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ARE WE ASKING TOO MUCH FROM DEFAMATION LAW?

REPUTATION SYSTEMS, ADR, INDUSTRY REGULATION AND OTHER EXTRA-JUDICIAL POSSIBILITIES FOR PROTECTING REPUTATION IN THE INTERNET AGE: PROPOSAL FOR REFORM

Defamation Law in the Internet Age

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Prepared by

Emily Laidlaw, Ph.D., Associate Professor, University of Calgary Faculty of Law

The LCO commissioned this paper to provide background research for its Defamation in the Internet Age project. The views expressed in this paper do not necessarily reflect the views of the LCO.

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and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age**
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Emily Laidlaw, Ph.D., Associate Professor, University of Calgary Faculty of Law

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I. INTRODUCTION

This research paper examines the question of whether we are asking too much of defamation law in a three-part paper focused on reputation, resolution and recommendations. The focus is on online defamation law. However, the kinds of resolution mechanisms explored in this paper potentially have a wider application. The research is couched in a broad internet governance framework, which is the backbone of my scholarly focus, and seeks to test what it would look like if various remedial mechanisms were deployed or incentivized through provincial legislation. The question is whether any such mechanisms improve access to justice or resolution for those who suffer reputational harm from online defamation. In other words, this paper seeks to answer the following question: given the reputational harms suffered in the digital age, what kinds of dispute resolution mechanisms would improve access to justice and resolution to complainants?

This paper focuses broadly on any defamation published online, including social networking sites, search engines, news media and other forms of interactive communications, such as comments sections, message boards and photo sharing. To the extent that this paper raises questions about intermediary liability, I will refer readers to my Law Commission of Ontario (LCO) commissioned paper with co-author Dr. Hilary Young, Associate Professor at the Faculty of Law, University of New Brunswick, “Internet Intermediary Liability in Defamation: Proposals for Statutory Reform” (“intermediaries paper”).¹

In Section II, I will identify the challenges of resolving online defamation disputes. This involves asking some of the following questions. What does reputation mean in the digital age? What unique problems are posed to legal regulation by online defamation? Why do defamation plaintiffs sue? What outcomes do complainants want to resolve a defamation dispute? How are these concepts of reputation and outcomes linked for online defamation disputes? The answers to these questions provide the foundation for sections III and IV.

In Section III, I examine various proposals for reforming resolution of legal disputes, both defamation and non-defamation specific. I draw ideas from a variety of industries for this analysis, including domain names, privacy, press, finance and construction, and I consider lessons from recent defamation reform in the United Kingdom. The paper explores the gamut of streamlined court processes, defamation regulatory bodies and non-defamation industry regulators (including co and self-regulatory bodies). I examine online dispute resolution (ODR), including techno-legal solutions, online courts or tribunals, company dispute systems, and government mandated alternative dispute resolution (ADR). I also examine the role of the intermediary in providing resolution to defamation disputes and how that can be conceptualized and incentivized through legislation.

In Section IV, I make recommendations to reform the law, including conceptualizing a dispute resolution framework that is aimed to meet the needs identified in section II and builds on lessons from section III.

The underlying concern in this report is improving access to justice, thus it is important to identify how the term is used in this paper. Access to justice can mean several things. It tends to be conceived using two-tracks. The first, defines it as improving access to legal services. The second asks broader questions about what justice means.² Trevor Farrow surveyed the public on its views of justice and one of the themes emerging from the interviews was that access to justice was “for the most part understood as access to the kind of life – and the kinds of communities in which – people would like to live. It is about accessing equality, understanding, education, food, housing, security, happiness, etc. It is about the good life – that is ultimately the point.”³ Flowing from this, Farrow states that efforts to reform the law to improve access to justice should consider the public’s views as central to their efforts or otherwise risk “alienation or exclusion” of this public.⁴

In the context of defamation law, Alastair Mullis and Andrew Scott identify access to justice as having an aspect of principle and practice. In principle, access to justice underpins the rule of law.⁵ In practice, the high cost of defamation actions has a chilling effect on speakers and is a prohibitive barrier to claimants.⁶

For the purpose of this paper, access to justice is conceived in relation to dispute resolution, which is both broader and narrower than the conceptions above. Ethan Katsh and Orna Rabinovich-Einy capture the access to justice issues with internet disputes:

The societal reaction to novel problems is often “there ought to be a law.” But the question of whether or not a statute or regulation achieves its goal directly depends on whether there is an appropriate infrastructure in place to assert claims and have problems resolved. One of the oldest maxims of law is that “there is no right without a remedy.” The history of law’s experience with the internet reveals a focus on statutory changes and court decisions but a neglect of remedies or dispute resolution processes. eBay’s sixty million disputes and Alibaba’s hundreds of millions of disputes are impressive, but also an indication that government and courts were not viable options. It also illustrates that innovative use of the new technologies can respond effectively to disputes.⁷

This paper adopts the definition used by The ODR Advisory Group of the Cyber Justice Council in the United Kingdom. The group argues for a “rethinking of access to justice”⁸ advocating for a shift away from top-heavy resolution (focused narrowly on streamlining court procedures etc.) and fleshing it out to include dispute avoidance and containment. Thus, access to justice means three things: dispute avoidance, dispute containment and dispute resolution.⁹ I adopt this definition in this paper, because it allows for a wider set of remedial mechanisms to be considered, which section II will show to be key for the nature of online defamation disputes.

The proposals of the ODR Advisory Group will be detailed later in this report, but at this stage, an example of the meaning of these terms is offered. Traditionally, dispute resolution focuses on access to resolution through courts. The ODR group flips that focus on its head, advocating for “a preventative philosophy”¹⁰ by introducing the avoidance and containment streams. Dispute avoidance is based on the belief that information facilitates parties to evaluate their situation and thereby avoid and/or resolve disputes. This might include tools to diagnose their legal problem or avoid one from arising in the first place.¹¹ Dispute containment focuses on de-escalating disputes and facilitating resolution.¹²

Based on this understanding of access to justice, the recommendations made in this report seek to improve access to justice by reducing costs and increasing access to dispute avoidance, containment and resolution.

II. REPUTATION AND REMEDIES

An orienting case for this section is *Pritchard v Van Nes*¹³ (*Pritchard*), where Ms. Van Nes posted defamatory comments on Facebook about her neighbour, a middle school music teacher, which implied that he was a pedophile and unfit to teach children.¹⁴ While in the past this comment might have been communicated in the pub on a night out with friends, however unfair and defamatory, the restrictions of the space and social convention meant there were built in limits to the reputational damage. The chances were that she might casually make these accusations to friends at the pub, but she was less likely to stand on a podium with a microphone and repeat the accusations to a large audience. However, in the digital age defamation of this type is communicated with ease on social networking sites, but with the impact of being centre stage with a megaphone. In this case, Ms. Van Nes “vented”,¹⁵ as she put it, to her Facebook friends. Instead of her comments being heard by a few friends, her post was seen by her 2000+ Facebook friends, and commented on 48 times by 36 different friends¹⁶ characterizing the defendant as “a ‘pedo’, ‘creeper’, ‘nutter’, ‘freak’, ‘scumbag’, ‘peeper’ and a ‘douchebag’”.¹⁷ In addition, her post was potentially visible to not only friends-of-friends, but the public as Ms.

Van Nes did not maintain any privacy settings. One friend emailed a picture of the post with a message to the plaintiff's school principal.¹⁸

This case is mentioned to illustrate the ease with which defamation can be communicated and spread online. Viktor Mayer-Schönberger discusses the internet as an environment of perfect remembering.¹⁹ The permanence of such comments, whether because they are still available to view on the site, returned on search engine results, screenshot, printed or otherwise shared, makes even the most off-the-cuff remark potentially damaging. In the case of *Pritchard*, the damage of the Facebook post was severe, causing the plaintiff to experience stress and humiliation, withdraw from his professional and social community, lose his love of his career in teaching, and endure comments by members of the community.²⁰

Yet in the case of *Pritchard*, the defendant and at least some of the commenters were members of the plaintiff's community. In this way, the internet served as a platform for a local discussion. The impact of the damage was potentially far-reaching. The plaintiff mentioned that he considered applying for a summer teaching job at another school but did not because he feared that the post was still "out there".²¹ However, the defendant was identifiable and local. This is not the case for many other cases of online defamation.

This environment of perfect remembering is magnified by search services. This was explored in *Niemela v Malamas*²² (*Niemela*), where the plaintiff sued Google for defamation related to websites and snippets returned in Google search results. The plaintiff sought an interlocutory

injunction ordering the worldwide delisting of the defamatory search results (Google had voluntarily removed results for the google.ca platform). The British Columbia Superior Court rejected the defamation claim, including the injunction sought.

If the goal is to limit the reputational harm, removal from search results diminishes the permanence and reach of the defamatory comment. One can do this technically by, for example, paying a reputation service to scrub the content from search results. Such a solution can be effective, but imperfect and impermanent.²³ If a legal avenue is sought, as was the case in *Niemela*, the debate largely centres on worldwide delisting (from all Google search services) versus more local delisting, such as from www.google.ca. The scope of delisting is currently being debated in Europe in the context of data protection laws,²⁴ and was recently decided by the Supreme Court of Canada (SCC) in *Equustek v Google*²⁵ (*Equustek*) upholding the injunction for worldwide removal of search results in an intellectual property case.

Regardless of where one lands on whether *Equustek*²⁶ was correctly decided, it is a much more difficult proposition to order worldwide delisting in defamation cases. This was noted by Justice Fenlon in *Niemela* (also the judge in the court of first instance in *Equustek*) in rejecting such a broad injunction. The facts didn't support the injunction – over 90% of the searches for the plaintiff were from Canadian IP addresses.²⁷ More fundamentally, such an order would not be enforceable in the United States in light of the *Communications Decency Act* (CDA)²⁸ and the *Securing the Protection of our Enduring and Established Constitutional Heritage* (SPEECH) Act.²⁹

Indeed, both acts above create a roadblock to enforce any Canadian defamation judgments that conflict with American law. In the context of internet intermediaries, such as social networking providers, e-commerce sites, internet service providers and payment systems,³⁰ the development of Canadian law enlisting intermediaries in a regulatory role has to be finely pitched. This is because many intermediaries are American-based, and intermediaries are broadly immune from liability in the United States under CDA s. 230.³¹ Therefore, unless a Canadian judgment can be directly enforced against an intermediary, or an intermediary voluntarily complies, other intermediaries are, practically speaking, out of reach. The result is that Canadian law, however crafted, does not translate as easily to resolve disputes in the online contexts, because many online platforms are American-based.³²

Beyond the cases is a social problem of things going viral and the grey area of the law within which this activity is located. The ball of string of potential defendants is long, as is the complication of the law. In *Pritchard*, the defendant was held liable for the defamatory comments of her friends, effectively holding the one who started it liable for the pile-on. I have questioned the veracity of this conclusion elsewhere.³³ In other contexts, it is unclear whether an individual would be liable, for example, for sharing a tweet. In the United Kingdom, one is potentially liable.³⁴ In Canada, the SCC held that the mere sharing of hyperlinks, without more, does not qualify as publication under defamation law.³⁵ It is unclear whether these underlying principles might extend to re-tweets (without additional comments) or sharing Facebook posts, or screenshotting and sharing snapchat communications.³⁶

Communications online are instantaneous, transnational, interactive, searchable, permanent and sometimes anonymous. For an area like defamation law, as the few case examples above illustrated, resolving disputes is challenging. This paper therefore steps back further to ask: what do defamation complainants consider a satisfactory resolution of a dispute? How is this impacted by the internet? To answer this question, interrogation is needed of the concept of reputation as it operates in the digital age and how this relates to mechanisms of resolution. Understanding this will better identify the kinds of outcomes sought by complainants. This research does not seek to unpack the various scholarly and judicial conceptions of reputation, but is rather targeted at the question of the link between reputation and resolution in the digital age.

A. Reputation in a Digital World

Robert C. Post, in his seminal work on the meaning of reputation, commented “[r]eputation...is a mysterious thing.”³⁷ Indeed, the common law does not define reputation. Eric Barendt wondered whether the failure to define reputation was “perhaps because it is unsure exactly why it protects the right.”³⁸ Post identified three oft-cited concepts of reputation as property, dignity and honour. Reputation as property is the most dominant conception of defamation law in America.³⁹ As a form of intangible property, it has value in the marketplace. Thus, reputation is something that one works hard to earn.⁴⁰ Reputation as dignity recognizes that attacks on reputation can impact our self-worth.⁴¹ Canadian and European defamation case law cite

protection of dignity as underlying the law of defamation.⁴² Post argues that defamation law is a reflection of civility rules deployed to protect dignity,⁴³ although he acknowledges it is unclear what it means to protect dignity.⁴⁴ Reputation as honour does not carry the same influence in modern society, which is more individualized than the institutional roles that honour more readily protects (protecting status in society). However, this conception helps explain some of the structures of defamation law that emerged from a time governed by more rigid social structures.⁴⁵

Despite the lack of clarity concerning the concept of reputation, a few key themes emerge from the scholarship. First, reputation is tied to our sense of self-worth. Mullis and Scott, drawing from social psychology, articulate three components to self-worth of self-appraisals, actual appraisals, and reflected appraisals (our perceptions of appraisals by others).⁴⁶

This links with the second theme, which is that our sense of self-worth is primarily tied to reflected appraisals, to “the perceived level of esteem that we think others hold for us”.⁴⁷ A common quote in defamation law literature is by Erving Goffman, the sociologist, stating, in relation to identity formation, that each “individual must rely on others to complete the picture of him of which he himself is allowed to paint only certain parts.”⁴⁸ In Post’s view defamation as dignity links with this theory, because our self-worth is dependent on others abiding by social rules.⁴⁹

Reputation is inherently social. As David S. Ardia explains, “reputation is not something we create ourselves. It is socially constructed.”⁵⁰ Indeed, our identity is developed in relation to our interactions with others, and our reputation is created by these interactions.⁵¹ Yet, reputation is also individualized – every person makes their own assessment of an individual.⁵² Social theorists describe reputation in this way, that it is “a social phenomenon, as something that is created and altered by the judgments of others rather than something that exists inherently or develops organically as a result of efforts by the reputation holder.”⁵³

Third, society has an interest in protecting reputation. This is reflected in Post’s conception of reputation as dignity in the sense that civility rules go beyond the interests of individuals and are about community values.⁵⁴ Laura A. Heymann frames it a different way, that others who interact with the reputation holder have an interest as well, although as she notes the interest is more limited. The interest in a good reputation might be “as a form of warranty, to reduce search costs, or as a signaling device.”⁵⁵ A company’s reputation, for example, is arguably a signaling device to consumers that their products or services are reliable or of a high quality.

The social value of protecting reputation is perhaps best summarized by Ardia, who describes reputation as a public good. When someone’s reputation is injured it is not just the individual who is harmed, but the community: “[w]hen an individual’s reputation is improperly maligned, it degrades the value and reliability of this information and devalues the community identity.”⁵⁶

Fourth, reputation is community based, meaning that one can have different reputations in different communities.⁵⁷ As Heymann argues, this means that reputation “is not so categorical. It is entirely possible for a restaurant that serves simple food at inexpensive prices to be thought of by some as a venue representing good value for money and by others as an unsavory dive.”⁵⁸

This is challenged by “the myth of the community”, the idea that there is a community defined by shared norms.⁵⁹ This is an enduring problem for defamation law, rather than specific to the internet. Part of the myth of the community, Ardia states, is that the community widely shares certain norms and that they are “static.”⁶⁰ He goes on to state that “defamation law imposes its assumptions of how society is structured and operates. When those assumptions diverge from reality – as is often the case when community boundaries are porous and social norms are changing – defamation law is not only ineffective, but also works to hinder social advancement.”⁶¹

A key theme running through the above is that reputation is a social construct, about building one’s identity and self-worth in relation to how you perceive others see you, which is tied to the communities in which you interact. Key to this paper is that in the digital age, these connections look like a web.⁶² Defamation law, however, is built on social norms that were created when people only interacted with a small group of people and were separated geographically.⁶³ In a networked society this means that reputation and the methods to solve harms to this reputation are more tightly linked.

Ardia identifies several challenges with the networked society, which inform the link between reputation and mechanisms of dispute resolution. In practice, defamation can only remedy a sliver of the harms that take place online.⁶⁴ Further, information is sought within the network but our judicial system is outside this network, so it doesn't have the same influence on people's views of one another and the world we live in. As a result, traditional remedies aren't as effective to address online defamation disputes: "the fact that reputational information flows *through networks* makes defamation law's task of protecting reputation more challenging and its remedies less effective."⁶⁵

Thus, Ardia argues not that reputation's meaning has changed, but that context in which the reputation harming statement is made has changed in a way that is significant to how we resolve defamation disputes. In his view, online defamation is even less amenable to traditional litigation than offline defamation, because everything is disaggregated: "reputation is disaggregated; information is disaggregated; and liability is disaggregated."⁶⁶ The judicial system, being outside the network, cannot provide what litigants want most, which is for their reputational harm to be fixed.⁶⁷ His proposals for reform will be examined in section III, but for now, it is sufficient to flag his underlying rationale for alternative solutions.

The above orients the reader to some of the key problems posed by online defamation to effective dispute resolution:

- **The defendant problem:** there might be multiple potential wrongdoers, the defendant posted anonymously or pseudonymously (and is not identifiable through a Norwich order⁶⁸ or similar), or the defendant is located out of jurisdiction. The problem here is the basic question of who to sue.
- **The jurisdiction and conflicts of law problem:** defendants and intermediaries are sometimes located out of jurisdiction making it more difficult to sue or enforce a judgment, in particular related to intermediary liability and American-based companies. Thus, Canadian law cannot be easily deployed to resolve transnational online defamation disputes.
- **The permanence problem:** once a defamatory post is online, it is almost impossible to un-ring that bell. The reputational harms are immortalized. As highlighted briefly above, removal from search results only de-indexes a link or snippet from that particular search engine. It does not remove the content from the internet. At best, removal from search results diminishes the reputational harm. Google voluntarily removes search engine results that link to unlawful content. The issue is the geographical scope of removal.⁶⁹ The 'permanence problem', if located within the wider body of internet regulation issues, is widespread across fields of law and jurisdiction, raising complicated issues that cannot be fully resolved here. However, the permanence problem, if broken down to its core, is that whatever outcome a defamation complainant wants, complete removal online is unlikely to be an available remedy. Even if removed from the host website, screenshots, sharing, archiving and so on, make it nearly impossible to put the

toothpaste back in the tube.⁷⁰ Technical tools are available to complement legal tools, to be explored below.⁷¹

- **The “network information economy”⁷² problem:** the shift to internet participation represents a shift from the one-to-many mass media communications that typified our information consumption pre-internet (newspaper, broadcast), to many-to-many business models that describe online platforms. Online communications often involve multiple parties, and information is shared across different platforms and contexts. Thus, your professional reputation on LinkedIn, friends on Snapchat, strangers on Twitter and so on can bleed together. Ardia discusses this interconnection as a “web of connections [that] leaves impressions, the sum of which comprises our reputation.”⁷³ It also means that reputation and information is disaggregated.⁷⁴
- **The community problem:** what is defamatory is largely “socially constructed”⁷⁵ and assessment of what is defamatory tasks the court with considering the community of the plaintiff where the harm is alleged to happen.⁷⁶ It asks questions about the boundaries of what a community considers acceptable. The internet and the web of connections that it inspires blows a hole in the notions of community that have sustained defamation law. While a case like *Pritchard* is relatively easy in this respect – accusations of pedophilia are defamatory in any context and in that case the community was more clearly defined, even if the impact potentially reached other communities. In other cases, what is not defamatory in one interactive context, if shared on another platform and in another way, carries a different potential reputational harm. To put it

another way, the norms of one community might not be the same as those of another community.⁷⁷

- **The high-volume, low-value problem:** All of the problems identified here – from the permanence problem to the network information problem, indicate a critical hurdle for resolution of these disputes: most online defamation claims are high-volume and low-value. By this I mean that there is a high volume of defamation online, but most claims are not worth litigating given low potential damages and legal complexity involved. The end result is that for most wronged there is little opportunity for redress.

The key questions are, given the reputational harms posed by online defamation and challenges to traditional methods of resolution: why do defamation plaintiffs sue? What outcome is satisfactory to complainants to resolve a defamation claim, and how does the online nature of the defamation impact achieving this outcome?

B. What Complainants Want

There are limits to what can be examined here given the lack of data. We know that most defamation complainants do not sue, but we do not know how many. Empirical work is needed to examine how many people in a given population have been defamed online, or perceive themselves to be defamed, and what they did about it or would like to do about it. How many would like to sue, but didn't? How many sought notice and takedown (NTD) from the host and did this provide the remedy the complainant wanted? Would the complainant use a process

that is faster and less-expensive but does not provide much in the way of damages if at all, such as an ODR process or tribunal? The above is problematized further by the unreliability of any data that could be gathered as it is relying on self-reporting.

This is the data that we do have concerning online platforms and most of it is not defamation-specific nor relates to traditional media. The data does give a sense of the amount of information processed and complained about, and the amount of abuse taking place on social media sites. Part of the issue in gathering data in this area is that many online platforms do not divulge private requests for content removal, which would be the bulk of requests related to defamation. For government requests for removal, many platforms publish transparency reports.⁷⁸

It almost goes without saying that major online platforms process an enormous amount of data and user complaints. Consider that Facebook has 1.7 billion users; Twitter has 320 million active users (1.3 billion accounts total); 4Chan has 11 million users; Snapchat has 100 million users; Reddit has 36 million accounts and WhatsApp has 900 million users.⁷⁹ On YouTube, users upload approximately 400 hours of video every minute,⁸⁰ and it receives 200,000 flags for content per day.⁸¹ On Facebook, 1.3 million posts are shared every minute⁸² and approximately two million requests are made to Facebook per week to remove content.⁸³ We do not have the data regarding Twitter, but consider that 500 million tweets are sent per day,⁸⁴ and of those subject to a complaint to Twitter, only 1% are removed.⁸⁵ In contrast, Facebook removes 39%

of reported content, while YouTube removed approximately 90%.⁸⁶ Facebook employs about 4,500 moderators.⁸⁷

There are many studies on online abuse, but most do not isolate defamation from other forms of abuse.⁸⁸ A recent study by the Pew Research Centre found that 41% of adults surveyed had been harassed online, of which 50% of harassment were by strangers, and most incidents occurred on social networking sites.⁸⁹ The impact of online harassment is not limited to those directly harassed. Rather, it has an indirect chilling effect on bystanders, with 27% choosing not to post something after witnessing a harassment, and 13% discontinuing use of a service after witnessing harassment.⁹⁰

Concerning untrue information, the study found that 26% of adults had untrue information posted about them online and 9% experienced emotional or mental distress as a result. Of those 26%, half (49%) attempted to have the information removed or corrected. 17% of interviewees advised the untrue information related to their reputation or character.⁹¹

The above evidences the high-volume of online disputes managed by online platforms. Other empirical data can inform our thinking and conclusions. There are no Canada-specific empirical studies on why people sue for defamation. However, we have the benefit of American studies, which provide a sense of what Canadian litigants might similarly think. These studies answer a key question about the outcomes sought by defamation claimants, at least related to lawsuits

against the press. Put more simply, why do plaintiffs sue and what do they want out of a libel suit.

In the 1980s researchers at the Iowa Libel Research Project⁹² empirically studied defamation suits, focusing on lawsuits against the press, asking who sues, why they sue and why the press allows a dispute to escalate to litigation.⁹³ The interest here is the study of why people sue, and note that with the focus on lawsuits against the press, the answer cannot be as confidently applied to all defamation suits. One of the lead researchers on the project, Randall P. Bezanson, identified several assumptions in the “model of libel law”.⁹⁴ Relevant here are assumptions that reputation can be injured by publications and that the law protects reputation; that litigants want a judicial remedy; that the harm suffered is economic and that money effectively remedies the harm; and that a libel judgment reflects a fair consideration and decision concerning the reputational harm.⁹⁵

For the purposes of this paper, the key take-away from the Iowa Project is that most defamation claimants are driven to sue for non-pecuniary-interests. This might explain the statistic that 15% of libel cases settle.⁹⁶ Bezanson summarized the findings as follows:

Our study has led us to four basic conclusions [three of which are relevant to this report]. First, libel plaintiffs do not sue for the sole purpose of obtaining a formal judicial remedy for reputational harm. They mainly sue to restore their reputation by setting the factual record straight, and this objective is accomplished in significant degree independent of the judicial result in the case. Second, money damages do not compensate libel plaintiffs. Indeed, money seems rarely to be the reason for suing. Most plaintiffs sue to correct the record and to get even. Third, the judicial decision in a libel suit does not reflect a fair and full determination of reputational

harm or of the truth, falsity, or uncertainty of the published statement. These issues are rarely addressed and even more rarely decisive in litigation.⁹⁷

This opens the possibility that other forms of dispute resolution than traditional litigation could potentially resolve disputes at minimal expense, relatively speaking,⁹⁸ something that will be explored in the next section.

More detail concerning the findings are instructive. Bezanson concluded that the primary motive of defamation litigation was “restoring reputation, correcting what plaintiffs view as falsity, and vengeance.”⁹⁹ Twenty per cent of plaintiffs surveyed sued with the dominant motive of monetary compensation.¹⁰⁰ Two-thirds felt that the lawsuit satisfied some of their objectives, despite the fact that 86% lost their case in court.¹⁰¹ For those that lost, 90% identified the objectives achieved as being reputation-related – 41% that they defended their reputation, 9% that they achieved family and friend support, and 40% that it reduced further publication. The other 10% reported that the lawsuit achieved their objective of punishing the media.¹⁰² Thirty-seven per cent of losing plaintiffs, however, felt that the lawsuit did not accomplish anything. Bezanson indicated this might show that “money and punishment may have played a greater role as motivating factors.”¹⁰³ Yet the flip side to this is that two-thirds of plaintiffs interviewed expressed dissatisfaction with the litigation experience, largely related to perceived “unresponsiveness of the judicial system to their claimed harm.”¹⁰⁴

Bezanson concluded that while plaintiffs seemed satisfied that a lawsuit satisfies their objectives, the legal system did not.¹⁰⁵ In Bezanson’s view, this indicates that there is a

disconnect between what the plaintiffs want out of a lawsuit, and the judicial process. He concluded:

There is an additional factor, however, that leads virtually all of the public plaintiffs and the overwhelming majority of private plaintiffs to say they would sue again. It is a perception that despite all its frustrations litigation is the only effective means of achieving a remedy for their reputational, as distinguished from economic, harm. The act of suing itself represents a public response denying the story, which legitimates the plaintiff's claim of falsity more effectively than any other method. The delay in judicial decision, coupled with resolution on grounds of privilege rather than truth or falsity, assures plaintiffs a face-saving explanation for the almost inevitable media victory. The risk that litigation will confirm the truth of the challenged statement is slight.¹⁰⁶

He goes on, "[i]n actual practice, therefore, the libel action serves very different purposes than those set for it by the legal system, and apparently serves those other purposes effectively."¹⁰⁷

However, of those interviewed the overwhelming majority would consider alternatives for resolution – 70% would consider it, and a further 13% would consider it with certain qualifications.¹⁰⁸

At the time there were minimal alternatives to traditional litigation.¹⁰⁹ The interviewees were asked if they would consider an alternative that had four key features of "(1) promptness; (2) fairness; (3) determination of accuracy of the challenged statement; and (4) publication of the outcome."¹¹⁰ Interviewees showed an "overwhelming express interest"¹¹¹ in alternatives to litigation.¹¹² The attraction was to avoid a suit (24%), reduce cost and time (22%), the possibility of a more just outcome (24%), having a public outcome (27%). Ten per cent identified the importance of money damages.¹¹³

Although we can draw some conclusions for the Canadian context, namely that libel plaintiffs likely seek the same general outcomes when suing, one aspect should be kept in mind. At the time of the Iowa Project, suing for libel in the United States was relatively inexpensive with 80% on contingency fee arrangements. Indeed, Bezanson identified this as one of the reasons plaintiffs sue despite the fact that less than 10% of media libel claims are successful in court.¹¹⁴ This is significant to the extent that the more expensive litigation is, the more attractive alternative resolution models will be. We also cannot seamlessly translate the findings in this study to other types of defamation lawsuits, although the information is persuasive.

While much has changed in the world since the 1980s, and the study is focused on American litigants, I view this study as a compelling analysis that counters the assumed narrative of libel judgments. Indeed, this type of approach informed some of the reform proposals in the United Kingdom, detailed more in the next section. The results must be interpreted with some caution. As Robert M. Ackerman pointed out, some of the responses are self-serving in that some of the interviewees would avoid appearing like they wanted a damages award.¹¹⁵ The take-away from the study is that most defamation claimants are driven to sue for non-pecuniary interests, namely to fix a reputational wrong by restoring it, correcting the falsity, and vengeance. Many scholars have explored the kinds of outcomes that could satisfy this goal. Before delving into different proposals for reform, this paper will isolate the kinds of outcomes that might satisfy these goals.

C. Outcomes for Online Defamation Complainants

Based on the work of the Iowa Libel Project, defamation complainants seem to seek restoration of reputation, correction of what the plaintiff sees as a false publication, and vengeance. Drawing from the analysis in section II.A., certain features I suggest can be teased out further. Namely, there is a rehabilitative aspect to restoration of reputation by healing the dignitary or other harm. The reader will recall that reputation is intimately tied with feelings of self-worth and identity formation, and the buildup or takedown of a reputation is inherently social.

Also relevant here is the signaling function to the community in correcting a falsity and restoring reputation. There is a social value in protecting reputation, communicating the rules of civility expected in a community. Thus, a harm to reputation is not just to the individual but to the community.

The internet poses challenges and opportunities to achieving these outcomes. In particular, I detailed problems concerning identification and enforceability against defendants, transnational nature of internet communications, permanence, speed and reach of posts, the web of interactions and communities that comprise internet communications, the disconnect between the judicial system and the online world in which defamatory statements are made, and the high-volume, low-value nature of many online defamation claims relative to the costs of litigation.

Thus, certain features of resolution emerge as important:

- Speed of resolution;
- Reach of resolution to the right communities;
- Using the discursive¹¹⁶ nature of internet communities in the resolution;
- Containment and erasure of information, because the information is still ‘out there’ (or as Ellyn M. Angelotti commented “the toothpaste is out of the proverbial tube”¹¹⁷);
- Costs of resolution.

Bernstein identifies four goals for online defamation dispute resolution, which complement the above: “containment, erasure, rehabilitation, and lowered costs”.¹¹⁸ She notes that unlike other areas of tort law, virtual injuries continue after the initial incident, because the injurious content is still out there. Thus, nonmonetary relief is appropriate in the form of containment and erasure, such as NTD.¹¹⁹ Rehabilitation targets the “honor, reputation, and self-esteem” at the heart of defamation harm, which damages does not adequately address.¹²⁰

I explore in more detail in the following section the dispute resolution frameworks that might provide the kinds of outcomes identified here. At this stage, it is helpful to identify various mechanisms that might achieve the outcomes identified, namely:

- Initiation of a claim, whether to a tribunal or court, as long as it is public or the decision is public;
- Containment and erasure of information. This involves technological processes to, for example, take down the content (through NTD procedures with social networking providers) or scrubbing the content to effectively contain, erase, or more accurately,

make it more difficult to find the information online (reputation companies offer such packages) (but see the complexity in this area in the intermediaries paper);¹²¹

- Identifying the defamatory information as contested (through a flag or something similar);
- Identifying the information as false (through a flag, notice or something similar);
- A public apology;
- A correction;
- A right of reply;¹²²
- A declaration of falsity.

One qualification relates to youth. While there is no indication that youth might seek a different outcome, the desired resolution mechanisms might be different. Shaheen Shariff conducted a study of cyberbullying. As part of her study, she interviewed 800 grades 6 and 7 students. Key for this paper, is that 50% did not report cyberbullying because they feared that (a) it would lead to more bullying; (b) that adults/teachers would not act on the complaint; and (c) that parents, in an effort to keep them safe, would prevent access to the internet and thereby isolate them.¹²³

Shariff found that 72% of females had been cyberbullied (compared to 28% of males), and that they would report the bullying provided the complaint could be done anonymously. Shariff commented, “[a]s the SCC noted, sexualized cyberbullying can add to the fear of being recognized and forcing children to disclose their identities could make them vulnerable to

further abuse.”¹²⁴ Shariff also cited to a report by the UNICEF Research Centre concerning child safety, which stated that the media identifying child victims “can exacerbate trauma, complicate recovery, discourage future disclosures, and cooperation with authorities.”¹²⁵

It is unclear what this means for the defamation context, specifically, although the concerns expressed by youth inform my thinking here more generally. In particular, containment and erasure seem to most closely reflect what youth are seeking, including privacy in resolving their problem – whether it is suing or complaining anonymously,¹²⁶ resolving it through a notice to the social networking provider, or containing the spread of the information by erasure of the content as much as possible.

Jane Bailey and Valerie Steeves’ research paper for the Law Commission of Ontario is instructive here.¹²⁷ They interviewed 20 youths between the ages of 15 to 21. In terms of dispute resolution, the study participants saw the law as “a last resort”¹²⁸ for resolving their reputational harm, preferring other forms of dispute resolution. In their view a legal response, among other things, would not de-escalate the conflict, resolve the social and emotional aspect of the harm, mend their reputation or change the behavior, and was costly and slow.¹²⁹ Thus, participants preferred resolution was community-based, followed by reporting to social media providers or schools.¹³⁰ In Bailey and Steeves view, law reform should focus on supporting community-based resolution mechanisms, improving platform regulatory structures, and improving education, with direct legal intervention reserved for the most serious situations.¹³¹

The question that requires interrogation is how resolution of defamation disputes should be reformed in light of the goals of complainants and challenges of the internet. I have identified ideas on the types of mechanisms that might achieve the outcomes desired. However, I have not, as of yet, examined the various possible dispute resolution frameworks within which these kinds of mechanisms could be deployed. The following section examines proposals for reform to dispute resolution, both defamation and non-defamation specific. I consider ideas from a variety of industries for this analysis, such as domain names, finance and privacy, and reform that ranges from streamlined court processes, industry and self-regulation, techno-legal solutions and online tribunals. ADR features prominently, as the analysis thus far revealed great promise for ADR as a complement to traditional litigation for defamation disputes.

III. REFORMING DISPUTE RESOLUTION

Several law reform proposals have been made specific to resolution of defamation disputes. Most proposals emerge from the United Kingdom, which completed reform to its defamation laws in 2013.¹³² Some proposals for reform are focused on streamlining court processes, while others envision more wholesale reform to how defamation disputes are resolved. They will be discussed in more detail below. Briefly, the reform proposals include, but are not limited to:

- Early binding determination of fact whether a statement is false (by judge or arbitrator);
- Early neutral evaluation by a judge;

- Mediation by a judge;
- Non-binding court-based arbitration;
- Specialized defamation court;
- Specialized defamation tribunal;
- Simplified hearings;
- Two-track process with simplified hearings and referral to court for more complicated cases.

This section will consider all of the above proposals, but also several non-defamation related dispute resolution models. First, this paper will examine proposals for defamation reform, focusing on early intervention, streamlined processes and alternative systems, the latter discussion drawing from regulatory models in other industries. Second, ODR will be examined, in particular the Civil Resolution Tribunal in British Columbia and forthcoming Online Court in the United Kingdom. ODR in practice will be explored, targeting models that are company-led, government-pushed or government-created. Third, I will examine the strengths and weaknesses of the disputes resolution frameworks of select online companies and how this type of resolution can be incentivized through legislation.

Most of the processes I will explore embrace ADR. ADR does not have a single definition, and indeed not all agree on the types of dispute resolution that are ADR. To some, arbitration is not ADR because it is a regulated system, nor is negotiation, because it narrowly involves lawyers and clients.¹³³ For the purpose of this paper, a broad definition is used to capture “the full

range of alternatives to litigation that might be available to a lawyer and client to resolve a civil dispute.”¹³⁴

In this paper ADR is taken to include:

- Negotiation – where the parties seek to resolve a dispute through discussion;
- Mediation – where an impartial third party helps to resolve a dispute but does not impose a solution;
- Arbitration – where the parties submit their dispute to a neutral third party selected to make a binding decision.

There are mixed versions of the above, such as med-arb, where mediation is the first dispute effort, followed by arbitration if settlement is not achieved through the mediation process.¹³⁵

Indeed, one of the examples that will be explored in this report, the domain names dispute resolution process, is not clearly mediation, arbitration or negotiation, although it reflects elements of all three. ODR, which will be examined in depth in this report, broadly refers to the use of technology to resolve legal disputes. For example, ODR can be an alternative to courts, such as ADR processes transplanted online, it can be the use of technological tools to enhance ADR or court processes, or it can even be a movement online of courts themselves, such as the creation of cybercourts.

ADR will be given such prominence in this paper, because section II identified the challenges of resolving online defamation through traditional litigation, in particular in light of the goals of

complainants. Further, the kinds of outcomes and mechanisms outlined in section II do not necessarily need to be deployed by courts. Given that a key feature for resolution for online disputes was speed, containment and erasure and lowered-costs, other regulatory models become interesting to explore.

Traditional litigation for the tort of defamation has always been an uneasy fit. The traditional goals of tort actions are (1) compensating the plaintiffs for the harm they have suffered and (2) signaling to defendants that their behavior fell below an acceptable standard.¹³⁶ Defamation law struggles to fit this paradigm, because of the underlying concern that imposing liability might have a chilling effect on freedom of expression.¹³⁷ More generally, court proceedings can be lengthy, costly, uncertain, formal, judges are often not experts in the particular field of law at issue, proceedings are public, adversarial, and difficult to litigate or enforce if it involves parties from other jurisdictions.¹³⁸

ADR, in contrast, is advantageous concerning, among other things, speed, cost, flexibility of proceedings and outcomes, its amenability to international disputes, less adversarial approach, and involvement of expert facilitators.¹³⁹ More fundamentally, ADR provides an opportunity to resolve a defamation dispute by focusing on the *interests* of the parties more than their *rights*.¹⁴⁰ Traditional litigation focuses on, for example, the right of a plaintiff to a fair trial and the right of a defendant to free speech. However, ADR, if done successfully, “can redirect the parties to focus on their respective interests, rather than on their legal rights.”¹⁴¹ In practice, this would focus on the interest of the defamation claimant to clear their name, or the interest

of the journalist to be accurate.¹⁴² This might align with the interest of claimants to right a reputational wrong.¹⁴³

However, I want to emphasize that this paper views traditional litigation as integral to resolving defamation disputes, and views ADR or other streamlined processes as complementary to traditional court actions. Traditional litigation has many advantages. Among other things, it “inspires the respect of society”,¹⁴⁴ trials can be “cathartic”,¹⁴⁵ it has rules and procedures to ensure a fair trial,¹⁴⁶ is publicly accountable, can produce a judgment and is enforceable with a greater range of remedial powers. For some defamation complainants, traditional litigation is the appropriate route to resolving the dispute where a judgment by a court carries a formal authority and public signaling important to the claimant.

A. Proposals for Defamation Reform

Proposals for defamation reform related to dispute resolution can be broken down to three variations: (1) early intervention, (2) streamlined processes and (3) alternative systems, either court-based or private. An effort to streamline processes to reduce cost and encourage speedier resolution features in all three variations.

1. Early Intervention

There are compelling proposals for early intervention to facilitate resolution of defamation disputes. This is particularly so knowing that the key driver for litigation is to set the record straight.¹⁴⁷ The proposals take a few forms, but capture the same nugget focused on early intervention.

One variation is early neutral fact-finding. This has been a particularly popular idea.¹⁴⁸ Ackerman proposes a few different models of early neutral fact-finding. One is binding fact-finding, where the parties agree beforehand that they will be bound by the factual findings. If the statement is found to be false, the defendant must print a retraction, while if the statement is found to be true, the plaintiff must drop the lawsuit.¹⁴⁹ The other proposal is non-binding fact-finding by a judge or arbitrator. A factual finding is made, and the parties do with it what they wish. The mediator might facilitate an agreement based on the factual findings, or the parties can reach their own agreement, if at all. This leaves open the possibility of proceeding with litigation.¹⁵⁰

Another model of early intervention is focused on early neutral evaluation. Unlike fact-finding, this more broadly invites a third party, whether a judge or facilitator with expertise in the field, to provide a non-binding evaluation of the chances of success of the case.¹⁵¹ The hope is that the evaluation leads to a settlement. This has been successfully used in the United Kingdom in family law and construction disputes.¹⁵² In the case of the latter, one judge commented that early neutral evaluation “almost never fails” to lead to settlement.¹⁵³ It is also advantageous for cases unsuitable for mediation, namely where one of the parties is unreasonable.¹⁵⁴

Early neutral evaluation has some disadvantages. If it fails to lead to a settlement, it simply burdens litigants with an additional, costly step in the process. It arguably might strain court resources, although if it leads to an early settlement, this might have the opposite resource effect. It is unclear whether early neutral evaluation should be mandatory. In the construction context in the United Kingdom there has been little take-up, despite its success when used.¹⁵⁵ It is also unclear at what stage in the litigation process the evaluation should take place. Usually it takes place after document disclosure, however at this stage the parties have expended considerable money and something earlier in the litigation process is perhaps advisable (although admittedly less effective without the same information available to the evaluator).¹⁵⁶

In comparing early neutral fact-finding versus evaluation, a determination of meaning has the advantage of being something that can be done based on the publication itself, in most circumstances, thus can be done early in the process unlike early neutral evaluation.¹⁵⁷ However, early neutral evaluation has more promise to address the strengths and weaknesses of a case as a whole, including defences, making it a more effective settlement facilitator.

2. Streamlined Processes

One theme running through proposals for defamation reform involves streamlined processes to encourage speedy resolution. Some of the proposals include:

- The option to sue for damages or seek a judicial declaration as to the truth or falsity of the content in dispute, but not both;¹⁵⁸
- Imposition of costs on a party that refuses ADR unreasonably;¹⁵⁹
- A streamlined fact-finding process by using a special verdict;¹⁶⁰
- A two-track process with simplified hearings and referral to court for more complicated cases;¹⁶¹
- Arbitration;
- Mediation;
- Stricter case management.¹⁶²

Some of these will be elaborated on below.

The special verdict process entails the jury answering simplified questions (did the defendant defame the plaintiff; was it false; was the defendant motivated by actual malice?). This malice component reflects the American-roots of this proposal. The benefits of this approach are that a plaintiff can clear his or her name and the defendant does not face the prospect of high damages.¹⁶³ Some of the drawbacks of the special verdict approach are, for example, that it creates issues concerning the burden of proof, and that a special verdict can be lengthy, costly and the results not widely reported.¹⁶⁴

Other proposals to streamlined resolution of defamation disputes focus on mediation and arbitration. Mediation is advocated for defamation disputes because it gives litigants the opportunity for personal resolution of the dispute:

Mediation concentrates on the personal, with people being treated as individuals, rather than just as parties to a case. It offers parties an opportunity to deal with emotions in tandem with the legal rights and wrongs of the case. The personal nature of mediation can make it cathartic for parties, particularly for claimants.¹⁶⁵

This is particularly relevant to the highly emotive nature of defamation claims;¹⁶⁶ it “takes the heat out of litigation and focuses on settlement, not presentation of the strongest possible case.”¹⁶⁷ Even if it does not lead to a settlement, it might help the parties narrow the issues. One suggestion is that mediation can be conducted through a private provider before a claim is filed.¹⁶⁸ Or, a cost sanction should be imposed on a party that fails to mediate, absent sufficient reasons.¹⁶⁹ The drawbacks of mediation are those evident more generally with mediation, namely that it is dependent on good faith participation of the parties. If lawyers participate rather than litigants it can circumvent the benefits of mediation, and a failed mediation increases costs.

Arbitration potentially offers the simplified procedure that is advocated in many of the proposals explored here (“cuts through the procedural red tape”¹⁷⁰) and has the benefit of being binding. As the defamation campaigner the Alternative Libel Project notes, “[p]eople who choose to use this route swap the benefit of judicial authority for the benefit of expediency and lower costs.”¹⁷¹ The drawback of arbitration, or any of the streamlined processes discussed

herein, are that a case is streamlined to the point that it does not properly resolve the dispute at issue.

Anita Bernstein, for example, proposes a court-based arbitration scheme that is elective and non-binding combined with a technical solution. If both sides accept the arbitrator's decision it would have the effect of a court judgment.¹⁷² In Bernstein's proposal, parties are compelled to accept the arbitration decision, because she recommends that courts impose penalties on litigants who choose to proceed to court and obtain an unfavourable outcome. The losing plaintiff, Bernstein suggests, should have to pay nominal damages and a small fee to the court to support the arbitration scheme.¹⁷³ After the decision is a judgment, Bernstein recommends that a 'remediator' seek to expunge the material from the internet.¹⁷⁴

Ireland offers something similar in its defamation legislation. Claimants can elect an expedited declaratory order that the statement is false and defamatory.¹⁷⁵ The catch is that the claimant foregoes a claim for damages. The criteria for an order are that the statement is defamatory and there is no defence, and that the claimant sought an apology, correction or retraction by the defendant and the defendant either failed or refused to do so, or did so in a way that was not as prominent as the defamation.¹⁷⁶

3. Alternative Systems

Building on the ideas in section III thus far, more wholesale proposals for reform have been suggested by scholars and civil society campaigners. They are identified separately from the proposals above, because they envision a more fundamental shift in defamation dispute resolution away from traditional litigation and using some of the ADR tools discussed above. This section will first consider defamation-specific proposals for reform and then contextualize them by considering industry regulators, both media and non-media.

a) Proposals for specialist defamation bodies

As identified above, reforming the framework for resolving defamation disputes was the focus of scholars and campaigners in the United Kingdom defamation reform process. However, Parliament did not ultimately tackle it in its defamation reform, opting for more modest changes.¹⁷⁷ Mullis and Scott were critical of Parliament's failure to take the opportunity to re-imagine dispute resolution in this area, commenting "[t]he core problem with libel law has been the justification and over-complication of public sphere disputes, and the attendant cost of embroilment in legal proceedings. This problem has been barely touched, to the benefit of no-one but tyrants and lawyers."¹⁷⁸

This section explores the alternative proposals suggested by some scholars and campaigners in the United Kingdom. A common theme is a specialized body that delivers low-cost, high speed resolution of disputes. Three variations of this are adjudication, courts and a tribunal. Mullis and Scott propose a hybrid model, which incorporates streamlined processes and larger

wholesale reform. The reader should note that most interviewees, when canvassed concerning an alternative form of dispute resolution, whether traditional ADR or a specialized court or tribunal, were positive about the potential of such a tribunal with the caveat that it would need to involve specialized judges or adjudicators.

An adjudication model¹⁷⁹ envisions a privately funded adjudicator making a decision that is non-binding on the parties. Parties can be compelled to use the procedure by mandating it through legislation as a pre-requisite to filing a claim, or it can be voluntary.¹⁸⁰ The main advantage is speed, and simplified procedures and remedies (e.g. evidence called, a hearing based solely on documents filed). A model is the construction industry in the United Kingdom. However, a defamation dispute might be more complicated than a contract dispute in construction, which can involve, e.g. non-payment of money¹⁸¹ and parties in defamation disputes are often not contractually linked, therefore adjudication is more difficult to compel or effect outside the media context (e.g. selection of adjudicators aren't agreed on).¹⁸² As the reader will see, a similar criticism can be made in translating e-commerce dispute resolution frameworks to the context of defamation.

A specialized court¹⁸³ would run similarly to traditional court actions in that the same remedies would be available. The key difference would be that the judge would be a specialist in the field and would rigorously manage the case to reduce time and cost. Trials could be limited in length, evidence managed and a costs cap imposed. More complex cases could be transferred to a traditional court. One model is the United Kingdom's Patents County Court.¹⁸⁴ Such a model

would not transfer as easily to a Canadian context, where judges are not as readily experts in defamation law and we do not necessarily have the population base to sustain such a bricks and mortar court. If, for example, one court was set up in Toronto, which is arguably all that would be sustainable, this would limit access for anyone outside the greater Toronto area.

A tribunal¹⁸⁵ is similar to the specialized court in that the process is speedy, simplified and binding, and an individual with specialized knowledge of the area is the chair. However, the case is not heard by a judge, but rather an expert in the field. Such a tribunal could be self-funded through claim fees. There are many variations of how such a tribunal could operate. The reader will note the various industry tribunals explored later in this report and the British Columbia Civil Resolution Tribunal, which operates an online tribunal for small claims and condominium disputes.¹⁸⁶ A tribunal could be chaired by one or more panelists, hear evidence orally or in writing, involve laypeople, and be mandatory or voluntary. If it is mandatory, it might create barriers to access to justice that such a model was designed to cure, being one more hurdle to get to court. This is especially the case when there is an imbalance of power between litigants.

Mullis and Scott's two-track model is notable as a hybrid of streamlined processes and more wholesale reform. Like other streamlined procedures, the two-track model similarly proposes a simplified, fast-track option. However, it operates differently in triaging complex cases from simplified matters that can be resolved through a streamlined process. It is compelling for analysis here, because the underpinnings of the model are similar to the analytical focus of this

paper. Namely, the two-track process is underpinned by (1) the critical psychological role of reputation as part of our self-worth; and (2) improving access to justice.¹⁸⁷

Track one is a simplified process focused on speedy resolution and discursive remedies. This could be deployed through the courts or a co-regulatory body created by legislation.¹⁸⁸ In this track, defamatory meaning is determined by the meaning the claimant infers, subject to a test of reasonableness (as in, the statement means what the claimant interpreted it to mean as long as that inference is reasonable). Truth and honest comment would be the main defences. In line with the outcomes identifies in section II, Mullis and Scott suggest a discursive remedy is better than a damages award for vindicating harms:

The most effective way of vindicating a person's reputation would be to ensure that the truth is aired, and misrepresentations corrected. This would require new provision for the award of an appropriate discursive remedy...The grant of a discursive remedy would remove the need to award damages to vindicate the claimant's reputation, but would instead provide the claimant with the very thing that most claimants want: a public declaration that they did not do what they were alleged to have done.¹⁸⁹

Mullis and Scott left it open as to the framework for discursive remedies, but noted corrections should be made for errors. Sometimes an apology, declaration of falsity or right of reply would be appropriate.¹⁹⁰ For online content, they suggested flags next to contested content.¹⁹¹

With track two, serious defamation cases would be referred to the High Court and damages would be uncapped.¹⁹² These would be cases where the claimant seeks special damages or the

psychological harms claimed are “severe so that the track-one procedure would be manifestly inappropriate to deal with the case.”¹⁹³

To summarize, many of the models proposed seek to improve access to justice by creating a body or process that is less expensive and faster, largely through the use of specialists, simplified procedures, simplified claims and defences, and limited remedies (focusing more on discursive rather than monetary remedies). One proposal is to operate this through courts, whether through streamlined procedures or a specialized court. The other is to create a specialized tribunal or outsource to a private adjudicator. Regarding alternative regulators to courts, there are several industry regulatory bodies in media and other industries that can inform recommendations here.

b) Industry regulators

Three types of industry regulatory models will be explored here: (a) media self-regulatory bodies; (b) the Privacy Commissioner and (c) the Canada Internet Registration Authority (CIRA). However, there are a variety of other regulators that can be considered as models, such as human rights tribunals and financial ombudsmen services.

i. Media models

Canada has a variety of self-regulatory bodies for the media. Most relevant for this report is the newspaper industry’s voluntary, self-regulatory press councils. While there used to be several

regional press councils, most were disbanded in favour of a national regulator, National NewsMedia Council (“Council”), created in 2015. Quebec and Alberta continue to operate their own press councils, although major provincial papers, such as the Calgary Herald are members of the national body.¹⁹⁴ Members of the National Newsmedia Council include most major Canadian newspapers.¹⁹⁵ The purpose of the Council is to promote ethical journalism and provide a complaints forum to the public.¹⁹⁶

One option is to strengthen the role of the Council in resolving media-related defamation disputes, or to encourage, mandate or oversee creation of an industry regulatory body more broadly for online defamation. The latter is problematic as it is unclear what precisely is the ‘industry’ captured by the regulator, it sometimes entails regulating the intermediary rather than the wrongdoer and voluntariness invites the usual problems of free-riding, inconsistent standards and lack of credibility.¹⁹⁷ Particular aspects of online defamation and the role of intermediaries is explored in the intermediaries paper with co-author Hilary Young and below in section III.C.

Media self-regulation is an interesting case study, however, for the question of how to structure the powers of a regulator. The Canadian Press Council is relatively weak as a regulator. It does not have a code of practice. Rather, it considers, “the stated code of the media organization, if any; the acceptable practices, standards and decisions of the former provincial press councils; the standards described in The Canadian Press Stylebook, or the Ethics Guideline established for members of the Canadian Association of Journalists.”¹⁹⁸

Although anyone can complain, the Council has discretion concerning the complaints it hears.¹⁹⁹ Even if it hears a complaint, powers of the Council are quite limited, and only include publishing a decision on its website and compelling news organization members to publishing the decision on their website. It has no powers to compel discursive remedies of the sort Mullis and Scott envision, nor the power to award damages or assign fines. In return, the complainant undertakes a significant burden, namely the complainant must waive their right to pursue a legal action in order to have a complaint heard.²⁰⁰

As one interviewee commented, the Council is for “for the little guy who isn’t going to launch a lawsuit.” It offers a speedy resolution with limited mechanisms once a decision is made. One complaint was that the Council has been captured by special interests, thus while it helps “the little guy”, it is vulnerable to abuse by repeat complainants, and thus the Council becomes a burden to newspapers.

Canada’s press regulatory model is an interesting comparison to the United Kingdom, which is hardening its regulatory structures for the press despite concerns of press freedom. While this paper cannot delve into depth concerning press regulatory reform in the United Kingdom, lessons can be learned from that experience. At the time of writing the state of United Kingdom press regulation is best described as in flux.

The Leveson Inquiry was launched in 2011 following reports of phone hacking and police bribery by News of the World employees.²⁰¹ The now defunct press self-regulatory body, the Press Complaints Commission (PCC), was criticized for failing to adequately investigate the allegations, which ultimately played a role in its demise in 2014.²⁰² Unlike Canada's Council, the PCC had a Code of Practice, which formed the basis of complaints from the public concerning press practices. The PCC did not have the power to fine members for breaches of the Code.

As it stands, the PCC had more powers than Canada's Council. The Leveson report was highly critical of the PCC for, among other things, its lack of remedial powers, insufficient independence from industry, and voluntary membership.²⁰³ Leveson recommended the creation of a new body, but recommended it be established via Royal Charter, in order to give the body the power to enforce decisions through, for example, fines. He in effect argued for a self-regulatory body underpinned by legislation, something that I have advocated for internet and human rights issues more broadly.²⁰⁴ In practice, this means that legislation would establish creation of a body without drilling down to the detail of day-to-day regulation. As I described this type of regulation, "the legislation would be directed at the process and legitimacy of the body, with allowance for undefined and open outcomes."²⁰⁵

The United Kingdom government implemented the Leveson recommendations through creation of a Royal Charter that paved the way for government approval of press regulators.²⁰⁶ There is currently one approved press regulator in the United Kingdom: Independent Monitor of the Press (IMPRESS) (as of 2016).²⁰⁷ Some media organizations created their own regulator,

the Independent Press Standards Organisation (IPSO) (as of 2014),²⁰⁸ which is a newly re-worked PCC. Major publications, such as the Guardian, have not signed up to either regulator, rather running their own complaints mechanism.²⁰⁹

There is a significant benefit to being a member of an approved regulator, and penalty for not being approved. Under s. 40 of the *Crime and Courts Act*,²¹⁰ any publisher that is a member of an approved regulator, with some discretion, must not have costs awarded against it in a defamation action. Conversely, s. 40 provides that if a publisher is not a member of an approved regulator, win or lose, costs must be awarded against it.²¹¹

Whether one is repelled by the notion of a government sanctioned regulator, such as IMPRESS, or unconvinced by the new private regulator IPSO, both regulators have sought to implement aspects of Leveson's recommendations. The breadth of the regulators investigatory and enforcement powers is particularly striking for the purposes of this paper. IMPRESS has investigatory powers (self-initiated or due to complaints), can impose wider sanctions than the PCC model (fines, corrections, apologies, publication of decisions) and offers as an arbitration service.²¹² Thus a potential complainant can choose between complaining to IMPRESS for a breach of the Code (presuming the issue is covered under the Code) or applying for arbitration (presuming it is an issue IMPRESS offers arbitration for, and defamation is one of them).²¹³

IPSO emphasizes different ADR procedures. It offers a complaints mechanism for breaches of its Code, although it gives priority to complaints about significant inaccuracies about facts. The

service is free. If the parties do not resolve the dispute, it then proceeds to an investigation by IPSO and a mediation between the parties. If the complaint is still unresolved it will proceed to an adjudication by the Complaints Committee, which has the power to order a correction, publication of the decision, and in certain cases, remedial action.²¹⁴ It has the power to award fines of up to 1 million pounds, but this is reserved for serious and systemic failures to comply with the Code.²¹⁵ It is currently piloting an arbitration scheme separate from its complaints scheme. It is different, because it requires a fee, deals with legal actions and offers different remedies. It is managed by an independent dispute resolution body.²¹⁶

Canada's other main media self-regulator is the Canadian Broadcast Standards Council (CBSC), which is the broadcasting industry's self-regulatory body. It is different than the Press Council in that, while it is entirely self-regulatory (self-funded through members fees), most private Canadian broadcasters are members.²¹⁷ The government body that oversees the broadcasting industry, the Canadian Radio-television and Telecommunications Commission (CRTC), issued a Public Notice in 1991 that it supported the CBSC and complaints about CBSC that fit under the industry code would be referred to CBSC to handle.²¹⁸ The CRTC also acts in an appellate role, hearing appeals of CBSC decisions.²¹⁹

The CBSC hears complaints from the public about private broadcasters on a variety of issues covered by several codes in areas of "ethics, violence, equitable portrayal, and journalistic practices."²²⁰ The codes are created by industry as guidelines.²²¹ The CBSC does not permit you to simultaneously pursue a legal action and a complaint with the CBSC.²²² In contrast, the

United Kingdom's broadcasting industry is governed by the Office of Communications (Ofcom). While it has more parallels with the CRTC as a government regulator, it is worthwhile to note here that complaints about broadcasting are made directly to Ofcom, which has the power to fine pursuant to s. 237 of the *Communications Act*.²²³

The key thread is that the United Kingdom is moving in the direction of hardened regulatory structures for media. They are not mimicking the court process exactly, but the Leveson Inquiry put a nail in the coffin of self-regulatory bodies without enforcement powers. Thus, a new era of regulation is borne for the media in the United Kingdom, which seems to more readily incorporate aspects of ADR tied with remedial mechanisms. The key features are: low or no fees; access without a lawyer; mediation; arbitration; the power to fine and discursive remedies.

ii) Non-media models

Most of the non-media models examined do not translate to the kinds of outcomes sought for resolving online defamation disputes. In particular, I examined the Office of the Privacy Commissioner (OPC)²²⁴ and CIRA.²²⁵

The OPC model (whether modelled on it or as an extension thereto) is not ideal to address defamation disputes as it is not enabled to the same extent as other models explored in this

paper to resolve individual disputes. Here I will briefly explain the structure of the OPC, although note there are provincial variants, such as the Office of the Information and Privacy Commissioner of Alberta (OIPC). The OPC is an agent of Parliament, tasked with overseeing compliance of the *Privacy Act*²²⁶ and the *Personal Information Protection and Electronic Documents Act* (PIPEDA).²²⁷

The OPC receives complaints from the public concerning its mandate (federal government and federal private sector privacy laws). The Commissioner can investigate organizations (self-initiated or in response to a complaint), conduct audits, enter into compliance agreements, and engage in wider legal and policy analysis. In conducting investigations, the Commissioner has the power of a Superior Court and can compel evidence. However, its findings and recommendations are non-binding. As the SCC commented, the Privacy Commissioner is “an administrative investigator, not an adjudicator.”²²⁸

OPC findings and recommendations are certainly persuasive, but the Commissioner has no general power to award fines. In practice, it is advisable for organizations to comply with OPC findings. It will soon have the power to award fines of up to \$100,000 for failure of an organization to report data breaches that pose a real risk of significant harm to those affected.²²⁹ While the OPC generally has no stick, for complaints it did not initiate, it may apply to the Court for a hearing (with the complainant’s consent), appear in Court on behalf of the complainant or appear as a party to a hearing.²³⁰

There are other models for privacy commissioners that have more teeth. The United Kingdom Information Commissioner's Office now has the power to impose fines on organizations. The change was implemented in response to a series of data privacy breaches, including Google's Streetview cars gathering personal information from Wi-Fi networks.²³¹ Further, Europe's General Data Protection Regulation (comes into effect in 2018)²³² empowers Supervisory Authorities such as the Information Commissioner's Office to impose substantial fines of up to 4% of global annual turnover or 20 million Euros, whichever is higher.²³³ This indicates a movement, at least outside of Canada, toward stronger enforcement powers for these types of bodies.

If we consider some of the outcomes identified in section II, in particular, personal resolution of harms, the OPC does not as easily fit the bill. It selects the complaints it investigates, and therefore many complainants would not have the opportunity for redress through an OPC-type model. However, the complainant would still be able to pursue a legal action. In terms of the wider societal harms of defamation, an OPC-model would serve that public interest. However, for the high-volume, low-value nature of the kinds of online defamation that are examined in this paper, such a model is likely unsuitable. If the focus were on seeking to improve industry standards for handling defamation complaints, such as the role of intermediaries, the OPC model might have merit, but that is not the focus here.

The other potential model is the CIRA,²³⁴ which manages registration of .ca domain names. I conclude that it is not a suitable model for a variety of reasons. However, it is a good example

of a private dispute resolution body running alongside traditional actions in court and borne out of the inadequacy of costly, time-consuming litigation for the high-volume, low-value nature of the disputes at hand. I suggest that we are at a similar crossroads with defamation disputes online.

Domain names provide user-friendly ways to find websites. For example, instead of remembering numeric IP addresses, one inputs www.ucalgary.ca. Early in the commercialization of the internet the domain name registrars (starting with the Internet Corporation for Assigned Names and Numbers (ICANN) for .com domain names, among others) began handling disputes concerning bad faith registration of domain names known as ‘cybersquatting’. There was natural symmetry with trademark law, although trademark law was largely ineffective, because a domain name did not qualify as use of a mark as required under trademark law.²³⁵ In the United States, trademark legislation was amended to address cybersquatting, but this did not overcome the unsuitability of traditional court actions to resolve the disputes. As Teresa Scassa and Michael Deturbide describe the United States context:

“Although [the *Anticybersquatting Consumer Protection Act*]²³⁶ provided some relief against cybersquatting, it still required plaintiffs to engage in costly, cumbersome, and time-consuming litigation in order to assert their rights or interests. Given the increasing number of conflicts in the registration of domain names, some form of alternative dispute resolution was considered to be necessary.”²³⁷

Thus, the Uniform Dispute Resolution Policy (UDRP) was designed for ICANN. CIRA’s domain name dispute resolution policy (CDRP) is modelled on the UDRP. I will focus for the purposes of

this report on the CDRP, but note there are variations between the policies of different registrars.

The CDRP is focused on clear-cut cases of bad faith. Thus, more complex cases (that, for example, involve clear trademark disputes) would proceed through an action in court. In this way, it is an interesting model for defamation disputes. However, there are key differences. First, CIRA has built-in powers of enforceability, unlike some situations of online defamation. When someone seeks to register a domain name, they sign a contract with CIRA. CIRA thus knows the identity of the domain name owner and has the power to impose the dispute resolution process on the owner, as well as the power to enforce a decision by cancelling or transferring the domain name. If a domain name is found to have been registered in bad faith, CIRA can, for example, transfer or cancel it.²³⁸ As one interviewee commented, “a dispute resolution tribunal [for defamation] is a great idea in theory, but in practice it requires enforcement mechanisms built in and an identity system built in. The domain name system has both but defamation has neither.”

Second, the CDRP process is streamlined to reflect its focus on clear-cut cases of bad faith registration. There is no hearing, rather the complaint is purely documentary via a complaint and supporting evidence. The domain name owner has an opportunity to respond in writing. The material is then provided to a de facto three-person panel, which makes a decision. Dispute resolution is administered by two bodies British Columbia International Commercial Arbitration Centre and Resolution Canada Inc.²³⁹ CDRP decision are published on the CIRA websites.²⁴⁰

In a defamation context, while streamlined, tribunal, and ADR processes have been reviewed extensively in this paper, CIRA is streamlined to the extent that it doesn't transfer as easily to a defamation context. For example, for such clear-cut cases, NTD is likely the most effective option and there is no need for such a dispute resolution panel. However, CIRA's focus on cases of bad faith, with complex cases ferried to the courts, is conceptually similar to Mullis and Scott's two-track model. A key difference is that Mullis and Scott envisioned a court-based procedure unlike CIRA's self-regulatory model.²⁴¹ While a private scheme similar to CIRA is possible, for the reasons detailed above, the lack of powers of enforceability make it a more difficult candidate for defamation disputes than something court-based. I suggest something bespoke is needed.

A recurring theme in the paper thus far is the need for techno-legal responses to resolve online defamation disputes, meaning a legal response that involves a technological component. It is identified here as a transition to the following section, which explores the potentiality of ODR as a tool or system for resolving the kinds of disputes explored here. The takeaway is that the law can only do so much to resolve online harms, and it is a combination of law and technical processes that is the most effective in practice in achieving the outcomes claimants seek. Many companies offer such reputation management services. In the United Kingdom, this full-service approach is offered through some law firms,²⁴² such as in-house experts in digital security, communications, risk management and technology. Law society rules make this more

challenging for a law firm to deliver in a Canadian context, but many reputation management firms operate to complement the work of law firms.

Ardia and Angelotti advocate such techno-legal solutions. There were two similar streams to their recommendations: (1) speedy resolution²⁴³ focused on reliable information, such as flagging content as disputed,²⁴⁴ or procedures to contextualize information for accuracy or to correct false information;²⁴⁵ and (2) deploying these types of solutions within the online communities. As Ardia advocates, “the procedures should be embedded in the networks people actually use.”²⁴⁶ Not surprisingly intermediaries were earmarked as in a good position to do this.²⁴⁷

In the context of Twitter, for example, libel cases are difficult for courts to litigate as the norms that govern the space and the behaviours that comprise the community of interactions on Twitter are foreign to many of the courts hearing the cases.²⁴⁸ Ardia pushes this concept further advocating that there should be a shift in focus away from liability to systems of ensuring reputational information is reliable and accurate.²⁴⁹

This invites consideration of ODR, both internal to companies and externally through structured court or tribunal processes. Moving resolution to online courts might arguably provide minimal substantive change to the resolution of defamation disputes, simply use a different venue. As will be evident, my conclusion is that ODR provides a fundamental opportunity for reform. The

next section canvasses developments in ODR more generally as well as specific to the technology sector.

B. Online Dispute Resolution

As discussed in section III.A, ODR refers to the use of technology to resolve legal disputes. It began in the mid 1990s, with the first ODR being the University of Montreal's eResolution.²⁵⁰ An instructive definition of ODR is as follows:

[T]he integration and use of technology in the process of dispute resolution, whether judicial or extrajudicial. This approach takes into account three specific criteria: the use of a software platform that provides an automated interface to go through all the steps of a procedure and to support the store and management of evidence (1); the possibility for users to obtain, at any time, online technical assistance (2); and the presence of a network of neutral third parties which are recognized for their expertise in the field of law in question (3).²⁵¹

Faye F. Wang describes technology as "a fourth party" in ODR, because it facilitates negotiations either independently or with the help of the neutral third party.²⁵² Another way to understand ODR is that there are two tracks: hard ODR, where the online process is devised to resolve the dispute and soft ODR where the process is designed to prevent disputes, such as eBay's system of providing feedback.²⁵³

ODR is of particular interest in this report, because it offers numerous features that tackle some of the issues identified in section II, namely the speed and cost of resolution, the cross-border nature of disputes, and the physical distance of the parties. What is difficult to overcome is the lack of a contractual relationship, in most cases, between the complainant and defendant.

Rather, the contractual relationship, if any, is usually with the intermediary through the terms of service. This impacts the enforceability of an ODR framework. Section III.C explores how to incentivize intermediary frameworks, or capitalize on that contractual relationship to encourage dispute resolution. This section examines the strengths and weaknesses of ODR and various examples of ODR in practice.

1. Strengths and Weaknesses of ODR

When ODR is used as a form of ADR there are several advantages over traditional ADR. Among other things, ODR is potentially less expensive, faster (no need for physical convergence), more transparent by leaving a digital trail (but this also creates a privacy vulnerability), and more flexible.²⁵⁴ It also lowers barriers to access to justice, in particular economic and geographic barriers. For example, some complainants are located in rural areas creating hurdles to accessing courts, or the type of dispute is not one for which complainants typically sue, such as low-value e-commerce claims, thus ODR opens up an avenue for redress.²⁵⁵

Many of the benefits of ODR mimic somewhat ADR's benefits compared to traditional litigation. Jordi Xuclà, the Council of Europe rapporteur on access to justice through online instruments²⁵⁶ highlighted that the "values upon which ODR procedures are based differ from those of litigation in courts."²⁵⁷ Namely, traditional litigation is more adversarial and top-down, while ODR is aimed at finding a consensual resolution to the dispute. Thus, ODR is potentially better if the parties wish to have an ongoing relationship. Further, the parties might be more satisfied with the procedure because of the win-win focus.²⁵⁸ ODR is an interesting framework to

explore to animate the kinds of resolutions defamation claimants seek as identified in section II. It might be well-suited to defamation disputes to the extent the goal is personal resolution of speech harm or to resolve the reputational harm.

ODR has potential drawbacks. First, low-value does not necessarily translate to “legal simplicity.”²⁵⁹ Indeed, one advisory group recommended that ODR is not suitable to all disputes, and is best deployed for high-volume, low-value disputes.²⁶⁰ Online defamation has the unfortunate position of being legally complex, high-volume and often low-value.

Second, it is unclear whether the lack of physical presence might diminish the benefits of ODR, particularly when the focus is on personal resolution of a dispute. Wang identifies the distance as advantageous in highly emotional situations where being in person would make that situation worse.²⁶¹ Angelotti criticizes that “[w]hile online mediation is more convenient, you often lose some of the richness of human expression and emotion communicating exclusively online”.²⁶² Particularly for mediation, which capitalizes on relationship building, it is unclear whether ODR helps or hinders resolution. Xuclà was of the view that technological tools, such as video conferencing, might overcome these problems.²⁶³

Relatedly, there might be concern that technology-facilitated resolution will be impersonal for resolution of these kinds of disputes, particularly when there is no human facilitator involved. However, human-computer interaction operates similarly to human-human interactions. As Darin Thompson explains,

Researchers have found that human–computer interactions follow patterns similar to human–human equivalents. Users may be aware they are interacting with machines, but still tend to follow human–human social rules, and treat computers as if they have feelings. Humans can become angry towards computers, and may be flattered or feel praised by them. Humans recognize computers cannot think or feel emotion, yet still follow human–human social patterns unconsciously. These manifestations are not limited to systems that take on anthropomorphic characteristics; research suggests they occur even with basic textual interfaces.²⁶⁴

What this means is that technology can play a critical role in delivering the resolution needs of human, including emotional needs. A properly designed ODR system, such as using a carefully crafted questionnaire, can “help users investigate and better understand their emotions in a dispute, along with the underlying interests to which they relate.”²⁶⁵

Third, a challenge for ODR is privacy and authentication.²⁶⁶ There is a vulnerability of access to private or confidential information and the risk of tampered records.²⁶⁷ One solution, which does not resolve the whole privacy challenge, is to advise users of the ODR provider’s procedures for storing, using and disposing of data.²⁶⁸ The advantage of such data collection is that it can be analysed to identify flaws in the dispute resolution system for improvement, identify trends in user behavior and develop precedents to provide consistency in decision-making. This is evident in the eBay case study examined in the next section.

Fourth, practical obstacles to increased use of ODR are lack of knowledge that it exists and/or trust in the system.²⁶⁹ eQuibbly, for example, a Canadian-based ODR provider, ceased operating in 2016. Its founder, Lance Soskin, advised eQuibbly was shut down because of the lack of demand for online arbitration, and the struggle in convincing non-corporate clients as to its

legitimacy.²⁷⁰ This is different than, for example, CIRA, where domain name owners are contractually bound to the dispute resolution process when a domain name is obtained. Xuclà suggests that governments can play a role in educating the public and accrediting providers.²⁷¹

More general concerns about ODR are that use of technology will marginalize vulnerable populations who do not have access to it, namely the elderly and poor.²⁷² This concern does not translate seamlessly to the focus of this paper on online defamation, because many of the parties in a dispute will be digitally savvy, although some complainants might be targeted on Snapchat, for example, without being a Snapchat user. Other drawbacks include technical difficulties making it difficult to use,²⁷³ and favouritism of repeat players familiar with the procedures and having relationships with the mediators involved.²⁷⁴

Despite the above criticisms, ODR has immense potential such that there is a growing movement toward implementation of ODR, both internally by companies to resolve complaints, and through the government, whether pushing for creation of ODR providers and minimum standards,²⁷⁵ or through creation of online courts²⁷⁶ or tribunals.²⁷⁷ The key features of an ODR system include convenience, expertise, trust, accountability,²⁷⁸ transparency, confidentiality²⁷⁹ and enforcement.²⁸⁰ Similar principles are evident in any system of good regulation.²⁸¹ Katsh and Janet Rifkin focus on three criteria as essential for an ODR system to be successful, although not necessarily to equal degrees: convenience, expertise and trust.²⁸²

A key component of any regulatory system is that it is effective, thus the ODR system must have an enforcement mechanism.²⁸³ This is problematic for resolution of defamation disputes where the losing party might simply refuse to comply with an outcome. Direct self-enforcement is evident with domain names regulation, where the end result of a dispute might be transfer of the domain name. Here, the dispute provider “control[s] the resources at play.”²⁸⁴ Other forms of enforcement might be, as Wang outlines them, “payment system escrow, a refund system, a transaction insurance system and technological constraints.”²⁸⁵

An indirect form of self-enforcement is where the party that loses is incentivized to voluntarily comply, such as “the use of trustmarks, reputation management and rating systems, publicly accessible reports, exclusion of participants from marketplaces, and payments for delay in performance.”²⁸⁶ Xuclà suggests such indirect mechanisms to overcome enforcement issues in the e-commerce context, advocating in particular for the use of trustmarks²⁸⁷ to encourage compliance with ODR decisions.²⁸⁸ In a defamation context, indirect self-enforcement mechanisms are viable, in particular the use of decisions to effect NTD or the remedial function of simply publicly communicating the result, while direct enforcement would be more difficult.

2. ODR in Practice

To conceptualize how ODR might be deployed in a defamation context, this section will explore ODR in three case studies: company-led (eBay), government-pushed (European ADR Directive²⁸⁹) and government-created (British Columbia’s Civil Resolution Tribunal²⁹⁰).

a) Company-led

As a matter of law reform, social networking sites and similar online platforms can provide inexpensive access to justice for those situations where resolution within and by the community provides the kind of resolution sought. Given evidence indicating the motivation for defamation litigation is correcting a reputational harm there is opportunity with these community-run resolutions. The question is how to encourage online platforms to provide such services, which will be explored in section III.C. The goal here is to provide an example of an innovative corporate dispute resolution system evident in eBay's model.

eBay's drive for developing its dispute resolution model is to build trust in its online marketplace. The dispute resolution system created now resolves 60 million disputes per year.²⁹¹ It uses a variety of means. For soft ODR, it uses a feedback system, where sellers are rated by buyers. Abuse of the feedback system also creates dispute resolution needs, but the system itself is designed to avoid disputes. It also offers a 'Seal Membership'. For a small fee, eBay sellers who commit to abide by a selling standard, and provide their identity and address, can have a trust seal posted as an icon on eBay linked to their seller ID. The icon is controlled by SquareTrade, a private ODR provider that eBay uses exclusively. SquareTrade can remove the seal at any time if the seller fails to abide by the selling standard.²⁹²

For a formalized, or hard ODR system, eBay offers two services: technology-assisted negotiation, and if the dispute is not resolved at this stage, then it can be escalated to a human

mediator.²⁹³ The resolution service is designed to be speedy and encourage resolution between the parties. Disputants must complain to eBay within 30 days of the delivery date (actual or estimated), but cannot begin this process until at least 8 days after a complaint was first made to the seller.

If the dispute concerns non-payment by buyers or failure to deliver a good that matches the description, negotiation is encouraged. The disputants are provided guidance for the negotiation.²⁹⁴ Rarely do eBay disputes proceed to the stage of requiring human facilitators. Eighty-five per cent of disputes are resolved using software²⁹⁵ If a resolution is not achieved, eBay offers an adjudication service. The parties make their case, and an eBay staff member makes a decision, which is enforceable using its Money Back Guarantee.

Most eBay disputes concern transactions, unlike the relational nature of defamation disputes. For disputes concerning the feedback system, which can involve allegations of defamatory reviews, eBay uses Net Neutrals. The design is instructive for online defamation disputes in general. From start to finish the process takes seven days, and while the dispute is in progress eBay removes the review.²⁹⁶ The 'Independent Feedback Review' process, as it is called, is led by a trained, neutral third party who reviews the information submitted by the parties, considers new arguments, and then decides whether the feedback should be removed based on a set of criteria.

eBay has been novel on many fronts concerning dispute resolution. As Katsh explains, eBay designed a system not a tool:

“[I]t introduced the concept of an ODR *system* as opposed to an ODR *tool*. In an ODR *system*, data is generated that reveals patterns of disputes and provides opportunities to both facilitate and monitor consensual agreements, thus making disputes in the future less likely.”²⁹⁷

What this means is that a database of decisions is created, which helps users see the provider as accountable. The data also provides a source for empirical research helping the provider identify trends and flaws in the system to make changes.²⁹⁸ This raises issues of data vulnerability and confidentiality, noted above as a weakness of ODR.

Colin Rule, VP of Online Dispute Resolution at Taylor Technologies and former Director of Online Dispute Resolution for eBay and PayPal, published a study analyzing user data. His goal was to show the benefits of eBay and PayPal’s dispute resolution processes. Instead of analyzing user-satisfaction reports, which did not quantitatively show the benefits of ADR, he analyzed the data of eBay and PayPal focusing on user behavior before and after the event in dispute.²⁹⁹ His team’s hypothesis was that “activity on the site after a dispute event would be correlated to dispute outcome.”³⁰⁰ The data did not support this hypothesis.

The results showed that “on average, users who reported a transaction problem and went through the online dispute resolution process increased their usage of the marketplace, regardless of outcome.”³⁰¹ This meant that whether a dispute was resolved in a user’s favour had no impact on their activity on the site. The only group who did not participate on the site as

frequently after the dispute were buyers for whom the process of resolving the dispute took a long time (as in longer than six weeks).³⁰² This made up less than 1% of the users observed.³⁰³

There is certainly a commercial benefit to this kind of data. Rule mentioned the loyalty value of helping users resolve a problem.³⁰⁴ The larger message, however, is that this data provides feedback to help improve a dispute resolution system, whether company-level or through an online tribunal. As will be evident, this data is equally available to the BC Civil Resolution Tribunal. In the case of eBay, the key takeaway is that trust is key for online services, and “[r]esolution is a core component of user trust.”³⁰⁵

b) Government-pushed

One option is, through legislative reform, to push for the use of ODR to settle defamation disputes. This can be done by encouraging that disputants or online platforms use ODR, by mandating that online platforms provide ODR, by setting standards for ODR, or by creating ODR bodies. An example of government-pushed ADR and ODR is the European Union’s *Directive on alternative dispute resolution for consumer disputes* (ADR Directive),³⁰⁶ which focused on off and online consumer disputes, and the related *Regulation on online dispute resolution for consumer disputes* (ODR Regulation),³⁰⁷ which implements an ODR platform for online consumer disputes.

As background, the European Commission, in its framework for building trust in the digital single market, identified the problem of settling disputes as an impediment thereto. It

concluded that these kinds of disputes are not amenable to traditional court proceedings and ADR systems provide an avenue for “a faster and less onerous means of ensuring the optimal development of online services.”³⁰⁸ The ODR Regulation aptly summarizes:

ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions. However, there is currently a lack of mechanisms which allow consumers and traders to resolve such disputes through electronic means; this leads to consumer detriment, acts as a barrier, in particular, to cross-border online transactions, and creates an uneven playing field for traders, and thus hampers the overall development of online commerce.³⁰⁹

Notably, the Commission limited its focus to small e-commerce transactions rather than the kinds of disputes analyzed in this report. Critical for this report is that the ADR Directive and ODR Regulation work in two ways concerning online consumer disputes: creating an ODR platform³¹⁰ at a European level,³¹¹ and setting minimum quality standards at a state level for ADR providers (related to both off and online disputes).³¹² The ODR Regulation sets up a free, interacting ODR platform, which was created and is operated by the European Commission, to resolve online contractual disputes between businesses and EU consumers.³¹³ The platform does not itself provide ODR services. Rather, it is a portal through which to launch a complaint and find an approved ADR provider.³¹⁴ While use of the ODR platform is voluntary, businesses must provide a link to the platform on their website.³¹⁵ The goal is for disputes to be resolved within 90 days of a complaint.³¹⁶

At a state level, the ADR Directive requires Member States to create a monitoring authority for certified ADR providers.³¹⁷ The United Kingdom appointed the Trading Standards Authority as the competent authority to monitor ADR providers for non-regulated sectors.³¹⁸ This is an

interesting approach for the defamation context. One option is to support use of ADR or ODR for resolution of defamation disputes.

c) Government-created

While the ODR platform is a clear example of government-created ODR, its focus remains on facilitating private ADR through setting minimum quality standards and improving accessibility. This section interrogates the movement online of more formalized institutions of legal decision-making, namely courts and tribunals.

ODR in the private sector has out-paced the public sector. Part of the reason is that in the private sector there is competition among providers. They must deliver the holy trinity of trust, convenience and expertise or users will go elsewhere.³¹⁹ However, Katsh and Rabinovich-Einy note that the pressure is mounting on government, because of what they describe as “liquid expectation”,³²⁰ the bleeding over of experiences from one industry, such as use of resolution tools on eBay or Amazon, to expectations in other arenas, such as dealings with the public sector.³²¹ This ranges from use of online tools to streamline court processes, such as Australia’s eCourtroom, which allows submission of documents and communication online,³²² to online courts. In the United States, for example, ODR was introduced to mediate railroad and airline disputes, and online processes are being used by the National Mediation Board.³²³ Online courts and tribunals now operate in several jurisdictions, including Michigan, Ohio, Puerto Rico, Australia and Canada.³²⁴

Most relevant here is the Civil Resolution Tribunal (CRT) in British Columbia.³²⁵ The CRT is a product of the *Civil Resolution Tribunal Act*.³²⁶ The tribunal hears small claims matter under \$5000 and strata (condominium) disputes.³²⁷ The focus of the tribunal is on collaborative problem solving of disputes. This focus on problem-solving informed the final structure of the tribunal. As one of the members of the BC Ministry of Attorney General's project team, Darin Thompson, commented,

We know between 1-2 % of cases filed in court will be resolved in trial. It is true across Canada, USA, and appears to be the case in England. So, 98% of the time it is not resolved in trial. Why would you make people start off that way if you aren't going to end up in that adversarial contest of rights? The BC Ministry of Attorney General was inspired to design something that worked for the other 98%.³²⁸

He summarized how it works:

The CRT's dispute resolution processes have a clear emphasis on collaboration and resolution by agreement. However, the tribunal will also offer an adjudicative phase, resulting in decisions and orders that can be filed and enforced through court enforcements processes. For delivery of its services, the CRT will rely heavily on modern information communication technologies, including ODR.³²⁹

The CRT operates in four phases of solution explorer, negotiation, facilitation and adjudication.³³⁰ Phase one is the 'solution explorer' where the parties use online tools to try to diagnose and resolve their problem. It is free, while there is a fee for the other phases. The solution explorer tools include interactive questionnaires and information services to help a person diagnose their problem and self-help services in the form of letter templates. Online tools also help stream and triage cases. For example, if a person advises they have a debt they cannot pay, they might be streamed to a credit counsellor.³³¹

Critical to the success of the solution explorer is advice from subject matter experts on common issues or questions from claimants, key impediments to resolution and pathways to resolution. This information was packaged into the interactive online tool. For example, these experts help advise as to the content of template letters and diagnostic tools. Another key feature of this phase is that it is facilitated by software, not humans. If one imagines, the software helps categorize the person's problem, helps narrow the problem to a particular issue and provides potential paths to resolution.³³²

If the dispute cannot be resolved using the Solution Explorer, the parties move to phase two of automated negotiation, where the parties try to negotiate a resolution party-to-party using online tools. Phase two is initiated with the equivalent of filing a statement of claim. However, the emphasis is different. Rather than setting out different arguments to succeed in court, the focus is on resolving the problem. The tools for negotiation include, for example, drop-down menus and templates.³³³

If the dispute is not resolved, phase three introduces human facilitators. In this phase, a tribunal member or case manager leads a mediation, which if successful, can be made into a tribunal order. Phase four is adjudication and the decision has the force of a court order.³³⁴ All of this is done using an online platform, although in-person meetings are also permitted, depending on the situation.³³⁵

A key feature of the CRT is that legal representation is limited. Exceptions include children and adults for which mental capacity is an issue.³³⁶ A party can hire a lawyer, but the lawyer would simply act as a helper. As the CRT explains:

A helper can assist you with lots of different things.

For example, a helper can:

- Help you keep organized
- Take notes
- Provide you with emotional support
- Help you fill out online forms

How much help you want your helper to give you is something you should discuss with them in advance.

A helper can't talk to the CRT on your behalf. You have to do all of the talking, but your helper can be there to support you every step of the way.³³⁷

Since the CRT's launch for strata disputes in summer 2016, there have been 6610 explorations, and a significant number proceeded to making an online claim (409), with 200 making it to the facilitation stage. Thus far there have been 56 tribunal decisions and over twenty settlements. The CRT expanded its service to small claims disputes in June 2017. Within two months there were 3500 explorations. As at August, 2017, approximately 600 applications have been made for dispute resolution.³³⁸

The United Kingdom is also developing an online small claims court set to launch in April, 2020.³³⁹ As Lord Briggs commented, "the Online Court is a concept for which the time has come."³⁴⁰ In imagining the "Skype of the Bailey"³⁴¹ as Julia Hörnle describes it, the Advisory Body advocated that courts can do more than resolve disputes, but could also provide dispute avoidance and containment services through ODR:

[A] legal system and the rule of law itself depend on the existence and widespread use of a public court system that applies, clarifies, and develops the law through decisions that are authoritative, enforceable, final and can set precedent. However, this policy position does not preclude the possibility of judges providing this service across the Internet. Nor need it limit the role of the courts to dispute resolution (as opposed to dispute containment and dispute avoidance).³⁴²

This reflects the focus on problem solving and outcomes that inspired the CRT.³⁴³

The details of the United Kingdom model do not need to be explored in depth here as conceptually there are many similarities with the CRT.³⁴⁴ Two key distinctions between the United Kingdom's Online Court and the CRT are that the Online Court proposes to be a court, unlike the tribunal set up in British Columbia,³⁴⁵ and lawyers are not excluded.³⁴⁶ It proposes three stages: (1) a "triage stage" helping claimants identify the nature of their legal claim, gather and upload information and evidence; (2) a "conciliation stage", where a case officer facilitates resolution of the dispute through negotiation and mediation; and (3) a "determination stage", where a judge decides the case, which can be based on documents, or through a hearing in-person, via video or telephone.³⁴⁷ The Online Court would be available for low-value disputes up to 25,000 pounds.³⁴⁸ Interestingly, it is proposed the court will have its own rules, run as a separate court, largely to surmount the "excessively lawyerish culture" that would make it difficult to navigate the system.³⁴⁹

The CRT and Online Court are potentially promising models for similarly resolving defamation disputes. Of particular interest is the dispute avoidance and containment strategies reflected in the staircased approach, the accessible nature of these frameworks, and the potential for

speed and remedies oriented to reputation corrections more so than damages. It is unclear whether a move online will better facilitate some of the techno-legal solutions explored in this paper. Two evident hurdles are enforceability and legal complexity. The potentiality of an ODR tribunal or court is further explored in section IV recommendations.

C. The Role of Intermediaries

The role of intermediaries is a recurring theme in this paper. A question for the purpose of this report is (a) the value of company-level dispute resolution of defamation complaints; (b) whether and how legislation can incentivize these types of complaints mechanisms; and/or (c) whether and how legislation can incentivize use of a government pushed/created ODR system.

The biggest hurdle to use of ODR, generally, and company-level ODR, is that transactional disputes evident in, for example, most eBay disputes, fundamentally differ from defamation disputes. Katsh and Rabinovich-Einy provide a useful summary of the major issues with resolution of social media disputes:

Those tasked with dealing with the conflict generated by social media have a much more difficult challenge than those working in any of the environments we have discussed in the previous chapters, such as health and e-commerce....there are elements that are inherent to the exchange of goods that make the task of resolving a transaction dispute simpler than resolving an online relationship dispute. For one, the feedback systems involved are a risk-reduction tool that increases the willingness to interact with someone whom the buyer or seller does not know. That, in turn, reduces the likelihood of a dispute occurring (although of course there are disputes over feedback ratings and there are commercial contexts in which feedback ratings are less effective). Second, the kinds of disputes that need to be resolved are limited. Most involve something broken, not paid for, not delivered, and so forth. Third, the disputes are two-party disputes rather

than involving many different parties. It's also difficult for parties to hide who they are, since identities are linked to some payment process; similarly, discovering who is at fault is easier with mechanisms such as shipment insurance and tracking. And last but far from least, monetary exchanges can occur immediately once an agreement is reached.³⁵⁰

Anger can be high in both types of disputes, but anger can more easily be managed with transactions disputes (once parties realize there was a mistake and so on). With relationship disputes the anger might have been building up over time and more difficult to resolve.³⁵¹ Further the infrastructure itself is designed to resolve transactions. Credit cards, for example, have a chargeback system. Social media disputes do not have these systems. Rather, the main enforcement tool of social networking providers is content removal, which is the crux of intermediary liability issues explored in the Intermediaries paper.³⁵² The issue of direct versus indirect enforceability has been explored throughout this paper.

Most e-commerce disputes involve parties living at a distance, thus ODR has an obvious value in providing an inexpensive and efficient remedial mechanism. Facebook friends are often friends in the offline world thus in-person resolution is possible.³⁵³ Katsh and Rabinovich-Einy argue that this is an area where disputes are easier to resolve in the offline world, "more effective offline processes in schools and other contexts in which there is some spillover from disputes that originated online is sorely needed."³⁵⁴ That said, 54% of interviewees in a Pew Research Center study advised their most recent online harassment was anonymous.³⁵⁵ While the identity of these users can be obtained from the intermediary through a Norwich order, they are not always identifiable, leaving an avenue for redress wanting even if provided through ODR.

This is not an either/or proposition. We know that many social media providers and other platforms resolve defamation disputes. We know that some frameworks are better than others. To a certain extent, we need these platforms to provide this service (consider the number of content complaints) and the key is in how to incentivize resolution structures that pass muster. On the other hand, encouraging corporate social responsibility (CSR) does not forego traditional litigation, nor the development of defamation tribunals or ODR through the courts or similar. These can be complementary. Without access to a method to resolve complaints, the reality is that for most people a complaint to the intermediary is the end of the line. This means there is arguably an access to justice problem based on the definition used in this report if we continue on the same path largely limited to traditional litigation and company-level complaints mechanisms.

The benefit of encouraging company-level mechanisms is that they can provide innovative responses to the problems persistent on their platforms. This is the kind of community-level response that Ardia advocated³⁵⁶ and techno-legal response explored throughout this report. In the last section, eBay's dispute resolution system was explored. However, it is instructive to examine dispute resolution frameworks of companies outside the e-commerce context, namely platforms that more readily manage problems of defamation (or more broadly online abuse).

Riot Games recently revamped its dispute resolution procedure for League of Legends, an online game with 67 million active monthly players,³⁵⁷ in response to losing players due to

online abuse.³⁵⁸ It assembled a ‘player behavior team’ to study user profiles, comprised of psychology, cognitive science and neuroscience professionals. What they found was as follows:

Persistently negative players were only responsible for roughly 13 percent of the game’s bad behavior. The other 87 percent was coming from players whose presence, most of the time, seemed to be generally inoffensive or even positive. These gamers were lashing out only occasionally, in isolated incidents—but their outbursts often snowballed through the community.³⁵⁹

Riot Games targeted community norms. Three innovations helped reduce abuse in the game. First, they turned off an automatic chat function, which reduced abuse by 30%. Second, they strengthened communication concerning abusive behavior by advising players why they were being punished, rather than just the disciplinary measure imposed, which decreased the recidivism rate.³⁶⁰ Third, they began involving the community as voluntary members of a tribunal, effectively juries, which voted on the appropriate punishment.³⁶¹

Wikipedia is similar to eBay in having developed a sophisticated dispute resolution system. It is an online encyclopedia with approximately 35 million articles in hundreds of languages edited by volunteers (mostly anonymous).³⁶² Disputes sometimes arise concerning the content of a Wikipedia article or conduct of editors.³⁶³

Dispute resolution is staircased, the first step being negotiation in a public “talk page”, followed by informal help (through things such as mediation, a request for comment, editor assistance or a third opinion) or formal help through mediation (led by a member of the Wikipedia Committee). The “last resort” or top of the staircase, if resolution has

not yet been achieved, is arbitration, which is public and appealable to Jimmy Wales, Wikipedia's founder.³⁶⁴

Katsh and Rabinovich-Einy identify the innovation of Wikipedia's approach: it "offers its users a variety of online parallels to traditional ADR processes (e.g., negotiation, mediation, and arbitration), as well as some new variants (such as the ability to draw broad input from the Wikipedia community of editors)."³⁶⁵ It is notable that Wikipedia puts a significant amount of effort into dispute prevention by analyzing dispute patterns, identifying resolution strategies that are effective, and detecting when editing problems take place, such as vandalism.³⁶⁶

Other social networking providers are experimenting with community-appropriate responses. A subsidiary of eBay, Marketplaats, is experimenting with crowd-sourcing resolution of feedback disputes.³⁶⁷ Facebook created a "compassion team" tasked with helping innovate resolution of interpersonal disputes.³⁶⁸ It has been experimenting with social reporting to address offensive content that does not breach the Terms of Service (called its Community Standards). With social reporting, a user can complain to the offender directly or to a trusted friend to facilitate resolution.³⁶⁹ Twitter uses a mute, block and report strategy to managing abuse on its service, and is experimenting with automated solutions.³⁷⁰

Despite some of these innovations, there are significant disadvantages to self-regulation of content disputes. I explore this in depth in my book, from the perspective of CSR and human rights. Distilled to relevant points for this report are the following.

First, these kinds of corporate regulation aren't great for standard setting. Some platforms provide minimal dispute resolution structures, particularly some American-based websites that capitalize on the immunity provided by CDA s. 230. Even where platforms provide dispute resolution, their frameworks vary wildly. This can be innovative, exemplified in some of the above, but can also fail to (a) reflect the law of defamation in Canada and (b) fail to provide clear standards to users as to legal and non-legal behavior.

One answer might be that users do not have to use Facebook or Snapchat, and so on. However, for defamation complaints, it does not need to involve a registered user. As the case of *Jones v Dirty World Entertainment Recordings LLC*³⁷¹ exemplified, and discussed in more detail in the intermediaries paper, someone might post defamatory content about you on <https://thedirty.com>, and given the Terms of Service of that site, be unsuccessful in having the content removed.

The lack of standard setting means that principles of good regulation that one normally expects of public institutions aren't normally present. Such principles include that regulations are transparent, accountable, proportionate, consistent and accessible.³⁷² Indeed, Ranking Digital Rights, a project led by Rebecca McKinnon, published a Corporate Accountability Index of 16 internet companies, including Facebook and Twitter. Among other things, it found that, concerning private requests for NTD, the major intermediaries provided minimal information:

Disclosure about private and self-regulatory processes is minimal and ambiguous at best, and often non-existent. Few companies disclose data about private third-party requests to remove or restrict content or to share user information – even when those requests come with a court order or subpoena, or are made in accordance with established legal processes such as a copyright “notice-and-takedown” system. Even fewer companies disclose any information about whether – let alone how – they receive or respond to private or informal requests. Further, **no companies in the Index disclose any information about actions they have taken to enforce their terms of service.** [emphasis added]³⁷³

This problem of a lack of transparency is particularly the case for social networking providers. Some providers have heard the criticism and are working toward improvements. League of Legends, as detailed above, benefitted from clearer communication with users on why their accounts were blocked resulting in reduced recidivism. Twitter just updated its policy to create better communication with complainants. Twitter stated,

We’re continuing to improve the transparency and openness of our reporting process. You’ll start to hear more from us about accounts or Tweets that you’ve reported to our support teams – both when you report harassment directed at you or another account. You will be notified when we’ve received your report and informed if we take further action. This will all be visible in your notifications tab on our app.³⁷⁴

However, for most complainants, once they make a complaint that is the end of the matter. Principles of due process that we expect of a court system, such as notice, a right to be heard and to hear the case against you, transparency, a right to confront witnesses, and access to a neutral decision maker, aren’t even notionally replicated in most company dispute resolution systems, particularly in the social networking context. As I wrote elsewhere:

The problem is that we know little about [social networking providers] decision-making processes. Once a complaint is made, the complainant’s involvement in the process is over and the complaint goes into a dark void where information is lacking: how many complaints are made for

infringement of the [Terms of Service]; data on enforcement of their [Terms of Service]; data on sharing of user information; reasons for decisions; and processes and training of ‘the deciders’.”³⁷⁵

Relatedly, many of the corporate frameworks are informed by the First Amendment, and while the underlying principles of free speech are compatible with a Canadian perspective, our laws do not fully align. Indeed, defamation law is a point of friction between our two countries.³⁷⁶

Further, it forces these intermediaries into a pseudo-judicial role.³⁷⁷ A theme from discussions with interviewees was that defamation was one of the more difficult areas of the law for intermediaries to assess. For example, if a person posts a review of a hotel on Tripadvisor that is negative and the hotel complains to have it removed, Tripadvisor is put in a difficult position. How does a Tripadvisor employee know if the review is based on accurate facts or, without more information, how does it untangle fact versus opinion. While in certain circumstances the defamatory nature of the review is clear, a difficulty for intermediaries subject to NTD, such as in Europe, is identifying at what point the obligation to remove content is triggered – on notice of a defamation complaint, once the unavailability of defences is exhausted, or once knowledgeable of the strengths or weaknesses of a case.

At a more fundamental level, the voluntary nature of these types of CSR frameworks, set down through contractual arrangements with users, is problematic. In my book I summarized some of the issues in a wider human rights context, which I will replicate here:

Pure-CSR codes simply lack the standard-setting appeal and oversight necessary to the structure of a free speech system. Such codes are too reliant on the whims or commitments of

management; they are thus susceptible to change over time and unreliable as a public signal of the expectations of company conduct. A change in management, for example, can lead to a change in the business's human rights policies or, more insidiously, lead to no change in policy, but a change in the seriousness with which human rights matters are treated. The work of the Private Sector and Human Rights Project found that the commitment of particular leaders in a company was the 'dominant driver for engaging with human rights'. The finding was particularly the case for companies that operated outside the public sector and industry regulation, which would be the case for most macro-[internet information gatekeepers] such as ISPs and search engines. The problem inherent in this situation is exacerbated by the fact that IT companies, in terms of their democratic impact, are changeable, and the internet environment is unstable. This leaves the public hopelessly confused and offers none of the characteristics of due process needed to be a governance framework. Most important, it makes it more difficult to establish and sustain human rights standards.³⁷⁸

The practical reality is that in the face of the multi-jurisdictional nature of internet communications and disputes, and the high-costs of litigation and low-value of most defamation claims, the rules these platforms create for use of their services become one of the only effective ways to resolve defamation disputes for some people (I elsewhere describe it as the "law of Facebook" and the "law of Twitter").³⁷⁹ In other work I asked the question as follows, which is instructive to how to conceptualize intermediaries role: "how can CSR be used to complement other efforts to achieve a desired objective?"³⁸⁰ In my view, we need these companies to regulate their platforms, but equally, we need government leadership in providing access to justice through systems of resolution.

Further, section II identified that a key outcome for defamation complainants is fixing the reputational harm, such as through a correction, retraction, or declaration of falsity. This requires a publicness to the resolution, which is absent from many complaints mechanisms through social networking providers. As the Corporate Accountability Index reported, actions taken to enforce Terms of Service were not publicly disclosed by the companies investigated.³⁸¹

A more formalized process that is either public or combined with technological processes that serve a public communication function (flagging disputed content or communicating that content has been removed for infringing community standards, etc.) might serve that objective.

Details of how to incentivize intermediary responsibility is provided in the intermediaries paper, which is recommended reading to fully understand the analysis here. Briefly, the recommendations in that paper are two-fold: (1) the publication element of defamation should be redefined so as to require a deliberate act of communicating specific words, effectively abolishing the distinction between primary and secondary publishers; and 2) intermediaries have a role in mediating removal requests and the procedures for handling defamation should be codified in legislation.³⁸²

We propose a framework modelled on the copyright notice-and-notice regime,³⁸³ best described as notice-and-notice-plus. Under this framework, there would be mechanisms for removal of allegedly defamatory content in narrow circumstances. The risk to the intermediary for failure to comply with the procedures would not be liability for the underlying defamatory content, but rather a risk of a fine. On incentivizing companies to comply we recommend the following:

In order to encourage responsibility, it is recommended that an intermediary's terms of service and other management of content on its services, such as its remedial mechanisms for disputes, be taken into account in assessing the suitability or amount of a fine. Similar clauses, for different purposes, and not without controversy, are observable in s. 40 of the UK's *Crime and Courts Act* (costs are not awarded to news publisher defendants that are members of a press regulator), and s. 417(5) the UK's *Companies Act* (requiring companies discuss their CSR policies in their annual

reports). Such provisions are designed to encourage responsibility for a particular issue. A similar provision in defamation legislation for intermediaries would aim to incentivize responsible management of services, focusing on the procedures in place, while at the same time providing allowance for the imperfect nature of content restriction.³⁸⁴

Other options are reporting requirements. California and the United Kingdom, for example, require reporting of supply chain management concerning trafficking and slavery.³⁸⁵ We acknowledge that regardless of the incentivizes deployed, enforcement in the United States against American-based companies will remain an issue due to the limitations set out in the SPEECH Act.³⁸⁶

If an ADR system were implemented, whether a tribunal (online or off) or incentivized similar to Europe's ODR platform, the question is how one would bring participants to the table. There are several options to incentivize through legislation that capitalizes on intermediaries' contractual relationship with its users:

- Mandate intermediaries have an internal complaints mechanism identifying minimum quality standards;
- Mandate a clause in the Terms of Service for Ontario users that, depending on the ADR system selected:
 - Provides users with a link to the ADR/ODR mechanism;
 - A more rigid option is to mandate that Ontario users for whom a defamation dispute is not successfully resolved through the intermediary's internal process, use the ADR/ODR system.

Requiring that industry resolve disputes via an adjudicator is observable in other industries. In the United Kingdom construction industry, discussed above concerning the Construction and Technology court, an adjudication system was introduced “underpinned by legislation”.³⁸⁷ Under the *Housing Grants, Construction and Regeneration Act*,³⁸⁸ a party to the contract can unilaterally refer a dispute to adjudication. The scope is limited to certain contractual issues. To implement this in a standardized manner across the industry, the Act requires that construction contracts must satisfy minimum requirements for an adjudication system (things such as notice, timescale of adjudication, impartiality of adjudicator, binding nature of decision),³⁸⁹ failing which terms are implied into the contract from the Scheme for Construction Contracts.³⁹⁰ This alleviates the need for all construction contracts to craft bespoke rules as they can fall back on the Scheme rules for adjudication.

The Act includes a section that requires the parties to continue with the operation. This serves to avoid disruption of work. A similar clause is possible for defamation disputes, providing that content related to disputes launched with an ODR or similar tribunal will be removed from the platform until the dispute is resolved. eBay operates this policy for handling of feedback disputes.

Another model is the Financial Ombudsman Service³⁹¹ in the United Kingdom, which resolves disputes between financial businesses and customers, including the power make money awards.³⁹² A decision of the Ombudsman is final, however, fewer than 10% of disputes reach that point. If the decision is accepted by the consumer, it becomes legally-binding.³⁹³

To summarize, intermediaries have an important role to play in managing the platforms that they provide, and this section explored ways to incentivize CSR, such as through reporting requirements, minimum quality standards for internal remedial mechanisms, and/or consideration of internal mechanisms in assessing the suitability and amount of a fine (presuming notice-and-notice-plus is implemented). However, I cautioned that corporate self-regulation has significant disadvantages, such as lack of standards and principles of due process, their pseudo-judicial role and the weaknesses with voluntariness, to name a few. If an ADR system were implemented, one option to bind users is to mandate a link to the ADR mechanism on intermediaries' sites or more rigidly require a clause be implemented in terms of service.

IV. RECOMMENDATIONS FOR CHANGES TO THE LAW

A. Summary of Findings

Several key problems were identified in this paper concerning online defamation, which inform the recommendations in this report:

- The web of connections online mean that information and relationships are disaggregated³⁹⁴ across different social groups, platforms, locations etc.;

- It is sometimes difficult to identify a wrongdoer or his/her location, or there are multiple wrongdoers/participants;
- Potential defendants are sometimes located out of jurisdiction;
- Online platforms are often based out of jurisdiction;
- Defamation laws and intermediary liability laws differ or conflict between countries, in particular with the United States CDA s. 230 and the SPEECH Act;
- Once defamatory content is posted online it is almost impossible to un-ring that bell;
- The above is compounded by the ease, speed and reach of online communications;
- Defamation online can go viral;
- There is a disconnect between courts and the online communities where the defamation was communicated. The notion of community in defamation is problematic for offline communications and is strained even further in an online context, both because of the disaggregated nature of online communications, but also because of the disconnect between courts and internet communities.³⁹⁵

For the purposes of resolving online defamation disputes, the above creates the following problems, among others:

- Defamation law, and any dispute resolution structure devised, can only solve a portion of the defamation harms online;
- Traditional remedies, as in court actions, are less effective to resolve some of these disputes;

- Other forms of resolution might fill the gap, but these are currently underdeveloped.

It also helps guide as the features of resolution that are important in an internet context. The nature of internet communications has at once opened doors to more innovative ways of resolving disputes (e.g. eBay, League of Legends, Wikipedia) while at the same time making it difficult to resolve disputes.

The features that I conclude are key for resolution are:

- Speedy resolution is critical, because information spreads quickly and easily;
- Accessibility of resolution is important, in terms of cost and ease of use of the process;
- Containment and avoidance of disputes are also key. With the risk that online defamation spreads quickly and disputes escalate equally as fast, the facilitation of resolution that arrests further harm and de-escalates is preferable;
- Technical solutions are fundamental to resolving online defamation disputes, and therefore the law is only part of the solution.

The question is what defamation plaintiffs want when they sue, as drilling-down to the outcomes they want helps identify potential avenues for dispute resolution, whether court-based or other. There is a lack of recent empirical data on this issue. However, as this paper examined, a series of empirical studies in the United States in the 1980s indicate that defamation claimants largely sue to restore their reputation. Claimants rarely sue with the primary purpose of money damages – they are rather focused on righting the reputational

wrong. The act of suing can be public vindication, whether the claimants are successful or not in the suit. However, when asked about alternative ways to resolve the disputes, the overwhelming majority expressed interest.³⁹⁶

This is interesting when considered alongside the empirical study of eBay and PayPal's dispute resolution system. The finding was that whether a dispute was resolved in a user's favour did not correlate to continued usage of the site. Rather, increased use of the site was reported *after* processing a dispute and *regardless* of outcome. The one exception was users for whom the dispute took longer than six weeks to resolve.³⁹⁷

These studies are not specifically instructive as to online defamation. However, I view it as compelling information on the reasons defamation litigants pursue a claim, and also that in an e-commerce context at least, there is indication that it is the availability of a dispute process itself that satisfies users more so than being successful. This indicates that perhaps in a defamation context, where the outcomes sought are also not tied to success at trial, there is ample opportunity to provide other forms of resolution that meet the goals of complainants.

The recommendations in this report also reflect consideration of information gained from interviews with industry, practitioners and the judiciary. The following points emerged from the interviews. All interviewees emphasized the importance of a speedy process for resolution of online defamation disputes.

Of interviewees questioned about a tribunal or small claims process for defamation disputes, the vast majority viewed such a process as a welcome method to resolving defamation claims provided that it had one feature: that it was a specialized tribunal in the sense that the adjudicator or judge had specialized knowledge of defamation law and the internet. Two interviewees mentioned the importance of NTD to intermediaries as a critical mechanism. For most interviewees, these were not mutually exclusive resolution mechanisms. Rather, NTD complemented by ADR, a tribunal or something similar, were advocated by many interviewees. The key theme running through all the intermediary interviews was the need for speedy resolution, in the form of content removal, an apology, retraction or similar discursive remedy, and minimal focus on traditional remedies such as money damages. Some interviewees identified the problem of anonymity in resolving defamation directly with the poster.

One interviewee cautioned against streamlined procedures through the courts, namely (1) a fact-finding hearing, because few cases revolve around this issue and (2) a two-track procedure, which provides a simplified hearing using a limited set of defences, because it was viewed as artificially excluding defences such as qualified privilege. One interviewee cautioned against a remedy such as court-mandated apologies, because courts would be unlikely to impose it without a legislative mandate (which would be subject to Charter challenge). And a court-ordered apology would not be a defendant's genuine expression of regret, which is ordinarily an essential element of an effective apology. Another interviewee pointed out that the proposals in section III were concerned primarily with implementing modified forms of existing processes and procedures, rather than with substantive reform focused on problem solving and

other outcomes which could be said to be the true policy objectives and rationale for a new dispute resolution body.

B. Recommendations

Based on the findings in the last section, the following principles form the basis of the recommendations in this report:

- The goal of defamation claimants is to restore their reputation;
- A claimant does not need to be successful to feel their reputation is restored. Rather it is the process of “setting the factual record straight” that provides this;
- The above indicates that there needs to be a public element to whatever process is inputted;
- The above indicates damages should not be the focal point of defamation dispute resolution, although it is not discounted entirely;
- Traditional remedies are not as effective to address online defamation disputes;
- There is a need for swift, accessible dispute resolution as the high-volume, low-value nature of many online defamation claims means many claimants do not access a forum to resolve the dispute;
- There is a need for subject matter expertise of caseworkers, adjudicators and judges;
- Protecting reputation has a social value signaling the norms expected of communities;
- We need to embrace imperfection.

We need a multi-faceted response to resolving defamation disputes involving courts, intermediaries and specialist tribunals. I recommend that company-incentivized complaints-mechanisms combined with ADR, in particular ODR, as complements to traditional litigation, is the combination that best reflects these principles and goes some way to resolving the problems identified.

1. Traditional Litigation and Improving Access to Justice

Traditional actions to the court should be maintained and any proposals made here are complementary to court actions. For complex claims, courts are the appropriate bodies to be deciding the dispute. Further, for some claimants, in particular claimants for whom money damages might be appropriate or who have a public profile, traditional litigation is also appropriate. This is because traditional actions satisfy the public vindication sought by some claimants, potentially setting the record straight. Given the technicality of defamation law, however, this paper cautions that cases that proceed to a full determination do not generally provide a judgment that reflects a decision on the reputational harm, truth of the statement or similar outcomes that restore a claimant's reputation.³⁹⁸ Further benefits of traditional litigation include the respect associated with courts, the cathartic function of trials, the procedures that ensure a fair trial and the greater range of remedial powers.³⁹⁹

The problem with court actions is that the length, cost and uncertain outcome associated with it makes it a practical barrier for most defamation claimants. Indeed, the majority of

defamation harms are not litigated. Online defamation is similar to e-commerce given the high-volume, low-value nature of many claims. However, online defamation claims tend to be more complicated than e-commerce disputes and therefore modelling a low-cost framework is more difficult. That said, the case studies discussed in section III illustrated several innovative responses in other industries to address this problem (see construction, domain names, finance, to name a few).

My primary recommendation is to provide ADR through a tribunal, in particular ODR, which will be outlined in these recommendations. However, there are several attractive reform mechanisms to streamline court procedures and thereby improve access to justice. They simply do not go as far to resolve the problems identified in this paper. They are, in my view, a Band-Aid on a much larger problem of resolving online content disputes.

Streamlining procedures that best meet the needs identified in this paper are:

- Early neutral evaluation; or
- A hearing to declare falsity.

Early neutral evaluation provides an avenue for dispute containment, among other things, by giving the litigants a “reality check”⁴⁰⁰ with the hope that it leads to settlement. In this way, costs are lowered and resolution is more quickly achieved. It is uncertain as to other outcomes, as failure to settle means the case proceeds through the courts as usual. It is uncertain at what

point in the process the evaluation should take place, and there is a risk, if mandatory, that it is an expensive hurdle to continuing with litigation.

A hearing to declare falsity modelled on the Irish *Defamation Act* has many features that satisfy the principles and outcomes identified in this paper. It is speedier, more cost-effective route to obtaining a decision from a court, and all the authority and respect that this carries, which can be communicated to the public thereby helping restore the claimant's reputation. The claimant foregoes money damages, but since this is not the primary reason that litigants sue for defamation, a declaration has promise. It lacks certain criteria, namely the judge might not have defamation expertise, the remedial options are limited, and it fails to facilitate personal resolution of the dispute. For online defamation disputes involving high-volume, low-value claims, I reason that most claimants would not pursue such a claim, similar to barrier in e-commerce disputes. I conclude it improves access to justice, but other mechanisms of resolution go further in that respect.

2. Incentivizing Companies to Regulate their Platforms

As many interviewees noted, a common first step in addressing a defamation problem is to complain to the online platform, such as Facebook or Snapchat, or to the news organization that posted the story online (often in relation to the comments section). Law reform in this area is explored in more detail with my co-author Hilary Young in the intermediaries paper.⁴⁰¹ As already noted, the recommendations in that paper are two-fold (a) the law of publication be modified such that secondary publishers are not considered publishers of defamatory content

and (2) the obligations of intermediaries related to complaints of third party defamatory content should be codified. The obligations we recommend are a notice-and-notice-plus regime (similar, but different to the copyright framework), detailing the obligations of an intermediary when it receives a complaint that it is hosting defamatory content. The risk for an intermediary failing to comply with the provisions is a fine. This paper assumes reading of the intermediaries paper and focuses on another aspect of the intermediary issue.

Specifically, the vision of the role of intermediaries is more limited in that paper. It is our recommendation that it was inappropriate for intermediaries to take on a quasi-judicial role of assessing the legality of the content on its services outside the context of its own terms of service. However, we conclude that there should be a mechanism for users to disable access to content that is defamatory. The recommended rules are largely procedural leaving room for innovative approaches bespoke to communities, while seeking to hold the websites accountable for managing defamation disputes. Key here is the recommendation that there should be no penalty for intermediaries managing abusive content on their services. Rather, the assessment of a fine will take into account the intermediary's dispute resolution or content management system. As detailed in this paper, these kinds of provisions that encourage CSR are evident elsewhere.⁴⁰²

However, not all defamation claims will be solved by complaints to an intermediary for a variety of reasons. The intermediary might not remove the content, regardless of what is codified in Ontario legislation (an enduring problem of regulatory arbitrage in the internet context). The

complainant might not be satisfied with the NTD, even if successful, and wish to seek further remedies, such as an apology, retraction, declaration of falsity or money damages. The social harm might be severe for the claimant making other action appropriate or necessary. Indeed, NTD is a speedy remedy, but more limited in terms of the outcomes defamation litigants want. If fixing the reputational harm is the goal, NTD only takes care of part of that. Yet, there is a great chasm between NTD and traditional litigation. In some ways, a chasm is necessary to dissuade the irked from over-easy access to complaints mechanisms. One interviewee noted this criticism about complaints to the National NewsMedia Council.

As a result of the weaknesses in traditional litigation, taking into account potential streamlined procedures recommended in this paper, and considering the nature of limits of intermediaries roles, I recommend development of ADR to resolve defamation disputes, in particular an ODR tribunal. Before making the case for this recommendation, however, a problem concerning the development of ADR/ODR is relevant to intermediaries. As was discussed in this paper, any Canadian-made mechanism to resolve defamation disputes is risky, because it cannot easily force litigants to the table. Some users post defamatory content anonymously or pseudonymously. While their identity might be obtained from the intermediary through a Norwich order, the wrongdoers are not always identifiable. Or the defamation might be the result of a pile-on and targeting all the wrongdoers unfeasible. Equally, the wrongdoers might be located out-of-country and a decision of a Canadian court might be unenforceable in the United States due to the SPEECH Act.⁴⁰³ Or simply, a defendant might not want to participate in a tribunal process, depending on whether it is voluntary.

However, for the kinds of dispute that would be escalated beyond NTD, there is arguably often a social harm in the local community that compounds the harm online. This might be local to a school, or as was the case in *Pritchard*,⁴⁰⁴ localized to the community in which the plaintiff lived and worked. In such a situation, there is an identifiable defendant(s) to either sue (as was the case in *Pritchard*) or seek resolution through an ADR mechanism.

Working models in other fields, such as domain names dispute resolution providers, have built-in direct enforcement powers. They have a contractual relationship with the domain name owners and have the power to cancel or transfer domain names. This is largely absent from defamation law. Rather, only indirect enforcement powers are available. This is potentially two ways. First, if a defendant refuses to participate a tribunal process, then the decision is public, available on the tribunal website, usable to seek NTD from an intermediary if not effected at that point, or to post in a particular group or thread where the defamation happened. In short, the decision has indirect enforcement effect by publicly communicating the wrong.

Second, intermediaries largely have a contractual relationship with their users. Ontario legislation can mandate that intermediaries include a term in their terms of service that defamation disputes involving an Ontario claimant escalated beyond the use of the internal complaints mechanism will be resolved using the ODR tribunal. This is an adjudication model underpinned by legislation evident in the United Kingdom to resolve construction disputes. This is an imperfect tool, but would provide an avenue for resolution that aligns the kinds of

remedial outcomes defamation claimants seek with solutions. A softer approach, drawn from the ADR Directive, is to require that intermediaries provide a link to an ADR/ODR mechanism for Ontario-based users.

3. Creation of an Online Tribunal

I recommend creation of a specialized tribunal for resolution of online defamation disputes. I come to this conclusion for many reasons. First, taking into account that reputational harm is a societal harm,⁴⁰⁵ the lack of access to justice for individuals to repair their reputation has great societal harm, and those that do manage to litigate their claims achieve remedies that are individual-oriented rather than serving the public good. This invites re-imagining of a system that is more accessible, not just in terms of access to the courts, but in re-thinking what is a good remedy for resolving these types of disputes. This report takes cues from the United Kingdom's ODR Advisory Group of the Civil Justice Council, which commented, "[t]he temptation to which many proposed reformers have succumbed in the past is to believe that the best way forward in saving costs and increasing access to justice is to streamline our existing system rather than change it fundamentally."⁴⁰⁶

Second, the consistent message from the research and interviews was the need for access to a forum of dispute resolution that was fast and less expensive, which tribunals are in a better position to deliver than courts.

Third, access to justice is about more than access to the courts, but rather, includes dispute containment and avoidance. This requires different forms of dispute resolution, such as information to diagnose and avoid disputes, containment facilitated through a third party to settle or narrow the issues in dispute, and techno-legal solutions, such as flagged content and similar.

Fourth, alternative forms of dispute resolution better meet the outcomes sought by defamation plaintiffs. While a judgment certainly can provide public signaling that restores a reputational harm, I conclude it is insufficient for most cases of online defamation. The problem is that for most online defamation, claimants do not pursue redress. ADR provides a greater range of tools to more quickly resolve a defamation claim, and a tribunal is better positioned to deliver the broad access to justice approach used in this paper of dispute avoidance, containment and resolution.⁴⁰⁷

Fifth, NTD is a mechanism, not a dispute resolution system. It is a mistake to view NTD as anything other than a tool to limit the harm, although it has a role to play. Fulsome resolution of disputes should be available in something other costly litigation. This has developed in other industries that were facing high-volume, consumer disputes such as finance, domain names and the construction industry, and in my view, the time has come to offer it to address online defamation disputes.

Sixth, tribunals can be specialized in a way that Canadian courts are not. This has multiple benefits in an area like defamation, where the law is technical. Simplified procedures were explored in this report. I am inclined to reject that approach. Rather, the simplification comes by way of experts facilitating negotiations and adjudicating disputes. This expedites the process, creates consistency and provides clarity to litigants as to their situation and chances of success at a trial, if that route is elected. A key theme that emerged from the interviews was the need for experts in general, and in particular, if setting up a tribunal.

Seventh, since it is recommended that a traditional legal action for defamation is maintained, this tribunal would operate as a complement to court actions. The question is whether the tribunal should be mandatory or voluntary, which is discussed below.

Eighth, techno-legal solutions are critical to resolve online defamation complaints, because they operate within the communities within which the defamation took place. Courts are often divorced from context. An online tribunal, because of its structure, is in a better position to facilitate delivery of techno-legal solutions.

a) Features of a defamation tribunal

At this stage, a sketch of a dispute resolution tribunal is offered. I recommend a model similar to the CRT. ODR aligns with the nature of online defamation disputes: the litigants might be at a distance, the defamation happened online, and part of the service is informational in helping litigants diagnose their situation. ODR also has the potential to be less expensive and time-

consuming than traditional ADR or tribunals, and allows for flexibility beyond what ADR offers. Most important, it lowers barriers to access to justice, in particular economic barriers. As we saw, in an e-commerce context many complainants will not sue, thus ODR provides an avenue of redress. I conclude that ODR has the potentiality to offer similar redress for defamation complaints.

The structure of the CRT process also translates to defamation disputes. If a similar four-phase process is used in the defamation context it might work as follows. In phase one's information and diagnostic space, experts might help compile tools to facilitate diagnosis of the defamation problem and facilitate resolution. Many defamation litigants would likely be self-represented and such tools would help the claimant drill-down to the legal issue, frame productive communication, or help diagnose the legal issues and frame productive responses.

If the parties fail to settle their dispute at this stage and a claim is filed, phase two offers technology facilitated negotiation. The reader will recall that eBay reported that 85% of disputes were resolved using software.⁴⁰⁸ If this fails, the parties move to phase three, human facilitated negotiation. If a settlement is reached, it can be made into a tribunal order. The fourth and final phase, is adjudication and the decision has the force of a court order.

The United Kingdom's forthcoming Online Court is another model the LCO might consider. However, I recommend that this is set up as a tribunal rather than an online court, because the key deficiency in deciding defamation disputes, particular at the speed sought here, is

expertise. Thus, lawyers with defamation expertise would be ideal candidates to adjudicate disputes, act as case managers, and help develop the diagnostic tools and information portal. Decisions would be publicly available, developing precedents to provide consistency in decision-making.

I recommend the LCO consider fleshing out the CRT model to meet digital needs, in particular building in tools for education, research and policy, and corporate support in the form of assessment tools, auditing and advisory services.⁴⁰⁹ In earlier research I designed an Internet Rights Governance Model which had some of these features, including a remedial mechanism, the latter of which has been the bulk of the focus of this paper.⁴¹⁰ The details of this model will not be explored here, except to note that this is an opportunity to further push the boundaries of dispute resolution, especially concerning containment and avoidance, in a way that is responsive to the digital society. Other state-funded regulators play similar roles such as privacy commissioners or broadcasting regulators, such as the United Kingdom's Ofcom.

Several issues require further commentary, namely whether the tribunal should be mandatory or voluntary, private or public, whether legal representation should be permitted and whether the tribunal should have the power to award damages.

i) Mandatory or voluntary?

There are strengths and weaknesses to mandatory use of such a tribunal. My inclination is to conclude that use of the tribunal should be voluntary for the claimant. This is because the underlying reasoning in this paper is that a tribunal is complementary to a traditional court action for defamation. A mandatory tribunal circumvents choice for the claimant and might impose greater costs on the litigants, especially for cases that are obviously suitable for court. Regardless, the defendant should be bound to the tribunal process if the complainant chooses that route, recognizing the enduring difficulty with anonymous or out-of-country defendants. It is recommended that intermediaries be required to provide a link to the ODR mechanism to Canadian or Ontario users.

ii) Private or public?

One option is to out-source such a dispute resolution service to a private body. There are certainly models for this kind of structure. CIRA, as discussed in this paper, has a contract with two Canadian arbitration providers. eBay uses private providers for some aspects of its dispute resolution. A middle-of-the-road path is evident in post-Leveson United Kingdom, with an industry regulator underpinned by legislation. In the area of defamation law, there is not one industry, like the media, which can more easily be identified for the purposes of this kind of regulation. Certainly, there are typical industry parties involving online defamation, and there are blurred edges to what is considered media. In my view, with the goals identified in this paper, a tribunal created by legislation and through government would be more appropriate. A private route would simply layer private resolution on top of whatever private resolution is offered by some online companies.

A more modest option for the LCO to consider, is something modelled on the ADR Directive, wherein private ADR for defamation is encouraged by creating a monitoring authority to certify ADR providers with defamation expertise, and create an information portal to direct users to providers, potentially combined with information and diagnostic tools identified in phase one. This is not the ODR tribunal advocated for in this section, but reflects some of the ADR recommendations in this paper, directed through private providers. It has the advantage of flexibility and can focus on setting minimum quality standards and accessibility to private ADR providers. The disadvantage of such an approach is that it lacks the decision-making power of phase four (an adjudication decision with the power of a court order) and potential remedial powers.

If use of private ADR is voluntary, there are less negative impacts. However, if it were mandatory, it should be borne in mind that setting minimum quality standards is not the same as a system of public governance. The privatization of public systems, such as the movement to ADR to deploy speedier and less expensive dispute resolution, has been researched significantly by scholars, citing the kinds of benefits explored in this paper, but citing concerns such as lack of accountability, impact on development of the law, and procedural unfairness.⁴¹¹ For internet issues, these concerns must be weighed against the peculiar challenges posed by digitization, including the lack of redress afforded to the public through traditional public systems.

iii) Legal representation?

As this paper identified, the CRT largely does not permit legal representation, although lawyers can work as helpers for litigants, guiding their client in the background even if not directly leading negotiations. In contrast, the United Kingdom Online Court plans to allow legal representation. In Bernstein's virtual model of containment, erasure and rehabilitation, lawyers risked being impediments to the advantages of ADR:

Containment, erasure, and rehabilitation fare better with lower costs, which in turn commends removing lawyers. Counsel can offer great value for plaintiffs and defendants in dignitary-tort actions but, as a general rule, only when the claims feature high damages, celebrity or notoriety, or pro bono implications. A dispute resolution mechanism that rests on the oft-stated contention that "it's not about the money," can conserve expenditures on damages, attorney time, and court formalities. Inside our virtual injury paradigm, lawyers impede remedies and increase transaction costs.⁴¹²

The first three phases of the tribunal depend on direct litigant participation. Even if legal representation is permitted, the communication should be restricted to litigants. This reflects the focus on problem solving and outcomes that is the crux of the tribunal, and the speed in resolution necessary to achieve these outcomes. However, I recommend that legal representation be permitted for the adjudication phase. Given the expected expertise of the adjudicator, this alleviates potentially uneven power between self-represented and represented litigants.

iv) Damages?

I recommend that the while the tribunal might have the power to award damages, this is not the focus of a remedies award. I am hesitant to limit the tribunal to non-damages remedies. In other work, I recommend that key for any regulator is the ability to, at minimum, impose fines

in order to have regulatory bite.⁴¹³ The benefit is evident with the United Kingdom's Information Commissioner's Office, which has become a much stronger regulator since gaining the power to award fines.

That said, in a defamation context, fines largely do not align with the outcomes sought by most litigants. Rather, as this paper examined, defamation plaintiffs seek restoration of their reputation. This opens the door for other remedies, especially techno-legal solutions, that better target the kinds of harms explored here, but deployment of many of these solutions can be costly.

v) Other?

This paper recognizes that this type of tribunal might impact the use of contingency fee agreements, since damages would not be the primary remedy. We do not have a Canadian statistic; however, we know that in the USA 80% of defamation litigants are on contingency agreement with their lawyers.⁴¹⁴ Even if we follow the direction of the CRT and prohibit legal representation, the reality is that lawyers will often advise as helpers to litigants. Therefore, those impacted most would be self-represented litigants who cannot afford a lawyer, having the bizarre effect that prohibiting representation pushes into the shadows the power imbalance of litigants without substantively changing or improving resolution of disputes. This concern might be counterbalanced by the specialized knowledge of the adjudicator.

A tribunal of this sort is a treasure trove of data. This has benefits and drawbacks. The drawback is data vulnerability. Every step would leave a digital trail containing sensitive and other information. The benefits are that this data can be analyzed to (a) identify trends and (b) to improve the work of the tribunal. For example, data can identify the kinds of information most seek when they visit the ODR portal, at what point most cases settle, the kinds of issues that are explored, repeat players, settlement drivers and so on. This information allows the tribunal framework to be improved in a way that a real-world ADR framework or court system cannot.

b) Business case

Lord Briggs captures my thoughts on the matter when he commented about his recommendation for creating an Online Court:

While I have no doubt that its design and launch will be attended by setbacks, teething troubles and unexpected difficulties, I consider that the objective of making the civil courts more generally accessible to individuals and small businesses, for a just resolution of their simpler and small to modest value disputes at proportionate cost, fully justifies the risks in stepping a little into the unknown, and even the small risk that the time, money and effort about to be devoted to it may turn out to have been wasted.

Those risks are in any event capable of being minimised by a thorough process of testing before launch, by a soft launch in stages, (as is being done for the CRT), and by ongoing development of the first generation model after launch, as its inevitable teething troubles emerge.⁴¹⁵

The business case for this tribunal requires further analysis. It is unclear how many claimants would use such a tribunal. We do not have Canadian data on online defamation that helps answer this question (how many perceive themselves to have been defamed online, how many

complained to an intermediary, litigated (to whatever phase), or most importantly, how many would have pursued a remedy through such a tribunal). Gathering such data through interviews is potentially unreliable as it relies on self-reporting (for example, that they would or wouldn't use such a tribunal).

We know some of the data on complaints to, for example, social-networking providers, although it is not isolated to defamation complaints. Generally, we know the chasm between complaints to online providers and the numbers of cases that make it to full determination in a court. In my view, defamation likely parallels e-commerce in that most do not sue, and providing this tribunal would open-up an avenue of redress to those for whom it would otherwise be unavailable. The business case is strengthened if the scope of this tribunal is widened to include online abuse more generally, in particular invasion of privacy, including non-consensual sharing of intimate images. Such a proposal is beyond the scope of this paper.⁴¹⁶

A lingering issue is the use-case for youth. If the data on youth reporting of online abuse can be extrapolated more widely, then youth might be reluctant to complain about defamation to such a tribunal unless anonymously. Empirical work by Shaheen Sharif shows that youth do not report cyber-bullying (which may or may not involve defamation), because, among other things, they fear it will invite further bullying.⁴¹⁷ It is unclear whether this concern translates to complaints about defamation, specifically, or how youth might perceive an ADR or ODR avenue of redress.

Ultimately, this paper recommends that the LCO seek law reform that creates ADR, in particular, ODR, dispute resolution mechanisms, which I conclude would improve access to justice and resolution to complainants of online defamation. This paper does not, as of yet, deliver a detailed model. If the LCO wishes to pursue this avenue, or eventually the Ontario government seeks to develop this model, the following steps are a guide. First, feedback on the model as currently sketched should be sought, and a more detailed model created. Then a prototype of the tribunal should be created and tested with a small group, incorporating feedback to create a version to launch, preferably to a limited group at first. This was the approach of the CRT and the United Kingdom Online Court is expected to be similarly deployed.

ACRONYMS

ADR	Alternative Dispute Resolution
CBSC	Canadian Broadcast Standards Council
CRTC	Canadian Radio-television and Telecommunications Commission
CDA	<i>Communications Decency Act</i>
CIRA	Canada Internet Registration Authority
CRT	Civil Resolution Tribunal
CSR	Corporate Social Responsibility
ICANN	Internet Corporation for Assigned Names and Numbers
IMPRESS	Independent Monitor of the Press
IPSO	Independent Press Standards Organisation
NTD	Notice and Takedown
OECD	Organisation for Economic Co-operation and Development
ODR	Online Dispute Resolution
Ofcom	Office of Communications
OPC	Office of the Privacy Commissioner
PCC	Press Complaints Commission
SCC	Supreme Court of Canada
UDRP	Uniform Dispute Resolution Policy

Note: Thank you to my research assistant, Rose Pappas-Acreman for her work on this project.

¹ Emily Laidlaw and Hilary Young, *Internet Intermediary Liability in Defamation: Proposals for Statutory Reform* (Toronto: Law Commission of Ontario, 2017). Online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf>.

² See discussion in Alice Woolley and Trevor Farrow, “Addressing Access to Justice through New Legal Service Providers: Opportunities and Challenges” (2016) 3(3) *Texas A&M Law Review* 549. Online: <http://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1092&context=lawreview>.

³ Trevor Farrow, “What is Access to Justice” (2014) 51(3) *Osgoode Hall Law Journal* 957, 983.

⁴ Trevor Farrow, note 3, 983. Online: <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2761&context=ohlj>.

⁵ The meaning of the rule of law is the subject of significant scholarly and other work. It is helpful here to provide the explanation of the Supreme Court of Canada in *Reference re Secession of Quebec*, [1998] 2 SCR 217: “[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action”, para 70.

⁶ Alastair Mullis and Andrew Scott, “Reframing Libel: Taking (All) Rights Seriously and Where It Leads” (2012) 65 *N. Ir. Legal Q.* 5, 12.

⁷ Ethan Katsh and Orna Rabinovich-Einy, *Digital Justice: Technology and the Internet of Disputes* (Oxford University Press, 2017), 15.

⁸ Online Dispute Resolution Advisory Group, *Online Dispute Resolution for low value civil claims*, (London, United Kingdom: Civil Justice Council, 2015), 17. Online: <https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf>.

⁹ Online Dispute Resolution Advisory Group, note 8, 17.

¹⁰ Online Dispute Resolution Advisory Group, note 8, 18.

¹¹ Online Dispute Resolution Advisory Group, note 8, 17-19.

¹² Online Dispute Resolution Advisory Group, note 8, 17-19 (and accompanying figures visually outlining their approach to access to justice).

¹³ 2016 BCSC 686 [*Pritchard*].

¹⁴ Justice Saunders accepted this defamatory meaning: *Pritchard*, note 12, para 74.

¹⁵ *Pritchard*, note 13, para 41.

¹⁶ *Pritchard*, note 13, para 23 and 75.

¹⁷ *Pritchard*, note 13, para 24.

¹⁸ *Pritchard*, note 13, para 26.

¹⁹ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

²⁰ *Pritchard*, note 13, paras 33-38.

²¹ *Pritchard*, note 13, para 33.

²² 2015 BCSC 1024 [*Niemela*].

²³ There are many online reputation management companies, such as Reputation.ca (Canadian-based) and ReputationDefender (American-based).

²⁴ The case that sets this is motion is *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos, Marios Costeja Gonzalez*, (2014) Case C-131/12. Subsequently the territorial scope of delisting has been debated. The French Data Protection Authority challenged Google's decision to localize delisting to Europe, arguing for worldwide delisting. In July 2017, the Conseil d'Etat referred questions to the Court of Justice of the European Union concerning the scope of the right to delist. Online: <http://www.conseil-etat.fr/Decisions-Avis-Publications/Decisions/Selection-des-decisions-faisant-l-objet-d-une-communication-particuliere/CE-19-juillet-2017-GOOGLE-INC>.

²⁵ 2017 SCC 34 [*Equustek*].

²⁶ See criticisms such as Michael Geist, "Global Internet Takedown Orders Come to Canada: Supreme Court Upholds International Removal of Google Search Results" (28 June 2017), personal blog. Online: <http://www.michaelgeist.ca/2017/06/global-internet-takedown-orders-come-canada-supreme-court-upholds-international-removal-google-search-results/>; Natasha Tusikov, "When Google and its ilk become regulators, we all

lose” (29 June 2017), *the Globe and Mail*. Online: <https://www.theglobeandmail.com/opinion/when-google-and-its-ilk-become-regulators-we-all-lose/article35501632/>.

²⁷ *Niemela*, note 22, para 26.

²⁸ 47 USC (1996) [CDA].

²⁹ 28 USC (2010) [SPEECH Act]. See *Niemela*, note 22, paras 33-35.

³⁰ For the term internet intermediary, I will use the definition from Laidlaw and Young, note 1, footnote 1. It is replicated almost verbatim for convenience. There is no single, generally-accepted definition of internet intermediary (the categories are unclear and overlapping, and intermediaries often play multiple online roles).

However, I adopt the Organisation for Economic Co-operation and Development (OECD)’s definition:

Internet intermediaries’ bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties (OECD, *Economic and Social Role of Internet Intermediaries* (April 2010), online: <https://www.oecd.org/internet/ieconomy/44949023.pdf>, 9).

Intermediaries tend to include internet service providers, search engines, e-commerce platforms, social networking platforms, payment systems and domain name registrars (OECD 9-10).

A narrower conception of intermediaries, one more relevant to the defamation context, is that intermediaries facilitate communication from and between third parties. Such a definition excludes entities that produce original content, at least in relation to that aspect of their activities. (See the excellent discussion of what an intermediary is in Rebecca McKinnon, Elonnai Hickok and Hae-in Lim, *Fostering Freedom Online: the Role of Internet Intermediaries* (Paris: UNESCO Publishing, 2014), Part 1.3, and noting that most definitions of intermediary exclude content producers). My usage does not strictly exclude content producers, such as online news media (see UNESCO report, section 1.3). News media with an online presence often operate in a hybrid role and teasing out the differing expectations between their media and intermediary functions is important (UNESCO report, 20). I include news media within my definition, but only concerning their *intermediary liability role*, namely vulnerability to liability and management of third party content posted on their websites (i.e. the comments sections).

³¹ CDA, note 27.

³² For Canadian law see Laidlaw and Young, note 1, 24-33.

³³ Emily B. Laidlaw, “*Pritchard v Van Nes*: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts Gone Viral” (18 May 2016), *ABlawg (blog)*. Online: <http://ablawg.ca/2016/05/18/pritchard-v-van-nes-imposing-liability-on-perpetrator-zero-of-defamatory-facebook-posts-gone-viral/>.

³⁴ Lord McAlpine’s experience is illustrative. Individuals on Twitter falsely linked him with a BBC Newsnight story stating someone senior in Thatcher’s administration was a pedophile. McAlpine sued several Twitter users, and famously offered to settle with any users with less than 500 followers. McAlpine settled with the BBC, ITV, Sally Bercow and Alan Davies. See *McAlpine v Bercow*, [2013] EWHC 1342 (QB); Mark Sweney, “Lord McAlpine settles libel action with Alan Davies over Twitter comment” (24 October 2013), *The Guardian*. Online: <http://www.theguardian.com/media/2013/oct/24/lord-mcalpine-libel-alan-davies>.

³⁵ *Crookes v Newton*, [2011] 3 SCR 269, 2011 SCC 47.

³⁶ For Facebook context see *Pritchard*, note 13.

³⁷ Robert C. Post, “The Social Foundation of Defamation Law: Reputation and the Constitution” (1986) 74 Cal. L. Rev. 691, 692.

³⁸ Eric Barendt, “What is the Point of Libel Law?” (1999) 52(1) *Current Legal Problems*, 114.

³⁹ David S. Ardia, “Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law” (2010) 45 *Harvard Civil Rights-Civil Liberties Law Review* 261, 290.

⁴⁰ Post, note 37. This conception of reputation is useful in articulating why companies can sue for defamation: Post, note 37, 696. Ardia is critical of this conception of property, arguing that it fails to capture the role that society plays in the concept of reputation: “[u]nder the view of reputation as property, social interactions are essentially meaningless unless they are mediated by the market”: Ardia, note 39, 292.

⁴¹ Post, note 37, 707. As Post identifies, however, there is a paradox in thinking here:

[I]t is not immediately clear how reputation, which is social and public, and which resides in the “common or general estimate of a person,” can possibly affect the “essential dignity” of a person’s “private personality.” The gulf that appears to separate reputation from dignity can be spanned only if defamation law contains an implicit theory of the relationship between the private and public aspects of the self. Post, note 37, 708.

⁴² In a Canadian context see *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130, para 107. In a European context, one of the purposes of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 is protection of dignity. The right to freedom of expression in Article 10 specifically cites reputation as a limit. In *Delfi AS v Estonia* (2015), Application no. [64569/09](#) (ECtHR, Grande Chamber), for example, the European Court of Human Rights discusses defamatory posts as degrading human dignity. Reputation has also been brought within the ambit of Article 8 right to private life: see discussion of case law in Mullis and Scott, note 6, 9-11. In the United Kingdom, the House of Lords commented, “[r]eputation is an integral and important part of the dignity of the individual”: *Reynolds v Times Newspapers and Others*, [1999] UKHL 45; [1999] All ER 609.

⁴³ Post, note 37, 711.

⁴⁴ Post, note 37, 712. Barendt reviews Post’s conceptions of reputation and considered dignity to resonate most with the modern world, in particular the dignity basis of fundamental rights. However, he does not consider dignity to be the purpose of libel law: “[a]ll it does is explain, and perhaps justify, the importance the law gives to the reputation right. We should not lose sight of the point that libel law protects reputation, rather than the underlying value of human dignity”: Barendt, note 38, 117. Dignity, he argues, is better suited to a constitution, but is too vague to form the basis of a legal action. That said, in his view, libel actions are sometimes used to remedy a dignitary harm. Libel law, he argues, has encouraged this because of the approach to defamatory meaning and the presumption of damages: Barendt, note 38, 116-117.

⁴⁵ Post, note 37, 706-707.

⁴⁶ Mullis and Scott, note 6, 10.

⁴⁷ Mullis and Scott, note 6, 10.

⁴⁸ Erving Goffman, *Interaction Ritual: Essays in Face-to-Face Behavior* (New York: Pantheon Books, 192) cited in Post, note 37, 709.

⁴⁹ Post, note 37, 710.

⁵⁰ Ardia, note 39, 267.

⁵¹ Ardia, note 39, 268-269.

⁵² Ardia, note 39, 269.

⁵³ Laura A. Heymann, “The Law of Reputation and the Internet of the Audience” (2011) 52 *Boston College Law Review* 1341, 1349.

⁵⁴ Ardia, note 39, 287.

⁵⁵ Heymann, note 53, 1343.

⁵⁶ Ardia, note 39, 264.

⁵⁷ Heymann, note 53, 1349.

⁵⁸ Heymann, note 53, 1350.

⁵⁹ Ardia, note 39, 300, 302.

⁶⁰ Ardia, note 39, 302.

⁶¹ Ardia, note 39, 303-304.

⁶² Ardia, note 39, 267.

⁶³ Ardia, note 39, 302-304.

⁶⁴ Ardia, note 39, 305.

⁶⁵ Ardia, note 39, 306.

⁶⁶ Ardia, note 39, 313.

⁶⁷ Ardia, note 39, 313.

⁶⁸ This is a mechanism whereby courts can order a third party to provide documents or information that can help assist the plaintiff: *Norwich Pharmacal Co v Commissioners of Customs & Excise*, [1974] AC 133 (HL).

⁶⁹ See discussion note 24 and 25.

⁷⁰ Ellyn M. Angelotti, “Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter” (2013) 13 *J High Tech L* 430, 499.

⁷¹ See examples in note 23.

⁷² See Yochai Benkler, *The Wealth of Network: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2007). Ardia discusses this in the context of defamation, note 39, 262.

⁷³ Ardia, note 39, 267.

⁷⁴ Ardia, note 39, 313.

⁷⁵ Ardia, note 39, 283.

⁷⁶ Ardia, note 39, 282

⁷⁷ Ardia, note 39, 289.

⁷⁸ For examination of corporate accountability, see Ranking Digital Rights, <https://rankingdigitalrights.org>, under the leadership of Rebecca McKinnon. They published a Corporate Accountability Index in November 2015, which assessed 16 companies: Ranking Digital Rights, *2015 Corporate Accountability Index* (2015). Online: <https://rankingdigitalrights.org/index2015/>.

⁷⁹ Brandwatch, “Marketing: 96 Amazing Social Media Statistics and Facts,” (7 March 2016). Online: Brandwatch <https://www.brandwatch.com/blog/96-amazing-social-media-statistics-and-facts-for-2016/>.

⁸⁰ Daphne Keller, “Making Google the Censor” (12 June 2017), *The New York Times*. Online: <https://www.nytimes.com/2017/06/12/opinion/making-google-the-censor.html?smid=tw-share&r=0>.

⁸¹ See United Kingdom Parliament, House of Commons, Home Affairs Committee, *Oral Evidence: Hate Crime and its Violent Consequences* (14 March 2017) (Chair: Yvette Cooper), Q 409 and Q 411.

⁸² See the Guardian’s Facebook Files, specifically Nick Hopkins, “Revealed: Facebook’s internal rulebook on sex, terrorism and violence” (21 May 2017), *The Guardian*. Online: <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence>.

⁸³ J. Rosen, “The Delete Squad” (29 April 2013), *The New Republic*. Online: www.newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules.

⁸⁴ Internet Live Stats, “Twitter Usage Statistics” Online: <http://www.internetlivestats.com/twitter-statistics/>.

⁸⁵ Home Affairs Committee, note 81, Q 409 and Q 411.

⁸⁶ Home Affairs Committee, note 81, Q 409 and Q 411.

⁸⁷ Olivia Solon, “Underpaid and overburdened: the life of a Facebook moderator” (25 May 2017), *The Guardian*. Online: <https://www.theguardian.com/news/2017/may/25/facebook-moderator-underpaid-overburdened-extreme-content>.

⁸⁸ See for example, Sarah Kessler, “A Snapshot of How Twitter Deals with Online Harassment” (13 May 2015), *Fastcompany*. Online: <https://www.fastcompany.com/3046262/a-snapshot-of-how-twitter-deals-with-online>

[harassment](#). Kick it Out, “Kick It Out Unveils Findings of Research into Football-related Hate Crime on Social Media” (16 April 2015), *Kick It Out*. Online: <http://www.kickitout.org/news/kick-it-out-unveils-findings-of-research-into-football-related-hate-crime-on-social-media/#.VTEHvRPF8bM>; Rad Campaign, “The Rise of Online Harassment” (2014) *Rad Campaign*. Online: <http://www.radcampaign.com/portfolio/rise-online-harassment-2014>; Working to Halt Online Abuse, “Online Harassment/Cyberstalking Statistics” (2015), *WHOA*. Online: <http://www.haltabuse.org/resources/stats/index.shtml>; Darcy Hango, *Cyberbullying and cyberstalking among Internet users aged 15 to 29 in Canada* (Statistics Canada, 2016); Samuel Perreault, *Self-reported Internet victimization in Canada, 2009* (Statistics Canada, 2011).

⁸⁹ Pew Research Center, “Online Harassment 2017” (11 July 2017), *Pew Research Center*. Online: <http://www.pewinternet.org/2017/07/11/online-harassment-2017/>.

⁹⁰ Pew Research Center, note 89.

⁹¹ Pew Research Center, 89.

⁹² There are several publications related to this project, but this paper focuses on a select few.

⁹³ Randall P. Bezanson, “Libel Law and the Realities of Litigation: Setting the Record Straight” (1985-85) 71 *Iowa L Rev* 215, 226.

⁹⁴ Bezanson, note 93, 226.

⁹⁵ Bezanson, note 93, 226.

⁹⁶ Bezanson, note 93, 228. Robert M. Ackerman states,

The view that the unpredictability of defamation law results in fewer out-of-court settlements is at least partially supported by the above findings [having discussed the Iowa Study]. A risk-adverse plaintiff motivated primarily by the prospect of recovering damages might rationally agree to a settlement in light of the uncertainty of the outcome. However, a plaintiff desirous of clearing her name and/or punishing a defendant may be willing to risk an uncertain result at trial, particularly when an adverse result does not serve to reinforce the original defamatory statement.

Ackerman, “Defamation and Alternative Dispute Resolution: Healing the Sting” (1986) *Journal of Dispute Resolution* 1, 10.

⁹⁷ Bezanson, note 93, 227. The fourth conclusion is not as relevant to this paper as it is more reflective of the peculiarities of American libel law. Bezanson concluded that constitutional privileges in American libel law, do not

translate to limited recovery against the press only in cases where it is in line with press freedom. Rather, the result is that “courts become the primary, if not exclusive, judges of press responsibility”: Bezanson, note 93, 227.

⁹⁸ This was Ackerman’s interpretation, note 96, 7.

⁹⁹ Randall P. Bezanson, “The Libel Suit in Retrospect: What Plaintiffs Want and What Plaintiffs Get” (1986) 74(3) *California Law Review* 789, 791.

¹⁰⁰ Bezanson, “The Libel Suit in Retrospect”, note 99, 791.

¹⁰¹ Bezanson, “The Libel Suit in Retrospect”, note 99, 793-4.

¹⁰² Bezanson, “The Libel Suit in Retrospect”, note 99, 794.

¹⁰³ Bezanson, “The Libel Suit in Retrospect”, note 99, 794-795.

¹⁰⁴ Bezanson, “The Libel Suit in Retrospect”, note 99, 795.

¹⁰⁵ Bezanson, “The Libel Suit in Retrospect”, note 99, 796.

¹⁰⁶ Bezanson, “The Libel Suit in Retrospect”, note 99, 799.

¹⁰⁷ Bezanson, “The Libel Suit in Retrospect”, note 99, 800.

¹⁰⁸ Bezanson, “The Libel Suit in Retrospect”, note 99, 800.

¹⁰⁹ Bezanson, “The Libel Suit in Retrospect”, note 99, 800.

¹¹⁰ Bezanson, “The Libel Suit in Retrospect”, note 99, 801.

¹¹¹ Bezanson, “The Libel Suit in Retrospect”, note 99, 802-803.

¹¹² Bezanson, “The Libel Suit in Retrospect”, note 99, 802-803.

¹¹³ Bezanson, “The Libel Suit in Retrospect”, note 99, 802.

¹¹⁴ Bezanson, note 93, 228.

¹¹⁵ Ackerman, note 96, 7-8, footnote 35.

¹¹⁶ See Mullis and Scott, note 6, discussing discursive remedies, 19-21.

¹¹⁷ Angelotti, note 70, 499.

¹¹⁸ Anita Bernstein, “Real Remedies for Virtual Injuries” (2012) 90 *North Carolina Law Review* 1457, 1484.

¹¹⁹ Bernstein, note 118, 1484-85.

¹²⁰ Bernstein, note 118, 1485.

¹²¹ Laidlaw and Young, note 1.

¹²² Mullis and Scott coined the term “discursive remedies” to capture such remedies such as an apology, retraction or right of reply as the optimal remedies to vindicate reputation: Mullis and Scott, note 6, 19-21.

¹²³ Shaheen Shariff, *Sexting and Cyberbylling: Defining the Line for Digitally Empowered Kids* (Cambridge University Press, 2015), 115.

¹²⁴ Shariff, note 123, 115.

¹²⁵ Shariff, note 123, 115-116.

¹²⁶ See e.g. *AB v Bragg Communications Inc*, [2012] 2 SCR 567, 2012 SCC 46 and *Jane Doe 464533 v ND*, 2016 ONSC 541 (default judgment set aside, awaiting re-trial: [2017] OJ No 60 (SC), 2017 ONSC 127).

¹²⁷ Jane Bailey and Valerie Steeves, *Defamation Law in the Age of the Internet: Young People’s Perspectives* (Law Commission of Ontario, 2017). Online: <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf>.

¹²⁸ Bailey and Steeves, note 127, 46, 62-66.

¹²⁹ Bailey and Steeves, note 127, 62-66.

¹³⁰ Bailey and Steeves, note 127, 46.

¹³¹ Bailey and Steeves, note 127, 93-95.

¹³² *Defamation Act 2013*, c 26.

¹³³ Susan Blake and others, *A Practical Approach to Alternative Dispute Resolution* (Oxford University Press, 2011), 1.11.

¹³⁴ Blake and others, note 133, para. 1.11.

¹³⁵ Faye Wang, *Online Dispute Resolution: Technology, Management and Legal Practice from an International Perspective* (Amsterdam: Chandos Publishing, 2008), 17.

¹³⁶ Marc A. Franklin, “A Declaratory Judgment Alternative to Current Libel Law” (1986) 74(3) *California Law Review* 809, 811.

¹³⁷ Marc A. Franklin, note 136, 811. See also Mullis and Scott discussing objectives of damages in British libel law: “to compensate for distress, hurt and humiliation; to compensate for unquantifiable, presumed reputation harm;

to compensate for actual (provable) harm; and to vindicate or restore the claimant's damaged reputation." Mullis and Scott, note 6, 13.

¹³⁸ Wang, note 135, 27-28.

¹³⁹ Wang, note 135, 27-28.

¹⁴⁰ Ackerman, note 96, 24.

¹⁴¹ Ackerman, note 96, 24.

¹⁴² Ackerman, note 96, 24.

¹⁴³ One figure published was that 90% of defamation cases that were mediated led to settlement: The Alternative Libel Project, *A Final Report on the Problems Created by Defamation Procedure with Recommendations for Change* (London: English PEN and Index on Censorship, 2012), 10. Online: https://www.englishpen.org/wp-content/uploads/2012/03/Alternative_Libel_Project_FinalMarch2012.pdf.

¹⁴⁴ Blake and others, note 133, para. 1.01.

¹⁴⁵ Ackerman, note 96, 26. Ackerman, in this context, notes that trials can be cathartic for those involved and that trials are especially appropriate when, for example, facts are in dispute: note 96, 26.

¹⁴⁶ Blake and others, note 133, para. 1.01-1.02.

¹⁴⁷ Ackerman, note 96, 19-20.

¹⁴⁸ See Ackerman, note 96, 20-23; Bernstein, note 118; The Alternative Libel Project, note 143, 16.

¹⁴⁹ Ackerman, note 96, 20-21.

¹⁵⁰ Ackerman, note 96, 23.

¹⁵¹ The Alternative Libel Project, note 143, 13-14.

¹⁵² The Alternative Libel Project, note 143, 1 and 13.

¹⁵³ The Alternative Libel Project, note 143, 13.

¹⁵⁴ The Alternative Libel Project, note 143, 14.

¹⁵⁵ The Alternative Libel Project, note 143, 29.

¹⁵⁶ The Alternative Libel Project, note 143, 13-14.

¹⁵⁷ The Alternative Libel Project, note 143, 16.

¹⁵⁸ Bernstein, note 118, 1476. See the Irish *Defamation Act 2009*, s. 28.

¹⁵⁹ The Alternative Libel Project, note 143, 9.

¹⁶⁰ Ackerman, note 96, 10-15.

¹⁶¹ Mullis and Scott, note 6, 23-25.

¹⁶² The Alternative Libel Project, note 143, 15-16

¹⁶³ Ackerman, note 96, 10-11.

¹⁶⁴ Ackerman, note 96, 12-15 and 21-22. See Ackerman for more detail of the strengths and weaknesses of this proposal. Some of the criticisms he addresses are specific to American defamation law.

¹⁶⁵ The Alternative Libel Project, note 143, 10.

¹⁶⁶ See the Alternative Libel Project, note 143, 10-11 for the value of mediation.

¹⁶⁷ The Alternative Libel Project, note 143, 30.

¹⁶⁸ The Alternative Libel Project, note 143, 30.

¹⁶⁹ The Alternative Libel Project, note 143, 30.

¹⁷⁰ The Alternative Libel Project, note 143, 7.

¹⁷¹ The Alternative Libel Project, note 143, 12-13.

¹⁷² Bernstein, note 118, 1487-1488.

¹⁷³ Bernstein, note 118, 1488.

¹⁷⁴ Bernstein, note 118, 1488-89.

¹⁷⁵ Irish *Defamation Act 2009*, note 158, s. 28.

¹⁷⁶ Irish *Defamation Act 2009*, note 158, s. 28(2).

¹⁷⁷ One can frame the amendments to intermediary liability rules (*Defamation Act 2009*, note 127, ss. 5 and 10) and the amendments to the *Crime and Courts Act, 2013* c 22 (to provide a costs penalty for not joining the government approved media regulators, s. 40) as reforming dispute resolution, but those provisions are not the analytical focus in this section.

¹⁷⁸ Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77(1) MLR 87, 88.

¹⁷⁹ The Alternative Libel Project, note 143, 25.

¹⁸⁰ The Alternative Libel Project, note 143, 25-26.

¹⁸¹ The Alternative Libel Project, note 143, 25.

¹⁸² The Alternative Libel Project, note 143, 25.

¹⁸³ The Alternative Libel Project, note 143, 27.

¹⁸⁴ The Alternative Libel Project, note 143, 27.

¹⁸⁵ The Alternative Libel Project, note 143, 28.

¹⁸⁶ See Civil Resolution Tribunal portal: <https://civilresolutionbc.ca>.

¹⁸⁷ Mullis and Scott, note 6, 23-25.

¹⁸⁸ Mullis and Scott, note 6, 23-24.

¹⁸⁹ Mullis and Scott, note 178, 108.

¹⁹⁰ Mullis and Scott, note 6, 24. The authors acknowledge the difficulty in imposing an apology, because it is imposed speech: note 60, 22. In their view the interference would not be disproportionate as it serves a wider public interest.

¹⁹¹ Mullis and Scott, “Tilting at Windmills”, note 178, 107.

¹⁹² Mullis and Scott, note 6, 24-25.

¹⁹³ Mullis and Scott, note 6, 24. This is in the context of Article 8 of the European Convention of Human Rights, note 42.

¹⁹⁴ See online: National NewsMedia Council, <http://mediacouncil.ca/about-us-ethics-journalism/>; the Alberta Press Council, <http://albertapresscouncil.ca>; the Quebec Press Council, <http://conseildepresse.qc.ca/en/>.

¹⁹⁵ National NewsMedia Council, note 194, “Member News Organizations”: <http://mediacouncil.ca/about-us-ethics-journalism/member-news-organizations/>.

¹⁹⁶ National NewsMedia Council, note 194, “About Us”: <http://mediacouncil.ca/about-us-ethics-journalism/>

¹⁹⁷ See Emily Laidlaw, *Regulation Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge University Press, 2015), chapter 3, in particular 77-79.

¹⁹⁸ National NewsMedia Council, note 194, “Journalistic Standards”: <http://mediacouncil.ca/about-us-ethics-journalism/standards/>

¹⁹⁹ The Council advises it hears the following types of complaints: “unsatisfied complaints from the public concerning accuracy, fairness and balance in the way that member media organizations gather and report news or opinion in print and/or digital format”: National NewsMedia Council, note 194, “FAQ”, <http://mediacouncil.ca/faq/#types-of-complaints>.

²⁰⁰ National NewsMedia Council, note 194, “FAQ”, <http://mediacouncil.ca/faq/#types-of-complaints>: “[t]he NewsMedia Council will not accept legal submissions or representations from either side. This is not a court of law; complaints to the Council are strictly between the complainant and the media organization. Complainants are required to sign a waiver agreeing not to pursue legal action.”

²⁰¹ See the Leveson Inquiry, online:

<http://webarchive.nationalarchives.gov.uk/20140122144906/http://www.levesoninquiry.org.uk/>.

²⁰² The PCC was operational until September 2014. Online: <http://www.pcc.org.uk>.

²⁰³ The Right Honourable Lord Justice Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press: Executive Summary* (London, November 2012), paras 41-456. Online:

<https://www.gov.uk/government/publications/an-inquiry-into-the-culture-practices-and-ethics-of-the-press-executive-summary>.

²⁰⁴ Laidlaw, note 197, 254..

²⁰⁵ Laidlaw, note 197, 254.

²⁰⁶ The Royal Charter was granted by the Privy Council in 2013: *Royal Charter on Self-Regulation of the Press*.

Online:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/254116/Final_Royal_Charter_25_October_2013_clean_Final_.pdf. The Royal Charter created a Recognition Panel (or more accurately through the

Charter an Independent Appointments Panel was created to select members of the Recognition Panel), the job of which was to approve press regulators.

²⁰⁷ The Press Recognition Panel (PRP) was formed in late 2014 and IMPRESS was launched in early 2016, with approval granted in October 2016. IMPRESS is privately funded, and currently receives most of its funding from two charities. For criticism of IMPRESS and the implications of s. 40 of the *Crime and Courts Act*, note 172, see:

David Pegg, “Here's what section 40 would do to the British press – and it's not good” (11 January 2017), *the Guardian*. Online: <https://www.theguardian.com/commentisfree/2017/jan/11/section-40-british-press-regulation-investigative-journalism>.

²⁰⁸ IPSO is funded by its publisher members (numbered currently at 1500 print and 1100 online publications).
<https://www.ipso.co.uk>

²⁰⁹ For the Guardian’s complaints mechanism, see “The Review Panel”:
<https://www.theguardian.com/info/2014/nov/20/review-panel>, and more generally about complaints:
<https://www.theguardian.com/info/complaints-and-corrections>.

²¹⁰ *Crime and Courts Act*, note 177.

²¹¹ *The Crime and Courts Act*, note 177. The government has yet to bring s. 40 into force.

²¹² IMPRESS, “Complaints FAQ”. Online: <http://impress.press/complaints/complaints-faq.html>.

²¹³ IMPRESS, “Complaints FAQ”, note 212.

²¹⁴ IMPRESS, “Complaints FAQ”, note 212.

²¹⁵ IPSO, “About IPSO”. Online: <https://www.ipso.co.uk/about-ipso/>.

²¹⁶ IPSO, “About IPSO”, note 215.

²¹⁷ The CBC, as a public body, is regulated separately.

²¹⁸ CRTC Public Notice CRTC 1991-90. Online: <http://www.crtc.gc.ca/eng/archive/1991/PB91-90.htm>.

²¹⁹ CBSC, “FAQ”. Online: <http://www.cbsc.ca/faqs/>.

²²⁰ CBSC, online: <http://www.cbsc.ca>. The “CBSC Codes” are accessible online: <http://www.cbsc.ca/codes/>.

²²¹ CBSC Codes, note 220.

²²² CBSC, “FAQ”. Online: <http://www.cbsc.ca/faqs/>.

²²³ 2003 c 21.

²²⁴ Office of the Privacy Commissioner. Online: <https://www.priv.gc.ca/en/>.

²²⁵ CIRA. Online: <https://cira.ca>.

²²⁶ RSC, 1985, c P-21.

²²⁷ SC 2000, c 5.

²²⁸ *Canada (Privacy Commissioner) v Blood Tribe Department of Health*, [2008] 2 SCR 574, 2008 SCC 44, para 20.

²²⁹ PIPEDA, note 222, ss. 10.1 and 28 as amended by the *Digital Privacy Act*, SC 2015, c 32 (not yet in force). See explanation, OPC, “The *Digital Privacy Act* and PIPEDA” (November 2015). Online:

https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/legislation-related-to-pipeda/02_05_d_63_s4/.

²³⁰ See PIPEDA, note 227, s. 15.

²³¹ *Data Protection Act*, 1998 c 29, ss 55A-55E, as amended by the *Criminal Justice and Immigration Act*, 2008 c 4.

As of 2010, the ICO has the power to award fines of up to 500,000 GBP for serious breaches of the Act. On Google Streetview, see Ian Brown, “Google Street View Got Off Lightly” (4 November 2010), *The Guardian*. Online:

<https://www.theguardian.com/commentisfree/2010/nov/04/google-street-view-got-off-lightly>.

²³² Regulation 2016/679 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) [GDPR].

²³³ GDPR, note 232, articles 83 and 58(2)(i) .

²³⁴ See <https://cira.ca>, note 225.

²³⁵ See Teresa Scassa and Michael Deturbide, *Electronic Commerce and Internet Law in Canada*, 2nd ed (Toronto: LexisNexis Canada, 2012), 279.

²³⁶ 15 U.S.C. § 1125(d).

²³⁷ Scassa and Deturbide, note 235, 281.

²³⁸ Generally see CIRA for information on the CDRP. Online: <https://cira.ca/cdrp-process-and-decisions>. For discussion of the CDRP process, see Scassa and Deturbide, note 235, 313-335.

²³⁹ <https://cira.ca/cdrp-process-and-decisions>

²⁴⁰ See “CDRP Decisions”. Online: <https://cira.ca/legal-policy-compliance/cdrp-process-and-decisions/cdrp-decisions>.

²⁴¹ Mullis and Scott, note 6.

²⁴² Schillings is an example of such a law firm. See the services offered. Online:

<https://www.schillingspartners.com/services#our-services>.

²⁴³ Ardia, note 39, 318; Angelotti, note 70, 467.

²⁴⁴ Ardia, note 39, 318; Mullis and Scott, note 178. See development of idea of a right of reply and user of asterisks in a series of articles by Frank Pasquale: “Rankings, Reductionism, and Responsibility” (2006) 54 Clev St L Rev 115 and “Asterisk Revisited: Debating a Right of Reply on Search Results” (2008) 3 J Bus & Tech L 61.

²⁴⁵ Ardia, note 39, 320-321.

²⁴⁶ Ardia, note 39, 319.

²⁴⁷ Ardia, note 39, 320-321.

²⁴⁸ Angelotti, note 70, 467. This was evident in a twitter criminal harassment *R v Elliott*, 2016 ONCJ 35. Angelotti comments, “[w]hile the fundamental foundation of Twitter is fast, free communication, the traditional remedies for defamatory publications remain slow and costly”: note 70, 467.

²⁴⁹ Ardia, note 39, 320.

²⁵⁰ Wang, note 135, 23. This is now: <http://www.cyberjustice.ca>. More generally, see Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge University Press, 2009).

²⁵¹ Alexandre Thibeault and Antoine Guilmain, *ODR Initiatives: Evaluation* (Montreal: CyberJustice Laboratory, 2013), 3.

²⁵² Wang, note 135, 18.

²⁵³ Wang, note 135, 25.

²⁵⁴ Wang, note 135, 28-29

²⁵⁵ Jordi Xuclà, *Access to justice and the Internet: potential and challenges* (Council of Europe, Committee on Legal Affairs and Human Rights, 2015), 8-9.

²⁵⁶ Xuclà, note 255, 3.

²⁵⁷ Xuclà, note 255, 9.

²⁵⁸ Xuclà, note 255, 9.

²⁵⁹ Xuclà, note 255, 9.

²⁶⁰ Online Dispute Resolution Advisory Group, note 8, 5.

²⁶¹ Wang, note 135, 28-29.

²⁶² Angelotti, note 70, 490.

²⁶³ Xuclà, note 255, 10.

²⁶⁴ Darin Thompson, "Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution" (2015) 1(2) *International Journal of Online Dispute Resolution*, 45. Working paper available at Osgoode Hall Law School Legal Research Paper Series (2016) 12(6) No. 27. Online:

<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1151&context=olsrps>.

²⁶⁵ Thompson, note 264, 46.

²⁶⁶ Xuclà, note 255, 12 and Angelotti, note 70, 490-491.

²⁶⁷ Xuclà, note 255, 12.

²⁶⁸ Xuclà, note 255, 12.

²⁶⁹ On trust, Angelotti, note 70, 490-491.

²⁷⁰ Robert Ambrogi, "Online Dispute Resolution Site eQuibbly Shuts Down" (7 March 2016). *LawSites*. Online:

<http://www.lawsitesblog.com/2016/03/online-dispute-resolution-site-equibbly-shuts-down.html>.

²⁷¹ Xuclà, note 255, 12-13.

²⁷² Xuclà, note 255, 10-11.

²⁷³ Xuclà, note 255, 10.

²⁷⁴ Xuclà, note 255, 11.

²⁷⁵ Directive 2013/11/EU on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [ADR Directive].

²⁷⁶ See, for example, the United Kingdom's forthcoming Online Court; Wang, note 135, 25.

²⁷⁷ Civil Resolution Tribunal, note 186.

²⁷⁸ Wang defines accountability as "being answerable to an authority that can mandate desirable conduct and sanction conduct that breaches identified obligations:" Wang, note 135, 73. This can be external to the ODR system (auditing etc.) or internal to it (internal best practices etc.).

²⁷⁹ Wang identifies a tension there between transparency and the need for confidentiality. However, confidentiality might be more important to consumer disputes, where she focused her attention, than defamation disputes, where public communication of the result or decision has a remedial function. Wang, note 135, 73-74.

²⁸⁰ See Katsh and Rabinovich-Einy, *Digital Justice*, note 7, 37, and Wang, note 135, 73-74, 83-84.

²⁸¹ See discussion of Laidlaw in general, specifically p 258, note 84.

²⁸² Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace*, 1st ed (Jossey-Bass, 2001) in Katsh and Rabinovich-Einy, note 7 *Digital Justice*, note 7, 37-38.

²⁸³ See Wang, note 135, 83.

²⁸⁴ Wang, note 135, 83.

²⁸⁵ Wang, note 135, 83-84.

²⁸⁶ Wang, note 135, 84.

²⁸⁷ See case study of eBay for example of trustmarks. In general, in the e-commerce sector it is a seal, logo or something similar indicating a seller is trustworthy.

²⁸⁸ Xuclà, note 255, 12.

²⁸⁹ ADR Directive, note 275.

²⁹⁰ Civil Resolution Tribunal, note 186.

²⁹¹ Colin Rule, "Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution" (2012) 34 *UALR Law Review* 767, 768. See Katsh and Rabinovich-Einy, note 7, 4.

²⁹² Wang, note 135, 66.

²⁹³ Katsh and Rabinovich-Einy, note 7, 34.

²⁹⁴ Online Dispute Resolution Advisory Group, note 8, 11.

²⁹⁵ Darin Thompson, *The Growth of Online Dispute Resolution and Its Use in British Columbia* (British Columbia, Civil Litigation Conference, 2014), 1.1.3.

²⁹⁶ Online Dispute Resolution Advisory Group, note 8, 12.

²⁹⁷ Katsh and Rabinovich-Einy, note 7, 35.

²⁹⁸ Wang, note 135, 66-67.

²⁹⁹ Rule, note 291.

³⁰⁰ Rule, note 291, 771.

³⁰¹ Rule, note 291, 772.

³⁰² Rule, note 291, 773.

³⁰³ Rule, note 291, 773. Further, if the user chose to resolve their dispute via their credit card company rather than through the e-commerce platform the same positive impact was not found. Rule, note 291, 774.

³⁰⁴ Rule, note 291, 775.

³⁰⁵ Rule, note 291, 774.

³⁰⁶ ADR Directive, note 275.

³⁰⁷ Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC [ODR Regulation]. Online: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32013R0524&from=EN>.

³⁰⁸ European Commission COM(2011) 942, *A coherent framework for building trust in the Digital Single Market for e-commerce and online services*, 14. See generally, European Commission, “Alternative and Online Dispute Resolution”. Online: http://ec.europa.eu/consumers/solving_consumer_disputes/non-judicial_redress/adr-odr/index_en.htm.

³⁰⁹ ODR Regulation, note 307, recital 8.

³¹⁰ ODR Platform. Online: <https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.show&lng=EN>.

³¹¹ ODR Regulation, note 307.

³¹² See ADR Directive, note 275. Quality levels are set out in Chapter II.

³¹³ ODR Regulation, note 307.

³¹⁴ ODR Platform, note 310.

³¹⁵ ODR Regulation, note 307, Article 14.

³¹⁶ Věra Jourová, *Settling consumer disputes online* (European Commission, 2016). Online: http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf.

³¹⁷ ADR Directive, note 275, Article 20. See discussion in Xuclà, note 255, 6.

³¹⁸ Trading Standards Authority, “ADR Approval”. Online: <https://www.tradingstandards.uk/commercial-services/approval-and-accreditation/adr-approval>. In regulated industries, existing regulators (i.e. the Gambling Commission or Office of Communications (Ofcom)) will monitor and certify ADR providers.

³¹⁹ Katsh and Rabinovich-Einy, note 7, 152.

³²⁰ Katsh and Rabinovich-Einy, note 7, 152.

³²¹ Katsh and Rabinovich-Einy, note 7, 152-153.

³²² Katsh and Rabinovich-Einy, note 7, 159.

³²³ See an online tool STORM, which the National Mediation Board is using to facilitate brainstorming of resolutions. Katsh and Rabinovich-Einy, note 7, 150-151 and more generally chapter 6.

³²⁴ See discussion Wang, note 135, 25.

³²⁵ Civil Resolution Tribunal, note 186. See discussion in Katsh and Rabinovich-Einy, note 7, 151-160.

³²⁶ SBC 2012, c 25.

³²⁷ Civil Resolution Tribunal, note 186. There is no financial limit on strata disputes to use the tribunal.

³²⁸ Interview with Darin Thompson.

³²⁹ Darin Thompson, “The Growth of ODR”, note 295, 1.1.4.

³³⁰ Civil Resolution Tribunal, “Getting Started”, online <https://civilresolutionbc.ca/how-the-crt-works/getting-started/>; “Starting a Disputes”, online: <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/#1-starting-a-dispute>.

³³¹ Interview, Darin Thompson.

³³² Katsh and Rabinovich-Einy, note 7, 160.

³³³ Katsh and Rabinovich-Einy, note 7, 160.

³³⁴ Katsh and Rabinovich-Einy, note 7, 160.

³³⁵ Darin Thompson, “The Growth of ODR”, note 295, 1.1.5.

³³⁶ Civil Resolution Tribunal, “Can I have a representative”. Online: <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/#can-i-have-a-representative>.

³³⁷ Civil Resolution Tribunal, “Do I need permission to have a helper”. Online: <https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/#do-i-need-permission-to-have-a-helper>.

The CRT website explains: “[y]es, you can hire a lawyer. You can use them as your helper. Or, if you’re allowed to have a representative, a lawyer can be that representative. If you are using a lawyer as your helper, they won’t be able to speak on your behalf. The CRT also won’t be able to talk to your helper about your case.” Online:

<https://civilresolutionbc.ca/how-the-crt-works/tribunal-process/starting-a-dispute/helpers-representation/#can-i-hire-a-lawyer-for-my-crt-dispute>.

³³⁸ Interview, Darin Thompson. The CRT also tweeted statistics on the small claims launch. Online:

<https://twitter.com/CivResTribunal/status/892235791048482816>.

³³⁹ Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, 2016), 6.46.

Online: <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>. Katsh and Rabinovich-Einy, note 7, 160.

³⁴⁰ Briggs, note 339, 6.44. Lord Justice Briggs report on the Civil Courts Structure Review is recommended reading concerning an online court in general. See specifically section 6.

³⁴¹ Julia Hörnle, “Online courts must not compromise fairness” (17 February 2016), *The Guardian*. Online:

<http://theconversation.com/online-courts-must-not-compromise-fairness-37692>.

³⁴² Online Dispute Resolution Advisory Group, note 8, 26.

³⁴³ Interview, Darin Thompson.

³⁴⁴ For further information, see Online Dispute Resolution Advisory Group, note 8; Briggs, note 339.

³⁴⁵ Briggs, note 339, 6.40-6.41.

³⁴⁶ Briggs commented that the traditional courts are really only accessible to lawyers and the vision for the Online Court is that it is accessible to both self-represented litigants and lawyers: Briggs, note 339, 6.22-6.39.

³⁴⁷ Briggs, note 339, 6.4 and 6.108-6.114.

³⁴⁸ For further discussion on this point, see Briggs, note 339, 6.47-6.54.

³⁴⁹ Briggs, note 339, 6.88-6.91.

³⁵⁰ Katsh and Rabinovich-Einy, note 7, 113-114.

³⁵¹ Katsh and Rabinovich-Einy, note 7, 114.

³⁵² Laidlaw and Young, note 1.

³⁵³ Katsh and Rabinovich-Einy, note 7, 115.

³⁵⁴ Katsh and Rabinovich-Einy, note 7, 115.

³⁵⁵ Pew Research Centre, note 89.

³⁵⁶ Ardia, note 39.

³⁵⁷ Katsh and Rabinovich-Einy, note 7, 129.

³⁵⁸ In particular, they were prompted to address abuse after gamergate, where female games developers and critics were abused online, including threats of rape and bodily harm. They noticed they were losing players and when they enquired further identified online abuse as the reason they were leaving.

³⁵⁹ Laura Hudson, “Curbing online abuse isn’t impossible. Here’s where we started” (15 May 2014), *Wired*. Online: <https://www.wired.com/2014/05/-fighting-online-harassment>.

³⁶⁰ Hudson, note 359.

³⁶¹ Katsh and Rabinovich-Einy, note 7, 129.

³⁶² Katsh and Rabinovich-Einy, note 7, 122.

³⁶³ This explanation will focus on the ODR system, rather than the broader editing governance structure, although in some respects they are intimately linked.

³⁶⁴ Katsh and Rabinovich-Einy, note 7, 123-125.

³⁶⁵ Katsh and Rabinovich-Einy, note 7, 124.

³⁶⁶ Katsh and Rabinovich-Einy, note 7, 125.

³⁶⁷ The framework being trialed is using 21 jurors “randomly selected from a volunteer panel of experienced users of Marketplaats and showing the details of the dispute”: Online Dispute Resolution Advisory Group, note 8, 12. The buyer and seller have opportunities to respond to the arguments made within a set period of time, and then the jurors have 10 days to review the material and make a decision whether to remove the feedback or not.

³⁶⁸ Katsh and Rabinovich-Einy, note 7, 113.

³⁶⁹ Facebook, “What Is Social Reporting?”. Online: www.facebook.com/help/www/128548343894719.

³⁷⁰ Twitter, “Learn how to control your Twitter experience”. Online:

<https://support.twitter.com/articles/20170134>. Note there are significant weaknesses with the governance frameworks of some of these social networking providers, which is not explored in depth here. See Emily Laidlaw, “What is a joke? Mapping the path of a speech complaint on Social Networks” in Lorna E. Gillies and David Mangan (eds), *The Legal Challenges of Social Media* (Cheltenham: Edward Elgar Publishing, 2017).

³⁷¹ 521 F3d 1157 (6th Cir. June 16, 2014).

³⁷² See Laidlaw, note 197, chapters 3 and 6.

³⁷³ McKinnon, note 78, 6.

³⁷⁴ Twitter, “Our Latest Update on Safety” (1 March 2017). Online:

https://blog.twitter.com/en_us/topics/product/2017/our-latest-update-on-safety.html.

³⁷⁵ Laidlaw, “What is a joke”, note 370, 149. See also the Guardian Facebook files, note 82.

³⁷⁶ For views of some intermediaries on their role, see Rikke Jørgensen, “Framing human rights: exploring storytelling within internet companies” (2017) *Information, Communication & Society* 1.

³⁷⁷ Laidlaw, note 197, 243-244.

³⁷⁸ Laidlaw, note 197, 246-247.

³⁷⁹ Laidlaw, “What is a joke”, note 370.

³⁸⁰ Emily Laidlaw, “Myth or promise? The corporate social responsibilities of online service providers for human rights” in Luciano Floridi and Mariarosaria Taddeo (eds), *Understanding Responsibilities of Online Service Providers in Information Societies* (Cham: Springer, 2017).

³⁸¹ McKinnon, note 78.

³⁸² Laidlaw and Young, note 1.

³⁸³ RSC 1985, c C-42, amended by the *Copyright Modernization Act*, 2012, c 20 [*Copyright Act*]. The notice-and-notice provisions are sections 41.25-41.27.

³⁸⁴ Laidlaw and Young, note 1, 106-107.

³⁸⁵ See California Transparency in Supply Chains Act (2010), Cal. Civ. Code, § 1714.43 and Modern Slavery Act, 2015 c. 30.

³⁸⁶ SPEECH Act, note 28.

³⁸⁷ Sir Michael Latham, *Constructing the Team, Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (1994), 91.

³⁸⁸ 1996, c 53 [Housing Grants Act].

³⁸⁹ Housing Grants Act, note 383, s. 108.

³⁹⁰ *The Scheme for Construction Contracts (England and Wales) Regulations*, 1998 SI No. 649.

³⁹¹ Financial Ombudsman Service. Online: <http://www.financial-ombudsman.org.uk>.

³⁹² It was created by the *Financial Services and Markets Act*, 2000 c 8, Part XVI, Schedule 17. See “Financial Conduct Authority Handbook”. Online: <https://www.handbook.fca.org.uk/handbook/DISP/>.

³⁹³ Financial Ombudsman Service, “Information for businesses covered by the ombudsman service”. Online: http://www.financial-ombudsman.org.uk/fag/businesses/answers/rules_a11.html.

³⁹⁴ Ardia, note 39, 313..

³⁹⁵ Ardia, note 39, 313.

³⁹⁶ See discussion section II.B. See Bezanson studies, notes 93 and 99.

³⁹⁷ Rule, note 291.

³⁹⁸ See Bezanson, notes 93 and 99.

³⁹⁹ See discussion section III. See Blake and others, note 133, para. 1.01-1.02; Ackerman, note 96, 26.

⁴⁰⁰ The Alternative Libel Project, note 143, 14.

⁴⁰¹ Laidlaw and Young, note 1.

⁴⁰² See California Transparency in Supply Chains Act and Modern Slavery Act, note 385.

⁴⁰³ SPEECH Act, note 28.

⁴⁰⁴ *Pritchard*, note 13.

⁴⁰⁵ Ardia, note 39, 264.

⁴⁰⁶ Online Dispute Resolution Advisory Group, note 8, 9.

⁴⁰⁷ See section I Introduction and Online Dispute Resolution Advisory Group, note 8, 17.

⁴⁰⁸ Thompson, “The Growth of ODR”, note 295, 1.1.3.

⁴⁰⁹ Laidlaw, note 197, chapter 6.

⁴¹⁰ Laidlaw, note 197, chapter 6.

⁴¹¹ See discussion in Laidlaw, note 197, chapters 3.

⁴¹² Bernstein, note 118, 1485-1486.

⁴¹³ Laidlaw, note 197, 263-265.

⁴¹⁴ Bernstein, note 118, 1475.

⁴¹⁵ Briggs, note 339, 6.44-6.45.

⁴¹⁶ However, broadening the scope of the tribunal would require further analysis. For example, the objective of complainants concerning other types of harms, in particular privacy invasions, is likely different. Defamation claimants usually seek public accountability, while privacy complainants often seek to contain revelation of private information, whatever the reason, and thus further publicity to the claimant would create further harm. Both harms seek containment, but there is a public signaling to defamation complaints, to correct the false statement, which is missing from privacy invasions, where this publicity can perpetuate the harm further. Anonymity was maintained for claimants in, for example, *AV v Bragg*, note 126 and *Doe v ND*, note 126. While there is a significant amount of overlap between privacy and defamation harms, the path to resolution has some key differences.

⁴¹⁷ Shariff, note 123, 115-116.