, as Ethan Katsh reminded us in a later session, other areas of law, such as the control of credit reporting, were grappling with similar issues.<sup>39</sup> Related to these issues is the identification of the underlying factors for defamation reform. Stephenson called for a greater understanding of the accountability profile of a jurisdiction in order to support a discussion of what reform of defamation law, if any, is necessary and appropriate.<sup>40</sup> Here, in the tradition of media and political economy scholarship identifying varying models

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36. In the United Kingdom. See *CG v Facebook Ireland*, [2016] NICA 54 (considering the interaction between intermediary liability and data protection, which is particularly unclear); *Pihl v Sweden App*, No 74742/14 (9 March 2017). For a discussion of the availability of data protection remedies where a defamation remedy would not be applied, see *Prince Alaoui v Elaph*, [2017] EWCA Civ 29.

37. See EC, *Regulation (EU) 679/2016 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)* [2016] OJ, L 119/1.

38. See Cameron, Rogers & Scott, *supra* note 3; Bailey, Kenyon & Stephenson, *supra* note 3; Kenyon, “Aspects of Reputation,” *supra* note 23 at 68. A recent example of Scott’s point is the action taken by Cliff Richard against the BBC. See Owen Bowcott, “Coverage of Raid on Cliff Richard’s home was in public interest, BBC tells court,” *The Guardian* (12 April 2018), online: <[www.theguardian.com/uk-news/2018/apr/12/cliff-richards-legal-battle-against-bbc-opens-in-high-court](http://www.theguardian.com/uk-news/2018/apr/12/cliff-richards-legal-battle-against-bbc-opens-in-high-court)> [perma.cc/DD25-AZWX].

39. See Katsh, Laidlaw & Thompson, *supra* note 4; *Spokeo v Robbins* (2017) 867 F (3d) 1108 (interpreting *Fair Credit Reporting Act*). For the Act referenced, see *Fair Credit Reporting Act*, 15 USC 1681 (1970).

40. Stephenson, *supra* note 10 at 41.

of a media system, he highlighted both the structure of the organized media and the presence of contextual factors (*e.g.*, politics and public law).<sup>41</sup>

A further bundle of questions asks whether defamation procedures (including general matters of tort law) are a good fit for the types of actions arising out of Internet communications even if defamation is the right doctrine. This was a major theme of the final panel of the day, though it was mentioned in every panel by at least one speaker. Emily Laidlaw's presentation highlighted the high volume, low value, and legal complexity of many such actions.<sup>42</sup> Non-pecuniary interests are often at stake, and accessible procedures that offer speedy and digital-aware resolution are in demand. One of the models referred to by Laidlaw in her work is that of the emerging Civil Resolution Tribunal ("CRT") in British Columbia.<sup>43</sup> Thompson, a key figure in the design of the CRT, presented its main features, speaking about the use of differing levels of automation in its online platform, with the greater use of such for diagnostic and self-help purposes at initial stages.

What other options for procedural reform might require further discussion? Rogers highlighted two important developments in the courts: the greater use of summary procedures and the growth in the number of cases between individuals, compared to the more conventional type of defamation action between, for instance, a well-known figure and a media corporation. As Katsh put it, recalling Roger Fisher and William Ury's *Getting to Yes*, conflict is a growth industry.<sup>44</sup> Maanit Zemel added that in a context where anonymity is widespread, various assumptions around the orderly progress of litigation, the use of interim orders, and the like become considerably more complicated and may, in some cases, make resolution impractical.<sup>45</sup>

### III. DISCUSSING THE DIGITAL

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41. See Bailey, Kenyon & Stephenson, *supra* note 3. For an example of this tradition, see Daniel C Hallin & Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press, 2004).

42. Katsh, Laidlaw & Thompson, *supra* note 4. See also Emily Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes" (2019) 56 Osgoode Hall LJ 162.

43. See Civil Resolution Tribunal, "Welcome to the Civil Resolution Tribunal" (2018), online: <[www.civilresolutionbc.ca](http://www.civilresolutionbc.ca)>.

44. See Katsh, Laidlaw & Thompson, *supra* note 4; Roger Fisher & William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, revised ed by Roger Fisher, William Ury & Bruce Patton (New York: Penguin Books, 2011).

45. See English, Schabas & Zemel, *supra* note 5.

The co-chairs of the event both framed the technological dimension of the day's proceedings in helpful ways. Young explained how the problems being discussed were highlighted, rather than created, by the Internet, while Cameron pointed to the nature of online community, the opportunities for novel forms of accountability, and the challenges of manageability, legitimacy, and reach.<sup>46</sup> This online aspect is indeed a distinctive feature of the LCO's project. Other recent reform initiatives, such as those in England and Wales, were, as Scott set out, informed by concern about the chilling effect of defamation law and the overall balance between the parties, rather than a high-level concern with the implications of technological and related social change. In this section, the debates on intermediary liability, de-indexing, dispute resolution, and counter speech will be highlighted.

As with dispute resolution, the question of the role of intermediaries was both the subject of a specific panel and a theme of the discussions during other panels. It was clear that the debate was moving to a more advanced stage. Christina Angelopoulos, who presented work she and Stijn Smet previously published on the continuum of approaches to intermediary liability across the world, emphasized that the question was not a simple choice between liability and immunity.<sup>47</sup> Instead, the question was which of a great number of models to choose or adapt, including the 'notice and notice' system known to Canadian audiences from copyright law, the new system developed for England and Wales in section 5 of the *Defamation Act 2013* (effectively interpolating a waiting period into notice and takedown and distinguishing between anonymous and non-anonymous contributions), and more.<sup>48</sup> Bailey highlighted the emergence of transparency as a key concern within the discussion of intermediaries.<sup>49</sup> Bram Abramson made reference to the Manila Principles on Intermediary Liability, which were developed by free speech and digital rights organizations and highlight a number of process issues, such as accountability and clarity.<sup>50</sup>

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46. See Abramson, Angelopoulos & Young, *supra* note 4; Cameron, Rogers & Scott, *supra* note 3.

47. See Abramson, Angelopoulos & Young, *supra* note 4; Christina Angelopoulos & Stijn Smet, "Notice-and-Fair-Balance: How to Reach a Compromise Between Fundamental Rights in European Intermediary Liability" (2016) 8 J Media L 266.

48. See Abramson, Angelopoulos & Young, *supra* note 4; *Defamation Act 2013*, *supra* note 15, s 5. See *e.g. Copyright Modernization Act*, SC 2012 c 20, ss 41.25-41.27.

49. See Bailey, Kenyon & Stephenson, *supra* note 3.

50. See Abramson, Angelopoulos & Young, *supra* note 4; Electric Frontier Foundation, "Manila Principles on Intermediary Liability," online: <[www.manilaprinciples.org](http://www.manilaprinciples.org)>.

Laidlaw and Young set out to present a new model of intermediary liability for defamation law, discussed at the conference by Young and set out in more detail in this issue.<sup>51</sup> The key obligation would be to pass a complainant's notice to the author of the content in question. A response (in justification) from an author would mean that the content remains available, but the obligation (punishable by a fine rather than the imposition of liability) would be to disable access to the content in the event of no response. This idea also links to the discussions of the nature of defamation law, as in Part II (above). The proposal here owes more to administrative or regulatory law than to the conventional private law model of defamation.

Two defining aspects of reform, as Zemel argued in an earlier panel, would be the degree to which key players would 'buy in' to change and, as a number of speakers said, whether statutory reform could create incentives for intermediaries, and indeed others, to act in a particular way.<sup>52</sup> In the famed Leveson Inquiry into press behaviour and standards in the UK, and indeed the earlier defamation reform project in the Republic of Ireland, we saw considerable discussion of how to incentivize cooperation with regulatory mechanisms (*e.g.*, the Irish statutory version of the *Reynolds* defence calls for participation (or non-participation) in a Press Council to be taken into account).<sup>53</sup>

In the meantime, a new role is emerging for a certain type of intermediary—search engines. Schabas reflected upon the Supreme Court of Canada's decision in *Google v Equustek*, where long-established equitable powers were deployed in an industrial property case in an attempt to prevent Internet users from accessing infringing material through the search engine.<sup>54</sup> This case has clear resonances of the European debate on the "right to be forgotten," or 'de-indexing,' especially the application of the then-Data Protection Directive to search results in the decision of the Court of Justice of the European Union in *Google Spain SL v Spain (Agencia Española de Protección de Datos)*.<sup>55</sup> Mention was also made of the

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51. Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation" (2019) 56 Osgoode Hall LJ 112.

52. See English, Schabas & Zemel, *supra* note 5.

53. See UK, Department for Digital, Culture, Media & Sport, *Leveson Inquiry - Report into the culture, practices and ethics of the press*, by Lord Justice Leveson, (London: The Stationery Office, 29 November 2012); *Defamation Act 2009* (Republic of Ireland), s 26(2).

54. See English, Schabas & Zemel, *supra* note 5; *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 (applying British Columbia's *Law and Equity Act*). For the legislation applied, see *Law and Equity Act*, RSBC 1996, c 253, s 39.

55. *Google Spain SL v Spain (Agencia Española de Protección de Datos)*, C-131/12, [2014] ECR 317.

very recent application of such in UK jurisdictions.<sup>56</sup> English noted how even though the doctrine was at an early stage in Canada, it was already shaping the strategy (and, in particular, the language) of interactions between dissatisfied parties and the press. Schabas, in turn, highlighted the debate on whether a right of this nature was already found within Canadian privacy legislation.<sup>57</sup>

Laidlaw's discussion of online dispute resolution also considered the opportunities of technology as part of libel reform, referring to features such as the enforceability of decisions, which was a major feature of the eBay ecosystem (and associated attention to reputation). Katsh, a pioneer in the field, presented reflections on the development of eBay's system and other models.<sup>58</sup> There was an intriguing discussion on the link between intermediary liability and the future of dispute resolution concerning not just the role that intermediaries could play in general, but also the possibility of using the contractual relationship between users and intermediaries as a means for ensuring, or at least making, engagement with a dispute resolution mechanism more likely.<sup>59</sup>

It was clear, even from the first panel (where each speaker touched upon the point in one way or another), that counter speech is an aspect of defamation law in the Internet age that provokes a range of reactions and ideas. The LCO's consultation paper set out a number of questions regarding remedies such as correction and takedown orders. Indeed, the idea of remedies also formed a facet of defamation law reform in other jurisdictions, leading to provisions such as section 30 of the *Defamation Act 2009* in Ireland (allowing a court order requiring a defendant to publish a correction in specific form and content) and section 13

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56. See *e.g. NT1 v Google LLC*, [2018] EWHC 799 (QB); *Townsend v Google Inc*, [2017] NIQB 81.

57. The question of the application of the *Personal Information Protection and Electronic Documents Act*, in particular section 4 and Schedule 1, to the operation of online search engines and to requests to de-index is considered in the Office of the Privacy Commissioner for Canada's "Draft OPC Position on Online Reputation." Issues include whether search engines act in the course of commercial activities, whether journalistic/literary exemptions are available, the effect of the principle of accuracy, the assessment of the public interest, and the territorial scope of action. See Office of the Privacy Commissioner for Canada, "Draft OPC Position on Online Reputation" (26 January 2018), online: <[www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos\\_or\\_201801](http://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/consultation-on-online-reputation/pos_or_201801)> [perma.cc/LU74-7FPJ]. See also *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, s 4, Schedule 1.

58. See Katsh, Laidlaw & Thompson, *supra* note 4; Ethan Katsh & Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (New York: Oxford University Press, 2017).

59. See Laidlaw, *supra* note 42 at 188-93, 195-96.

of the *Defamation Act 2013* for England and Wales (allowing a court order to remove a statement or cease distribution).

Scott set out the debate on corrective information, including the feasibility of a right of reply.<sup>60</sup> This debate is indeed an area with a checkered history. Right of reply requirements have faced constitutional difficulties under US law, although such requirements have become more prevalent in Europe, as they form one of the coordinated aspects of broadcasting law in the European Union (*i.e.*, there is no EU-wide system, but each member state must reflect the principle of right of reply in its law).<sup>61</sup> Some members of the audience, though, highlighted existing imbalances in power and the disparate impact of harmful speech as possible reasons why even a strong iteration of counter speech, court-ordered or otherwise, would fail to provide adequate redress for some complainants. Scott also points to the recommendations he made in the Northern Ireland review that would replace the existing approach to ‘single meaning’ (the court’s role in identifying the meaning of a statement before assessing its defamatory nature and any applicable defences) with clear incentives to correct meaning at an early stage through clarificatory text.<sup>62</sup>

Is the Internet a particular space where, as Kenyon wondered, more speech would be a more feasible response than earlier forms of communication? This point was taken up and developed in English’s discussion of unpublishing in the context of news archives and, in particular, the merits of adding subsequently disclosed or determined information, rather than deleting, by way of retraction, an earlier report or aspect thereof.<sup>63</sup> Again, discussion here began to touch upon the nature of online communication in a time that is said to have seen the impact of ‘fake news.’ Recent empirical work has considered the speed at which

60. See Cameron, Rogers & Scott, *supra* note 3. For Scott’s published work on the matter, see Mullis & Scott, *supra* note 29 at 107-108.

61. See *e.g.* *Miami Herald Pub Co v Tornillo*, 418 US 241 (1974); EC, *Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)*, [2010] OJ, L 95/1, art 28(1) (“any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies”).

62. See Cameron, Rogers & Scott, *supra* note 3; *Reform of Defamation Law in Northern Ireland*, *supra* note 19.

63. See English, Schabas & Zemel, *supra* note 5. For greater detail, see Kathy English, “The longtail of news: To unpublish or not to unpublish” (October 2009), online (pdf): *Associated Press Media Editors* <[www.apme.com/resource/resmgr/online\\_journalism\\_credibility/long\\_tail\\_report.pdf](http://www.apme.com/resource/resmgr/online_journalism_credibility/long_tail_report.pdf)> [perma.cc/FE5U-6KZT].

reports spread and the varying role played by humans and automated systems in disseminating true and false information.<sup>64</sup>

#### IV. THREE CONCLUDING THOUGHTS

In launching its consultation paper in November 2017, the LCO noted its desire to investigate “whether or how defamation law should be reformed in light of fast-moving and far-reaching developments in law, technology and social values.”<sup>65</sup> What role did the conference of May 2018 play in this process? The present report has only summarized a number of the discussions, but it may be useful to make three brief observations by way of a conclusion.

First, although the merits of freedom of expression were outlined and emphasized in various contexts, it is quite clear that the debates of the day took place with full awareness of a range of fundamental rights. There was reasonable disagreement about the scope and significance of reputation (a matter that has also provoked varying responses in, for instance, the European Court of Human Rights’ interpretation of the European Convention on Human Rights), but the discussions—like the LCO’s review itself—placed communication and expression in a broad social context.

Second, in common with a broader trend in media law in the Commonwealth, and indeed the European Union, defamation law was situated within the world of media and Internet law. Important points were made on the differences between conventional media defendants and others and on the capacity and particular features of tort law. However, participants chose liberally from conceptual frames and case studies across the worlds of public and private law and tried to think about the best legal fit (substantively, doctrinally, and procedurally) for problems and harms.

Finally, participants certainly began to explore whether the answers to defamation law in the Internet age might relate to the Internet itself. As one might expect, there was little time wasted on proclaiming that technology would solve all problems. Nonetheless, speakers worked through a range of models that

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64. See *e.g.* Soroush Vosough, Deb Roy & Sinan Aral, “The Spread of True and False News Online” (2018) 359 *Science* 1146 at 1150 (notably finding that while bots speed up the distribution of news without reference to truth and falsity, responsibility for the rapid spread of ‘fake news’ is more likely to lie with human users).

65. “Defamation Law and the Internet: Where Do We Go From Here?” (last visited 18 October 2018), online: *Law Commission of Ontario* <[www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/defamation-law-and-the-internet-where-do-we-go-from-here](http://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/defamation-law-and-the-internet-where-do-we-go-from-here)> [perma.cc/6YSV-CKEK].

would co-opt certain relevant features—systems of identity and trust, means of enforcement, the capacity to carry additional information—and also picked up the theme, which the LCO’s team knows well, of the shift towards social media. Much of the earlier wave of Internet-related defamation reform assumed certain types of intermediaries and authors; today’s answers may distribute rights and responsibilities a little differently.

One does not envy the LCO’s researchers in trying to make sense of this volume of comments and ideas. It is, however, a tribute to the far-reaching nature of its consultation paper (and the associated commissioned papers), and its work should inform reviews of defamation—and media—law well beyond the province.