

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **Wiebe v. Bouchard**,
2008 BCSC 249

Date: 20080311
Docket: 04-1156
Registry: Victoria

Between:
Ken Wiebe

Plaintiff

And

Pierrette Bouchard, Isabel Boily, Marie-Claude Proulx, Her Majesty The Queen
In The Right of Canada, and The Minister Responsible for the Status of Women
Canada

Defendants

Before: The Honourable Mr. Justice Nathan Smith
Reasons for Judgment

Counsel for the plaintiff
Counsel for the defendants Pierrette Bouchard, Isabelle
Boily and Marie-Claude Proulx
Counsel for Her Majesty The Queen In The Right of Canada
and The Minister Responsible For The Status of Women
Canada

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Date and Place of Trial:

April 23-27, April 30-May 4, 2007 &
January 28 & 31, 2008
Victoria, B.C.

[1] The plaintiff is the creator of a website called B.C. Fathers, which he says is intended to provide information and peer support for fathers involved in child custody disputes. A research paper published by a federal government agency used an image taken from the plaintiff's website as an example of internet "hate messages." The plaintiff sues the authors and the federal Crown for defamation. The defendants rely primarily on the defence of fair comment, although they also raise defences of justification and qualified privilege.

The Plaintiff's Website

[2] The plaintiff is a computer consultant who works for companies and government departments on a contract basis. In the late 1990s, he created the "B.C. Fathers" website, which includes material the plaintiff wrote or contributed to, as well as material taken from other sources. Its home page states that, among other things, it is "a resource for fathers who have had their children taken without just cause." The home page also says "The Canadian Courts enforce the separation of fathers and children to everyone's great loss, except feminists, politicians and lawyers."

[3] At least some of the items on the website can fairly be described as stridently anti-feminist. The plaintiff testified that he is not opposed to feminism as such, but is critical of what he calls the "more extreme" feminist view. However, not all of the material on the website makes that distinction. One article refers to "feminist myths and tricks." A portion of that article refers to men who express agreement with feminists and says "You're far from the first man to sell out their own."

[4] The plaintiff said fathers unjustly separated from children express anger and that anger is reflected on the website. An example of that anger can be found on another website that is linked to the B.C. Fathers site. This site publishes a letter from a woman protesting that the site supports "deadbeat dads," and referred to her own difficulties in collecting child support. In response, a writer identified as "Dick Freeman" says:

"Get a job. Get a life. Get off your ex-husband's back, he isn't your (expletive deleted) slave and he doesn't "owe" you a damn thing. If you can't handle the kid(s) then give them back to him. You pay him the court ordered support and see how you bloody like it. "

The plaintiff said that "Dick Freeman" is a pen name and that he is one of three people who sometimes write under it.

The Defendants' Publication

[5] The alleged defamation is contained in a lengthy document that contains only two direct references to the plaintiff or his website. It is therefore necessary to set out the context at some length before the describing the alleged defamation.

[6] The document at issue is called "School Success by Gender: A Catalyst for Masculinist Discourse." It is dated March, 2003, but was not actually released until May of that year. The defendant, Pierrette Bouchard, was the lead author of the document and for convenience I will sometimes refer to it as "the Bouchard report." The defendants Isabelle Boily and Marie-Claude Proulx were research assistants whose names appear as co-authors. The Bouchard report was the result of a research project funded by Status of Women Canada (SWC), which also published and distributed it. SWC is a federal government agency whose function at the time included the funding and publication of research on issues related to gender equality.

[7] In September, 1999, SWC's policy research fund issued a call for proposals for research on two themes, one of which was "Where Have All the Women Gone? Shifts in Policy Discourse." At the time, Dr. Bouchard was a professor in the faculty of science of education and the head of a research section at Laval University in Quebec. In response to SWC's call for proposals, she submitted a proposal to study public and media discussion of alleged poor school performance by boys, as opposed to girls. In her proposal, she said she expected the study to "help reveal a reactionary ideology designed to attack gains by women and to discredit feminism." Dr. Bouchard testified that she had done previous research on the comparative academic achievements of boys and girls and, in the course of that research, formed the view that the issue was not being accurately reported in the media.

[8] SWC accepted Dr. Bouchard's proposal after review by an external advisory board and Dr. Bouchard entered into a contract giving SWC the right of first publication of her report. The Bouchard report was in fact published in both English and French, in hard copy and by posting on the SWC website.

[9] The English version of the Bouchard report is 145 pages long, including appendices and footnotes. The first reference to the plaintiff's website appears at page 69. The only other reference to the website is in an appendix that lists a number of organizations. That list also contains the report's only reference to the plaintiff by name. However, the plaintiff says that because he was identified in that way, a number of other, more general statements must be read as referring to him.

[10] The Bouchard report analyzes discussion in the media about comparative school performance of boys and girls. It says that, during the 1990s, much of this media discussion came to focus less on the girls' success and more on boys' "malaise." That discussion, according to the report, then began to include more criticism of women and feminism. The report states in its introduction:

Toward the middle of the decade we begin to see in the media discourses that cast suspicion on female elementary school teachers, single mothers and feminists, blaming them for the problems experienced by boys. A key element seen in this period is the emergence of a victimization theme, in which boys are portrayed as being discriminated against by an educational system that has become a feminist environment. More space is given to experts who support this thesis, including some for other countries. Co-educational schools are challenged and, toward the end of the decade, we see systematic links established to male suicide rate, boys on Ritalin, fathers gaining custody of their children, the suffering of male abusers, the loss of male identity, false allegations of violence against men etc.

[11] The report says that this discussion is being driven by a "masculinist lobby" that threatens to "overturn policies that protect women's rights." The term "masculinist" is defined first in a footnote referring to the work of another Quebec writer without quoting the definition, then in another footnote that refers to "groups that defend men, as a social group, in different spheres of life". In the body of the report, "masculinism" is defined as "the equivalent of feminism, as a social movement that pretends to speak on behalf of all men."

[12] The initial focus of the Bouchard report was on 612 newspaper and magazine articles published in Canada and elsewhere between 1990 and 2000. However, the research was later expanded to include internet sites operated by "masculinist" groups. The report cites various arguments and proposals advanced as part of the "masculinist discourse" and includes this comment:

For masculinists, who of course claim to speak for all men, women are primarily responsible for making men feel inferior...But even worse than "women" are feminists, whom masculinists ruthlessly attack. In particular, they denounce the "plot" that feminists, working in complicity with governments, judges, police officers and the media, have supposedly hatched against fathers and men accused of violence.

[13] A subsequent section of the report sets out a "typology of masculinist groups" that "are increasingly forming national and international networks and feeding journalists information." These groups are categorized as follows:

- Men's Rights Groups, who argue that women have attained an equal position in society and hold more power than men in certain circumstances. These groups are said to focus on such issues as fathers' rights in divorce and custody cases and opposition to equal opportunity programs. "The most conservative groups accuse feminists of being dictators ('feminazis')."

- Pro-Feminist Groups, which generally support women's causes and highlight "the plurality of masculinities," but "overestimate the change that can be achieved by individual decisions arising from growing awareness, and consequently underestimate the strength of structures and traditions."
- Masculinist Therapy Groups, which deal with "men as individuals and their relationship to masculinity" and which hold a variety of retreats, workshops and discussion groups for men.
- Conservative Groups, which argue for traditional social roles for men and women and emphasize the importance of the traditional family.

[14] After setting out this categorization, the Bouchard report states that the authors had prepared a list of "masculinist groups (excluding pro-feminists)" on the internet, along with their organizers. This list of more than 80 organizations is set out in an appendix II. The first organization listed is "B.C. Fathers" and the plaintiff is named as the creator of the B.C. Fathers website.

[15] It should be noted here that there is no evidence the plaintiff's name appears on the B.C. Fathers website, although it does appear on the linked "Dick Freeman" site, where the plaintiff is identified as the B.C. Fathers webmaster. The B.C. Fathers website also states that it is hosted by Continuum Consulting Inc., which is a company operated by the plaintiff. Dr. Bouchard said she learned the plaintiff's name from a list of men's organizations obtained from another source. That list refers to B.C. Fathers and gives the plaintiff's name.

[16] After stating that the authors had prepared a list of "masculinists" groups, the Bouchard report discusses internet sites, where the authors say they found "an often hateful, violent and unrestrained discourse against feminists and women." Three examples are given, including one identified as coming from the plaintiff's website. After giving these examples, the report discusses the **Criminal Code** sections dealing with harassment and hate propaganda and their relationship to the **Charter of Rights**.

[17] The next chapter consists of a response to some of the claims made by masculinists, suggesting many of the arguments are unsupported by evidence or ignore other data. At page 75 of the report, it states:

Although masculinists compare themselves to their female counterparts, they usually fail to provide relevant data about women's real situation. At best, some related data (frequently inaccurate or incomplete) are used to show how hard done by men are; at worst, women's living conditions are passed over in total silence. Either way, the outcome is the same: the question of power relationships exercised at the expense of women is ignored.

The conclusion of the report states, in part at page 88:

This movement offers a different interpretation of relationships between the sexes, specifically a stubborn denial that girls or women are victims of discrimination, as a social group, by men. Masculinists are in the process of building a discourse to show that indeed it is now men, or in this case boys, who are victims of a school system that has become a feminized environment...and maintain that feminism is responsible for this situation.

The authors then make a number of recommendations, including monitoring of internet sites and amendments to the criminal code to deal with hate propaganda against women.

The Alleged Defamation

[18] As said above, the Bouchard report states on page 68 that the authors prepared a list of masculinist associations and refers the reader to an appendix listing these associations. The plaintiff and his website are the first named on that list. The Bouchard report's reference to the list of masculinist organization is immediately followed by a discussion of internet sites: (In all of the following excerpts, the words and phrases underlined are the ones specifically quoted and alleged to be defamatory in the Statement of Claim.)

A more thorough examination of the groups feeding the media discourse revealed an extensive Internet network. Using the resources provided on these sites, we found a disturbing, even threatening reality involving the expression of an often hateful, violent and unrestrained discourse against feminists and women. Far from being an isolated case, this second-level, or perhaps "underground" discourse focuses on the same problems as those mentioned in the media (especially regarding fathers' rights), but without any modicum of restraint. None of the groups state on their Web pages that they do not wish to be associated or confused with any specific group of the same type.

Hate-Mongering

Some masculinist groups use the Internet as a vehicle for hate-mongering against feminists. This accessible and virtually universal medium gives them the opportunity to say and post almost anything. It is no accident that this medium is being used by those on the extreme right, pedophiles and pornographers. It lets them both hide and be found easily. While it is easy to find information on the Internet, it is just as easy to disseminate information, whether it is true or not. Some sites contain not just information but defamatory comments and propaganda inciting fear and hatred. Other sites maintained by men's groups display direct threats to feminists and their allies and contain vicious comments.

[19] Beginning at page 69, the report then gives three examples of what are stated to be hate messages on the internet. The first of these examples reproduces an image that is identified as coming

from the B.C. Fathers site. This image, which is reproduced in the report and which the plaintiff agrees appeared on his site, consists of a reproduction of the swastika flag of Nazi Germany, with the four branches of the swastika altered so that each resembles the letter F. Below that is a photograph of a baby whose hand appears to be raised in a familiar obscene gesture involving the middle finger. The words "Get the hint?" have been added to the photograph and, below the photograph is the caption: "We are all tired of feminazism. So stop it, okay?" In case my description is unclear, I have reproduced the image as it appeared in the report and it is attached to this judgment as Appendix A.

[20] The reproduction of this image in the report is accompanied by the following:

We found this picture on the "BC Fathers" site. It combines images of extreme violence (the swastika, SS symbol synonymous with supremacy and racism, transformed so the "F" of feminism catches your attention, and a picture of a baby who is supposed to be making a threatening comment) with the play on the words "feminism" and "Nazism" and the hateful, angry raised-finger gesture. The whole picture is a very strong symbolic accusation of mothers. This is a father-oriented site, and the decision to use a young child was not a neutral choice.

This picture suggests the possible breakdown of the mother-child relationship. It is a barely veiled threat by the authors of the site. Reproduction and family issues are central to this propaganda. The message below the picture—"we are all tired of feminazism. So stop it, Okay"—is prescriptive and authoritarian. In effect, the authors of the message are claiming to speak for everyone ("all") except for feminists or pro-feminists. There is no ambiguity in the wording and no question of discussion or objection; the message simply tells feminists to "stop it."

[21] The plaintiff is not referred to by name in that passage, but is identified in the appendix as the creator of the B.C. Fathers website. In addition to being defamatory in itself, the plaintiff says his identification in that way would lead a reasonable reader to connect him with other statements in the Bouchard report that do not refer to him directly. These other statements appear as follows.

- An abstract, at the beginning of the Bouchard report, includes a statement that there is "a need to ensure closer monitoring of hate-mongering sites to determine whether legal action should be taken."

- In an executive summary, the report refers to an ideology that aims to challenge gains made by women and discredit feminism. It states that his ideology is mainly spread through the print media and internet sites of men's associations and that "some statements also incite hatred and violence." The executive summary refers to a number of recommendations contained in the report, including a recommendation that "consideration be given to whether legal action can be taken under s. 319 of the Criminal Code" (the hate propaganda section).

- Page three of the report, as part of the introduction, refers to an extensive network using the internet and says: "We have found a discourse of hate, often violent and unchecked, directed at women and feminists." The report states that this "underground discourse" operates without any of the restraint shown in other media, adding: "This is one of the peculiar features of the internet; it enables extremists, racists, supremacists, heterosexists, misogynists and other individuals and groups from the right and extreme right to openly espouse their positions without restriction."

- Page 7, in a section discussing international economic forces that have led to a feeling of insecurity in segments of the population, states: "One American researcher (McCarthy, 1998, cited in Lingard and Douglas, 1999) suggests that his economic insecurity may produce "a resentment politic" in the male population and promote a resurgence of the right wing, racism and various anti-feminist groups."

- Page 18, near the end of a section discussing research methodology, says: "After presenting our research findings, we offer readers our thoughts on the form of violence that amounts to "hate mongering" and on attacks against women and feminism." That is followed immediately by a paragraph headed "Internet Research," which begins with the statement: "Our analysis revealed a number of men's groups behind the stands taken; either the authors were members of these groups or journalists gave them visibility by covering some of their activities. We wanted to find out more about these groups by searching on the Internet."

- At pages 72 and 73, the report discusses section 319 of the **Criminal Code**, which makes it an offence to incite hatred against an identifiable group. It notes that the **Criminal Code's** definition of "identifiable group" referred to a section of the public distinguished by colour, race, religion or ethnic origin, adding that: "If the Anti-Terrorism Bill is enacted, the list of distinguishing characteristics will be expanded to include sexual orientation, sex, age and physical or mental deficiencies."

- The report contains 15, specific recommendations. Recommendation number four, at page 92, is: In light of the growing use of the internet by masculinist groups to develop misogynist sites inciting violence and the growing number of discussion groups used to promote hatred of women, we suggest that a monitoring organization be established, similar to Hate Watch, but focussed [sic] solely on gender social relations. It would be useful to maintain, publish, disseminate and update a list of misogynist groups.

- Recommendation number 8 says:

Along the same lines, studies should be carried out to put together files concerning section 319 of the **Criminal Code**. Mechanisms must also be developed to ensure the safety of those who publicly denounce

hate messages against women, specifically action against electronic mail harassment practices, defamation and infringement of privacy through Internet sites.

Since such action is limited to protecting an identifiable group within the meaning of s. 318 of the Criminal Code...and this section does not provide for the fact that a group distinguished by gender, such as women, may be subject to hate propaganda, we recommend that s. 318 be amended to include women among the segments of the public distinguished by sex in the definition of "identifiable group."

· Recommendation number 14 at page 93 says:

Many women and women's groups may experience repercussions from the propaganda of the masculinist discourse, whether in terms of grants to maintain existing resources or create new ones, increased violence against women and the consequent need to accommodate more women, access to public resources, employment equity, possible discrimination in the application of legislation and the creation of new bills, or in terms of the education of girls at risk—completely overlooked—and quilt trips laid on those who succeed etc. We suggest that support be given to establishing a monitoring and awareness network (an observatory centre) among people and groups targeted by these discourses, notably gays and lesbians, who are victims of the same hate propaganda. This network could also be responsible for gaining a better understanding of how masculinist groups are influencing policy makers, in order to make them aware of the limitations and shortcomings of these discourses. All policies, measures, programs or legislation related to equal opportunity should be monitored.

[22] The plaintiff alleges that the effect of all of these statements is to identify him as a hatemonger and a danger to women, to associate him with racists, extremists, pedophiles, pornographers and terrorists and to assert that he has committed criminal offences. In his testimony at trial, the plaintiff said he learned about the Bouchard report in the late spring or early summer of 2003. He said he was shocked and believed he was being put on a list of people who needed to be "watched or marginalized or criminally charged." This was particularly serious, he said, because the document carries the logo of the government of Canada.

[23] The plaintiff says he has never threatened or expressed hatred to women and has never condoned violence. However, he says he does criticize what he calls the "extreme elements" of feminism and uses the word "feminazism" to distinguish that extreme position from mainstream feminism.

[24] As for the image of the baby and the altered swastika reproduced in the Bouchard report, the plaintiff said he used the swastika to highlight the use of the word "feminazism." He thought the picture of the baby was funny, but agreed it was intended to be insulting.

[25] At the time the Bouchard report was published, the plaintiff said that he was working for the British Columbia government as an information technology contractor and was concerned the report, which was distributed to provincial officials, would affect his work opportunities. This was particularly so because he was working on a project involving the ministry of Community, Aboriginal and Women's Services, which works with SWC.

[26] About 1,500 hard copies of the Bouchard report were published and distributed according to SWC distribution lists, which include research organizations, individual researchers, libraries and universities. Libraries that listed the report in their catalogues included the Vancouver Public Library and the National Library of Canada. The report was also posted on SWC's website, but in November, 2003, the appendix listing organizations was removed from the on - line version, apparently as a result of complaints from some of the organizations listed. Of course, the list, including the plaintiff's name, can still be found in the hard copies that are in circulation.

[27] Dr. Bouchard testified that she used the word "masculinist" because she needed a way to name the phenomenon of males expressing resentment, anger or unhappiness. She adopted the term from an article written in French by a Martin Dufresne, which defined the word as "the discourse of demands formulated by men as men." The Dufresne article in which the term is used is titled "Masculinism and sexist criminality."

[28] Dr. Bouchard said that when she decided to expand her analysis to include the internet, the defendant Isabelle Boilly was given the task of researching internet sites. Ms. Boilly testified that when she came across the plaintiff's site and the image of the baby and altered swastika she was disturbed and shocked by the image. She took it as one that associated feminists with Nazis by using something very important to women—their child—and that she believed the image, by using a baby, was an attack on mothers. She interpreted the words "stop it", in the context of the image, as a threat and considered the image to be an example of "verbal violence." The defendant Marie-Claude Proulx testified that she had a similar reaction when Ms. Boilly showed her the image. She said it was "as if the baby was telling me I don't need you and I don't care about you."

[29] Dr. Bouchard testified that when Ms. Boilly showed her the image from the plaintiff's site, the first thing she saw was the altered swastika which was "like a knife going through my heart." She said she had never previously seen or heard the word "feminazism" and interpreted the images as a "violent message that 'we are fed up and stop it'." She said that, as a feminist, she took the message that "they hate us and they want us to get that message."

[30] When it was suggested to them on cross-examination that the image was clearly meant to be sarcastic, ironic or humorous, the defendants said they did not see any humour in it. Asked if they had at the time ever heard of an American talk show host and author who counsel suggested had popularized the term "feminazism" in Anglophone culture, they said they had not.

The Tort of Defamation

[31] In order to succeed in an action for defamation, a plaintiff must show:

1. That the words complained of are defamatory;
2. That they referred to the plaintiff; and
3. That they were published to a third party.

R.E. Brown, *The Law of Defamation in Canada*, 2nd ed. [Brown] (looseleaf) (Toronto: Thomson Carswell, 2007) at pages 1-31.

[32] If the plaintiff proves those elements, the defendant can rely on a number of specific defences. The relevant defences in this case are justification (truth), fair comment and qualified privilege.

[33] The law of defamation deals with the protection of an individual's reputation. In **Hill v. Church of Scientology**, [1995] 2 S.C.R. 1130, 126 D.L.R. (4th) 129 (S.C.C.) the Supreme Court of Canada said: Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws.

Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

Was the Plaintiff Defamed?

[34] There is material on the plaintiff's website that many readers would find offensive. The defendants had every right to attack the views and attitudes that are expressed there and the plaintiff, having decided to put forward those views in a public forum, can not complain when others take issue with them. However, that does not diminish the plaintiff's right to protection of his reputation as an individual. Therefore, the first issue that needs to be determined is which words refer to the plaintiff.

[35] If an allegedly defamatory statement does not identify the plaintiff by name, the question is whether a reasonable person would understand that it referred to the plaintiff. (**Taylor-Wright v. CHBC-TV A Division of WIC Television Ltd.**, [1999] B.C.J. No. 334 (Q.L.) (B.C.S.C.) at para. 26; affirmed 2000 BCCA 629, 82 BCLR (3d) 50. The Court must apply a two-part test. The first step is a question of law — whether the statement, having regard to its language, is capable of referring to the plaintiff. If so, the second question is whether the statement in fact would lead a reasonable person to conclude it refers to the plaintiff. (**Dale's Trad'N Post Ltd. v. Rhodes**, [1987] B.C.J. No. 2096 citing **Knupffer v. London Express Newspapers**, [1944] 1 All E.R. 495.).

[36] The only explicit reference to the plaintiff is in the list that appears in the appendix and labelled "List of Men's Associations." That list refers to "B.C. Fathers" and to "Ken Wiebe, creator of the BC Fathers web site." The significance of the appendix is set out at page 68, where the authors state they have "prepared a list of masculinist groups." That reference follows a discussion of the different types of masculinist groups. Although it is clear that the authors disagree with these groups, there is nothing in the description or listing of them that can be considered defamatory.

[37] That discussion is followed by a discussion of an internet network formed by masculinist groups and the presence of an "often hateful, violent and unrestrained discourse against feminists and women". The report then makes the statement that "some masculinist groups use the internet as a vehicle for hate mongering." The key word, in my opinion, is "some," which re-enforces the fact that the authors are not and cannot be taken to be claiming that all the individuals and organizations listed in the appendix are promoting or spreading hatred.

[38] However, the report then goes on to give specific examples of hate messages, including one that is stated to come from the B.C. Fathers site. Therefore, although not all organizations listed in the appendix are said to be spreading hatred, the reader is clearly told that B.C. Fathers is one that is. The appendix identifies the plaintiff by name as the founder of the B.C. Fathers web site. Accordingly, a reasonable reader would understand the Bouchard report to be stating that the plaintiff was using his site to express hatred of women and feminists.

[39] By the time a reader got to the portion that identifies the plaintiff's website, he or she would have encountered several general references, beginning with the abstract and the executive summary, to "hate mongering sites," a "discourse of hate" and statements that "incite hatred and violence." When first encountered, none of these earlier statements refer to the plaintiff in any way. However, they do refer to a

class of "hate mongering sites," "internet sites of men's associations" and "an extensive network using the internet." When the authors give examples of these groups and internet sites, a website identified as having been created by the plaintiff is included. At that point, all of the previous statements about hate message become capable of referring to the plaintiff and I conclude that a reasonable reader recalling those passages would likely conclude they referred to the plaintiff.

[40] In its recommendation section, recommendation number four refers to "misogynist sites inciting violence" and suggests formation of a monitoring organization. That follows the explicit identification of the plaintiff and, in light of the earlier statements, it is open to a reasonable reader to conclude this is a further reference to the plaintiff, with the additional suggestion that the plaintiff is among those who must be monitored.

[41] A defamatory statement is one that "tends to lower the plaintiff in the estimation of right-thinking members of society generally or to expose him to hatred, ridicule or contempt." (**Chernesky v. Armadale Publishers**, [1979] 1 S.C.R. 1069 at 1079). Just as it is defamatory to label a person a racist (as was the case in **Chernesky**) there can be little doubt that an association with hatred and violence against women would "lower the plaintiff in the estimation of right-thinking members of society."

[42] I therefore conclude that there are a number of statements in the Bouchard report that are capable of suggesting and do suggest to a reasonable reader that the plaintiff, through his website, promotes hatred of women and that those statements are therefore defamatory.

[43] The plaintiff alleges that certain other statements in the Bouchard report carry different or additional defamatory meanings, associating the plaintiff with pornographers, pedophiles, racists and right wing extremists. In the context of the entire document, I do not accept that those words are capable of being read as suggesting that the plaintiff is a pedophile, a pornographer or a racist. The comments simply imply that the plaintiff uses the same medium as other groups. But in so doing, the words would lead a reasonable reader to conclude that the plaintiff is expressing views that are equally repugnant and is deserving of a similar level of public contempt. I conclude that they are therefore, in that sense, also defamatory of the plaintiff.

Defences

[44] The defendants rely primarily on the defence of fair comment, but have also advanced the defence of justification. Where both defences are advanced in support of the same statements, they are usually mutually exclusive. The defence of justification relates to allegations of fact and requires the defendant to prove the substantial truth of the defamatory statement. The defence of fair comment relates to matters of opinion or analysis, which are not capable of proof, although they must be based on true facts. In **Chernesky**, the Supreme Court of Canada said:

Comment or criticism is essentially a statement of opinion as to the estimate to be formed of a man's writing or actions. Being therefore a mere matter of opinion, and so incapable of definite proof, he who expresses it is not called upon by law to justify it as being true, but is allowed to express it, even though others disagree with it, provided that it is honest. (at page 1072)

[45] Whether a statement is one of fact or comment — or, more precisely, whether a reasonable reader would take it as fact or comment — is to be considered in the context of the entire publication in which the allegedly defamatory statement appears. In **Scott v. Fulton**, 2000 BCCA 124, 73 BCLR (3d) 392, the Court of Appeal adopted the following passage in the House of Lords decision in **Telnikoff v. Matusevich**, [1991] 3 W.L.R. 952:

The first matter considered by Drake J. and the Court of Appeal was whether those parts of the defendant's letter which were defamatory in character ... were capable of being regarded as statements of fact or could only properly be held to be comment ... Drake J. said that on a consideration of the letter as a whole he had no doubt that these paragraphs constituted comment. If he had felt any doubt about the matter he would presumably have left it to the jury to decide, having regard to the law as stated in *Halsbury's Laws of England*, 4th ed., (1979) vol. 28, para. 228:

"The question whether all or some of the words complained of are statements of fact or comments is a question of construction for the judge. If, in his opinion, there is no reasonable doubt, he must direct the jury accordingly; but if, in his view, there is reasonable doubt as to whether the words are statements of facts or expressions of opinion he must leave it to the jury to decide."

[46] I take that to mean that the Court must go through a process similar to the one used in deciding whether the words complained of refer to the plaintiff. The Court must first decide whether the words are capable of being understood as a statement of fact and, if so, whether that is indeed how an ordinary reader would understand them. In regard to the second part of that test, the Court emphasized in **Scott** that the matter is not one of academic analysis but "what a reasonable person would immediately think."

[47] **Telnikoff**, referred to in **Scott**, provides an illustration of the difference between fact and comment that is particularly useful in this context. In that case, the plaintiff had written a newspaper article and the defendant wrote a letter in response that, among other statements, characterized the plaintiff's position as a "racialist recipe." Lord Keith of Kinkell said the "racialist" reference was pure comment, but

other parts of the same sentence and other parts of the letter appeared to attribute to the plaintiff specific words that he had not used and could be read as a statement of fact to the effect that the plaintiff had said those things.

[48] In this case, the defendants do not attribute any specific statements to the plaintiff beyond the excerpt from the website that is reproduced in the Bouchard report. Statements that the plaintiff's website expresses or promotes hatred of women and feminists represent the defendants' interpretation or analysis of the message they believe is conveyed by the material on that website. As such they must be seen as matters of comment rather than allegations of fact.

[49] However, counsel for the plaintiff argues that because the promotion of hatred is an offence under the **Criminal Code**, R.S.C. 1985, c. C-46 the defendants have stated as a fact that the plaintiff committed a criminal offence. An allegation that a person has committed a criminal offence, counsel submits, must always be regarded as an allegation of fact.

[50] Counsel gives no authority for that general proposition, but it would obviously be correct in most cases. A statement to the effect that a person stole certain property at a certain time would clearly be a statement of fact. If no specific theft is alleged, but a person is called a thief, that would in most cases be considered an allegation of fact that the person has at some point committed a criminal offence or is likely to do so. That is because the word "thief" is well and commonly understood to mean a person who has committed a specific criminal offence, the nature of which is well understood in common parlance.

[51] However, a reference to hate or hatemongering is not so clearly and unambiguously associated with a criminal offence, either in common parlance or in law. The relevant provision of the **Code** is s. 319: 319.(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

The phrase "identifiable group" is defined as having the same meaning as in s. 318, which says:

318. (4) In this section, "identifiable group" means any section of the public distinguished by colour, race, religion, ethnic origin or sexual orientation.

[52] An allegation that a person is a hatemonger or spreading hatred can only be an allegation of a criminal offence if the alleged hatred is directed at a group that is identifiable on one of the specific bases set out in the section. The allegation in this case is that the plaintiff was promoting hatred of women and feminists. As the defendants clearly state in their report, neither women nor feminists are among the groups protected from hatred by s. 319(1). One of the recommendations of the report involves possible future amendments to the **Code** that would include women in the category of identifiable groups, but an allegation that the plaintiff has in the past promoted hatred against women or feminists or that he continues to do so cannot, by definition, be an allegation of fact that a criminal offence has been committed. In terms of the two part test discussed in **Telnikoff**, the statements are not capable, as a matter of law, of being an allegation of criminal conduct.

[53] Because I have concluded that the passages at issue are matters of comment rather than statements of fact, the defence of justification has no bearing on this case and I must determine whether the defendants satisfy the test of fair comment.

[54] Some authorities refer to the defence of fair comment as having five elements. The statement must be (1) a comment, (2) based upon facts that are true, (3) made honestly and fairly, (4) without malice, (5) on a matter of public interest. (**Dhami v. Canadian Broadcasting Corp.**, 2001 BCSC 1811, [2001] B.C.J. No. 2773 (Q.L.) (B.C.S.C.) at para 138, adopting *Brown, at chapter 15-18*. However, in **Vander Zalm v. Times Publishers** (1980) 18 BCLR 210 (B.C.C.A.) Nemetz C.J.B.C. adopted a three part test at paragraph 7:

First, the matter must be recognizable to the ordinary reasonable man as a comment upon true facts, and not as a bare statement of fact. Secondly, the matter commented upon must be one of public interest...

Finally, ... the comment must be "fair" in that it must, to quote Martland, J. in **Cherneskey** (*supra*) at p. 1073, "represent an honest expression of the real view of the person making the comment."

[55] Both formulations include the requirement that the matter be one of public interest and there can be no dispute about that issue in this case. By creating a website and posting material on it, the plaintiff obviously decided that material was of public interest and related to social or political issues. Any response to or comment upon it must be of equal public interest.

[56] Both formulations also require that the comment be based on true facts. The supporting facts must be either stated in the publication or generally known and must be proven to true. (**Ross v. New Brunswick Teachers Association**, (2001) NBCA 62, 201 D.L.R. (4th) 75, (N.B.C.A.) at para 69).

[57] In this case, the defendants reproduced an image that the plaintiff admits was on his website. The defendants made statements about that image and what they considered to be its symbolic meaning and underlying message. For the purpose of the defence of fair comment, the "facts" on which the comment is based consist of the image itself and the fact that it appeared on the plaintiff's website. Some readers looking at the image may agree with what the defendants say about it. Others may fail to see how

the defendants drew those conclusions, while still others may think the defendants have misinterpreted and over-reacted to an attempt at humour or satire. The point is that the image is there for readers to consider in light of what the defendants say about it. In my view, that makes it a classic example of a comment based on true, clearly stated facts.

[58] The question then becomes whether the other statements in the Bouchard report that I have found to be references to the plaintiff are also fair comment based on stated true facts. These other statements refer to a discourse of hatred on the internet without giving specific examples and without naming the plaintiff or anyone else. As Lord Denning said in ***Slim and Others v. Daily Telegraphs Ltd. and Others***, [1968] 2 Q.B. 157 :

When [a plaintiff] complains of libel, he complains of the injury which the words do to his reputation in the minds of the ordinary reader. Now the ordinary reader takes the imputations as a whole. He does not divide them up into bits. Nor should the plaintiff be able to do so. (at page 168)

[59] Most of these other comments appear early in the Bouchard report. They are general statements that the reader would anticipate being discussed in greater depth later in the document. The reader then comes to page 69, where specific examples are given and the plaintiff is named for the first time. If, as I have held to be the case, a reader would at that point conclude that the earlier statements referred to the plaintiff, the same reader would have to consider those earlier statements in reference to the image that is reproduced. These earlier comments are not independent assertions, but are entirely dependent upon the comments at page 69 for their foundation.

[60] The report continues on to make certain recommendations, including monitoring of internet sites and changes to the ***Criminal Code***. These are clearly matters of opinion. A reader seeing those recommendations and interpreting them as being directed at the plaintiff would by then have seen the image on page 69 and be in a position to agree or disagree with the necessity or desirability of what the defendants suggest.

[61] The difference between the two formulations of the test for fair comment that I referred to earlier lies in the concept of malice. The test adopted in ***Vander Zalm*** refers to the requirement that the comment be an honest expression of the defendant's real view, while the five-part test appears to add a separate requirement that the statement be made without malice. That choice between those two tests is potentially significant in this case.

[62] The plaintiff, in addition to arguing that the individual defendants could not and did not honestly believe their statements, submits that the defendants had other motives that amount to malice. The plaintiff submits that the defendants made a deliberately selective reading of material out of context in order to attack people they considered to be ideological enemies and to create a "blacklist." Counsel for the plaintiff also argues that the defendants had an oblique motive related to continuation of funding for government programs related to women. In effect, counsel argues that the defendants needed to create an enemy to serve their own interests.

[63] In ***Slim v. Daily Telegraph***, Lord Denning said, at page 170:

...in considering a plea of fair comment, it is not correct to canvass all the various imputations which different readers may put upon the words. The important thing is to determine whether or not the writer was actuated by malice. If he was an honest man expressing his genuine opinion on a matter of public interest, then no matter that his words conveyed derogatory imputations; no matter that his opinion was wrong, or exaggerated or prejudiced; and no matter that it was badly expressed so that other people read all sorts of innuendoes into it; nevertheless, he has a good defence of fair comment. His honesty is the cardinal test. He must honestly express his real view...

I stress this because the right of fair comment is one of the essential elements that go to make up or freedom of speech. We must ever maintain this right intact. It must not be whittled down by legal refinements.

[64] There are many statements in the common law to a similar effect, which Martland J. in ***Chernesky*** summarized by saying that "a defence of fair comment is dependent upon the fact that the words in question represent the real view of the person making the comment."

[65] It has also been said many times that the comment does not have to be "fair" in the sense of being reasonable. In ***Reynolds v. Times Newspapers***, [2007] 2 A.C. 127 Lord Nicholls said: ... the time has come to recognise that in this context the epithet "fair" is now meaningless and misleading. Comment must be relevant to the facts to which it is addressed. ... The true test is whether the opinion, however exaggerated, obstinate or prejudiced, was honestly held by the person expressing it: see Diplock J. in ***Silkin v. Beaverbrook Newspapers Ltd.***, [1958] 1 WLR 743, 747.

The passage was adopted by the New Brunswick Court of Appeal in ***Ross***, where the Court added: Therefore, for a comment to be protected by a plea of fair comment, the comment must be relevant to the facts to which it is addressed, but it need not be reasonable nor one with which the trier of fact agrees. It need only be proven to be "fair" or "relevant" in the sense that the comment relates to the proven underlying facts on which the commentator relies and represents an honest expression of the real view of the person making the comment. To be protected, comment need not be proven to be true.

[66] The question of an improper motive amounting to malice frequently arises in relation to the defence of qualified privilege. In *Hill*, the Supreme Court of Canada said at paragraph 45: Malice is commonly understood, in the popular sense, as spite or ill-will. However, it also includes ... "any indirect motive or ulterior purpose" that conflicts with the sense of duty or the mutual interest which the occasion created ... Malice may also be established by showing that the defendant spoke dishonestly, or in knowing or reckless disregard for the truth.

[67] Although the concept of malice has often been treated in the same way in cases involving fair comment as in cases involving qualified privilege, the authors of *Gatley on Libel and Slander* (10th edition), (London: Sweet & Maxwell, 2004) tenth edition) state at page 309 that this is incorrect. The defence of qualified privilege is based on the notion of performance of a duty or protection of an interest. A motive unrelated to that duty or interest may destroy the privilege. However, the defence of fair comment is based solely on the importance of protecting the freedom of comment on matters of public interest. On that analysis, Lord Nicholls said in *Cheng v. Tse Wai Chun*, [2000] 3 H.K.L.R.D. 418 (H.K. Ct. of Final Appeal): A comment which falls within the objective limits of the defence of fair comment can lose its immunity only by proof that the defendant did not genuinely hold the view that he expressed. Honesty of belief is the touchstone. Acutation by spite, animosity, intent to injure, intent to arouse controversy or other motivation, whatever it may be, even if it is the dominant or sole motive, does not of itself defeat the defence. That is also the view of Professor Brown, who states at pages 15-103:

If the defendant has reported his or facts correctly and the comment has been made honestly and fairly, that should be sufficient; the state of mind of the defendant should otherwise be irrelevant.

[68] Dr. Bouchard and her co-authors have testified that they were shocked and offended by the image on the plaintiff's website. They explained that reaction in part as one of horror that feminists, like themselves, would be associated with Nazism and were particularly offended that a baby would be used to convey a message that they considered hateful and threatening to women. Having heard their evidence-in-chief and on cross-examination, I accept that was their genuine and sincere reaction. Dr. Bouchard testified that when she looked at the image, she thought of the notorious École Polytechnique massacre (where female engineering students in Montreal were murdered by a gunman expressing hatred of feminists). I accept that the individual defendants, as feminist academics working and living in the province where that tragedy occurred, may be less likely than other readers to see humour or satirical intention in what they perceived to be an attack on feminists.

[69] The plaintiff argues that the defendants made no effort to consider the image in context, no effort to contact him to find out what his true motives were and no effort to learn the humorous, if disparaging, meaning of the term "feminazism" in Anglophone culture. In my view, none of that is relevant to the defence of fair comment. The law of fair comment imposes standards of honesty and factual accuracy. It does not impose standards of objectivity or impartiality. Both the Supreme Court of Canada, in *Chernesky*, and the Court of Appeal, in *Vander Zalm*, adopted the frequently quoted charge to the jury of Diplock J. in *Silkin v. Beaverbrook Newspapers Ltd.*:

People are entitled to hold and to express freely on matters of public interest, strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided - and this is the important thing - that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?"

[70] Similarly, the same judge, by then Lord Diplock, said in *Horrocks v. Lowe*, [1974] 1 All E.R. 662 (H.L.) (albeit in the context of qualified privilege);

In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value. In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at it may still be 'honest'. i.e. a positive belief that the conclusions they have reached are true. The law demands no more.

[71] It therefore does not assist the plaintiff to argue that the defendants approached the matter with an ideological or political agenda. They obviously did. Most commentary on political or social issues, whether in the media or in academia, flows from the authors' pre-existing point of view and is frequently made for the specific purpose of either persuading others to accept those opinions or re-enforcing those opinions in those who already share them. There may be some political or social commentators who approach every issue with a completely open mind, who meticulously consider and present all possible arguments on every issue and who carefully avoid advocacy, but even if such paragons exist, the law has never suggested they are the only ones entitled to benefit from the defence of fair comment.

[72] In this case, Dr. Bouchard, who considers herself a feminist, believed there was a "reactionary ideology" attempting to discredit feminism and undermine its achievements. The goal of the research project was to find evidence of that "masculinist discourse" and to warn against it. The defendants put forward what they believed to be the evidence supporting the initial hypothesis. They expressed the view that the image they found on the plaintiff's website represented the most extreme example of what they had found. The plaintiff himself did something similar from the opposite point of view when his website listed a number of quotations from feminist authors as examples of what he considered the offensive "radical extreme" of feminism.

[73] The plaintiff says that any fair-minded reader would have recognized the image relied on by the defendants as a cartoon, capable of innocuous and humorous meaning. The nature of cartoons was central to *Vander Zalm*, where Aikins J.A. said at paragraph 85:

The particular difficulty in the present case, which may well apply to most cases involving cartoons, is to ascertain the meaning conveyed. It is in the nature of a cartoon not to speak directly. This needs little elaboration, but it is worth giving a definition. I borrow the definition of "cartoon" from the Encyclopedia Britannica (1961), given in the reasons for judgment of the Chief Justice, as follows:

... a pictorial parody... which by devices of caricature, analogy and ludicrous juxtaposition sharpens the public view of a contemporary event, folkway, or political or social trend. It is normally humorous but may be positively savage.

The trial Judge clearly recognized the difficulty of interpretation arising from the nature of a cartoon ... His conclusion was that the cartoon should be considered "symbolically, allegorically or satirically, as it should be and would be by the viewing public." I think the trial Judge was right in reaching this conclusion. Every "reasonable man of ordinary intelligence" is familiar with cartoons, whether political or otherwise. They are published in an unending stream. The reasonable man of ordinary intelligence would clearly understand that political cartoons are rhetorical in the sense that the cartoonist makes his point indirectly by the use of symbolism, allegory, or satire and I would add, exaggeration.

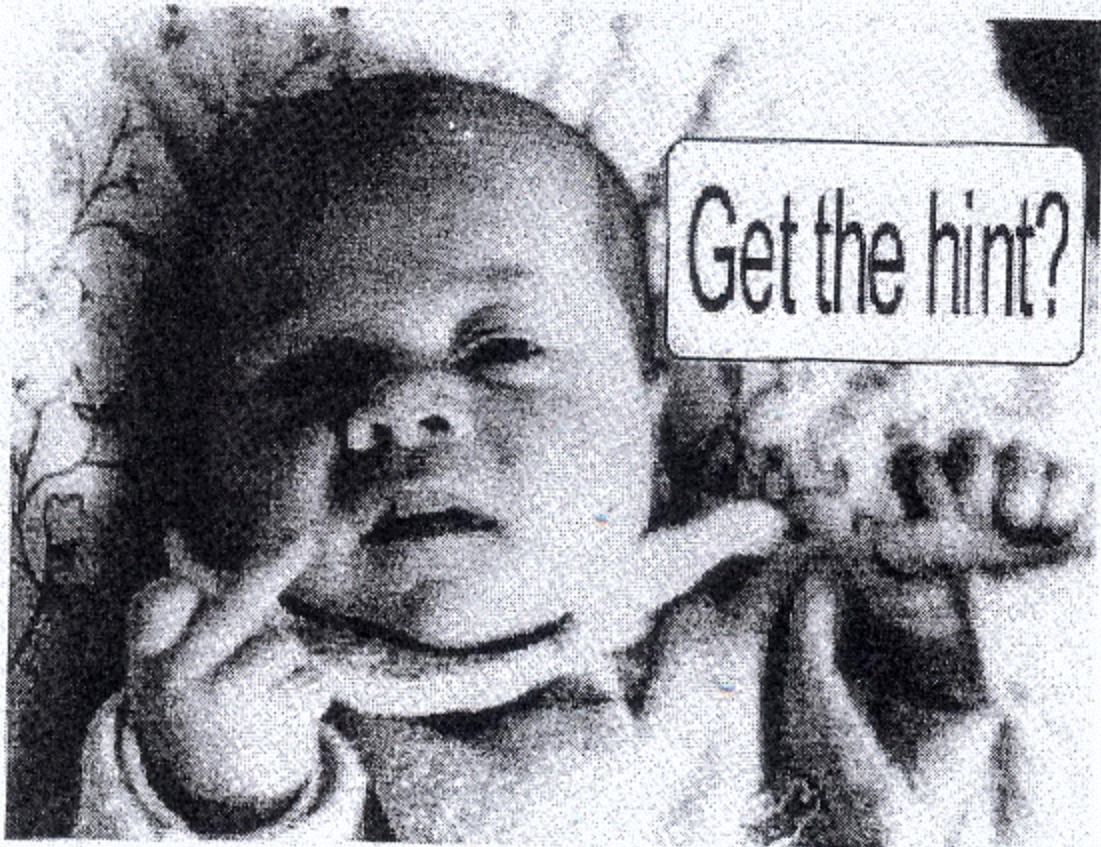
[74] In *Vander Zalm*, the alleged libel was contained in a cartoon and the Court of Appeal held it to be fair comment. In this case, the alleged libel is contained in a commentary on the cartoon. The fact that cartoons use symbolism, allegory or satire rather than direct statement makes it inevitable that readers will view them through the lens of their own knowledge, experience, prejudices and sensitivities. Some will not "get the joke" and may see a symbolic or allegorical meaning very different from what the cartoon's publisher intended.

[75] Whatever message the plaintiff intended to convey with the cartoon, the defendants interpreted it in a way that they considered to be offensive and hateful. It does not matter whether the Court or anyone else accepts that interpretation. I have found their interpretation and the statements flowing from it to represent their honestly held opinion at the time. While setting out that opinion, they reproduced the image at issue, giving their readers the opportunity to agree or disagree with their comments.

[76] In summary, I find that the plaintiff was defamed, but the defendants have satisfied the necessary requirements for a successful defence of fair comment. Having reached that conclusion, I do not need to consider the alternate defence of qualified privilege or to deal with the issue of damages. The plaintiff's claim is dismissed.

Nathan Smith, J.

APPENDIX A



[We are all tired of feminaziism. So stop it, okay?]