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Towards a More Workable Approach: Proportionality and Internet Defamation

As the internet continues to develop into the primary forum for expression in our society, defamation actions increasingly involve comments made online.

As a result, litigants in defamation cases increasingly find themselves entangled in the world of electronic discovery ("e-discovery"). The recent decision of Master Short in *Warman v. National Post Company*, 2015 ONSC 267 illustrates both the need for renewed emphasis on proportionality in e-discovery, and the need for counsel in defamation actions involving online comments to be prepared for some of the potential pitfalls e-discovery can create.

Background

The Plaintiff in *Warman* is a human rights lawyer who prosecutes hate speech under s.13 of the *Canadian Human Rights Act* ("CHRA"). As part of his work, the Plaintiff poses as a racist online and writes racist comments in online forums, in order to elicit responses which are subsequently prosecuted under the CHRA. The Defendant, a Canadian journalist and television personality, alleged in various online posts of his own that the Plaintiff was responsible for an especially repulsive comment, made online, about a notable Canadian woman. The Plaintiff denied the allegation and sued for defamation.

A key issue in the dispute was the claim that the repulsive comment appeared to originate from a specific IP address that matched the IP address of the Plaintiff's computer. After two different forensic searches of the Defendant's computer performed by two different third-party companies found no evidence that the Plaintiff had authored the repulsive comment, the Defendant brought this motion seeking an Order requiring the Plaintiff to produce the report from the latest third-party search without redactions for relevance. Of particular interest to the Defendant were the over 12,000 appendix pages showing the results from single word searches of the Plaintiff's hard drive which had been redacted for relevance and privilege. The Defendant also sought full particulars for any privilege claims made by the Plaintiff.

By the time Master Short issued his decision dismissing the motion (the third decision issued during the production stage of the litigation alone), over six years had elapsed since the litigation had been initiated in 2008, and discoveries had still not taken place.

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How can counsel in defamation actions involving online comments avoid a similar fate? The answer lies in the emphasis Master Short placed on proportionality throughout the decision.

As Master Short observed, "…it is clear the bar still needs to move further towards a proportionally appropriate response in cases such as this." In elaborating on what this might look like, Master Short asserted that "…the default rule for discovery should start with proportionality…" and should recognize that not every potentially relevant fact is discoverable in every case. While relevancy should "remain a threshold requirement" it cannot be "a license to obtain discovery regardless of the burden or expense imposed on the opponent if the costs of discovery outweigh the likely benefit." In dismissing the motion, Master Short noted that the action should not be delayed while "huge swathes of probably irrelevant documentation" were sifted through at high cost, especially in light of the conclusions by multiple third-party experts that there was no evidence indicating that the Plaintiff authored the repulsive comment to be found on his computer.

Counsel need to be aware of decisions such as this one, and should actively assert the principle of proportionality contained in Rule 1.04(1.1) of the *Rules of Civil Procedure* before unduly onerous processes of discovery, such as this one, are able to occur. Furthermore, as this decision shows, where counsel can illustrate how the cost or delay of certain production requests for production is obviously disproportionate to the likely relevancy of the information sought, there is ample ground to argue that the step should not be taken on proportionality grounds.

- Research contributed by Sam Johansen, 2014/2015 articling student.