

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Weaver v. Corcoran*,
2015 BCSC 165

Date: 20150205
Docket: S102698
Registry: Vancouver

Between:

Andrew Weaver

Plaintiff

And

**Terence Corcoran, Peter Foster, Kevin Libin, Gordon Fisher,
National Post Inc., d.b.a. The National Post,
John Doe, Jane Doe, Richard Poe and Sally Yoe**

Defendants

Before: The Honourable Madam Justice Burke

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.
June 2-6, 9-13, 16-20
July 14-16, 2014

Place and Date of Judgment:

Vancouver, B.C.
February 5, 2015

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I. OVERVIEW

[1] In late 2009 and early 2010, the *National Post* published four articles in print and online referencing the plaintiff, Dr. Andrew Weaver (“Dr. Weaver”), and climate change. At this time, Dr. Weaver was a professor at the University of Victoria in the Faculty of Arts and Science in the School of Earth and Ocean Sciences Department.

[2] Dr. Weaver brings an action for libel in relation to those four articles:

- (a) December 8/9, 2009 – Peter Foster, “*Weaver’s Web: Is it unreasonable to suggest his charge of theft against the fossil fuel industry is totally without merit?*”, *National Post* [*Weaver’s Web*];
- (b) December 10, 2009 – Terence Corcoran, “*Weaver’s web II: Climate modeller’s break-in caper spreads across Canadian university, exposing Climategate as monster cross-disciplinary big-oil funded attack on psychology labs*”, *National Post* [*Weaver’s Web II*];
- (c) January 27, 2010 – Terence Corcoran, “*Climate agency going up in flames: Exit of Canada’s expert a sure sign IPCC in trouble*”, *National Post* [*Climate Agency Going up in Flames*]; and
- (d) February 2, 2010 – Kevin Libin, “*So much for pure science: ‘Climategate’ raised questions about global warming. The ongoing debate about its impact raises questions about the the [sic] vested interests of climate science*”, *National Post* [*So Much for Pure Science*].

[3] These articles, except for *Weaver’s Web*, remained on the *National Post*’s Internet site since their publication.

[4] Dr. Weaver alleges the articles defame his character. He also complains about defamatory statements posted to the *National Post* website in association with *Weaver’s Web*, *Weaver’s Web II*, and *Climate Agency Going up in Flames*. In addition, Dr. Weaver complains against the defendants in relation to the re-

publication by others of *Weaver's Web*, *Weaver's Web II*, *Climate Agency Going up in Flames*, and *So Much for Pure Science*.

[5] Dr. Weaver says the words are defamatory both in their ordinary meaning and/or in their inferential meaning. In brief, Dr. Weaver says the words used in the various publications state or contain innuendos or inferences that he attempted to divert public attention from a scandal involving "Climategate" and the Intergovernmental Panel on Climate Change (the "IPCC") by fabricating stories about the involvement of the fossil fuel industry with respect to the break-ins at his office; that he is untrustworthy, unscientific and incompetent; and that he distorts and conceals scientific data to promote a public agenda and receive government funding.

[6] The defendants include the *National Post*, a newspaper publishing nationally, Peter Foster, Terence Corcoran, and Kevin Libin, all columnists/journalists who have published articles in the *National Post* and Gordon Fisher, the publisher of the *National Post*.

[7] The defendants maintain the articles do not contain defamatory statements, as they do not attack Dr. Weaver's character. Further, the defendants maintain the statements are not "of and concerning" Dr. Weaver. Rather, they reference climate alarmists and the scientists involved in the Climategate scandal or "Himalayan error". Alternatively, the defendants maintain the statements are protected by the defence of fair comment. As for the reader postings, the defendants say they are not the publishers. Alternatively, the defendants submit that they are protected by the defence of innocent dissemination.

[8] The scientific debate referenced in the four impugned articles and indeed the issue of climate change is not simple. It continues to be topical as reflected by numerous publications over the years. Much of the evidence in this case dealt with the scientific basis for some of the allegations made.

[9] The question in this case is not who is right in the debate on climate change. Rather, the issue is whether the words and statements in the four articles defame the character of Dr. Weaver.

[10] The words complained of are replicated below. The underlining in each article is as reflected in the plaintiff's statement of claim.

Headline: *Weaver's web

* The headline and subheading of the article as it appears on the National Post Internet Sites read as follows: Peter Foster; *Weaver's web*

Is it unreasonable to suggest his charge of theft against the fossil fuel industry is totally without merit?

Text:

The spinning from the climate industry in the wake of Climategate has been as fascinating as the incriminating emails themselves.

One demand being peddled by the powers-that-warm in Copenhagen and elsewhere is that we should all concentrate not on the damning emails, but on who was responsible for their "theft," which had to be carried out for money, which in turn obviously came from the fossil fuel industry.

These guilty-until-proven-innocent villains have also been fingered by Canada's warmest spinner-in-chief, Dr. Andrew Weaver. Dr. Weaver, who is Canada Research Chair in Climate Modelling and Analysis at the University of Victoria, claims that his office has been broken into twice, that colleagues have suffered hack attacks, and that mysterious men masquerading as technicians have attempted to penetrate the university's data defences.

There have been no arrests, and there are no suspects, but Dr. Weaver has no problem pointing to the shadowy culprits – the fossil fuel industry – thus joining his colleagues in the left coast Suzuki-PR-industrial complex.

Is this what the scientific method looks like? Is Dr. Weaver's hypothesis about fossil-fuel interests "falsifiable?" If Dr. Weaver has any evidence, he should produce it. Indeed, the University of Victoria should immediately launch an inquiry into these very serious allegations. Who knows what they might find? Was Dr. Weaver's office the only office broken into? If other offices in non-climate departments of the university also had computers stolen, might this suggest that the thefts were not related to climate change? Is it unreasonable to suggest that Dr. Weaver's charge against the fossil fuel industry is totally without merit?

Dr. Weaver has also been in the forefront of the warmest counterattack. On Monday, he co-authored a piece with Thomas Homer-Dixon in The Globe and Mail from which references to Climategate were conspicuously absent. The two academics boldly knocked down erroneous "skeptical" arguments without identifying who actually holds them. Strangely, apart from avoiding the "C" word, and appearing not to understand what solar climate theory actually involves, they also ignored the main point of scientific skepticism,

which is that a link between human activity and a significant impact on the global climate has not been established. Meanwhile they make some distinctly dodgy arguments of their own.

They assert that the claim that warming has stopped is based on nefariously taking 1998 as a starting point. "The El Nino [ocean oscillation] event of 1998 was the strongest in a century," they write, "so it's not surprising that the planet's surface temperature was sharply higher than it was in the years immediately before or after. To choose this year as the starting point for a trend line is misleading at best and dishonest at worst."

Call the campus police! But hang on, who first cherry-picked 1998 as a significant year? Climate alarmists such as Dr. Weaver! Indeed, in a piece in the Financial Post in September 1999, in which he sought to refute an article by skeptic Fred Singer, Dr. Weaver cited Climategate emailer Michael Mann's now-debunked hockey stick: "In the 1,000-year record," wrote Dr. Weaver, "1998 represented the warmest year, the 1990s the warmest decade and the 20th century the warmest century."

Far from citing El Nino as a factor in 1998, he quoted a study by paleoclimatologist Jonathan Overpeck that "failed to identify any natural mechanism for the unprecedented warming that led to 1998 being the warmest year in at least the past 1,200."

Mr. Overpeck, for the record, had noted in 1998 that "It's a good bet that the warming like we're seeing now is going to continue for decades." When it turned out to be a bad bet, at least for this decade, 1998 became a nuisance. However, Dr. Weaver tells us that "global temperatures are now about to resume their upward trend."

But apart from his implicit request to "trust me," doesn't saying that they will "resume their upward trend" admit that they've been flat?

....

Getting back to 1999, Dr. Weaver went on to write: "I don't understand Dr. Singer's suspicion of government-funded scientists ... Conspiracies require a motive, and I can't fathom what advantage would accrue from a government plot of climate change misinformation."

Anybody who can't fathom how scientists might be corrupted by government money, or why politicians and bureaucrats might embrace a theory that promises huge new powers, betrays an otherworldly innocence that should never be let outside the ivory tower. (See Bret Stephens' commentary elsewhere on this page). Yet Dr. Weaver's naiveté about the political class appears to be matched by a corresponding cynical demonization of corporations. "I fear corporate lobbying has already created an era of misinformation," he wrote in 1999, "and am extremely concerned about the disproportionate coverage the mainstream media gives to what is, in reality, negligible scientific controversy."

We now know how Dr. Weaver's colleagues manipulated the peer review process to make sure that controversy was as "negligible" as possible.

On Monday, Dr. Weaver and Mr. Homer-Dixon suggested that climate policy follows from climate science. This would not be true even if the science were

well understood. But then Dr. Weaver has also written that he believes that climate change “presents a wonderful opportunity” for Canada to become “the world’s leading nation in the business of climate.” Which suggests that his knowledge of economics and economic history ranks with his grasp of human motivation.

In the light of all this, the conclusion of Monday’s piece ranks as chutzpah indeed: “The difference between science and ideology is that science tries to explain all known observations, whereas ideology selects only those observations that support a preconceived notion.”

Say, like 1998 being all about man-made climate change then, but, 10 years later, when the models are all falling apart, not so much?

Headline: Weaver’s Web II, Climate modeler’s break-in caper spreads across Canadian university, exposing Climategate as monster cross-disciplinary big-oil funded attack on psychology labs” – published December 10, 2009

Text:

Following up on “Weaver’s Web,” Peter Foster’s column on this page yesterday regarding Andrew Weaver, Canada’s leading climate modeler and climate crime victim, we have news: The break-in at Doc Weaver’s office, which he linked to the evil fossil fuel industry’s attempt to discredit global warming policy, turns out to have been one of numerous break-ins at the University of Victoria.

On Dec. 2, an official university-wide email warned that “there have been a number of office and lab break-ins across campus in recent days – initially Science & Engineering buildings, but now Cornett & BEC. Psychology has had several offices and labs broken into, and last night there were break-ins in second-floor offices in BEC. Entry seems to be happening by jimmying/forcing locks.”

This news comes from none other than Steve McIntyre (the man who broke Mr. Weaver’s hockey stick) on his world-famous Climate Audit blog. A UVic informant sent Mr. McIntyre a copy of the internal email after reading that Doc Weaver was publicly blaming the oil industry for the break-in at his office at the university, where he is chair in Climate Modeling and Analysis. He says his computer was stolen and implied a connection to the Climategate email scandal at the Climatic Research Unit (CRU) (sic) the University of East Anglia. Gosh those oil industry guys are smart and sophisticated--there they are wandering around the University of Victoria, jimmying locks in the psych labs. Look there: Are those lab tests on cognitive impairment part of the climate modelers tool kit?

...I have reason to believe – based on the same high-quality line of reasoning and evidence that led Doc Weaver to link his office break in to big oil....

Headline*: Climate Agency Going up in Flames; Exit of Canada’s expert a sure sign IPCC in trouble

*The Headline and subheading of the article as it appears on the National Post Internet Sites read as follows: Terence Corcoran: Heat wave closes in on the IPCC

Insider Andrew Weaver is getting out while the going is good

Text:

Catastrophic heat wave appears to be closing in on the Intergovernmental Panel on Climate Change. How hot is it getting in the scientific kitchen where they've been cooking the books and spicing up the stew pots? So hot, apparently, that Andrew Weaver, probably Canada's leading climate scientist, is calling for replacement of IPCC leadership and institutional reform

If Andrew Weaver is heading for the exits, it's a pretty sure sign that the United Nations agency is under monumental stress. Mr. Weaver, after all, has been a major IPCC science insider for years. He is Canada Research Chair in Climate Modelling and Analysis at the University of Victoria, mastermind of one of the most sophisticated climate modelling systems on the planet, and lead author on two recent landmark IPCC reports.

For him to say, as he told Canwest News yesterday, that there has been some "dangerous crossing" of the line between climate advocacy and science at the IPCC is stunning in itself.

Not only is Mr. Weaver an IPCC insider. He has also, over the years, generated his own volume of climate advocacy that often seemed to have crossed that dangerous line between hype and science.

...

He has also made numerous television appearances linking current weather and temperature events with global warming, painting sensational pictures and dramatic links.

"When you see these [temperature] numbers, it's screaming out at you: 'This is global warming!'"

Mr. Weaver is also one of the authors of The Copenhagen Diagnosis, an IPCC-related piece of agit-prop issued just before the recent Copenhagen meeting.

The Copenhagen Diagnosis is as manipulative a piece of policy advocacy as can be found...

That Mr. Weaver now thinks it necessary to set himself up as the voice of scientific reason, and as a moderate guardian of appropriate and measured commentary on the state of the world's climate, is firm evidence that the IPCC is in deep trouble. He's getting out while the getting's good, and blaming the IPCC's upper echelon for the looming crisis.

...

Mr. Weaver's acknowledgement that Climategate -- the release/leak/theft of thousands of incriminating emails from a British climate centre showing deep infighting and number manipulation -- demonstrates a problem is real news in itself. When Climategate broke as a story last November, Mr. Weaver dismissed it as unimportant and appeared in the media with a cockamamie story about how his offices had also been broken into and that the fossil fuel industry might be responsible for both Climategate and his office break-in.

The latest IPCC fiasco looks even more damaging. In the 2007 IPCC report that Mr. Weaver said revealed climate change to be a barrage of intergalactic ballistic missiles, it turns out one of those missiles -- a predicted melting of the Himalayan ice fields by 2035 -- was a fraud. Not an accidental fraud, but a deliberately planted piece of science fiction. The IPCC author who planted that false Himalayan meltdown said the other day “we” did it because “we thought ... it will impact policy makers and politicians and encourage them to take some concrete action.”

Mr. Weaver told Canwest that the Himalayan incident is “one small thing” and not a sign of a “global conspiracy to drum up false evidence of global warming.” We shall see. It is a safe bet that there have been other tweaks, twists, manipulations and distortions in IPCC science reports over the years. New revelations are inevitable. Now is a good time to get out of the kitchen. Mr. Weaver is the first out the door.

Headline: “So much for pure science; ‘Climategate’ raised questions about global warming. The ongoing debate about its impact raises questions about the the (sic) vested interests of climate science”

Text:

Confronted with the infamous hacked emails from the University of East Anglia’s Climate Research Unit - suggesting scientists at one of the world’s most influential climate labs conspired to manipulate data and censor research that cast doubt on anthropogenic global warming - one of Canada’s more prominent scientists zeroed in on what he saw as the heart of the scandal. “The real story in this is, who are these people and why are they doing it?” demanded Andrew Weaver, a University of Victoria atmospheric scientist and contributor to the Intergovernmental Panel on Climate Change’s reports blaming humans for altering the weather. He actually meant the hackers: agents of Big Oil, he figured. They “don’t like” the research, “so they try to discredit it.”

Really, CRU staff did the discrediting, with talk of “hiding” data and sabotaging journals publishing papers they disliked. The hacker simply revealed it. But Weaver’s reflex to distract is understandable: The success of his book, Keeping Our Cool: Canada in a Warming World, and, to some extent, his career success, depend on the momentum of a global-warming panic. Just as discomfoting, the events that have now been dubbed “Climategate” provide an important public service, reminding us that scientists, too, can be close-minded and crooked.

Environmental alarmists have long insinuated as much, baselessly smearing critical scientists — the esteemed MIT climatologist Richard Lindzen; former National Academy of Sciences president Frederick Seitz — as corrupt industry shills. James Hoggan, the chairman of the David Suzuki Foundation, calls skeptics “fake” scientists peddling “deception.” But having implied that scientists can be led astray, why assume only IPCC types are immune? The climate panic is, after all, rather big business itself (as Weaver’s publisher knows). The CRU alone lured \$22 million in research grants; Greenpeace and the World Wildlife Fund raised almost a half-billion dollars last year; Al Gore made a mint investing in CO2-reducing firms.

It's naïve to presume that nowhere could there be vested interests in this great slush of shekels. But it isn't just money that can blind scientists to truth; they are, like us, mere emotional and fallible mortals. As David Resnik, the National Institute of Environmental Health Sciences bioethicist, has written, universities promote ethical research codes precisely because biases exist (though such codes are only as good as those upholding them). Bias happens, too, "when researchers fail to critically examine their work because they want to believe that their research is accurate," Resnik notes. Or where they see only "what they want or expect to see."

Yet ours is a society obsessed with scientific studies. Awash in products and technologies few fully comprehend, and anxious about their safety, we beseech PhDs for clarity – about pesticides, cellphones, baby bottle plastics. The media readily delivers answers, but uncritically: A recent examination by HealthNewsReview.Org found TV news shows habitually portray research on new drugs or health scares "unquestioningly," ignoring dissent or interest conflicts. We long ago learned to be leery of media, corporations and government. If Climategate raises doubts about global warming, it also raises perhaps overdue ones about the credibility of the folks in white coats. No wonder some would prefer we focused on something else.

II. ISSUES

[11] The issues for determination are:

- (1) Were the statements defamatory?
- (2) Were the statements "of and concerning" Dr. Weaver?
- (3) Were the statements published?
- (4) Does the defence of fair comment apply?
- (5) Re-publication;
- (6) Are the defendants the publishers of the reader postings arising from *Weaver's Web*; *Weaver's Web II*; and *Climate Agency Going up in Flames*?
- (7) If the defendants are the publishers of the reader postings, is there a defence of innocent dissemination or fair comment?

III. OVERVIEW

[12] At the outset, I thank counsel for their thorough and thoughtful presentation and submissions in this case. This has assisted with the issues and voluminous evidence in this case.

1. The Plaintiff

[13] At the time the above statements were made, Dr. Weaver was a professor in the Faculty of Arts and Science in the School of Earth and Ocean Sciences Department. He joined the University of Victoria in 1992; became a tenured associate professor in 1994 and a full professor in 1997. Dr. Weaver's extensive *curriculum vitae* reflects a number of degrees including a Ph.D. of Applied Mathematics granted by the University of British Columbia in 1987. Dr. Weaver's academic background includes the Canada Research Chair in Climate Modeling and Analysis in the School of Earth and Ocean Sciences at the University of Victoria from 2001 to 2013. He has also been a Lansdowne professor from 2012 to the present. Since May 2013, Dr. Weaver has been the BC Green party Member of the Legislative Assembly for Oak Bay/Gordon Head.

[14] Dr. Weaver's major field of scholarly or professional interests includes climate dynamics; climate modeling; earth system climate modeling; paleoclimate modeling and analysis; the role of ocean and climate change and climate variability; the role of the Arctic Ocean and ice cover in climate change and climate variability; the analysis of historical climate records; carbon cycle dynamics; and climate policy. Paleoclimate analysis undertakes climate modeling to understand what happened in the past. Paleo means the period from the pre-industrial world to the beginning of the earth. Most of Dr. Weaver's work has concerned the last two and a half million years of earth's history. He is largely focussed on understanding past climates and the role of the ocean in the period up to the beginning of the industrial era.

[15] Dr. Weaver has received a variety of research grants over the years. These grants, however, do not remunerate Dr. Weaver directly. The University of Victoria receives the grant money and administers them at his request. This provides the University with the ability to reduce Dr. Weaver's teaching load and administrative responsibilities, enabling Dr. Weaver to pursue his research.

[16] In 2008, Dr. Weaver published a book entitled *Keeping Our Cool: Canada in a Warming World* (Toronto: Penguin, 2008) [*Keeping Our Cool*]. Dr. Weaver was

contacted by Penguin to write this book, which sold mainly in Canada. Much of Dr. Weaver's views concerning climate warming are set out in this book. Part of that book also set out Dr. Weaver's views with respect to the distinction between climate and weather, and the likelihood or occurrence of particular events. As noted by Dr. Weaver in his book at page 10:

Scientists will never be able to say that the rainfall on July 20, 2007, in England or the record-breaking temperature on July 11, 2007, in Victoria, was because of global warming. Rather, what science can offer is a quantification of the change in the likelihood of such an event ... It's the projected future changes in the likelihood of occurrence of these extreme events (tail ends of the probability distributions) that pose the greatest problem for societal adaptation to global warming. [Emphasis added.]

[17] Dr. Weaver has also participated in the Nobel Prize-winning organization, the United Nations' IPCC. In *Keeping Our Cool* at 103, Dr. Weaver set out the role of the IPCC as follows:

In 1988, the WMO [World Meteorological Organization] and the UNEP [United Nations Environment Programme] established the IPCC as a means to assess global time change. The IPCC is governed by United Nations regulations with a mandate (reaffirmed in 2006 at its twenty-fifth session):

The role of the IPCC is to assess on a comprehensive, objective, open and transparent basis the scientific, technical and socio-economic information relevant to understanding the scientific basis of risk of human-induced climate change, its potential impacts and options for adaptation and mitigation. The IPCC reports should be neutral with respect to policy, although they may need to deal objectively with scientific, technical and socio-economic factors relevant to the application of particular policies.

The IPCC oversees three working groups (WGI, WGII, and WGIII 3) that assess the science, socio-economic impacts and adaptation, and mitigation aspects of global warming and climate change..... Another way to think of these groups is: WGI describes the problem of global warming; WGII details its consequences; WGIII assesses what we can do about it. A common public misconception is that the IPCC working groups undertake their own independent research, collect their own data, or monitor the climate system. This is not the case—they exclusively provide an assessment of the peer-reviewed scientific literature, although they may make passing reference to publish technical reports. Websites and newspaper opinion pieces/editorials are not used in the assessment, as they had not passed the standards set by the peer-review system.

[18] In the course of his testimony, Dr. Weaver outlined the process and nature of peer review journals. He noted peer review journals' attempts to edit out material demonstrably erroneous or flawed, thereby setting a high standard that encourages academic rigor.

[19] Dr. Weaver has contributed, as a lead author, to several IPCC assessment reports, including:

- Chapters 5 and 6 of *Climate Change 1995: The Science of Climate Change: Contribution of Working Group 1 to the Second Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 1995);
- *Climate Change 2001: The Scientific Basis. Contribution of Working Group I to the Third Assessment of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2001);
- *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2007); and
- *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 2013).

[20] In each of these assessments, the Canadian government nominated or asked Dr. Weaver to participate. No compensation was provided to Dr. Weaver for this work.

[21] Since the publication of *Keeping Our Cool*, Dr. Weaver has had a number of speaking engagements. When he is asked to speak, however, he speaks largely about science communication and, in particular, his weather station project.

2. The Defendants

[22] Peter Foster and Terence Corcoran are journalists who have had an interest in climate change over the years.

[23] Mr. Corcoran joined the *National Post* in 1998. While he is the editor of the *Financial Post*, the business section of the *National Post*, he is responsible for the *Financial Post* comment page. Mr. Corcoran produces his column on this page four times a week. He is also nominally the editor of the *Financial Post* magazine but has no responsibilities for the magazine.

[24] Mr. Corcoran testified his areas of interest over his career include government policy; national and provincial fiscal policy; monetary policy as it relates to government policy and the application of government policy; regulatory affairs and the security commission. Mr. Corcoran first started writing articles on global warming in 1988. His interest was initially in the policy side of this topic. His interest in the science of global warming arose when he joined *The Globe and Mail* in 1989. Since then, he testified he has “followed it carefully over the last 25 years”.

[25] Mr. Corcoran indicated he has delved into the IPCC reports many times; reading parts of the reports over the last 20 years. He has followed the controversies over the elements of science and policy making. Mr. Corcoran said the *Financial Post* comment page in the *National Post* has been associated with the issue of global warming for some time. The newspaper has been attacked numerous times with letters and comments on blog sites. Mr. Corcoran stated his character has also been attacked in this context. Questions have arisen as to whether the oil industry funds his writing. He noted while not true, that is the nature of the debate.

[26] Mr. Foster has written twice weekly columns for the *National Post* since 1998. In addition, he has written a number of books. Mr. Foster has been interested in the issue of global warming and the environmental movement since 1992. Early on, he was of the view that science might be polluted by ideology. His interest in writing on this stemmed from his time with the *National Post*, since at least 1999.

[27] Kevin Libin is a journalist who writes for the *Financial Post* magazine. He testified he has a particular interest in bias that might underpin science.

3. The Debate on Climate Change

[28] The debate for the purpose of this matter, as at the date of the publication of the articles, can be described as follows: on the one hand, scientists espouse the view that recent global temperatures demonstrate human-induced warming. On the other hand, other scientists say the science has not established this proposition.

[29] As set out in the IPCC's *Summary for Policy Makers in Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* at 10:

Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations. This is an advance since the TAR's [Third Assessment Report's] conclusions that "most of the observed warming over the last 50 years is *likely* to have been due to the increase in greenhouse gas concentrations". Discernible human influences now extend to other aspects of climate, including ocean warming, continental-average temperatures, temperature extremes and wind patterns...

[30] A brief description of the counter-point to this is set out in Lawrence Solomon's article, "*The original denier: into the cold*", published December 22, 2006 and February 2, 2007, which notes as follows:

To better understand the issue of climate change, including the controversies over the IPCC [Intergovernmental Panel on Climate Change] summary documents, the White House asked the National Academy of Sciences, the country's premier scientific organization, to assemble a panel on climate change. The 11 members of the panel, which included Richard Lindzen, concluded that the science is far from settled: "Because there is considerable uncertainty in current understanding of how the climate system varies naturally and reacts to emissions of greenhouse gases and aerosols, current estimates of the magnitude of future warming should be regarded as tentative and subject to future adjustments (either upward or downward)."

[31] In the November 30, 2009, article, "*The climate science is not settled*", Richard Lindzen notes:

The main statement publicized after the last IPCC Scientific Assessment two years ago was that it was likely that most of the warming since 1957 (a point of anomalous cold) was due to man. This claim was based on the weak

argument that the current models used by the IPCC couldn't reproduce the warming from about 1978 to 1998 without some forcing, and that the only forcing that they could think of was man. Even this argument assumes that these models adequately deal with natural internal variability- that is, such naturally occurring cycles as El Nino, the Pacific Decadal Oscillation, the Atlantic Multidecadal Oscillation, etc.

Yet articles from major modeling centers acknowledge that the failure of these models to anticipate for the natural internal variability. Thus even the basis for the weak IPCC argument for anthropogenic climate change was shown to be false.

[32] Part of the debate at the time of the publication of the four articles centered around an event referred to as "Climategate", where a large cache of emails were leaked or stolen from the University of East Anglia's Climate Research Unit (the "CRU"), an important research unit responsible for collecting temperature data. The emails were alleged to show imperfect data, the withholding of information by scientists and impacted the credibility of climate scientists who maintain climate change is occurring.

[33] There was extensive media coverage of Climategate in 2009 and negative commentary on the scientific practices and the comments by the scientists in those emails.

[34] This matter was ultimately reviewed in April 2010 by an international panel. One conclusion of the *Report on the International Panel set up by the University of East Anglia to examine the research of the Climate Research Unit* was:

We saw no evidence of any deliberate scientific malpractice in any of the work of the Climate Research Unit and had it been there we believe that it is likely that we would have detected it. Rather we found a small group of dedicated if slightly disorganised researchers who were ill-prepared for being the focus of public attention. As with many small research groups their internal procedures were rather informal.

[35] That, however, was not a conclusion available at the time the articles at issue were published.

[36] In addition, much has been debated between scientists over the "hockey stick" reconstruction of trends in global and hemispheric surface temperatures over the last millennium. This reconstruction appears to show recent Northern

Hemisphere warmth to be anomalous in the context of the last past millennium: see Michael Mann, Raymond Bradley and Malcolm Hughes, “*Global-Scale Temperature Patterns and Climate Forcing over the Past Six Centuries*” (1998) 392 *Nature* 779.

[37] Mann *et al.*'s study, which led to the initial hockey stick reconstruction, was criticized in 2003 by two Canadian scientists, Stephen McIntyre and Ross McKittrick, whose work is heavily relied upon by the defendants: see “*Corrections to the Mann et al. (1998) Proxy Data Base and Northern Hemispheric Average Temperature Series*” (2003) 14:6 *Energy and Environment* 751 [Corrections to the Mann].

[38] In 2005, Mr. McIntyre and Mr. McKittrick challenged the Mann *et al.*'s study again, maintaining the graph generated had a computer error that favoured data that would lead to a “hockey stick”: see “*Hockey Sticks, Principal Components, and Spurious Significance*” (2005) 32 *Geophysical Research Letters* L03710. In 2009, *The Copenhagen Diagnosis 2009: Updating the World on the Latest Climate Science* (Sydney: University of New South Wales Climate Change Research Centre, 2009) [*The Copenhagen Diagnosis*] at 45, noted these criticisms and reported that a 2006 National Research Council report largely supported the original findings.

[39] The scientific debate on climate change continues. That, however, is not something that can or should be resolved in this case. It is, however, part of the context that informs my determinations in this case.

4. Historical Events

[40] The context of this case includes the publication by Dr. Weaver of a number of articles and statements over the years leading up to the impugned publications. In addition, it includes the commentary and publication of articles by the *National Post* dealing with climate change and some of Dr. Weaver's publications over the years. It is therefore necessary to reference a variety of the pertinent publications.

[41] On September 2, 1999, the *National Post* published the article, “*Clash over climate change: Singer article clouds the picture*”, by Dr. Weaver which set out a number of comments including:

An overwhelming body of evidence points to significant warming over the past century, including tree ring analyses by Michael Mann and colleagues that reconstruct northern temperatures during the past 1,000 years. They show a dramatic increase in Northern Hemisphere temperatures at the turn of this century. In the 1,000-year record, 1998 represented the warmest year, the 1990s the warmest decade and the 20th century the warmest century.

While Dr. Singer correctly notes that natural oscillations play a significant role in determining climate, data analyzed by paleoclimatologist Jonathan Overpeck of the National Atmosphere and Ocean Administration have failed to identify any natural mechanism for the unprecedented warming that led to 1998 being the warmest year in at least the past 1,200 years. ...

Dr. Singer says the effects of climate change would be, on the whole, positive. I counter that scientist lack the ability to predict definitively how global warming will affect regional climates and extreme weather events, or what major climate surprises might be in store. So it surprises me that any economic analysis, which must make assumptions on all of these, is possible at all.

[42] In that article, Dr. Weaver referred to the “hockey stick” tree-ring analysis by Mann and colleagues. As noted earlier, this analysis reconstructs northern temperatures during the past 1,000 years showing a dramatic increase in northern hemisphere temperatures at the turn-of-the-century. The graph referred to in the Michael Mann article has been used in IPCC publications.

[43] On November 21, 2002, the *Financial Post* published an editorial by Dr. Madhav Khandekar titled “*Faulty forecast*” which referred to Dr. Weaver as the “unofficial spokesman” for David Anderson, Environment Minister.

[44] On November 25, 2002, Dr. Weaver forwarded an email to Mr. Corcoran and others at the *National Post*, requesting a formal retraction and apology for this reference. Dr. Weaver also denied, as per the November 2002 editorial, that he tried to pin individual weather events on global warming. Dr. Weaver noted he had written a number of pieces in which he states one can never do this, and attached a sample of his writing to this effect at the end of his email.

[45] The attached article by Dr. Weaver, which he stated was previously published by several newspapers, including the *Vancouver Sun* on August 20, 2002 as “*Kyoto isn't the answer; it is a first step*”, noted in the first two paragraphs:

...the difference between weather and climate is often not well understood by the public. By definition, climate is the statistics of weather including, for example, its means and variance. A torrential downpour is an individual weather event, whereas the likelihood of its occurrence in any given year is an aspect of our climate that is derived from long term averages of many individual weather event.

When we discuss climate change, we are discussing the change in the statistics of weather. The term Global Warming refers to the increase in the Earth's global mean temperature as a direct consequence of the increased atmospheric loading of greenhouse gases arising from fossil fuel combustion.

[Emphasis added.]

[46] As a result, on November 29, 2002, the *National Post* published the following "Correction/Clarification":

Dr. Andrew Weaver, a climatologist at the University of Victoria, is not an unofficial spokesman for David Anderson, the federal Environment Minister. Incorrect information appeared in a Financial Post editorial of Nov. 21. The Financial Post regrets the error.

- On a point of clarity, the Canadian climate model criticized by James O'Brien and Pat Michaels before a U.S. Congressional committee -- as was mentioned in the same editorial -- was the model of the Canadian Centre for Climate Modelling and Analysis, not the Earth System Climate Model developed by Dr. Weaver and his colleagues.

[47] On January 25, 2005, Corcoran published an article titled "*Canadians find flaw in Kyoto 'hockey stick': Global Warming debate*". Dr. Weaver denied making the statement attributed to him in that article. On February 2, 2005, the *National Post* published the following "Correction":

Andrew Weaver, a professor in the School of Earth and Ocean Sciences at the University of Victoria, has described the contention that the theory of global warming is reliant on research published by Dr. Michael Mann as "unadulterated rubbish," but he has not read a recent paper challenging Dr. Mann's work, by Ross McKittrick and Stephen McIntyre, published in *Geophysical Research Letters*. Incorrect information appeared in the *National Post* of Jan. 27. The *Post* regrets the error.

[48] Less than two weeks later, on February 15, 2005, Mr. Corcoran published an article in the *National Post* titled "*Bre-X climate*", in which he referred to Mr. McIntyre and Mr. McKittrick's article, noting the article found the statistical methods behind the famed hockey stick graph of world temperatures was flawed. Mr. Corcoran's article noted:

When the National Post broke the McIntyre/McKittrick story last month, the science establishment dismissed their work. Andrew Weaver, Canadian research chair at the University of Victoria, said that he hadn't read the McIntyre/McKittrick paper, but he generally condemned their earlier research as "rubbish."

[49] On that same day, Dr. Weaver again forwarded an email to Mr. Corcoran, complaining about incorrect attribution of quotes to him, despite the *National Post's* retraction on February 2, 2005. Dr. Weaver wrote, "As the *National Post* correctly noted in the retraction, what I noted was that to suggest that 'the theory of global warming is reliant on research published by Dr. Mann is 'unadulterated rubbish'".

[50] On August 23, 2006, Mr. Corcoran published an article in the *National Post* entitled "*Hockey sticks and hatchets: Inside the Globe's 4,200-word hatchet job on climate skeptics*". The article made a number of factual assertions about Dr. Weaver and noted, "...in 2004, Dr. Weaver dismissed the original hockey-stick research debunking the 1,000-year claim as 'simply pure and unadulterated rubbish'".

[51] Dr. Weaver sought to correct a number of factual errors made by Mr. Corcoran in that article. By email, Dr. Weaver noted he is not a Government of Canada employee, does not lobby for more government funding, had never been a member of any political party, and never dismissed the original hockey stick research debunking the 1,000-year claim as "simply pure and unadulterated rubbish". Dr. Weaver again noted that the newspaper had already published a retraction to this original quote on February 2, 2005. This, as cited earlier, set out that incorrect information appeared in the *National Post* on January 27, 2005 and regretted the error. A letter from Dr. Weaver, which corrected factual errors by Mr. Corcoran, was published in the *National Post* on August 31, 2006.

[52] Mr. Corcoran published the article "*Politics first, science second*" in the *National Post* on January 27, 2007, which he testified was to highlight the usual pattern of the IPCC to produce a semi-leaked document ahead of the official report and isolate keywords. In that article Mr. Corcoran references Dr. Weaver, noting that:

The University of Victoria's Andrew Weaver, official Canadian government climate modeller -- and the CBC's go-to scientist for suggestive but unproven links between bad weather and climate change -- blew himself right out of the galaxy over the Fourth Assessment Report. "This isn't a smoking gun; climate is a battalion of intergalactic smoking missiles."

[53] In December 2007, the Associated Press published an article, "*2007 set to be one of the warmest on record*", that quoted Dr. Weaver. The article reads in part:

The annual temperature for 2007 across the contiguous United States is expected to be near 54.3 degrees Fahrenheit – making the year the eighth warmest since records were first begun in 1895, according to preliminary data from NOAA's [National Oceanic and Atmospheric Administration's] National Climatic Data Center.

...

"Within the last 30 years, the rate of warming is about three times greater than the rate of warming since 1900," says Jay Lawrimore, chief of the climate monitoring branch at the center. "The annual temperatures continue to be either near-record or at record levels year in and year out."

...

"Including 2007, seven of the eight warmest years on record have occurred since 2001 and the 10 warmest years have all occurred since 1997," it added. "The global average surface temperature has risen between 0.6°C and 0.7°C since the start of the twentieth century, and the rate of increase since 1976 has been approximately three times faster than the century-scale trend."

"When you see these numbers, it's screaming out at you, 'This is global warming,'" said climate scientist Andrew Weaver of the University of Victoria in Canada. "It's the beginning and it's unequivocal."

Weaver said previous warm weather records probably would have been broken this year were it not for some cooling toward the end of the year because of La Niña – a cooling of the mid-Pacific equatorial region.

[54] This article was referred to by Mr. Corcoran in the January 2010 impugned article *Climate Agency Going up in Flames*.

[55] On February 27, 2008, Dr. Weaver forwarded an email to Mr. Corcoran concerning an article written by Mr. Foster. In that email, Dr. Weaver says:

Dear Mr. Foster,

I would like to ask you to please provide the evidence that I have "released a diatribe against the research of Ross McKittrick and Stephen McIntyre".

Your newspaper has already formally retracted a statement to this effect twice before and I have no idea why you keep repeating this. Obviously the

statement “The Post regrets the error” was insincere. It is now the third time the Financial Post has printed this incorrect assertion.

In addition, I would also ask that you provide evidence that I state “it is dangerous to allow skeptics a voice in scientific debate”. I have never made this statement. It makes no sense since by definition, real scientists are all skeptics. Being skeptical is precisely how one advances science. If you are referring to the interview I did many years ago with a UBC student that he published in the UBC journalism magazine “Thunderbird” then your statement is demonstrably incorrect.

Finally, the innuendo left by your statement “sounds suspiciously like Nature” implies that somehow I was involved in that Nature editorial. I knew nothing about it, was never contacted about it and only found out about it when an former graduate student now living in New Zealand sent it to me.

I am formally writing to ask you to retract these fallacies with an apology.

Dr. Andrew Weaver FRSC
Professor and Canada Research Chair in Climate Modelling & Analysis

[56] On February 29, 2008, the *National Post* published a correction as follows:

In a column in Wednesday’s paper, *Nature: Red in Tooth and Politics*, Peter Foster incorrectly stated that climate scientist Andrew Weaver had “released a diatribe” against the research of Ross McKittrick and Stephen McIntyre. Rather, Dr. Weaver has suggested that to believe that global warming theory depended on the work of Michael Mann, which was refuted by Messrs. McIntyre and McKittrick, was “unadulterated rubbish.” Also, Mr. Foster did not mean to imply that Mr. Weaver was in any way an author of the editorial in *Nature* magazine which was the subject of the column.

5. More Recent Events

[57] On November 24, 2008, a break-in occurred at Dr. Weaver’s third floor office at the University of Victoria. Dr. Weaver’s office is in the building that also houses the office of the Canadian Centre for Climate Modelling and Analysis (the “Centre”), a federal government agency on the second floor. Dr. Weaver reported in that break-in his papers appeared to have been shuffled through and a zippo lighter was gone. Three days later, on November 27, 2008, the office of Dr. Weaver’s assistant, whose office connected to Dr. Weaver’s office, was broken into. In this incident, a computer with the name *Journal of Climate*, on his assistant’s desk, was taken. While normally computers are locked to the desk with a cable, as this one was broken it was not attached. Dr. Weaver did not know of any other break-ins at the time.

[58] On Wednesday, February 11, 2009, Mr. Corcoran forwarded Mr. Foster an email attaching CBC program scripts from *The National*, which included a comment from Dr. Weaver as follows:

We're seeing increased summer drying associated with warming summer temperatures. So, yes, we will be seeing forest fires in the future on the scale that they're sitting there.

[59] On February 12, 2009, Mr. Foster sent Mr. Corcoran an email attaching an article entitled "*Green policy arsonists*". That article referenced the green movement in Australia opposing the controlled burning of bush and noted it bears much of the responsibility for the mega-fires in Australia.

[60] In November 2009, the University of New South Wales Climate Change Research Centre published *The Copenhagen Diagnosis*.

[61] Dr. Weaver was a contributing author to this publication. The report covered a range of topics evaluated by Working Group I of the IPCC, namely the physical science basis. The preface of the report noted in part:

The report has been purposefully written with a target readership of policy-makers, stakeholders, the media and the broader public. Each section begins with a set of key points that summarises the main findings. The science contained in the report is based on the most credible and significant peer-reviewed literature available at the time of publication. The authors primarily comprise previous IPCC lead authors familiar with the rigor and completeness required for a scientific assessment of this nature.

[62] On November 23, 2009, the CBC emailed Dr. Weaver about the upcoming Copenhagen meeting. On that same day, an article appeared in *Mail Online*, "*Climate Change scientists reject claims they manipulated data to prove global warming is caused by humans*".

[63] I have included this article to reflect the context of the articles at issue in this matter. It describes some of the issues referenced as "Climategate", which are noted in these articles. That article reads:

The director of a climate research unit at the centre of a row over manipulating data on global warming after hundreds of private emails were

stolen by hackers said today it was 'ludicrous' to suggest anything untoward took place during the research.

The material was taken from servers at the University of East Anglia's Climatic Research Unit, a world-renowned research centre, before it was published on websites run by climate change sceptics, possibly in a bid to undermine next month's global climate summit in Denmark.

But Professor Phil Jones, the centre's director whose emails were at the centre of the row, said he wanted to put the record straight.

Some commentators claimed his emails showed that scientists at the centre manipulated data to bolster their argument that global warming is genuine and is being caused by human actions.

In one email seized upon by sceptics, Prof Jones referred to a 'trick' being employed to massage temperature statistics to 'hide the decline'.

Today, he said the email 'caused a great deal of ill-informed comment, but has been taken completely out of context and I want to put the record straight'.

He said: 'The word 'trick' was used here colloquially as in a clever thing to do. It is ludicrous to suggest that it refers to anything untoward.'

But Lord Lawson, the former chancellor who is now a prominent climate change sceptic, called for an independent inquiry into the claims.

He said the credibility of the unit and of British science were under threat. 'They should set up a public inquiry under someone who is totally respected and get to the truth,' he told the BBC Radio Four Today programme.

'If there's an explanation for what's going on they can make that explanation.'

Kevin Trenberth, a leading climate change scientist whose private emails were also among those stolen, said the leaks may have been aimed at undermining next month's global climate summit in Denmark.

Dr. Trenberth, of the US National Centre for Atmospheric Research, in Colorado, said he believed the hackers deliberately distributed only those documents that could help attempts by sceptics to undermine the scientific consensus on man-made climate change.

'It is right before the Copenhagen debate, I'm sure that is not a coincidence,' he said.

The lead author on the 2001 and 2007 Intergovernmental Panel on Climate Change assessments said he found 102 of his emails posted online.

'I personally feel violated,' he said.

'I'm appalled at the very selective use of the e-mails, and the fact they've been taken out of context.'

In one of the stolen e-mails, he is quoted as saying: 'We can't account for the lack of warming at the moment and it is a travesty that we can't.'

He said sceptics had argued it showed scientists cannot explain some trends that appear to contradict their stance on climate change.

But Dr. Trenberth said his phrase was actually contained in a paper he wrote about the need for better monitoring of global warming to explain the anomalies – in particular improved recording of rising sea surface temperatures.

Last week, a spokesman for the University of East Anglia said: 'It is a matter of concern that data, including personal information about individuals, appears to have been illegally taken from the university and elements published selectively on a number of websites.

'The volume of material published and its piecemeal nature makes it impossible to confirm what proportion is genuine.

'We took immediate action to remove the server in question from operation and have involved the police in what we consider to be a criminal investigation.'

[64] On November 26, 2009, the *Georgia Straight* published the article "*Climate scientists under attack before Copenhagen summit*" by Travis Lupick, which noted:

Thousands of files recently stolen from the University of East Anglia's climate-research unit have the world buzzing ahead of December's summit in Copenhagen. Some have alleged that the documents and e-mails contain evidence of a conspiracy orchestrated by the scientific community to silence those who refute links between climate change and human activity.

But the University of Victoria's Andrew Weaver, a prominent climatologist, dismissed the entire matter outright and said that it does not change a thing about humanity's understanding of the environment.

"People don't like the freaking numbers," Weaver said from Victoria. "So what they are trying to do is create all sorts of controversy when controversy doesn't exist."

One e-mail receiving more attention than any other is a November 1999 message attributed to Phil Jones, director of the climate research unit at UEA. Jones wrote: "I've just completed Mike's Nature [the scientific journal] trick of adding in the real temps to each series for the last 20 years (i.e., from 1981 onwards) and from 1961 for Keith's to hide the decline."

Jones has since denied manipulating any data and said he regrets using "poorly chosen words" written during a moment of frustration.

Weaver maintained that thousands of scientists from around the world are in agreement on climate change, and noted that the UEA researchers are not the only climate scientists under attack.

He claimed to have knowledge of repeated attempts to hack into computers used by Environment Canada's Canadian Centre for Climate Modelling and Analysis, which has offices in the same building as Weaver's.

"There are people who don't like that message and they are trying to undercut that message by selectively targeting individuals," Weaver said.

[65] On December 2, 2009, Dr. Weaver emailed the CBC an undated article sent to him by Elizabeth May, titled “*And now to discuss those hacked emails*”, which included the comment:

Strange, isn't it that media are not wondering about who hacked into the computers and who paid them? Or why Dr. Andrew Weaver's office in Victoria has been broken into twice. My guess is that all the computers of all the climate research centres of the world have been repeatedly attacked, but defences held everywhere but East Anglia.

[66] During this time, Mr. Corcoran also took an interest in the Climategate emails. He was of the view it was a good idea for the *National Post* to have a comprehensive overview of Climategate. On December 19, 2009, the *National Post* published the article “*A 2,000-page epic on science and skepticism*”. This, Mr. Corcoran said, he wrote after reviewing hundreds of Climategate emails.

[67] Mr. Foster, as a journalist for the *National Post*, kept a file of notes and excerpts on Climategate as per his normal practice of assembling material on matters he writes on. As soon as the news concerning Climategate arose in 2009, Mr. Foster began compiling this set of notes which he utilized for the article *Weaver's Web*. Mr. Foster's notes included excerpts from articles in newspapers about these issues. In addition, Mr. Foster had transcribed a quote from the December 2nd broadcast of CBC's, *The National*, where Dr. Weaver stated:

... Where it gets a little nasty is where you have your office broken into twice in the past year which is my case. Or I have colleagues, for example, whose computers, people have tried to hack into them. I have other colleagues who you, you know, people posing as network technicians are wandering the halls trying to get access to offices.

[68] Mr. Foster was immediately struck by this comment. He decided to look into it further. In his notes, Mr. Foster wrote:

Andrew Weaver is the Canada Research Chair in Climate Modeling and Analysis. He is a true believer. [How did he get the job. The background Canada research chairs]

[69] On December 4, 2009, *The Globe and Mail* published an article by Thomas Homer-Dixon and Dr. Weaver called “*Responding to the Skeptics*”. Mr. Homer-Dixon is a professor at the University of Waterloo. At the time, he held the CIGI Chair of

Global Systems at the Balsillie School of International Affairs. Mr. Homer-Dixon had emailed Dr. Weaver on November 24, 2009, about writing a piece in *The Globe and Mail*. Mr. Homer-Dixon wrote the first draft of the article. Dr. Weaver ensured the scientific statements were accurate. The contents of this article reflect Dr. Weaver's views.

[70] A note in Mr. Foster's file about this article reads as follows:

When it comes to the rest of the strawman demolition job attempted this week by Messrs. Weaver and Homer-Dixon, they don't appear to understand the solar theory of climate influence, they claim that the "potential" change that the world is facing is "huge", which of course depends on the central uncertainty of the impact of anthropogenic carbon dioxide emissions.

[71] This comment, Mr. Foster indicated, reflected his view the article misrepresented the skeptics' arguments on climate. He referenced the solar theory as an example.

[72] Mr. Foster decided to write an article responding to the Homer-Dixon and Dr. Weaver article. Prior to doing this, Mr. Foster read the article "*Climategate does not change the reality of warming*", in the *Edmonton Journal* by Graham Thompson dated December 10, 2009, as follows:

The facts over Climategate are perplexing but what it clearly demonstrates is the lengths the denial industry will travel to in an attempt to confuse the public over climate change. One Canadian climatologist, Andrew Weaver at the University of Victoria, says scientists face a well-orchestrated campaign of harassment by deniers of global warming. He says his office has been broken into twice and hackers have tried to break into his computer system several times. "They were trying to find any dirt they could, as they have done in the UK." said Weaver. If they can't find "dirt", they manufacture it from out-of-context emails or skewed statistics.

[73] Mr. Foster was also aware of commentary on an Internet blog called the *DeSmog Blog*. It noted that:

It is no coincidence that the groups publicizing the University of East Anglia email hacking story also have a long history of taking money from oil and coal companies to attack the conclusions made by climate scientists...

[74] Meanwhile, on December 3, 2009, Megan O'Toole, a journalist working for the *National Post*, interviewed Dr. Weaver by phone about the upcoming climate

change summit in Copenhagen. Ms. O'Toole was referred by her editor to a CBC story on Dr. Weaver in 2009 and was asked to write an article.

[75] As part of her normal practice, Ms. O'Toole indicated she would have undertaken some research on Dr. Weaver's background and then spoke to Dr. Weaver. Ms. O'Toole indicated she likely would have written this story between 10:00 a.m. and 2:00 p.m. on December 3, 2009. Part of this process would include checking the video of the CBC story; checking Dr. Weaver's background; speaking to both Dr. Weaver and Ms. Pitts, a staff member from the University of Victoria; and drafting the article.

[76] On December 4, 2009, the *National Post* published Ms. O'Toole's article, "*People are trying to find anything; Security breaches*". The article commences as follows:

An alleged series of attempted security breaches at the University of Victoria in the run-up to next week's Copenhagen Summit on climate change is evidence of a larger effort to discredit climate science, says a renowned BC researcher.

Andrew Weaver, a University of Victoria scientist and key contributor to the Nobel prize-winning work of the intergovernmental panel on climate change, says they have been a number of attempted breaches in recent months, including two successful break-ins at his campus office in which a dead computer was stolen and papers were rummaged through.

"The key thing is to try to find anybody who's involved in any aspect of the IPCC and find something that you can... take out of context," Mr. Weaver said, drawing a parallel to the case of British climate researcher Phil Jones, who was forced to step down this week after skeptics seized upon hacked emails they allege point to a plot to exaggerate the threat of climate change.....

People don't like it, so they try to discredit it, and the way they try to discredit it is by attacking the individual responsible for it." Mr. Weaver said.

"The real story is this, who are these people and why are they doing it?" Mr. Weaver said, noting the Jones controversy was not the result of the "lucky hack" days before the Copenhagen conference. "They are trying to find anything. They don't care what it is."

He believes the campaign is driven by the fossil – fuel industry, citing "the war for public opinion". [Emphasis added]

[77] Both a transcript of the interview between Ms. O'Toole and Dr. Weaver and a recording of the interview were entered in evidence. There is some controversy as to

whether there is a gap in the recording in a critical part referencing the fossil fuel industry. While Dr. Weaver did not deny in cross-examination saying “fossil fuel” in the context of Climategate, he was adamant this comment was not with reference to any break-ins to his office.

6. The Publications at Issue

[78] Mr. Corcoran indicated the first information he had with respect to the break-ins at the University of Victoria was from *CBC, The National Newscast* on December 2, 2009. Mr. Corcoran obtained the script of that broadcast. He was forwarded a copy of Ms. O’Toole’s article on December 3, 2009, and sent it to Mr. Foster, along with a link to Mr. Lupick’s article “*Climate scientists under attack before Copenhagen summit*”. As quoted earlier, Mr. Lupick’s article included the following:

He claimed to have knowledge of repeated attempts to hack into computers, used by Environment Canada’s Canadian Center for Climate Modeling and Analysis which has offices in the same building as Weaver’s.

“There are people who don’t like that message and they are trying to undercut that message by selectively targeting individuals”, Weaver said.

[79] Mr. Foster indicated his knowledge with respect to the break-ins at the University of Victoria included *CBC’s The National Newscast* on December 2, 2009, in which Dr. Weaver noted his office had been broken into twice in the past year; and the article by Ms. O’Toole published on December 4, 2009, which referred to office break-ins in the last year noted by Dr. Weaver. This, Mr. Foster read on December 3, 2009, as the article was forwarded to him by Mr. Corcoran on that date. Mr. Foster then wrote the article *Weaver’s Web*.

[80] Mr. Corcoran sent an email to Matt Gurney, a *National Post* colleague, titled “*Add to peter*”, in reference to *Weaver’s Web*, as follows:

Was Weaver’s office the only office broken into? If other offices in non-climate department of the University also had computers stolen, might this suggest that the thefts Corcoran indicated that he would not insert something into Foster’s column without him being aware of it. Were they not related to climate change? Is it unreasonable to suggest that Weaver’s charge against the fossil fuel industry is totally without merit?

[81] This passage was added into the article *Weaver's Web*.

[82] In the evening of December 8, 2009, *Weaver's Web* by Mr. Foster was published on the Internet. On December 9, 2009, the *National Post* published *Weaver's Web* in the print edition of the *Financial Post* comment section.

[83] The second and third paragraphs of *Weaver's Web* noted amongst other things:

One demand being peddled by the powers-that-warm in Copenhagen and elsewhere is that we should all concentrate not on the damning emails, but on who was responsible for their "theft," which had to be carried out for money, which in turn obviously came from the fossil fuel industry.

These guilty until proven innocent villains have also been fingered by Canada's warmest spinner in chief, Dr. Andrew Weaver. Weaver, who is Canada research chair in climate modeling and analysis at the University of Victoria, claims that his office has been broken into twice, that colleagues have suffered hack attacks, and that mysterious man masquerading as technicians have attempted to penetrate the University's data defences.

[84] Mr. Foster noted the *CBC National Newscast*, the O'Toole article, and a December 2009 *Edmonton Journal* article by Mr. Thompson, led him to writing the second paragraph of *Weaver's Web*. Mr. Foster wrote that Dr. Weaver had "fingered these guilty until proven innocent villains" in the third paragraph as Dr. Weaver had pointed to a vague group which Ms. O'Toole identified as the fossil fuel industry. In addition, Mr. Foster noted he referred to the *DeSmog Blog* which claimed oil and gas industry were involved in the Climategate scandal. Mr. Foster stated in the fourth paragraph he suggested Dr. Weaver was making unfounded allegations by saying Dr. Weaver has no problem pointing to the shadowy culprits – the fossil fuel industry.

[85] When Dr. Weaver read this article, he was dumbfounded; shocked; and did not know how someone could write this about him.

[86] Late the same day, on December 9, 2009, at 11:13 p.m., *Weaver's Web II* by Mr. Corcoran was published on the Internet. The article was also published in the print edition of the *Financial Post* comment page. This follow-up to the column by Mr. Foster noted:

Following up on “*Weaver’s Web*,” Peter Foster’s column on this page yesterday regarding Andrew Weaver, Canada’s leading climate modeller and climate crime victim, we have news: the break-in at DOC Weaver’s office, which he linked to the evil fossil fuel industries attempt to discredit global warming policy, turns out to have been one of numerous break-ins at the University of Victoria.

[87] Mr. Corcoran stated he wrote this as he became aware of an article, dated December 9, 2009, by Mr. McIntyre about the break-ins at the University of Victoria that had no relation to climate issues. Mr. Corcoran testified his comment that Dr. Weaver had linked the break-ins to the fossil fuel industry was based on the article by Ms. O’Toole.

[88] Dr. Weaver testified he was hit with the second “whammy” when *Weaver’s Web II* was published by the *National Post* on December 10, 2009. He said he was in “sustained disbelief”; “blown away”; “devastated” with these personal attacks. He stated “it was a horrible experience”. He felt his character was being publicly assassinated across Canada two days in a row.

[89] Dr. Weaver stated the articles attributed to him things he had never said, for “all and sundry” worldwide to see. The readers’ comments to these articles posted December 9 and 10, 2009, had a significant level of vitriol. He was shocked and in disbelief.

[90] Dr. Weaver did not initially complain about these articles. He said he was “literally beaten” up by these editorials. It was also a very busy time of work, being the end of term in December; typically very busy with the second week being an exam period. He was wrapping up course work; dealing with projects and graduate students. Dr. Weaver testified if he could just ignore it, he thought it would go away. He did try to ignore it.

[91] Sometime later, on January 26, 2010, Dr. Weaver received an email from a German correspondent, Quirin Schiermeier, of the journal *Nature*, regarding *Re: Future of the Intergovernmental Panel on Climate Change: A query from Nature*. The email noted comments in the German weekly newsmagazine *Der Spiegel*, which called for the reform of the IPCC and the resignation of its chairman. The

correspondent asked a number of scientists to review the article and provide comments on the main points, including whether the IPCC is in need of significant institutional reform.

[92] On the morning of the same day, January 26, 2010, Dr. Weaver forwarded an email to Mr. Schiermeier, outlining his response in detail. At the same time, another journalist, Richard Foot, was assigned to write a story about Climategate by an editor from *CanWest*. He had previously published an article about the Climategate file on December 5, 2009, in *CanWest News Service*, titled “*The Canadians who changed the climate debate*”.

[93] Mr. Foot contacted Dr. Weaver by email, who agreed to a telephone interview to talk about his reaction to the story in the international press. Mr. Foot asked Dr. Weaver questions about the “Himalayan glacier melting” issue, the IPCC and its leadership. Mr. Foot stated his normal process was to tape the interview, make notes, and transcribe relevant points. He tries to quote and accurately paraphrase based on his notes.

[94] Dr. Weaver testified on January 24/25, 2010, he and Mr. Foot had two long conversations over the course of two days. Mr. Foot had not done much background research and did not appear to know anything about Dr. Weaver. From Dr. Weaver’s perspective, it was a “bizarre” interview. As Mr. Foot had so little background on the issues, Dr. Weaver spent significant time bringing him up to speed.

[95] Dr. Weaver talked about the IPCC; its mandate; its working groups; the fact it is policy-neutral, assessing science but not policy. Mr. Foot then posed a series of questions in an email, and a second conversation took place the following day. Dr. Weaver sent the *Der Spiegel* article to Mr. Foot prior to the publication of his article.

[96] Mr. Foot sent an unedited draft of the article to his editor in the afternoon of January 26, 2010. That same day, Mr. Corcoran emailed *CanWest News Service*

requesting a look at Mr. Foot's article or on an early version of what had been written so far.

[97] Later that evening, on January 26, 2010, Mr. Foot's article "*Canadian Scientist calls for overhaul of UN climate change panel*" was published online by *CanWest News Service*.

[98] This was followed by a tweet by Mr. Libin as follows:

Nice 2 C University of Victoria's Andrew Weaver finally gets wise to "Intergovernmental Panel on Climate Change's" problems Feel kind bad I'll be giving him a hard time in next week's FP Mag. Kinda.

[99] In Mr. Foot's article, Dr. Weaver was quoted on a number of points including allegedly making the comment:

Dr. Weaver says that Dr. Pachauri, the panel's chairman, should resign, not only for his recent failings but because he was a poor choice to lead the IPCC to begin with.

[100] Dr. Weaver was shocked when he saw this reference in the article. He testified he recalled telling Mr. Foot, specifically in his own words, that he was not calling for the resignation of Mr. Pachauri.

[101] As a result, late on January 26, 2010, at 11:56 p.m., Dr. Weaver sent an email to Mr. Foot as follows:

I saw the story today and wanted to follow up. I am surprised about this first paragraph: "a senior Canadian climate scientist says the United Nations' panel on global warming has become tainted by political advocacy, that its chairman should resign, and that its approach to science should be overhauled."

You and I both know that I specifically and pointedly stated that I am NOT calling for Pachauri to resign. That is something that the UN should decide.

All you have to do is review the tapes of the interview. Of course the quote attributed to me in the article is accurate. It is a measured statement. I stated "I think that is a very legitimate question." To ask. The whole nature of our discussion was with respect to the IPCC leadership (not the IPCC itself) sometimes crossing the lines into advocacy which the IPCC as an organization is not tasked to do. [p. 1630]

[102] In response Mr. Foot writes as follows:

Thanks for your email. I'm sorry to hear you feel I misrepresented you. Obviously that was not my intention. My understanding from our second interview is that you were indeed calling on Pachauri to resign – that you decided to make that statement, qualified by the fact that you felt Pachauri wasn't right for the job to begin with. I didn't make that nuanced point in the first paragraph – which is a summary of the story that followed – but I was careful to point it out later in the article as I went through various points. Here's what I wrote further down the piece:

“Weaver says Pachauri, the panel's chairman, should resign, not only for his recent failings but because he was a poor choice to lead the IPCC to begin with.” I carefully reviewed my notes from our second interview before writing the story. Here's what you said:

in the case of Pachauri, I agree with what is being said in Der Spiegel. [The Der Spiegel's piece you sent me, and endorsed, clearly called for his resignation].

“I would have argued he was the wrong appointments to begin with and I think he has crossed the line, and I would agree it's time to move on. So let's have them move on, not because of the latest Himalayan thing, because he should have moved on two years ago after last IPCC report was done. With too much power at helm for too long there is a danger you start to believe you're invincible. But I agree he should move on.”

Please call me today, or send me the time I can call you, if you'd like to discuss this further.

[103] On January 27, 2010 at 7:46 a.m., Dr. Weaver sent the following email to Mr. Foot:

Hi Richard, thanks for the email.

As you noted below, I sent you the Der Spiegel piece as I agreed with the substance of the criticism. That is, when you are a chair of an organization tasked with informing policy you should not be prescribing policy. The example of telling people not to eat meat is a case in point raised in that article.

I did state that I did not think Pachauri should have been reappointed for a second term. But I also was careful to point out that my opinions have nothing to do with the Himalayan thing. The way the first paragraph is spun without context is definitely misleading.

I was concerned about Pachauri advocacy not the IPCC's [which is an institution] reporting to the UNFCCC [that is not made clear]. I did not call on him to resign. Me “agreeing that he should move on” is absolutely not the same as “my calling for him to resign”. In my opinion, this is the spin that was manufactured.

[104] Mr. Foot did not respond to Dr. Weaver's final email and did not speak to Dr. Weaver again. Dr. Weaver agreed he made no complaint about the column by Mr. Foot. He felt he had corrected the public record by sending letters to the editor of a variety of publications.

[105] On January 27, 2010, a shortened version of Mr. Foot's article appeared in the *National Post* titled "Overhaul UN climate panel, scientist urges 'fundamental shift'". The article commences with:

A senior Canadian climate scientist says the United Nations panel on global warming has become tainted by political advocacy, that is chairman should resign, and that its approach to science should be overhauled.

[106] That same day, the *National Post* also published the third article at issue. That article, written by Mr. Corcoran, was on the front page of the print edition of the *National Post*. It was titled "Climate Agency Going up in Flames" with the subtitle "Exit of Canada's Expert a Sure Sign IPCC in Trouble". In that article, Mr. Corcoran, amongst a number of statements, said:

A catastrophic heatwave appears to be closing in on the intergovernmental panel on climate change. How hot is it getting in the scientific kitchen where they've been cooking the books and spicing up the stew pots? So hot, apparently, that Andrew Weaver, probably Canada's leading climate scientists, is calling for replacement of IPCC leadership and institutional reform.

If Andrew Weaver is heading for the exits, it's a pretty sure sign that the United Nations agencies under monumental stress. Mr. Weaver, after all, has been a major IPCC science insider for years. He is Canada research chair in climate modeling and analysis at the University of Victoria, mastermind of one of the most sophisticated climate modeling systems on the planet, and lead author on two recent landmark IPCC reports.

[107] He went on to say:

The latest IPCC fiasco looks even more damaging. In the 2007 IPCC reports that Mr. Weaver said revealed climate change to be a barrage of intergalactic ballistic missiles, it turns out one of those missiles – a predicted melting of the Himalayan nation ice fields by 2035 – was a fraud. Non-accidental fraud, but a deliberately planted pieces science fiction. The IPCC author who planted that false Himalayan meltdown said the other day "we" did it because "we thought... It will impact policymakers and politicians and encourage them to take some concrete action."

[108] Once Dr. Weaver saw the two articles, he was of the view he had been set up by Mr. Corcoran. He felt Mr. Corcoran had gotten Mr. Foot to do a “hatchet job” on him – “Here we go again someone who doesn’t know who I am; an example of Mr. Corcoran personally trying to discredit me”.

[109] The article by Mr. Corcoran had initially appeared online on January 26, 2010 at 8:10 p.m. posted by the *National Post* editor. Dr. Weaver reviewed at least 76 reader comments on the article. These comments were placed into evidence. As an example, the first reader comment, posted January 26, 2010 at 8:36 p.m., reads:

Dr. Weaver is as big a hypocrite as he is a fraudster. He was front and center with his “global warming” lies and deception and should be made to repay his research monies and lose his tenure and degrees. A few centuries in jail would give him time to reflect on his part in the biggest fraud in the history of mankind. Perhaps he would settle for a 100-year sentence by giving evidence against his fellow fraudsters?

[110] There are many other reader comments of this nature. The comments continued for quite some time.

[111] Dr. Weaver testified he no longer checks the reader comments as they are too disturbing. He testified it was “crushing”; people claimed he was a fraud; a liar; many people attacked him in phone-in shows. He did not know what to do to defend himself. All of this was based on a complete fabrication of facts.

[112] In addition to the articles in the *National Post* and *Financial Post*, Dr. Weaver testified he googled key words such as “Climate Agency in Flames” to ascertain where the articles appeared. He determined the articles were distributed over the Internet; going worldwide, in particular in the U.S. The article was on hundreds of sites. Dr. Weaver reviewed a number of sites in order to determine whether they had been distributed there and whether they were still available.

[113] Clarifications by Dr. Weaver in relation to Mr. Foot’s article, which appeared in numerous newspapers under different titles, were published by newspapers in Victoria, Calgary, Edmonton, Nanaimo, and Vancouver: “*Weaver clarifies comments on panel*” *Times Colonist* (29 January 2010); “*Clarity on climate*” *Calgary Herald* (30

January 2010); “*Prof clarifies position on climate panel*” *Edmonton Journal* (31 January 2010); “*IPCC findings sound in face of all controversy*” *Nanaimo Daily News* (1 February 2010); and “*Weaver sets the record straight*” *Vancouver Sun* (2 February 2010).

[114] In “*Weaver clarifies comments on panel*”, Dr. Weaver noted Mr. Foot’s article suggested he believed the IPCC “was tainted by political advocacy; that its chairman should resign, and that its approach to science should be overhauled”. Those statements, he noted, did not accurately reflect his views.

[115] Dr. Weaver also set out his views in the “*Clarity on climate*” clarification published in the *Calgary Herald* as follows:

The above article suggested that I believe the UN Intergovernmental Panel on Climate Change (IPCC) was tainted by political advocacy, that its chairman should resign, and its approach to science overhauled. These statements do not accurately reflect my views. I have been a lead author on chapters in IPCC assessments in 1995, 2001 and 2007. The IPCC offers policy-makers rigorous assessments of climate change science. It develops reports that inform policy, but it does not prescribe policy outcomes. Any recommendations represent individual views, rather than the IPCC’s view. Some have been questioning whether certain statements by the chair are appropriate. These are legitimate questions to ask, but I am not calling for the chair’s resignation.

The IPCC has three working groups: Science; Impacts and Adaptation; and Mitigation. These groups have become large due to the enormity of evidence to be examined and there is not as much interaction among them as they should be. The recent erroneous statements regarding the likelihood of the Himalayan glaciers “disappearing by the year 2035 and perhaps sooner” is a case in point. Were there more regular interactions among the groups, such a statement would likely have been caught by the broader science community. The IPCC groups recognize the need for better interaction. None of this changes the IPCC’s conclusions concerning the human contribution to global warming. These conclusions are supported by the national science academies of the U.S., U.K., France, Germany, Canada, China, India, Japan and other nations. The question is whether we want to deal with this problem.

For this, the IPCC cannot provide the answer.

[116] On February 1, 2010, the *National Post* published an editorial by an unspecified author titled “*The IPCC needs a makeover*”.

[117] On February 2, 2010, the *National Post*, via the print edition of the *Financial Post Magazine*, published the fourth article at issue, *So Much for Pure Science*, written by Mr. Libin. That article commences with these comments:

Confronted with the infamous hacked emails from the University of East Anglia's Climate Research Unit – suggesting scientist at one of the world's most influential climate labs conspired to manipulate data and censor research that cast doubt on anthropogenic global warming – one of Canada's most prominent scientists zeroed in on what he saw as the heart of the scandal. "The real story in this is, who are these people and why are they doing it?" demanded Andrew Weaver, a University of Victoria atmospheric scientist and contributor to the Intergovernmental Panel on Climate Change's reports blaming humans for altering the weather. He actually meant the hackers: agents of Big Oil, he figured. They "don't like" the research, "so they try to discredit it."

[118] Dr. Weaver was again shocked when he saw the article and felt "here we go again"; everyone in the *National Post* was after him – it was no longer just Mr. Foster and Mr. Corcoran. Mr. Libin had never contacted Dr. Weaver. The attacks were spreading; going viral with the *National Post*, including editorials targeting him as an individual. He felt he had no other choice but to now correct the public record; to try to put an end to the "complete fabrication of facts" and claims attributed to him which were completely inaccurate. He concluded he could no longer simply allow the character assassination and mistruths to continue.

[119] On February 10, 2010, Dr. Weaver's counsel contacted the defendants, via letter, alleging defamation in relation to *Weaver's Web II* and *Climate Agency Going up in Flames*; *Weaver's Web* on February 11, 2010; and *So Much for Pure Science* on February 12, 2010. The letters requested retractions and apologies in relation to the four articles and the immediate withdrawal of the articles from the Internet.

[120] Dr. Weaver set up a "Wall of Hate" outside his office. Copies of diatribes against him are posted since the issue arose in 2010. He testified about and noted the photo of a person at the entrance to the University of Victoria, carrying a placard which called him a liar. Dr. Weaver testified he filed this lawsuit as it appeared to be the only option left due to the persistent attacks by the *National Post*, Terence

Corcoran, Peter Foster and now Kevin Libin. He needed to correct the public record and protect his name.

[121] On April 21, 2010, as a result, Dr. Weaver commenced this action for defamation.

IV. DEFAMATION

[122] The elements required to establish defamation are set out in the Supreme Court of Canada decision in *Grant v. Torstar*, 2009 SCC 61 at para. 28 [*Grant*]:

A plaintiff in a defamation action is required to prove three things to obtain judgment and an award of damages: (1) that the impugned words were defamatory, in the sense that they would tend to lower the plaintiff's reputation in the eyes of a reasonable person; (2) that the words in fact referred to the plaintiff; and (3) that the words were published, meaning that they were communicated to at least one person other than the plaintiff. If these elements are established on a balance of probabilities, falsity and damage are presumed, though this rule has been subject to strong criticism... The plaintiff is not required to show that the defendant intended to do harm, or even that the defendant was careless. The tort is thus one of strict liability.

[123] Where the plaintiff succeeds in proving the elements of defamation, "the onus then shifts to the defendant to advance a defence in order to escape liability": *Grant* at para. 29.

1. Were the Statements Defamatory?

[124] Dr. Weaver says the words used in the various publications are capable of being defamatory in their natural and ordinary meaning and in the inferences or innuendos that the words contain.

[125] In considering whether the words complained of are defamatory, the first task of a judge is to determine whether the words complained of are reasonably capable of a defamatory meaning. The question of whether the words are capable of a defamatory meaning is a question of law. The question of whether the words were in fact defamatory is a question of fact: *Lawson v. Baines*, 2012 BCCA 117 at paras. 11-12 [*Lawson*].

[126] In *Mainstream Canada v. Staniford*, 2013 BCCA 341 at para. 15 [*Mainstream* (C.A.)], the BC Court of Appeal observed in a defamation action tried by a judge alone, it is not necessary for the judge to first determine whether the words in question were capable of having a defamatory meaning. Rather, it is only necessary for the judge to determine whether the words did in fact have a defamatory meaning.

[127] The applicable legal principles concerning defamatory meaning are well settled. In *Cherneskey v. Armadale Publishers Ltd.*, [1979] 1 S.C.R. 1067 at 1079 [*Cherneskey*], the Supreme Court of Canada referenced *Gatley on Libel and Slander*, 7th ed., at 5, para. 4:

Any imputation which may tend to lower the plaintiff in the estimation of right-thinking members of society generally or to expose him to hatred, contempt or ridicule is defamatory of him.

[128] The words or expressions must be such as to adversely affect the reputation of the plaintiff: *Lund v. Black Press Group Ltd.*, 2009 BCSC 937 at para. 114.

[129] As set out in *Lawson* at para. 13:

There are three alternate means by which defamation can be proven:

- a) if the literal meaning of the words complained of are defamatory;
- b) if the words complained of are not defamatory in their natural and ordinary meaning, but their meaning based upon extrinsic circumstances unique to certain readers (the “legal” or “true” innuendo meanings) is defamatory; or
- c) if the inferential meaning or impression left by the words complained of is defamatory (the “false” or “popular” innuendo meaning).

[130] Dr. Weaver complains about both the literal and inferential meaning of the words relying on the first and third meanings as set out in *Lawson*.

[131] In assessing the natural and ordinary meaning of the expressions at issue the test is objective. The words must be considered in the sense they would reasonably be understood by an ordinary person in light of his or her general knowledge and experience and generally known facts: *Lawson* at para. 23.

[132] More often the sting is not so much in the words themselves as in what the ordinary person will infer from them. In *Leenen v. Canadian Broadcasting Corp.*, 48 O.R. (3d) 656 at 676, aff'd (2001), 54 O.R. (3d) 612 [*Leenen*] the Court notes that “[o]ne does not select a meaning that is the harshest and most extreme because the test assumes a reasonable and fair-minded audience, rather than one that is looking to the question of the plaintiff’s reputation”.

[133] In determining the meaning of a publication, the court may take into consideration “all of the circumstances of the case, including any reasonable implications the words may bear; the context in which the words are used; the audience to whom they were published and the manner in which they are presented”: *Crookes v. Newton*, 2011 SCC 47 at para. 39 [*Crookes*], citing *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at para. 62.

[134] With these principles in mind, I must determine whether the words complained about by the plaintiff, Dr. Weaver, were capable of and in fact defamatory.

[135] In my view, whether the words used tended to injure Dr. Weaver’s reputation is best ascertained by considering the inferential meaning of the words at issue. The facts and circumstances around the making of the statements are important. That context, in this case the debate in the scientific community about climate change, along with Climategate, is noteworthy in ascertaining the inferential meaning of the words.

[136] There is a distinct overlap between the four publications at issue. Accordingly, I will deal with the overlapping facts and circumstances in coming to a conclusion about the words and publications at issue. While I have considered the individual statements, I will not deal with the specifics of each word or sentence alleged to be defamatory but rather summarize the general allegations made in this matter.

[137] Essentially, the allegations of the defamatory character of the words in the four articles can be summarized as the following innuendos or inferences that Dr. Weaver:

- (a) attempted to divert public attention from the IPCC and Climategate scandal by fabricating stories about the involvement of the fossil fuel industry with respect to the break-ins at his office, theft of emails from a UK University, and hack attacks at the Centre;
- (b) engaged in deceptive misconduct in the news media to do so;
- (c) engaged in willful manipulation and distortion of scientific data for the purposes of deceiving the public in order to promote a public agenda;
- (d) in doing so, is motivated by a corrupt interest in receiving government funding and financial rewards;
- (e) is wilfully concealing scientific climate data;
- (f) knows or believes the IPCC reports concerning global warming are unscientific and fraudulent and seeks to avoid personal accountability for the manipulation/distortion of those reports by disassociating himself from that organization;
- (g) has deceitfully or incompetently linked current weather and temperature events with global warming;
- (h) authored a deceitful and manipulative work of agitation propaganda known as *The Copenhagen Diagnosis*; and
- (i) is untrustworthy, unscientific and incompetent.

[138] The defendants say there is a live issue as to whether any of the words are defamatory. The defendants maintain the statements are about Dr. Weaver's public actions and words and, even if false, do not impugn his character. The defendants

argue, indicating Dr. Weaver resigned from the IPCC, even if false, is not defamatory. It does not go to his character as there is no moral fault or turpitude that flows from that statement. There is also nothing in the nature of an attack on a person's character when Dr. Weaver is said to have blamed the fossil fuel industry for attempts to breach security; that he criticized the IPCC and its chairman; that he wrote an article which fails to address key arguments and made some dodgy ones; or that he has distracted from the Climategate issues by focusing on the hackers. These are statements about his public actions and words, not his character.

[139] With respect to Mr. Libin's article, *So Much for Pure Science*, the defendants maintain the column speaks in general terms about how bias can creep into science in numerous ways. Mr. Libin did not refer to University of Victoria break-ins. The reference to Dr. Weaver claiming the Climategate hacking in England was linked to the fossil fuel industry's attempt to smear the scientists was taken from the Dr. Weaver's statements reported in the O'Toole story. The reference to Dr. Weaver's reflex to distract was his view, as Dr. Weaver was making an issue about the hackers, rather than the content of the leaked emails. The statement Dr. Weaver's career benefits from the importance of global warming issue is an obvious inference or deduction based on Dr. Weaver's career as an author, speaker, public figure and academic on global warming issues.

[140] While at first blush the articles may appear to be associated with actions such as commenting on various theories associated with climate warming in the media or the associated organizations, the reality is the combination and cumulative effect of these articles is such as to adversely impact on Dr. Weaver's reputation and integrity as a scientist. Imputations of dishonest behaviour on the part of a scientist or professor in that role can constitute defamation.

[141] The critical context of these remarks was the controversy surrounding the Climategate media storm, in which numerous allegations were made as a result of hacked emails that directly impacted on the credibility of scientific research at the University of East Anglia's CRU at this time. Dr. Weaver's name was consistently

raised in this context without any distinct differentiation, thereby lending credibility to the argument the articles painted Dr. Weaver with the same brush and deliberately smeared his reputation. That flaw led to the overall inference of a lack of integrity in the professor's research and actions.

[142] While the initial story that Dr. Weaver linked the fossil fuel industry with break-ins to his office in isolation may not by itself impact on his character, the inference in both *Weaver's Web* and *Weaver's Web II* is Dr. Weaver fabricated the linkage of the fossil fuel industry to break-ins to further his own interests when those break-ins had occurred throughout the university. Those interests were identified as deflecting criticism from the Climategate controversy as it impacted his own scientific credibility. The allegation he did so impacts on his ethical reputation. It creates the impression he concocted a false story in order to distract from the Climategate scandal in the press.

[143] The impression created by *Climate Agency Going up in Flames*, the third article at issue, was that Dr. Weaver knew or believed the IPCC reports concerning global warming were unscientific and fraudulent and sought to avoid personal responsibility by disassociating himself from that organization. There is an allegation of "cooking the books" in the scientific kitchen in *Climate Agency Going up in Flames*, painting a picture of deceit, with a clear impact on Dr. Weaver's character.

[144] The defendants maintain the reference to "cooking the books" was not a reference to Dr. Weaver. It was about those amongst the hundreds involved in the CRU and IPCC who were involved in fiascos, which none of the articles connect to Dr. Weaver personally. I have concluded, however, that reference in this context includes Dr. Weaver. That will become more apparent when I deal with the whether the remarks are "of and concerning" Dr. Weaver.

[145] In addition, I conclude there is innuendo that Dr. Weaver is incompetently linking current weather and temperature events with global warming "painting sensational pictures". This is also troubling as Dr. Weaver has, over the years, as set out earlier in this case, sought corrections and retractions from the *National Post*

and Mr. Corcoran, in particular, when he has previously been misquoted. The *National Post* and Mr. Corcoran knew about Dr. Weaver's cautious views on this point and ignored them in the pertinent articles. I will elaborate on this further as part of my analysis.

[146] The words in *So Much for Pure Science* continued the theme that Dr. Weaver was deceitful and had falsely accused the fossil fuel industry of being involved with the leaked or stolen emails from the CRU for the purposes of diverting public attention from the alleged misconduct of the CRU. More importantly, however the article again, by the inferential meaning of the words to an ordinary reader, contained the innuendo Dr. Weaver was not a competent or credible scientist by this action and was compromised by the receipt of financial rewards from the public purse. I agree the title *So Much for Pure Science* was a reference to impure or corrupt science. The first two paragraphs of the article then reference Dr. Weaver and his "reflex to distract" in this context.

[147] The defendants argue any decision on this matter must avoid a chill on the "freewheeling debate" which Canadian courts are mandated to protect: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 at para. 2 [*WIC Radio*]. While the Supreme Court of Canada is clear about the critical importance of free speech, as noted earlier, this does not provide a roadmap to the individual's reputation as a "regrettable but unavoidable road kill on the highway of public controversy": *WIC Radio* at para. 2.

[148] The object of the exercise as set out in *WIC Radio* is to attempt reconciliation between the protection of an individual's worth and dignity, including their reputation, with freedom of expression: at para. 2.

[149] There is no doubt the court should avoid putting the worst possible meaning on the words. I have applied the test of a reasonable, objective viewer, focusing on what an ordinary person would infer, given their general knowledge and experience.

[150] In my view, a reasonable person, after a review of the combination of the articles would conclude that Dr. Weaver, in his position as a scientist and professor,

is incompetent and/or deceitful. This is particularly so as the comments regarding Dr. Weaver were made in the context of the “Climategate scandal whereby scientists were alleged to have fudged the numbers in order to support their respective thesis on climate change”. Indeed, as set out in *Gatley on Libel and Slander*, 12th ed (London, UK: Thomson Reuters, 2013) at 82:

It is defamatory to impute that a person is unfit for his profession or calling owing to want of ability, mental stability, learning or some other necessary qualification, or that he has been guilty of any dishonest or disreputable conduct or any other misconduct or inefficiency therein.

[151] Essentially, the synthesis of the allegations is to attribute by inference to Dr. Weaver misconduct concerning research in the area of climate change, such that Dr. Weaver’s character is impugned with allegations of having an incompetent, inept, and unethical character. Dr. Weaver’s reputation is blotted with innuendos of research misconduct. There is also the inference of deceit in the guise of distraction from research misconduct in the climate science area, which arises from the series of articles.

[152] It is one thing to debate the merits of a theory. It is quite another to impugn a person’s character with innuendos concerning honesty, ethics and competence in the course of that debate: see *Myers v. Canadian Broadcasting Corp.* (1999), 47 C.C.L.T. (2d) 272 at para. 173, aff’d (2001), 54 O.R. (3d) 626 [*Myers* (S.C.)].

[153] The Ontario Court of Appeal, in *Myers v. Canadian Broadcasting Corp.* (2001), 54 O.R. (3d) 626 at para. 21 [*Myers* (C.A.)] noted:

As in *Hill*, Myers was attacked in his calling, in his profession and, as found by the trial judge, Myers was defamed “through the distortion of his own words which has the effect of being especially damaging, since it is much more difficult to explain the truth”.

[154] A reading of the articles as a whole leads me to conclude an ordinary person would find the inferences from the words complained of defamatory. These inferences from the words complained of in the four articles are that Dr. Weaver has been deceitful to the public; attempted to distract the public from his academic failings in his research on climate change; and the public cannot trust what he says.

Essentially, the inferences support the conclusion Dr. Weaver is incompetent, inept, and unethical.

[155] Turning to the specific articles, I summarize my conclusions as follows.

[156] With respect to *Weaver's Web*, I conclude the words were understood and intended by the defendants to bear the inferential meanings that Dr. Weaver:

- (a) attempted to divert public attention from the Climategate scandal by fabricating stories about involvement of the fossil fuel industry in: (i) two break-ins at his office; (ii) hack attacks on the Centre; and (iii) an attempt by men masquerading as technicians to enter the Centre after hours on Friday;
- (b) engaged in willful manipulation and distortion of scientific data for the purpose of deceiving the public in order to promote a political agenda;
- (c) is untrustworthy, unscientific, and incompetent; and
- (d) engaged in a pattern of deceptive conduct in the news media to deflect attention from and cover-up alleged misconduct at the IPCC described by the defendants as "Climategate".

[157] These conclusions arise from:

- the context and reference to Climategate without distinguishing Dr. Weaver from that alleged scandal and the "incriminating emails";
- the pejorative reference to Dr. Weaver as Canada's "warmest spinner-in-chief";
- the reference to Dr. Weaver's "claim" that his office had been broken into;
- the reference to Dr. Weaver's "charge" against the fossil fuel industry; and

- all in conjunction with the title “*Weaver’s Web*” and “spinning from the climate industry in the wake of Climategate”. The title and that line introduced the theme of the piece which was in essence spin or deception by Dr. Weaver.

[158] The plaintiff was named numerous times in this article, including a specific reference to his title “Canada Research Chair in Climate Modeling and Analysis”. He is noted as being in the “forefront of the warmest counterattack” and referenced as a climate alarmist. While some of these references may be characterized as simply derogatory, the pervasive theme of deception, reiterated and elaborated on in *Weaver’s Web II*, taints the words and lends support to this conclusion.

[159] With respect to *Weaver’s Web II*, I conclude the defendants understood and intended the inferential meanings that Dr. Weaver:

- (a) concocted a false story for media consumption that his office break-ins were “linked to the evil fossil fuel industry’s attempt to discredit global warming policy”;
- (b) his deceitful claims were exposed by a University informant who released a December 2, 2009 “university-wide email which warned” that “there have been a number of office and lab break-ins across the campus in recent days, initially Science and Engineering buildings, but now Cornett and BEC”; and
- (c) is deceitful and incompetent.

[160] These conclusions arise from:

- the context and reference to Climategate without distinguishing Dr. Weaver;
- the reference to “Doc Weaver” linking the break-in of his office to the “evil fossil fuel industry’s attempt to discredit global warming policy turns

out to have been one of numerous break-ins at the University of Victoria”;

- the reference to Doc Weaver implying a connection to the Climategate scandal at the CRU;
- the inference arising from the comment that a UVic informant sent a copy of an internal University of Victoria email on the university break-ins after reading that Doc Weaver was publicly blaming the oil industry for the break-in.

[161] The title *Weaver's Web II* and these statements, lead to the clear inference he was fabricating this story for his own interests and is thereby deceitful and incompetent.

[162] With respect to *Climate Agency Going up in Flames*, I conclude the defendants understood and intended the inferential meaning of the words to be that Dr. Weaver:

- (a) knows the IPCC reports concerning global warming are unscientific and fraudulent. He seeks to avoid personal accountability by dissociating himself from IPCC and calling for the replacement of its leadership and institutional reform of the IPCC;
- (b) has deceptively made numerous television appearances in which he linked current weather and temperature events with global warming, painting sensational pictures and dramatic links;
- (c) deceitfully concocted a false story alleging the involvement of the fossil fuel industry in a break-in at his office and in the theft of emails from a UK university;
- (d) condoned the inclusion of fraudulent information in the 2007 IPCC report; and

- (e) has betrayed his obligation as a scientist to provide information he believes to be truthful to the public generally by knowingly and corruptly participating in a scam to obtain public money for his personal, selfish benefit.

[163] These conclusions arise from:

- the full title of *Climate Agency Going up in Flames* which includes the subtitle: “Exit of Canada’s expert a sure sign IPCC in trouble”;
- the reference to Dr. Weaver as an “insider” who is “getting out while the getting’s good”;
- the reference to the IPCC and “cooking the books”;
- the paragraph indicating “Mr. Weaver’s acknowledgment that Climategate – the release/leak/theft of thousands of incriminating emails from a British climate centre showing deep infighting and number manipulation”, concluding with the comment that “[w]hen Climategate broke as a story last November, Mr. Weaver ... appeared in the media with a cockamamie story about how his offices had also been broken into and that the fossil-fuel industry might be responsible for both Climategate and his office break-in”; and
- the article then links Dr. Weaver to what it says is a fraud, by noting:

The latest IPCC fiasco looks even more damaging. In the 2007 IPCC report that Mr. Weaver said revealed climate change to be a barrage of intergalactic ballistic missiles, it turns out one of those missiles — a predicted melting of the Himalayan ice fields by 2035 — was a fraud. Not an accidental fraud, but a deliberately planted piece of science fiction. The IPCC author who planted that false Himalayan meltdown said the other day “we” did it because “we thought ... it will impact policy makers and politicians and encourage them to take some concrete action.”

[164] These words once again support the inference Dr. Weaver is incompetent, unethical, and deceitful.

[165] With respect to *So Much for Pure Science*, I conclude the defendants understood and intended the inferential meanings that Dr. Weaver:

- (a) is deceitful, avaricious, and untrustworthy;
- (b) deceitfully accused the fossil fuel industry of being involved with the hacked emails from the CRU for the purpose of distracting and diverting public attention from the misconduct of the CRU;
- (c) deceitfully promoted the false theory that global warming is occurring and is caused by human activity in order to cause public panic and generate funding to satisfy a selfish personal interest in receiving financial rewards from the public purse; and
- (d) is not a competent or credible scientist.

[166] These conclusions arise from:

- the context of Climategate;
- the reference to the manipulation of data and censoring of research that casts doubt on anthropogenic global warming along with the comment that Dr. Weaver said the real story was who was hacking the emails: “He actually meant the hackers; agents of Big Oil, he figured. The “don’t like the research “so they try to discredit it”; and
- the reference to “Weaver’s reflex to distract is understandable: The success of his book *Keeping Our Cool* ... and, to some extent, his career success, depend on the momentum of global-warming panic”.

[167] The inference of these comments in the context of Climategate and the alleged manipulation of data lead the ordinary reader to believe Dr. Weaver has been deceitful and is promoting his scientific views to satisfy his personal gain.

[168] I reiterate my conclusion that an ordinary reader would infer these meanings from an overall consideration of the articles; particularly the first three, which relatively quickly set the stage for the theme of deception and incompetence. The plaintiff's integrity and credibility as a professor and scientist was called into question, thereby damaging his personal and scientific reputation.

2. Were the Statements "Of and Concerning" Dr. Weaver?

[169] The defendants say there is a live issue with respect to whether the words complained of were "of and concerning" Dr. Weaver. While his name is used and certain paragraphs may be about him, others were about scientists involved in Climategate and not about Dr. Weaver. The defendants maintain the Court needs to take a close look at whether a reasonable person would identify certain statements with Dr. Weaver or whether they were about many others. They submit many of the statements, such as the reference to climate alarmists and to the scientists involved in the Climategate scandal or Himalayan error, or about the scientific debate more generally, were not "of and concerning" Dr. Weaver at all.

[170] I do not agree. As is evident from my analysis of whether the words were defamatory, I have concluded the words were "of and concerning" Dr. Weaver.

[171] The test is objective as to whether an ordinary person would understand the words to be about Dr. Weaver: see *Bou Malhab v. Diffusion Métromédia CMR inc.*, 2011 SCC 9 at para. 57 [*Bou Malhab*]. The mere fact the person is referred to in the publication does not make every statement about him. One must look at the words in their context.

[172] The factors set out in *Bou Malhab* include: (a) the size of the group; (b) the nature of the group; (c) the plaintiff's relationship with the group; (d) the real target of the defamation; (e) the seriousness of the allegations; (f) the plausibility of the comments; and (g) extrinsic factors: at paras. 58-78.

[173] Dr. Weaver is named numerous times in each article dealing with the Climategate and IPCC matters. He is referred to as part of the group of climate

alarmists in *Weaver's Web*. He is also referred to as the "warmest spinner-in-chief" in that context. Indeed, two of the articles use Dr. Weaver's name in the title; *Weaver's Web* and *Weaver's Web II*.

[174] Not only is Dr. Weaver named individually in this context, he is directly linked to the science and institutions that are being labeled as both deceitful and incompetent. He is referred to in *Climate Agency Going up in Flames* more than once as an IPCC insider – the institution alleged to be "cooking the books". In addition, his extensive work on the IPCC panels is referred to. The reference to his work on *The Copenhagen Diagnosis* as an IPCC-related piece of agit-prop is consistent with this theme and is a direct reference to its context.

[175] Paragraph 12 of *Climate Agency Going up in Flames* references Dr. Weaver and Climategate, and refers to thousands of "incriminating" emails; deep infighting and manipulation. The allegations are serious and clearly relate to Dr. Weaver in the overall context. The theme throughout the publications is "essentially deceit and incompetence in the climate scientists who have advised of global warming" and this group includes Dr. Weaver.

[176] *So Much for Pure Science* again names Dr. Weaver directly in the first two paragraphs when discussing Climategate. The overall effect of the words leads the ordinary person to conclude the words complained of are in fact "of and concerning" Dr. Weaver.

3. Were the Statements Published?

[177] There is a presumption of publication where the publisher is a newspaper: *Crookes v. Newton*, 2009 BCCA 392 at para. 32, aff'd 2011 SCC 47.

[178] The presumption of publication has not been refuted by the defendants in regards to the four articles at issue. Accordingly, I conclude the four articles have been published.

[179] The defendants submit the identity of the publisher for each article is at issue. The four articles were published jointly by a journalist/columnist and the *National Post*. The defendants maintain that each article should be treated independently and that Mr. Corcoran, Mr. Foster and Mr. Libin are only liable for the article they authored as each had nothing to do with the other articles.

[180] The defendants also maintain the claim against the defendant Mr. Fisher should be dismissed with costs, as there is no evidence he had any role in the words complained of: see *Home Equity Development Inc. v. Crow*, 2004 BCSC 124 [*Home Equity*].

[181] I disagree. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at para. 176, the Supreme Court of Canada noted that it is well-established that all individuals involved in the commission of a joint tort are jointly and severally liable for the injury:

It is a well-established principle that all persons who are involved in the commission of a joint tort are jointly and severally liable for the damages caused by that tort. If one person writes a libel, another repeats it, and a third approves what is written, they all have made the defamatory libel. Both the person who originally utters the defamatory statement, and the individual who expresses agreement with it, are liable for the injury.

[182] The evidence is that Mr. Foster and Mr. Corcoran communicated on *Weaver's Web*; indeed Mr. Corcoran added to it; they communicated about this particular theme that ultimately ran through all four articles, i.e. Dr. Weaver's deceit and alleged distraction from Climategate.

[183] Furthermore they are all writing for the same publication which published this series of articles. Ultimately, I have found the cumulative effect of the articles, particularly the first three, to make the same defamatory theme of Dr. Weaver's character, of lack of integrity and scientific incompetence and/or deceit.

[184] The plaintiff has successfully established the elements of defamation. I conclude as a matter of law the words in the articles at issue were capable of

defaming the plaintiff, and as a question of fact they have done so. The onus now shifts to the defendants to establish a defence to this liability.

V. DEFENCE OF FAIR COMMENT

[185] Words that have been found *prima facie* defamatory can be protected by the defence of fair comment. The words must be a comment on a matter of public interest, based on fact and made honestly, without malice: *WIC Radio* at para. 28.

[186] The defence of fair comment reflects the high value and importance of freedom of expression in our society. As Justice Binnie noted in *WIC Radio* at para. 1 the defence of fair comment:

... helps hold the balance in the law of defamation between two fundamental values, namely the respect for individuals and protection of their reputation from unjustified harm on the one hand, and on the other hand, the freedom of expression and debate that is said to be the “very life blood of our freedom and free institutions.”

[187] The onus rests on the defendants to prove the elements of fair comment: *Grant* at para. 29; *WIC Radio* at para. 52.

[188] If the defendants successfully establish the defence of fair comment, the onus then shifts to the plaintiff to vitiate the defence by proving malice on part of the defendants: *WIC Radio* at para. 52.

1. Are the Statements Protected by Fair Comment?

[189] The test for establishing the defence of fair comment is set out by Binnie J. in *WIC Radio* at para. 28:

For ease of reference, I repeat and endorse the formulation of the test for the fair comment defence set out by Dickson J., dissenting, in *Cherneskey* as follows:

- (a) the comment must be on a matter of public interest;
- (b) the comment must be based on fact;
- (c) the comment, though it can include inferences of fact, must be recognisable as comment;
- (d) the comment must satisfy the following objective test: could any [person] honestly express that opinion on the proved facts?

- (e) even though the comment satisfies the objective test the defence can be defeated if the plaintiff proves that the defendant was [subjectively] actuated by express malice.

[190] There is no dispute in this case that the publications are on a matter of public interest.

[191] The sting of the articles is that Dr. Weaver has been unscientific, incompetent, and has an unethical character as demonstrated by both the inference of research misconduct and his alleged distraction or deceit from research misconduct in the climate science area.

[192] As set out in *Silkin v. Beaverbrook Newspapers Ltd.*, [1958] 1 W.L.R. 743 and adopted by the Supreme Court of Canada in *Cherneskey* at 1073 and the BC Court of Appeal in *Vander Zalm v. Times Publishers, Bierman, McLintock and Underhill*(1980), 18 B.C.L.R. 210 at 222-223, the expression “fair comment” is somewhat misleading:

But the expression “fair comment” is a little misleading. It may give you the impression that you, the jury, have to decide whether you agree with the comment, whether you think it is fair. If that were the question you had to decide, you realize that the limits of freedom which the law allows would be greatly curtailed. People are entitled to hold and to express freely on matters of public interest strong views, views which some of you, or indeed all of you, may think are exaggerated, obstinate or prejudiced, provided – and this is the important thing – that they are views which they honestly hold. The basis of our public life is that the crank, the enthusiast, may say what he honestly thinks just as much as the reasonable man or woman who sits on a jury, and it would be a sad day for freedom of speech in this country if a jury were to apply the test of whether it agrees with the comment instead of applying the true test: was this an opinion, however exaggerated, obstinate or prejudiced, which was honestly held by the writer?

[193] In *Leenen* at 699-700, the Court noted a statement of opinion is a comment; an inference drawn by the writer or speaker from the facts. Comment must, however, appear as comment. It must not be so mixed up with statements of fact that the reader cannot distinguish between the facts reported and the comment. The trial judge in that case went on to quote *Myers* (S.C.) at para. 89:

The key lies in determining whether a defamatory statement or broadcast is presented as an objective fact which requires no support, or whether it is presented as a comment or opinion for which supporting facts are included.

Indeed, the difference can be a subtle one, since opinions are often expressed more as facts than as personal views. Regardless of how it is expressed, in order for the defence of fair comment to apply, the opinion must still be recognizable to the reasonable viewer as an opinion. To do this, the opinion must be supported by enough true facts for the viewer to see how the commentator could have reached this conclusion.

[194] In *Mitchell v. Victoria Daily Times*, [1944] 1 WWR 400, the defence of fair comment was rejected on the basis the article was a combination of comments and statements of fact, such that could not be determined what was intended to be comment and what was statement of fact.

[195] Dr. Weaver maintains the defendants are unable to establish the necessary factual foundation or substratum to invoke the defence of fair comment. As set out in the leading case regarding factual foundation, *Mainstream (C.A.)* at para. 24, “comment[s] must be an expression of opinion on a known set of facts, and the audience must be in a position to assess or evaluate the comment”.

[196] The defence of fair comment is only available for fair comment made upon true facts. It is not available if it is based on facts which are untrue or misstated. As noted in *WIC Radio*, “if the factual foundation is unstated, unknown, or turns out to be false, the fair comment defence is not available”: at para. 31. Where the defendant cannot prove the truth of the facts upon which the comment is made, the defence of fair comment will not be available: *Lawson* at para. 44.

[197] There are two main areas of disagreement on the facts which impact on this case. The first is the University of Victoria security breaches, and the second is the criticism of the IPCC and its leadership. The first area of disagreement reflects on all four articles: *Weaver’s Web* and *Weaver’s Web II*, *Climate Agency Going up in Flames*, and *So Much for Pure Science*. The second area of disagreement impacts only *Climate Agency Going up in Flames*.

[198] In defending the comments in *Weaver’s Web*, *Weaver’s Web II* and *Climate Agency Going up in Flames*, the defendants argue the factual foundation was notorious, had been reported widely, was available online, and appeared in the same newspaper a day earlier or at the same time.

[199] The defendants rely on the O'Toole article and interview as provided in evidence. They maintain Dr. Weaver lacked believability in distancing himself from statements linking the oil industry to campaigns of disinformation. The defendants maintain the nub of all this is that the O'Toole news story reported Dr. Weaver's sentiments entirely fairly, including the reference to the "campaign" which, according to Dr. Weaver included the University of Victoria security breaches, "is driven by the fossil fuel industry, citing 'a war for public opinion'".

[200] The defendants say in this case the O'Toole article appeared on December 3, 2009. Shortly after, on December 9 and 10, 2009, *Weaver's Web* and *Weaver's Web II* appeared in the same newspaper. In addition, there were numerous media articles about Dr. Weaver's statements about the University of Victoria security breaches.

[201] Dealing with this first, I note Dr. Weaver did not deny saying "fossil fuel" in the context of Climategate but was adamant this reference was not with respect to the break-ins experienced at his offices at the University of Victoria.

[202] A review of the O'Toole interview establishes while Dr. Weaver references the fossil fuel industry, he does so when Ms. O'Toole asks him who would benefit from mixing weather with climate in the global warming context. The reference is some time after the commencement of the interview which starts with questions about the security breaches in Dr. Weaver's office. The interview progresses from that point, however, and Ms. O'Toole asks a question about whether Dr. Weaver has done any research on how many people in Canada are actually skeptical that global warming is happening. The pertinent questions and answers are:

44: MO: Yeah. And have you done any research yourself on how many people in Canada are actually skeptical that global warming is happening?

AW: I haven't myself. Within the scientific community, sure, there isn't anybody. There's a few geologists, and they're typically based in Alberta. But within, within the atmospheric science community there's nobody, you've just got 3,000 scientists from various societies sending open letters to the government.

45. MO: Right
- AW: There's no scientific debate here. The only debate is there's a war for public opinion happening but it's hardly a war. On the one hand you have, you know, like you have a well-funded military, on the other hand you have a few kind of, people standing up every now and again trying to defend something. This is, this is just it's PR machine against a bunch of scientists and a few NGOs.
- 46: MO: I'd heard something in a recent poll that about 40% of Canadians are skeptical of global warming. Do you think that's an accurate figure?
- AW: I don't know. I know Angus Reid data from 2007, which I used in the book that I wrote, and there it was much higher.
47. MO: Much higher level of skepticism?
- AW: Much higher percentage back in 2007. But you know what, the problem is people mix weather up with climate. And, and there has been a very successful disinformation, misinformation, propaganda campaign to try to confuse people.
- ...
50. MO: And what value do you think it has; who benefits from trying to propagate that rumour?
- AW: Who benefits are people who are making money from the status quo, that is the fossil-fuel industry.

[203] The question that initiated the particular aspect of the discussion was whether Dr. Weaver had done any research himself or how many people in Canada are actually skeptical that global warming is happening. It was in that context, which referenced "a war for public opinion" and the propaganda campaign, that Dr. Weaver noted the fossil fuel industry.

[204] While the defendants maintain Dr. Weaver invited people to connect the dots, it is evident the comments about the fossil fuel industry were made in the context of a series of questions about the "war for public opinion" – the propaganda campaign – not as to who broke into Dr. Weaver's office. Dr. Weaver's office was broken into twice within three days in 2008. He did not say the fossil fuel industry might be responsible for that break-in; nor did he implicate them in the other break-in incidents at the University of Victoria.

[205] To access the fair comment defence, the defendants are required to prove the facts they are relying on as true. I do not find the fact that “Dr. Weaver claimed the fossil fuel industry might be responsible for break-ins to his office in UVic” to be established in this case. The defendants relied heavily upon and commented upon the O’Toole article as a foundation piece for their respective articles – *Weaver’s Web* and *Weaver’s Web II*; indeed, all four articles. This ultimately impacts on the availability of the defence of fair comment

[206] The second area of significant factual disagreement is whether Dr. Weaver criticized the IPCC and called for a change in leadership. They maintain the accuracy of Mr. Foot’s article is confirmed in an email exchange between Dr. Weaver and Mr. Foot and Dr. Weaver’s testimony in cross-examination. The only article at issue, *Climate Agency Going up in Flames*, merely said Dr. Weaver was calling for change in leadership, which he clearly was doing. He was also calling for reform of the institution.

[207] With respect to *Climate Agency Going up in Flames*, I find Dr. Weaver did not call for the resignation of Mr. Pachauri, but rather as noted indicated he should “move on”. I conclude this on the basis of the emails sent by Dr. Weaver to *Nature*, which said something completely different, and those immediately sent to Mr. Foot, which indicated he was surprised by this comment. Mr. Foot had the *Nature* article and, in my view, simply referenced that opinion when writing the article, as reflected in his email in response to Dr. Weaver’s correction.

[208] The January 26, 2010 email from Dr. Weaver to *Nature* says in part:

I don’t know that I would describe the IPCC as needing “institutional reform”. Rather I think “procedural reform” is a better way of putting i[t]. I would say that it has become far too cumbersome and the reports overwhelmingly large. I would like to see the IPCC refocus its attention on specific problems. That is, rather than have these monolithic assessments in the future, we should have reports focused on very specific questions...

[209] He also notes:

The IPCC process has been incredibly valuable to date. But there is so much science out there to assess, it needs to be better focused. The distinction

between different working groups also needs to be revised. Many of the problems are coming out of WGII which is largely made up of social scientists. Scientific comments (like Himalaya glacier retreat) should have come out of WGI (Science). If you have diverse interdisciplinary teams working on specific problems, then you can have scientists, economists, engineers all looking at a particular problem through the lens of their expertise. This phenomenological approach would lead to more integrated assessments.

In my opinion, Pachauri crossed the line with some of his statements. I also don't think he should've been reflected for a second year term.

[210] Later in that email, as part of his concluding comments, Dr. Weaver notes:

Perhaps Pachauri has failed, but then he should step aside.

I would summarize that I think Pachauri may have been overly enthusiastic in some of his statements. He, like many of us, recognize[s] that global warming is a very serious problem.

[211] Dr. Weaver testified his comment indicating perhaps Mr. Pachauri should step aside, reflected his view that it was not for him to judge. Rather, a panel of the IPCC would make that judgment.

[212] In an email to Mr. Foot late on the same day the story was published on the Internet, Dr. Weaver said:

You and I both know that I specifically, and pointedly, stated that I am not calling for Pachauri to resign. That is something that the UN should decide.

All you have to do is review the tapes of the interview. Of course the quote attributed to me in the article is accurate. It is a measured statement. I stated "I think that is a very legitimate question." to ask. The whole nature of our discussion was with respect to the IPCC leadership (not the IPCC itself) sometimes crossing the lines into advocacy which the IPCC as an organization is not tasked to do.

[213] The immediate request by Dr. Weaver that Mr. Foot review the tape of the interview lends credence to Dr. Weaver's testimony he did not call for Mr. Pachauri to resign. As he noted, he provided a measured statement. Calling for the replacement of a high profile individual in the area he was working is clearly more significant and indeed utilized as such. In fact, it appeared to generate the incendiary title: *Climate Agency Going up in Flames*.

[214] While the defendants note if there is an alleged error in the factual foundation, it must be substantive to the point it would alter opinions, I conclude this is a significant error. The combination of this with the headline referencing the “exit” of Dr. Weaver, a false reference; underpins the concept the IPCC is in trouble, and Dr. Weaver is as a result departing the organization.

[215] The article tells the reader Dr. Weaver is “exiting” the IPCC. Dr. Weaver had no plan to exit and was prepared to participate as requested. “*Exit of Canada’s expert a sure sign IPCC in trouble*”; the subtitle is an important part of the article *Climate Agency Going up in Flames*. The first paragraph of that article then immediately refers to it getting “hot in the scientific kitchen” with someone “cooking the books”. This is a reference to the IPCC. The ordinary meaning of “cooking the books” is the falsification of information or fraud.

[216] In that context, the comments in the first paragraph of *Climate Agency Going up in Flames* say Dr. Weaver is calling for the “replacement of the IPCC leadership” and “institutional reform”. This gave the impression Dr. Weaver was calling for these changes because of Climategate and because of falsification of information or “cooking the books”. This is contrary to the evidence in this case.

[217] The comment in *Climate Agency Going up in Flames*, that Dr. Weaver was disassociating himself from IPCC was false. While the defendants rely on the existence of Mr. Foot’s article that same day in the same newspaper for their comments, I conclude the “fact of Dr. Weaver’s exit; his calling for Mr. Pachauri’s resignation and institutional reform” has not been established. The most Dr. Weaver said was that the organization needed procedural reorganization with respect to the composition of the working groups and that Mr. Pachauri should perhaps “move on”.

[218] As reflected in Dr. Weaver’s email to *Nature* magazine, he was of the view that “the IPCC process has been incredibly valuable to date”. This is completely contrary to the statements and inference contained in the article “Climate agency going up in flames”. Reliance on an article appearing the same day in the same

newspaper does not immunize the writer of the article from establishing a factual foundation that is true.

[219] There is also no evidence of a substratum of fact to substantiate the comment that Dr. Weaver acknowledged that Climategate and the release or leak of thousands of incriminating emails from the CRU at the University of East Anglia, showing deep infighting and numbers manipulated demonstrates a problem. I agree the article tells the reader Dr. Weaver is leaving the IPCC in this context. In *Climate Agency Going up in Flames*, the key fact of Dr. Weaver's alleged exit underpinning that article was wrong.

[220] Another area of factual dispute is whether Dr. Weaver has repeatedly linked weather and temperature events in articles and the media as stated by the defendants. Dr. Weaver took issue with the statement made in the publications that he has made numerous television appearances linking current weather and temperature events with global warming.

[221] The evidence established Dr. Weaver's writings and position on this was consistent and clear. It included articles authored by Dr. Weaver and his book *Keeping Our Cool*. These publications establish Dr. Weaver does not link current weather and temperature events with global warming, as noted in *Climate Agency Going up in Flames*. Rather, Dr. Weaver is consistently cautious when questioned about the relationship between specific weather events on global warming. In *Keeping Our Cool*, Dr. Weaver explains the distinction between weather and climate and the relationship between the statistics of weather and climate. Dr. Weaver does not link current temperature events with global warming.

[222] In that context, I agree Mr. Corcoran, in *Climate Agency Going up in Flames*, took a quote from a 2007 Association Press article by Dr. Weaver and gave it a different meaning to incorrectly support the assertion that Dr. Weaver was linking current weather and temperature events to global warming. He inserted the word "temperature" and adding an exclamation point after the word "warming". As part of the article, he said:

Not only is Mr. Weaver an IPCC insider. He has also, over the years, generated his own volume of climate advocacy that often seemed to have crossed that dangerous line between hype and science. ...

He has also made numerous television appearances linking current weather and temperature events with global warming, painting sensational pictures and dramatic links.

“When you see these [temperature] numbers, it’s screaming out at you: “This is global warming!”

[Emphasis added.]

[223] The numbers in the quote Dr. Weaver was referring to in his article were “the global average surface temperatures” and not weather and/or temperature events. It was also clear from Mr. Corcoran’s testimony that he knew the difference between these two concepts; he knew Dr. Weaver was referring to global average surface temperatures but changed the quote for his own purposes.

[224] While I agree, as argued by the defendants, the global warming issue is live, the Climategate emails had been released, and controversy arose as a result, I do not agree that the statements referenced in articles written by Ms. O’Toole and Mr. Foot were “fact”, such that the defendants could make the comments that ultimately impugned Dr. Weaver’s character by inferences he was an incompetent and unethical scientist, misrepresented research in the area of climate change, concocted a false story to distract from the Climategate email issue in the media at the time” and sought to disassociate himself from the IPCC because he knew or believed the IPCC reports concerning global warming were unscientific or fraudulent and sought to avoid personal responsibility for this.

[225] My conclusions directly impact on the statements made in the four articles which continuously reference Dr. Weaver’s “charge” or allegation that the fossil fuel industry broke into his office. In *Weaver’s Web*, he is said to have made a “charge of theft against the fossil fuel industry”. That article also references:

- “These guilty-until-proven-innocent villains have also been fingered by Canada’s warmest spinner-in-chief, Dr. Andrew Weaver”;

- “Dr. Weaver has no problem pointing to the shadowy culprits – the fossil fuel industry”; and
- “Is it unreasonable to suggest that Dr. Weaver’s charge against the fossil fuel industry is totally without merit?”

[226] With respect to *Weaver’s Web*, I conclude that Dr. Weaver:

- (a) did not “point to the shadowy culprits – the fossil fuel industry”;
- (b) did not make “a charge against the fossil fuel industry”; and
- (c) did not implicate the fossil fuel industry in the break-in incidents of 2008 or 2009 involving facilities at the University of Victoria.

[227] *Weaver’s Web II* noted:

The break-in at Doc Weaver’s office, which he linked to the evil fossil fuel industry’s attempt to discredit global warming policy, turns out to have been one of numerous break-ins at the University of Victoria;

...

Doc Weaver was publicly blaming the oil industry for the break-in at his office at the university, where he is Chair in Climate Modeling and Analysis.

[228] With respect to *Weaver’s Web II*, I conclude these two statements are false.

[229] *Climate Agency Going up in Flames* noted:

- “Exit of Canada’s Expert a Sure Sign IPCC in Trouble”;
- “Insider Andrew Weaver is getting out while the going is good”;
and
- “When Climategate broke as a story last November, Mr. Weaver dismissed it as unimportant and appeared in the media with a cockamamie story about how his offices had also been broken into and that the fossil-fuel industry might be responsible for both Climategate and his office break-in”.

[230] With respect to *Climate Agency Going Up in Flames*, I conclude that Dr. Weaver:

- (a) was not “heading for the exits” nor was he “getting out” of the IPCC, nor was he “calling for replacement of IPCC leadership.” In his interview with Mr. Foot, Dr. Weaver specifically told Mr. Foot he was not calling for the leadership to change;
- (b) has not made numerous television appearances linking current weather and temperature events with global warming, painting sensational pictures and dramatic links. Although Dr. Weaver has been interviewed on television many times, he is consistently cautious when questioned about a relationship between specific weather events and global warming;
- (c) did not say, in a television appearance linking current weather and temperature events with global warming, “when you see these [temperature] numbers, it’s screaming out at you: this is global warming!” Dr. Weaver does not link current temperature events with global warming. None of the words “temperature” or “global warming” can be found in the original quotation from a newspaper article. Dr. Weaver’s statement did not concern a weather event. Instead, he was speaking about “global annual mean temperature” in December 2007; and
- (d) Dr. Weaver did not appear “in the media with a cockamamie story about how his offices had also been broken into and that the fossil-fuel industry might be responsible for both Climategate and his office break-in.” Dr. Weaver’s office was broken into twice within three days in 2008. He did not implicate the fossil fuel industry as being responsible for the break-ins in 2008 or 2009 at the University of Victoria.

[231] In *So Much for Pure Science*, the reference is:

He actually meant the hackers: agents of Big Oil, he figured. They “don’t like” the research, “so they try to discredit it.”

[232] With respect to *So Much for Pure Science*, I conclude:

- (a) Dr. Weaver did not say nor did he “figure” that the “hackers” of “emails from the University of East Anglia’s Climate Research Unit” were “agents of Big Oil”;
- (b) Dr. Weaver did not display a “reflex to distract” for the purpose of diverting public attention from the misconduct of the CRU; and
- (c) the “success of his book, *Keeping Our Cool: Canada in a Warming World*, and, to some extent, his career success”, does not “depend on the momentum of a global-warming panic”.

[233] I have concluded none of those statements were accurate.

[234] It was also clear from Mr. Libin’s testimony that he did not know anything about Dr. Weaver. He testified he was not interested in knowing whether Dr. Weaver was paid for his research or whether he got a personal pecuniary benefit from any of the research grants. He agreed, however, his reference to “shekels” was to money and he wanted his readers to understand that money could blind scientists to the truth.

[235] While only the “pith and substance” of the facts is necessary and the commentator is not required to set out all pertinent pros and cons (*Creative Salmon Company Ltd. v. Staniford*, 2009 BCCA 61 at para. 60), the distortion of words can be especially damaging, as it is much more difficult to explain the truth: *Myers* (C.A.) at para. 21. In this case, the defendants altered the complexion of the facts and omitted facts sufficiently fundamental that they undermine the accuracy of the facts expressed in the commentary to the extent the facts cannot be properly regarded as a true statement of the facts.

[236] Accordingly, I have concluded the factual foundation to the four articles was distorted or false and the defence of fair comment is not available in numerous instances. The selection of the words, the tone and misstatement of central facts distorted Dr. Weaver's words such that the articles were defamatory and not protected by the fair comment defence. The error in the factual foundation was substantial to the point it would alter opinion.

[237] This is particularly so due to the constant reference that Dr. Weaver had in effect concocted the story about the fossil fuel industry being behind the break-ins at his University of Victoria office (i.e., Dr. Weaver charges against the fossil industry; pointing to the shadowy culprits – the fossil fuel industry). These references appeared particularly in the first three articles: *Weaver's Web*, *Weaver's Web II* and *Climate Agency Going up in Flames*. This constant reference tainted each of the articles. The references underpinned further claims in the articles that directly impacted on Dr. Weaver's character.

[238] Essentially, the defendants extrapolated a statement from Ms. O'Toole's article and created a theme of deceit that tarnished Dr. Weaver's reputation; impacting on both the integrity and scientific competence of Dr. Weaver. In doing so, they took the risk the fact underpinning the inference was accurate. It was not. While I appreciate the deadlines a journalist may operate under, that does not excuse the need for accuracy in facts that may impugn a person's character. I find this particularly so in this case where the history between the parties demonstrates this was an issue throughout as reflected in the historical publications of Dr. Weaver and the *National Post*.

[239] While much of what might be characterized as facts set out in the publications have been disproved by Dr. Weaver in the voluminous evidence submitted in this case, including previous articles written by Dr. Weaver, publications in newspapers, and the book *Keeping our Cool*, a reasonable person would be likely unable to ascertain this. Whether or not the scientists who point to climate warming or those that reject that claim are right, essentially, I conclude the defendants are using

inaccurate information to paint an unflattering picture of Dr. Weaver, ultimately in a defamatory way, as part of expressing their view of the science that Dr. Weaver represents.

[240] As noted by Esson J. in *Vogel v. C.B.C.* (1982), 35 B.C.L.R. 7 (S.C.) at 77:

To be fair, comment must be based on facts truly stated and must not contain imputations of corrupt or dishonourable motives on the person whose conduct is criticized, save insofar as such imputations are warranted by the facts...

[241] I have concluded fair comment does not protect the defamatory statements about Dr. Weaver. The facts upon which they rely are not true. As such, I do not need to address whether any person could honestly express those opinions on the proven facts.

[242] With respect to what I would characterize as the scientific debate – in particular the hockey stick and solar theory – I conclude the comments on those are not defamatory, as they do not go to the plaintiff's character. Whether or not a particular theory is "debunked" is regularly debated in the scientific community. It would, in my view, impede the necessary debate to find such commentary defamatory in the circumstances of this case.

[243] The defendants refer to *The Copenhagen Diagnosis* as an IPCC-related piece of agit-prop. This reference also cannot be taken as a fact capable of proof. Rather, it is clearly a matter of opinion and again part of an ongoing debate on climate change. It is important not to silence debate in the scientific and other communities.

2. Malice

[244] I will briefly comment on malice.

[245] Dr. Weaver asks the Court to conclude Mr. Corcoran, through the article *Climate Agency Going up in Flames*, deliberately set out to create a damaging impression of the plaintiff through distortion, fabrication, and omission of facts. Not only did the defendants fail to apologize, but they left three of the publications

including, *Climate Agency Going up in Flames*, on the Internet, despite the plaintiff's express request; the knowledge acquired in the course of the discoveries and Dr. Weaver's evidence on direct. Dr. Weaver submits this can be used to support an inference of malice. Further, the defendants did not take the trouble to listen to the recording of the O'Toole interview. They were simply not interested, also supporting a finding of malice in this case.

[246] As noted in *Creative Salmon* at para. 33, malice is a state of mind. While Dr. Weaver argues malice is evident in the defendants' actions, I do not find malice to be present. Rather, I conclude the defendants definitively espouse a skeptical view of climate change and are unwavering in their expression of this. While certainly entitled to express those views, in this case as part of that expression, they deliberately created a negative impression of Dr. Weaver.

[247] In doing so, I conclude the defendants have been careless or indifferent to the accuracy of the facts. As evident from the testimony of the defendants, they were more interested in espousing a particular view than assessing the accuracy of the facts. This lack of accuracy has led in part to my conclusion that certain aspects of the articles, especially when read together, are defamatory and are not saved by the fair comment defence. This is not sufficient, however, to lead to a finding of malice.

VI. RE-PUBLICATION

[248] The test for establishing whether a defamatory statement(s) was published was set out in the Supreme Court of Canada decision in *Crookes* at para. 16 as follows:

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

There are no limitations on the manner in which defamatory matter may be published. Any act which has the effect of transferring the defamatory information to a third person constitutes a publication.

(*Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, at para. 5, citing Raymond E. Brown, *The Law of Defamation in Canada* (2nd ed.), vol. 1, at No. 7.3.)

[249] The Supreme Court of Canada summarized the basic legal principles behind re-publication in *Breeden v. Black*, 2012 SCC 19 at para. 20. The Court noted:

20 ... It is well established in Canadian law that the tort of defamation occurs upon publication of a defamatory statement to a third party. In this case, publication occurred when the impugned statements were read, downloaded and republished in Ontario by three newspapers. It is also well established that every repetition or republication of a defamatory statement constitutes a new publication. The original author of the statement may be held liable for the republication where it was authorized by the author or where the republication is the natural and probable result of the original publication (R. E. Brown, *The Law of Defamation in Canada* (1987), vol. 1, at pp. 253-54). In my view, the republication in the three newspapers of statements contained in press releases issued by the appellants clearly falls within the scope of this rule.

[250] The plaintiff submitted into evidence two large volumes of alleged re-publications. The plaintiff points out where the re-publication was authorized by the author or where the re-publication is the natural and probable result of the original publication, the original publisher will be jointly and severally liable with the re-publisher. In this case, the plaintiff points out the reader was invited to email; twitter or send the articles to friends.

[251] The evidence of re-publication includes numerous downloads of *Weaver's Web*; *Weaver's Web II*; *Climate Agency Going up in Flames*; and some of *So Much for Pure Science* from various websites. The defendants maintain, however, republication cannot be a mere hyperlink as stated in *Crookes*. Thus, the "story tools" on the *National Post* website do not qualify as authorization. The evidence established these are merely permitted hyperlinks back to the original article.

[252] It was not disputed the defendant *National Post* owns and operates a number of different websites such as:

<http://www.nationalpost.com/>

<http://www.financialpost.com>

<http://network.nationalpost.com>

<http://www.facebook.com/NationalPost>

[253] The defendant *National Post* publishes electronic versions of certain articles from each day's edition of the hardcopy *National Post* newspaper and electronic versions of the *Financial Post Magazine* on the *National Post* Internet sites, where they are accessible on the Internet.

[254] The defendant *National Post* also publishes electronic versions of certain articles from each day's edition of the hardcopy *National Post* newspaper and electronic versions of the *Financial Post Magazine* in a "subscribers" zone on the Internet at <http://www.nationalpost.com/> and <http://www.financiapost.com> and <http://canada.com>, accessible with a paid subscription to the *National Post* or a paid subscription to daily newspapers published by *Canwest*, including the *Victoria Times Colonist*, *The Province* (Vancouver), the *Vancouver Sun*, the *Edmonton Journal*, the *Calgary Herald*, and others.

[255] *Canwest* also publishes electronic versions of certain articles from each day's edition of the hardcopy *National Post* newspaper and electronic versions of the *Financial Post Magazine* on an electronic database operated under the name "FPinformat.ca", which is accessible on the Internet at <http://www.fpinformat.ca> [the "*Financial Post Database*"].

[256] The defendant *National Post* also publishes electronic versions of certain articles from each day's edition of the hardcopy *National Post* newspaper and electronic versions of the *Financial Post Magazine* in certain electronic databases accessible on the Internet, including the following:

- (i) Proquest;
- (ii) Factiva; and
- (iii) The Financial Post Database

[257] Dr. Weaver reviewed many of the alleged re-publications in his evidence. This included at least one email, dated January 3, 2010, from a colleague of Dr. Weaver that attached another email to the Premier at the time, Gordon Campbell, with the attached article *Climate Agency Going up in Flames*. This alone may well be sufficient to establish re-publication of the article.

[258] The contents of the impugned articles were however reproduced numerous times over the Internet. The *National Post* says this is in violation of its copyright. John Racovali, the Assistant Managing Editor of the *National Post* who is in charge of legal matters, said the *National Post* may occasionally send a “cease and desist” letter but not much more as the *National Post* may not be aware of the violation.

[259] Copies of the downloaded publications contain reader comments, an example of which is *Heatwave*, referencing *Climate Agency Going up in Flames* and posted January 25, 2010:

Andrew Weaver was a willing participant in the AGW fraud and his “jumping ship” at this time will not save his sorry ass.

[260] A review of the material demonstrates further reader comments, including many reader comments on the Climate Audit site of the article. In my view, this evidence is sufficient to establish the fact of re-publication. As noted in *Crookes* at para. 109, “if a plaintiff proves facts from which it is reasonable to infer that the words were brought to the knowledge of some third person, that will establish a *prima facie* case of publication”. These reader comments, accessed and reviewed by Dr. Weaver, in my view prove the fact of republication of the impugned articles.

[261] The invitation to email the article to a friend meets the test set out in the jurisprudence that re-publication is the “natural and probable result of the original publication”. The invitation is to email an article, the content of which is known and indeed created by the defendants. This is unlike the situation in *Crookes* which involved a website concerning commentary on various issues with hyperlinks to *other* websites, the content of which is not controlled by the operator of the website.

In this context, I am prepared to conclude that a reasonable inference could be drawn of publication to a third person of each of the articles at issue.

[262] *Crookes* pointed out the potentially harmful impacts of defamatory speech on the Internet. As noted by Abella J., writing for the majority, at para. 37:

... Because the Internet is a powerful medium for all kinds of expression, it is also a potentially powerful vehicle for expression that is defamatory. In *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416 (C.A.), at para. 32, Blair J.A. recognized the Internet's "tremendous power" to harm reputation, citing with approval the following excerpt from Lyrissa Barnett Lidsky "Silencing John Dow: Defamation & Discourse in Cyberspace: (2000), 49 Duke L.J. 855, at pp. 863-64:

Although Internet communications may have the ephemeral qualities of gossip with regard to accuracy, they are communicated through a medium more pervasive than print, and for this reason they have tremendous power to harm reputation. Once a message enters cyberspace, millions of people worldwide can gain access to it. ...

[263] I also acknowledge the comment as noted in *Brown on Defamation* at pp. 7-190, that "to subject hyperlink to the traditional rules of publication would have a serious chilling effect on the functioning of the Internet and the flow of information and this, in turn, would adversely affect freedom of Expression". This comment is referenced at para. 36 of *Crookes*, as per Abella J.

[264] Also in *Crookes* it is noted by Deschamps J. in her concurring judgment:

[101] My colleague Abella J. states that "[r]eferencing on its own does not involve exerting *control* over the content" (para. 26 (emphasis in original)). Yet the concept of publication in the common law of defamation has never involved a rigid requirement of control. Instead, the inquiry has always been contextual: did the defendant act knowingly and what were the consequences of his actions? (Brown, at para. 7.3) Although a formal distinction can of course be drawn between references and other acts of publication, this distinction evades the questions that are at the heart of the law of defamation. Where a person deliberately makes defamatory information readily available through the creation of a hyperlink, the very rationale for the tort of defamation comes into play.

[265] As noted, however, by Abella J., it appears that control of the content at issue on the Internet may well inform the developing framework to analyze the legal issues at this time. A review of the concurring opinions establishes these are early days in

the consideration of the impact of the Internet on jurisprudence concerning publication and defamation. As such, there is likely room for a nuanced approach when considering the emerging issues.

[266] Accordingly, taking into account the jurisprudence expressed above and the circumstances of this case, I have concluded re-publication of each of the articles has occurred.

VII. READER POSTINGS

[267] Dr. Weaver also complains about the numerous reader postings arising from each of the articles. The defendants once again say they are not publishers of the reader postings as they do not have effective control over those posts. Even if they did, the defendants raise the defence of innocent dissemination and fair comment.

[268] There is no real dispute that some of the reader comments are defamatory. Indeed, the evidence was that some of these comments were removed because of that complaint. I have reviewed the comments and concluded, in any event, that many were defamatory clearly attacking the plaintiff's character in a vitriolic manner

[269] The parties are of the view this case raises, for the first time in Canada, the issue of whether one who operates an internet forum – in this case a reader comment area on the newspaper's website – is liable for third-party postings.

[270] In *Crookes* at para. 20, the Supreme Court of Canada acknowledged the defence of innocent dissemination, which developed in an earlier era for secondary distributors such as booksellers, will likely come into play with secondary Internet publications. The Court recognized however that, on the Internet, courts must be careful to develop the law in a way that does not unduly stifle the free exchange of ideas. As such, in *Crookes*, the Court held hyperlinks are not publications.

[271] The Supreme Court of Canada in *Crookes* concluded while the legislator has created a specific presumption a publication in respect of broadcast, it has not done

so in respect hyperlinks and therefore the court should refrain from creating a new one: at para. 108.

[272] The defendants argue there is no evidence of awareness and no evidence that the *National Post* or any of its columnists were involved as an editor of any words in the reader posts. They maintain the *National Post* has a passive instrumental role in the dissemination of the reader postings or took no deliberate action amounting to approval, adoption, promotion or ratification of the contents of the reader posts: *Home Equity*.

[273] Once the defendants became aware of the comments in the reader postings and received a complaint, they were then taken down. The volume of postings is such it would not be realistic to expect the defendant to pre-vet every posting.

[274] Dr. Weaver notes the defence of innocent dissemination is not available to the defendants, as this was a defamatory article published by the defendants. As noted in *Slack v. Ad-Rite Associates Ltd.* (1998), 79 O.T.C. 46, “every person who takes part in the publication of defamatory material bears responsibility for its publication, including writers, editors, printers and distributors”. This case is unlike that of a bookseller who may say they did not see the contents. Further, the defendants were made aware Dr. Weaver said the material was defamatory. While the defendants say they took the reader comments down as soon as they were made aware of them, this evidence is not credible.

[275] I agree, as argued by the defendants, that the cases appear to establish the requirement to show an active or deliberate act in making defamatory information available to establish liability. This appears to be a consistent approach in a number of English cases which have grappled with the issue. The one concern, however, is how this jurisprudence can be applied to the *National Post*, which is a content provider, not simply an Internet Service Provider (“ISP”). While hyperlinks may lend themselves to a more bright-line analysis, as characterized by Deschamps J. in *Crookes*, a more nuanced approach is necessary for reader comments which the *National Post* invites.

[276] The degree of knowledge and involvement to be a publisher was explored in *Home Equity*, where a number of individuals were sued in defamation over a “Hardball Newsletter”. All of the defendants were found by the trial judge to be “in some way involved in its publication”. The trial judge nevertheless ruled that “the question remains as to whether that involvement was sufficient to find them liable...” (para. 134).

[277] In *Godfrey v. Demon Internet Ltd.*, [1999] EWHC 244 (Q.B.) [*Godfrey*], defamatory material was published by an ISP, Demon Internet. When the plaintiff discovered this material, he requested it be removed. Demon Internet agreed, but failed to remove it. The Court held that the ISP was considered to be a publisher as of the date that the material was brought to Demon’s attention. After that date, there was no sustainable defence of innocent dissemination because it could not prove that it had taken reasonable care in relation to its publication.

[278] In *Bunt v. Tilley*, [2006] EWHC 407 (Q.B.) [*Bunt*], three defendant ISPs posted defamatory messages on websites operated by three other defendant ISPs. The defendant ISPs operating the website applied to have the action against them dismissed. They were successful. At paras. 21- 23, Eady J. found a passive role was not sufficient to establish liability. He held that there must be some proof a person was aware of the publication before being held liable for it:

[21] ...If a person knowingly permits another to communicate information which is defamatory, when there would be an opportunity to prevent the publication, there would seem to be no reason why liability should not accrue.

[22] I have little doubt, however, that to impose legal responsibility upon anyone under the common law for the publication of words it is essential to demonstrate a degree of awareness or at least an assumption of general responsibility...

[23] Of course, to be liable for defamatory publication it is not always necessary to be aware of the defamatory content, still less of its legal significance. Editors and publishers are often fixed with responsibility notwithstanding such lack of knowledge. On the other hand, for a person to be held responsible there must be knowing involvement in the process of publication of *the relevant words*. It is not enough that a person merely plays a passive instrumental role in the process.

[279] *Metropolitan International Schools Ltd. v. Designtechnica Corp.*, [2009] EWHC 1765 (Q.B.), reviewed *Godfrey and Bunt* and found Google was not a publisher of “snippets” that were compiled when an individual entered search terms into its search engine. Eady J. concluded Google could not be found to be a publisher because it had not “authorised or caused the snippet to appear on the user’s screen in any meaningful sense”: at para. 51.

[280] In *Tamiz v. Google Inc.*, [2013] EWCA Civ 68 at para. 25, the England and Wales Court of Appeal found that Google “plainly facilitates publication of the blogs (including the comments posted on them)” and its involvement did not make it a primary publisher of the blogs in light of the fact that it did not create the blogs, nor did it have any knowledge of or effective control over the blogs content, and it was not in the position of traditional primary publishers.

[281] Mr. Racovali stated before an individual is entitled to post a reader comment, they must be logged in to the *National Post* to read and registered to post a comment. To register, contact information must be provided including an email address. The reader is then invited to post a comment on the website. A person who registered in 2009 accepted terms that precluded the use of false, defamatory or libelous language and retained the right of the publisher to remove any user content. Mr. Racovali testified however the sheer volume of visits and traffic to the web page was such that the *National Post* could not possibly pre-vet comments.

[282] Essentially, it appears the jurisprudence establishes some awareness of the nature of the reader posts is necessary to meet the test of publication. As per the comments by Deschamps J. in *Crookes* at paras. 84-85:

84 The courts have begun incrementally to impose limitations on the nature and types of actions that can attract liability for defamation at common law...

85 There appears to be an emerging consensus among the courts and commentators that only *deliberate* acts can meet the first component of the bilateral conception of publication. According to Prof. Brown, “a person must knowingly be involved in the process of publishing the relevant words” (para. 7.4 (emphasis added)). In *Stanley v. Shaw*, 2006 BCCA 467, 231 B.C.A.C. 186, pleading that the defendants “said and did nothing” (at para. 7)

was held to be insufficient to support a finding of publication, because no tortious act had been alleged in relation to their silence (see also *Smith v. Matsqui (Dist.)* (1986), 4 B.C.L.R. (2d) 342 (S.C.), at p. 355; *Wilson v. Meyer*, 126 P.3d 276 (Colo. App. 2005), at p. 281 (“[a] plaintiff cannot establish [publication] by showing that the defendant silently adopted a defamatory statement”); *Pond v. General Electric Co.*, 256 F.2d. 824 (9th Cir. 1958), at p. 827 (“[s]ilence is not libel”); Brown, at para. 7.3. In *Scott v. Hull*, 259 N.E.2d. 160 (Oh. App. 1970), at p. 162, a U.S. court held that “[l]iability to respond in damages for the publication of a libel must be predicated on a positive act, on something done by the person sought to be charged”. I agree with this view. [Emphasis in original]

[283] While there was no direct evidence of the volume of comments in December 2009, the evidence shows there are currently nearly a quarter million visits a month across the *National Post* and *Financial Post* websites. There were 47,000 hits per month in November 2011, which were the earliest available figures. It is therefore reasonable to infer there were many thousands of visits per month in the December 2009 to February 2010 period when the publications occurred. I accept this difficulty would prevent reasonable attempts to pre-vet reader comments on the posted articles.

[284] Until awareness occurs, whether by internal review or specific complaints that are brought to the attention of the *National Post* or its columnists, the *National Post* can be considered to be in a passive instrumental role in the dissemination of the reader postings. It has taken no deliberate action amounting to approval or adoption of the contents of the reader posts. Once the offensive comments were brought to the attention of the defendants, however, if immediate action is not taken to deal with these comments, the defendants would be considered publishers as at that date.

[285] In this case, while Mr. Racovali could not recall who he spoke to about having the comments removed, he testified within one or two days of receiving the complaints of the reader posts, he took steps to remove the offending reader posts. While Dr. Weaver says this evidence is not credible as Mr. Racovali did not make a note of this, I accept his evidence on this point. The reader posts were clearly offensive. There is no apparent reason for the *National Post* to retain posts of such vitriolic character.

[286] Action must immediately be taken to fulfill the responsibility not to distribute defamatory material. The evidence establishes that was done within one to two days to address that problem. In my view, that is all the defendants could realistically do in the circumstances. While the plaintiff maintains more should have been done, I am unable to agree based on the evidence before me. As technology progresses, the answer and evidence on this issue may well be different.

[287] Due to the prompt removal of the offending reader comments once known to the defendants, I have concluded the defendants are not publishers of the reader postings. Accordingly, I do not need to deal with the defence of innocent dissemination or fair comment.

VIII. DAMAGES

[288] Some general principles applicable to an assessment for damages for libel were outlined by Cunningham J. in *Leenen* at 728-729, as follows:

In attempting to arrive at the appropriate level of general damages in a defamation case, one must always be aware of not only the damage inflicted to a person's reputation but also the fact that once damaged a reputation is very difficult to restore. Always mindful of the fine balance between freedom of speech and the protection of reputation, once the scales have been tipped through defamation, a plaintiff is entitled to be compensated not only for the injury caused by the damage to his integrity within his broad community but also for the suffering occasioned by the defamation. A number of cases including *Nagy v. Webb*, [1930] 1 W.W.R. 357, [1930] 2 D.L.R. 234 (Sask. C.A.); *Thomas v. C.B.C.*, [1981] N.W.T.J. No. 12, *supra*, *Vogel v. C.B.C.*, [1982] B.C.J. No. 1565, *supra*, and *Thompson v. NL Broadcasting Ltd.* (1976), 1 C.C.L.T. 278 (B.C.S.C.) established factors which might be considered in assessing the appropriate level of compensation. While not all inclusive, some of these factors are as follows:

- (a) the seriousness of the defamatory statement;
- (b) the identity of the accuser;
- (c) the breadth of the distribution of the publication of the libel;
- (d) republication of the libel;
- (e) the failure to give the audience both sides of the picture and not presenting a balanced review;
- (f) the desire to increase one's professional reputation or to increase ratings of a particular program;

- (g) the conduct of the defendant and defendant's counsel through to the end of trial;
- (h) the absence or refusal of any retraction or apology;
- (i) the failure to establish a plea of justification.

[289] As in *Leenen*, the defamation in this case was serious. It offended Dr. Weaver's character and the defendants refused to publish a retraction. The libel was widely published by at least one high profile journalist and two others. In addition, the libel effectively ran through a series of articles in a national newspaper published over a short and continuous time period. Re-publication of the libel occurred as established by the plaintiff.

[290] I am of the view a significant award is appropriate. The inferential meaning of the words implies a serious defect in character that impacts Dr. Weaver's academic and professional world. The evidence establishes Dr. Weaver was deeply affected by what he perceived as a barrage of articles impugning his integrity and academic reputation. These gave rise to the "Wall of Hate" that he maintained outside his office; comments, he noted, which arose after the publication of those articles.

[291] I consider an award of \$50,000 in general damages against all defendants jointly and severally to be appropriate in this case. I decline to award aggravated or punitive damages. I have not found malice to be present in this case.

[292] Dr. Weaver sought an injunction and assignment of copyright. I direct the defendants to remove the offending articles from any electronic database, where they are accessible under the control of the *National Post* Internet sites and electronic databases. In addition, the defendants are required to expressly withdraw any consent given to third parties to re-publish the defamatory expression and to require these third parties to cease re-publication.

[293] Further, the defendants will publish a complete retraction of the defamatory expression in the hardcopy *National Post* Internet sites and electronic databases in a form agreed to by the plaintiff. Failing agreement, the parties are at liberty to apply to this Court for directions concerning the form and content of such retraction. As to the

question of ordering an assignment of copyright, without more foundation, I am unable to accede to that as requested by the plaintiff in this matter.

[294] The parties are at liberty to speak to the question of costs, if they cannot agree.

“Burke J.”

Burke J.