Submissions to the Ontario General of Ontario on:

The Law Commission of Ontario report, *Defamation Law in the Internet Age*

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Executive Summary

1. DCLC supports the recommendations of the LCO report,[1] namely repealing the *Libel and Slander Act*[2] ("the Act"), and creating a new statute that reflects the modern realities of online communication and defamation. If this government does not want to repeal the entire Act, we provide several alternatives.

2. The primary focus of these submissions is around the special and unique notice provisions of the LSA. These provisions are particularly onerous for low-income populations, who are entirely unaware of the abbreviated timelines required for actions under the Act. The ambiguity of whether these provisions apply to online communications and social media also warrant their amendment or repeal.

3. DCLC's recommendations as it relates to the Act are as follows:

    1) **DCLC agrees with the LCO's recommendation to repeal the LSA entirely.**
    2) **In the alternative, DCLC submits that sections 5 to 8 of the LSA be repealed.**
    3) **In the further alternative, DCLC submits that an express 2-year limitation period apply to all online defamation actions.**
    4) **Finally, as another alternative, DCLC submits that the LSA should be amended to clarify that it does not apply to online communications.**

[1] "Defamation Law in the Internet Age, Final Report", Law Commission of Ontario (March, 2020) online: <https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/>, [Defamation Law Report].
[2] RSO 1990, c L.12.

Background

4. The Durham Community Legal Clinic ("DCLC") was founded in 1985, and has operated under a very traditional model of clinic legal services for much of that time. Beyond legal services such as housing law, social benefits, employment law, WSIB, and human rights, DCLC also is actively involved in public legal education, advocacy and law reform initiatives. In accordance with DCLC's focus on law reform, DCLC has reviewed the Law Commission of Ontario's ("LCO") report on defamation law in the internet age. DCLC appreciates the opportunity to provide feedback with respect to defamation law generally.

5. From an access to justice perspective, the current LSA prevents impecunious plaintiffs from obtaining a practical legal remedy due to the time and expense involved in a legal proceeding. Even if a plaintiff had the monetary ability to pursue legal recourse, the reputational harm is ongoing until the end of often lengthy legal proceedings. These issues are exacerbated by the fact that the Act does not expressly address online defamation, and creates an abbreviated notice provision that most members of the general public would be entirely unaware of. The public policy reasons for these provisions relate to historic purposes of defamation actions, and no longer serve the same goals. The Act is therefore dated legislation and only applies to defamation stemming from traditional sources such as newspapers and broadcast media.

6. These applications are completely incongruent with the current zeitgeist, whereby the Internet is the primary source of communication including, but not limited to, online news sources as well as

social media. Online mediums allow for much swifter and virtually universal broadcasting of defamatory statements. As such, it is clear that a more practical and quicker alternative to the current legislative regime is required in order to best facilitate access to justice.

Part 1 - The Origin and Purpose of the LSA

7. The *LSA* emerged out of the regulatory context in England, with the *Newspaper Libel and Registration Act 1881*.[3] This U.K. statute, and its subsequent amendments, required mandatory registration for all newspapers due to the anonymous nature of print publications at that time and, as a compromise, provided them with a notice requirement for any defamation action against them.[4] The newspaper was required to provide their name and contact information in the publication for the purpose of this notice.[5]

8. The primary purpose of these provisions was, and still is, to mitigate the damage to the plaintiff's reputation through timely correction or apology. Specifically, the nature of circulation of newspapers in print form means that past newspapers are discarded, and therefore the damage to the plaintiff's reputation could be reduced through a timely intervention by the publisher. The

[3] *Newspaper Libel and Registration Act 1881,* 1881 Chapter 60 44 and 45 Vict.
[4] *Ibid*.
[5] Tom O'Malley & Clive Soley, *Regulating the Press*, (London, Pluto Press, 2000) at pp. 46-48.

requirement to print the identity of the printer and publisher was not only to offer the information as to who the notice should be provided, but to prevent anonymous defamation by print publications.[6]

9. The Legislative Assembly of Ontario adopted much of the same wording as the English legislation, maintaining the compromise between mandatory registration and publication of contact information, in exchange for a notice requirement and a short limitation period.

10. The notice provisions under the *LSA* were thus originally intended to provide a plaintiff with the ability to compel the identification of a defamatory anonymous party from the print publisher, a third-party.[7] If the *LSA* applies to online publications, in cases involving anonymous defamatory comments posted on online "newspapers", all the plaintiff would need to do is serve the online publisher with an *LSA* notice to compel disclosure of the commentator's identity. This is contrary to the established practice of applying to the courts for a *Norwich Order*, "an intrusive and extraordinary remedy that must be exercised with caution."[8] *Norwich Orders* provide judicial oversight over the disclosure and include built-in safeguards that are intended to protect the privacy of the anonymous posters.

11. The relevant sections of the *LSA* find their origin in the 19th century and have been amended several times to reflect, *inter alia*, technological advances in the media:

[6] George Elliot, *The Newspaper Libel and Registration Act, 1881: With a Statement of the Law*, (London: Stevens and Haynes, 1884) at pp. 89-91
[7] Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford, Oxford University Press, 2016) at pp. 70-71
[8] *GEA Group AG v. Ventra Group Co.*, 2009 ONCA 619 at para. 85, per Cronk J.A.

a. Section 5(1) of the Act, which establishes the requirement to give a libel notice, was first enacted in 1887.[9]
b. Section 6 of the Act, which imposes a 3 months limitation period, was first enacted in 1894.[10]
c. The definition of "newspaper" was first enacted in 1894.[11]
d. Section 7, which limits the application of the Act to "newspapers printed and published in Ontario" was first enacted in 1909.
e. In 1958, the definition of "broadcast" was added to the Act.[12]
f. The definitions of "newspaper" and "broadcasting" were last amended in 1980 to reflect the current versions of those definitions.[13]

12. The most notable amendment was in 1958, when the definition of "broadcast" was added, intending to apply to publications on radio and television. It is significant that the introduction of the technology of radio and television required a statutory amendment and was not expected to automatically extend the definition of "newspaper" to those modes of publication. This illustrates that the application of the *LSA* is intended to be technology-specific and not technology-neutral, contrary to the ONCA's analysis in *Ballingall*,[14] which is the primary basis of these submissions. Indeed, the technology of the Internet is different from the technology of "newspaper" in the same manner that "broadcast" is different from "newspaper".

[9] *An Act Respecting the Law of Libel*, (1887) 50 Vic. c. 9, ss. 1(2).
[10] *An Act Respecting the Law of Libel*, (1894) 57 Vic. c. 27, s. 4
[11] *Ibid.* at s. 2, "newspaper."
[12] *The Libel and Slander Act 1958*, S.O. 1958, c. 51, ss. 1(a) "broadcasting."
[13] *An Act to Amend the Libel and Slander Act*, S.O. 1980, c. 35, s. 1.
[14] *John v Ballingall et al.,* 2016 ONSC 2245; 2017 ONCA 579 (aff'd); 2018 CanLII 43780 (leave to SCC ref'd) ["*Ballingall*"]. Note that the author was co-counsel in this matter, and the contents of these submissions largely reflect those proceedings.

13. The *LSA* was amended as recently as November 3, 2015, through the passing of the *Protection of Publication Participation Act, 2015*[15] (commonly referred to as the *Anti-SLAPP* Legislation), which amended section 25 of the *LSA* to expand the defence of qualified privilege. It made no other amendments to the *LSA* and, significantly, no reference the Internet or online publications.

14. If the legislature had intended to include a particular thing within its legislation, it would have referred to that thing expressly. The legislature's failure to explicitly mention the thing forms the grounds for inferring that it was deliberately excluded. When a provision specifically mentions one or more items, but is silent with respect to other comparable items, it is presumed that this silence is deliberate and reflects an intention to exclude the items that are not mentioned.[16]

15. The fact that the *LSA* was last updated in 2015 should put to rest any questions of legislative intent, as "the legislator does not speak in vain."[17] The deliberate exclusion of the Internet from the 2015 amendments to the *LSA*, and the failure of the legislature to amend the *LSA* to include the Internet to date, should be construed as clear legislative intent that this statute is not intended to be applied to online publications. The evolving realities of the Internet were not different in 2015 as they are today.

[15] *Protection of Public Participation Act, 2015,* S.O. 2015 c.23, s. 4.
[16] Prof. R. Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., at p. 248 (Toronto: LexisNexis, 2014)
[17] *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, 1985 CanLII 35 (SCC), [1985] 1 S.C.R. 831, at para. 28

16. Although the 2015 amendments were not intended to extend the Act to the Internet, the judiciary has been forced to extend it to online communications, largely through necessity.[18] Doing so however imposes notice provisions and timelines which were intended for traditional and print media, and the unique peculiarities with those formats, into the online context, in ways that provide unreasonable and onerous burdens, especially for low-income and vulnerable populations.[19]

Part 2 – Inconsistency in the State of the Law

Inconsistent Supreme Court of Canada Decisions

17. To succeed in an action for defamation, the plaintiff must prove on a balance of probabilities that the defamatory words were published, that is, that they were "communicated to at least one person other than the plaintiff."[20]

18. Section 2 of the *LSA* creates a presumption of publication for defamatory words published in a "newspaper" or "broadcast", as follows:[21]

> Defamatory words in a newspaper or in a broadcast shall be deemed to be published and to constitute libel.

[18] *Ballingall, supra* note 14. However, other courts have determined there was insufficient evidence to extend this ruling to social media, without definitely concluding that it could not extend to social media; *Levant v. Day*, 2017 ONSC 5956, at paras 44-48. This uncertainty is the primary basis for calling for reform of the Act.
[19] Omar Ha-Redeye, "An Online Newspaper is not a Newspaper," Slaw, Aug. 13, 2017, available at: <http://www.slaw.ca/2017/08/13/an-online-newspaper-is-not-a-newspaper/>.
[20] *Crookes v. Newton*, 2011 SCC 47, [2011] 3 S.C.R. 269 at para. 1, citing *Grant v. Torstar Corp*., 2009 SCC 61 (CanLII), [2009] 3 S.C.R. 640, at para. 28
[21] *Libel and Slander Act*, R.S.O. 1990 c. L. 12, at s.2

19. Thus, in actions that are subject to the application of the *LSA*, the plaintiff is not required to prove publication, a provision that is intended to benefit the plaintiff. The purpose of this presumption is clear: if the plaintiff were required to prove publication in a print newspaper, he or she would need to adduce at trial the oral testimony of each and every person who read the defamatory statements. This places an unfair evidentiary burden on plaintiffs in such cases. When defamation is published on the Internet, however, it is not necessary to call to testify each person who read the defamatory postings. Rather, it is sufficient to adduce electronic evidence illustrating that the defamatory statements were accessed or downloaded by third parties.

20. This issue was considered and addressed by the Supreme Court of Canada in *Crookes v. Newton* (hereinafter, "*Crookes*"). In *Crookes,* the Supreme Court considered the parallel section of the British Columbia *Libel and Slander Act* (hereinafter, the "B.C. Act") in the context of the Internet, and concluded that there is no presumption of publication in relation to material published on the Internet.[22] A plaintiff in an online defamation claim must prove that at least one person has downloaded, viewed or accessed the defamatory content online.[23] Since *Crookes*, several Ontario trial level decisions have found that in Ontario there is no presumption of publication on the Internet.[24]

[22] *Crookes v. Newton, supra*, at para. 14 (Abella C.J.C.) & para. 108 (Deschamps C.J.C., concurring).
[23] *Ibid.*
[24] *Elfarnawani v. International Olympic Committee*, 2011 ONSC 6784, at para. 34; *Bernstein v. Poon*, 2015 ONSC 155, at paras. 90 & 91; *Craven v. Chumra*, 2013 ONSC 1552, at paras. 24 & 25; *Smith v Baglow*, 2015 ONSC 1175, at para. 167.

21. The Ontario Court of Appeal in *Ballingall* failed to consider section 2 of the *LSA* in its entirety, or to reconcile the presumption of publication created by section 2 with the Court's decision in *Crookes*. This failure results in inconsistency and uncertainty on the issue of whether there is, or is not, a presumption of publication in Ontario. It also places the correctness of the Ontario trial decisions that followed *Crookes* at issue.

22. Furthermore, the Ontario *LSA* should be interpreted consistently with the B.C. Act, which contains definitions that are similar to the definitions of "newspaper" and "broadcast" in the Ontario *LSA*. As indicated above, in the *Crookes* case, the Supreme Court of Canada considered the B.C. Act in the context of online publications. In holding that the B.C. Act did not apply to publications on the Internet, the Court essentially found that those definitions did not include the technology of the Internet.[25]

23. The ONCA's failure to consider the *Crookes* decision in *Ballingall*, and to reconcile it with its analysis of the relevant provisions of the *LSA*, requires the legislature to take action to reform the provisions of the Act, or replace it entirely.

[25] *Libel and Slander Act*, R.S.B.C. 1996, c. 263, s. 1 "broadcast" and "public newspaper or other periodical publication", BOA at tab B-10; *Crookes v. Newton*, supra, at para. 14 (Abella C.J.C.) & para. 108 (Deschamps C.J.C., concurring)

24. By reading in the word "Internet" into the definition of "newspaper" in the LSA, the ONCA in *Ballingall* effectively amended the statute. Such a fundamental statutory amendment should only be made by the legislature.

Inconsistent Ontario Court Decisions

25. The ONCA's decision in *Ballingall* was inconsistent with other ONCA decisions and lower court decisions that followed them.

26. In *Bahlieda v. Santa*,[26] (hereinafter, "*Bahlieda*"), which was decided in 2003, the ONCA held that a trial with a full evidentiary record, including expert evidence, is required in order to determine whether the Act applies to defamation posted online. This principle was followed by several subsequent Court decisions.[27]

27. In contrast, in *Weiss*,[28] which was decided in 2002, the ONCA held in *obiter,* that the word "newspaper" is broad enough to include an online publication. The Court in *Weiss* did not consider whether an online publication is "printed and published in Ontario" and refused to consider whether the word "broadcast" applied to the Internet, because of the lack of evidence on that issue.[29]

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[26] *Bahlieda v. Santa* (2003), 68 O.R. (3d) 115 (Ont. C.A.)
[27] *Ibid.*, at para. 6; followed by *Fromm v. Warman*, 2008 ONCA 842 at paras. 76 – 92; *St. Lewis v. Rancourt,* 2015 ONCA 513 para. 8; *Kim v. Dongpo News,* 2013 ONSC 4426 at para. 25; *Warman v. Grosvenor*, 2008 CanLII 57728 (ON SC);
[28] *Weiss v. Sawyer* (2002), 61 OR (3d) 526 (C.A.) ["*Weiss*"].
[29] *Weiss, ibid* at par. 5; followed by *Janssen-Ortho Inc. v. Amgen Canada Inc.*, 2005 CarswellOnt 2265 (C.A.) at para 41.

28. The issue came before the Court of Appeal again in *Shtaif v. Toronto Life Publishing Co.*,[30] ("*Shtaif*"), in 2013, more than a decade after the *Weiss* and *Bahlieda* decisions. The Honourable Laskin C.J.A. considered the conflicting decisions in *Weiss* and *Bahlieda* and, in so doing, pointed out the unstable foundation upon which the *Weiss* decision was based. The ONCA then proceeded to reject the reasoning in *Weiss* and to adopt the reasoning in *Bahlieda*:[31]

> In this case, I think the sensible course is that adopted in Bahlieda: to leave to trial the question whether the internet version of the article is a newspaper published in Ontario or a broadcast from a station in Ontario. I am not satisfied that the evidentiary record before us is sufficient to decide these questions, which have broad implications for the law of defamation.
> [emphasis added]

The ONCA in *Shtaif* concluded:[32]

> Therefore, I would hold that the issue whether the claim for libel in the internet version of the article is subject to ss. 5(1) and 6 of the Act is a genuine issue requiring a trial.

29. In *Ballingall*, the ONCA adopted the reasoning in *Weiss*, without a satisfactory explanation as to why it preferred the *Weiss obiter* analysis to that of *Shtaif*. Indeed, *Weiss* is distinguishable on the facts alone, as the defendant was an individual who wrote a libelous letter and not a media defendant, nor was there any evidence that the defamatory statement was published online. The ONCA's reliance on this case as its sole authority reinforces the concern that its decision will have broader applicability to online defamation actions, and gives rise to definitional issues as to who can receive the protections of the *LSA*'s strict notice and limitation provisions.

[30] *Shtaif v. Toronto Life Publishing Co*., 2013 ONCA 405
[31] *Ibid* at para. 24
[32] *Ibid* at para. 26

30. Furthermore, in *Shtaif*, the ONCA correctly noted that there is a need for legislative amendments if the *LSA* is to apply to online defamation:[33]

> The Act was drafted to address alleged defamation in traditional print media and in radio and television broadcasting. It did not contemplate this era of emerging technology, especially the widespread use of the internet. The application of the Act to internet publications will have to come about by legislative amendment or through judicial interpretation of statutory language drafted in a far earlier era.
> [emphasis added.]

31. As indicated above, the *LSA* was amended post-*Shtaif* in 2015, without including any reference to the Internet, an indication that the legislature considered the ONCA's guidance in *Shtaif* and intended to exclude online publications from the application of those statutory provisions.

The Multiple Publication Rule

32. The "Multiple Publication Rule" stands for the proposition that each publication of a defamatory meaning gives rise to a separate and distinct cause of action, even if the material in each publication relates to matters previously published. If an action is brought for the most recent publication, the limitation period begins at that point, and not on the date of the earlier publication.[34]

33. Defamatory words published in a newspaper, or on radio or television, cannot be altered once published and, in most cases, are not repeated by the publisher. Online defamation, however, is republished on a continuous basis and may be removed or altered by the publisher at any time. The

[33] *Ibid* at para 20
[34] Prof. R. E. Brown, *Brown on Defamation: Canada, United Kingdom, Australia, New Zealand, United States* 2nd. Ed., p. 17-312 (2016, Toronto – Thomson Reuters)

publisher may also remove the defamatory words from the Internet and republish them again the next day or at a later date. Thus, every day that the defamation is posted on the Internet, the publisher is making a conscious decision to republish it. Given this unique characteristic of the Internet, for every day that the defamatory words are published online, a new and distinct cause of action accrues, and a new limitation period begins to run. This application of the Multiple Publication Rule in the context of the Internet was discussed by the British Columbia Court of Appeal in *Carter v. B.C. Federation of Foster Parents Assn.*[35] ("*Carter*"). It is also consistent with the Supreme Court's holding in *Crookes* that there is no presumption of publication on the Internet.[36]

34. In *Shtaif*, the ONCA also implicitly confirmed this principle when it rejected the "Single Publication Rule", because the Single Publication Rule is essentially the opposite of the Multiple Publication Rule.[37]

35. The ONCA in *Ballingall* rejected the Multiple Publication Rule[38], citing a single lower court decision as its authority, without considering the long-established common law principles of defamation law, the analysis in *Shtaif*, the B.C. Court of Appeal analysis in *Carter*, and the unique characteristics of online defamation, discussed above. A failure to do so further muddies the law of online defamation, not only in Ontario but across Canada.

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[35] *Carter v. B.C. Federation of Foster Parents Assn*., 2005 BCCA 398 ["*Carter*"]
[36] Prof. R.E. Brown, *ibid* at p. 17-386; *Crookes, supra*, at para 108; *Carter*, *ibid* at para. 20
[37] S*htaif v. Toronto Life Publishing Co.*, 2013 ONCA 405 at paras. 27 – 40.
[38] *John v Balligall,* supra note 1 at para 35 [Tab 2B]

Other Inconsistent Appellate Court Decisions

36. The ONCA's decision in *Ballingall* is also inconsistent with appellate level decisions from other provinces. The most recent is that of the Manitoba Court of Appeal in *Canadian Broadcasting Corporation et al v. Morrison*.[39] In that decision, the Manitoba C.A. cites *Shtaif* as the leading authority on the interpretation of the *LSA* in Ontario, and states, in pertinent part:[40]

> It is well understood that the nature of the Internet as a communication medium raises unique concerns regarding the question of "publication" separate and apart from a broadcast through a television network (see *Crookes v Newton*, 2011 SCC 47 (CanLII) at paras 16-43; *Shtaif* at paras 23-24; and Matthew Collins, *The Law of Defamation and the Internet*, 3rd ed (New York: Oxford University Press, 2010) at para 4.06).

37. Furthermore, as indicated above, the ONCA's decision in *Ballingall* is inconsistent with the B.C. Court of Appeal decision in *Carter* on the Multiple Publication Rule and with the B.C. Court of Appeal decision in *Crookes* on the application of the B.C. *Libel and Slander Act* to online defamation.[41]

38. Addressing these inconsistencies, especially where the judiciary has been unable or unwilling to do so, would be an effective exercise of legislative power, especially where this ambiguity continues to create uncertainties for litigants.

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[39] *Canadian Broadcasting Corporation et al v. Morrison*, 2017 MBCA 36
[40] *Ibid* at para. 55
[41] *Crookes v. Newton*, 2009 BCCA 392, at paras 32, 33

Part 3 - Reputations of Low-Income Populations

39. The legal community generally accepts that defamation law has a propensity to benefit the wealthy. For example, Bruce McDougall states,[42]

> If you've ever suspected that the law might favour one particular group of people over another, you have only to look at defamation law to confirm your suspicions. The law aims to balance freedom of speech with the damage to a person's reputation that might arise from freely spoken but inaccurate or malicious communications. But it seems that the law protects only people who have enough fame to suffer if someone exposes it to damage, and in law, we measure fame with money.
>
> Even in light of suggested revisions from the Law Commission of Ontario (LCO), you'll discover that you can defend yourself successfully against defamation only if you have money.

40. This disparity in power has a potential to have a chilling effect on the impoverished, especially as to where their speech and expression is directed towards the wealthy. For example, the Ontario Court of Appeal stated in *St. Elizabeth Home Society v. Hamilton*,[43]

> The "chilling effect" of the common law of defamation has been recognized by this court and other courts around the common law world without empirical evidence.

41. Rectifying this power imbalance has been suggested through anti-SLAPP measures, and intermediate liability.[44] Although the former exists in the current Act, the latter does not. Furthermore, the use of anti-SLAPP measures has increasingly been employed by the wealthy and those who historically have had ample access to the courts and the traditional mechanisms of

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[42] Bruce McDougall, "Sticks and Stones," Lawyer's Daily, May 11, 2020, available at: <https://www.thelawyersdaily.ca/articles/19009/sticks-and-stones-bruce-mcdougall?category=opinion>.
[43] 2008 ONCA 182 at para 32.
[44] Hilary Young, "Improving Access to Justice in Defamation," The Lawyer's Daily, May 21, 2020, available at: <https://www.thelawyersdaily.ca/articles/19172>.

defamation law. Without further refinement, it's unlikely that anti-SLAPP measures themselves will rectify these power imbalances.

42. The courts have attempted to damper the potential chilling effects of defamation law, for example, through the use of punitive damages. The Supreme Court of Canada stated in *Hill v. Church of Scientology of Toronto*,[45]

> Punitive damages can and do serve a useful purpose. But for them, it would be all too easy for the large, wealthy and powerful to persist in libelling vulnerable victims. Awards of general and aggravated damages alone might simply be regarded as a licence fee for continuing a character assassination. The protection of a person's reputation arising from the publication of false and injurious statements must be effective. The most effective means of protection will be supplied by the knowledge that fines in the form of punitive damages may be awarded in cases where the defendant's conduct is truly outrageous.

43. However, punitive damages are awarded sparingly, as they should be, and may not provide adequate deterrence to the type of conduct described by the Court here. They fail to address the problems raised by the authors above, namely that the very threat of a defamation suit by a wealthy or powerful individual is typically sufficient to intimidate and stifle entirely the expression rights of the disempowered, most who can never afford counsel or have the ability to engage in protracted litigation.

[45] 1995 CanLII 59 (SCC), [1995] 2 SCR 1130 at 199.

44. The utilization of defamation suits in this manner, by those who have far greater access to legal assistance and the justice system, can be found in more recent discourse by the Court, such as in *Grant v Torstar Corp*,[46]

> While the law should provide redress for baseless attacks on reputation, defamation lawsuits, real or threatened, should not be a weapon by which the wealthy and privileged stifle the information and debate essential to a free society.

45. In *Grant*, the Court established the new defense of responsible communication, which provided a further basis for the enactment of the anti-SLAPP provisions in the Act. The purpose of anti-SLAPP legislation was to deter cases in which the plaintiff's goal was not to obtain compensation, but to drag the defendant into a costly legal battle as a means of silencing them. Anti-SLAPP legislation theoretically allows defendants to bring a relatively quick and efficient motion that requires the plaintiff to demonstrate that, among other things, the public interest in proceeding outweighs the public interest in censured expression.

46. Defamation suits typically go in one direction. Although all individuals in society have reputations that are worthy of protection, the volume of cases in Ontario demonstrates that it is often the powerful that sues the weaker. The protections around s. 2(b) of the *Charter*, and its exceptions, are often phrased around the notion of the "marketplace of ideas."[47] These cases

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[46] 2009 SCC 61 (CanLII), [2009] 3 SCR 640 at para 39 ["*Grant*"].
[47] See, for example, *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 SCR 467 at paras 102-104, 140, 171; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 SCR 697 at 704, 718, 761, 798, 801, 832, 863; *Canada (Human Rights Commission) v. Taylor*, 1990 CanLII 26 (SCC), [1990] 3 SCR 892 at 952, 966; *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 SCR 731 at 826-827.

recognize that minorities and vulnerable populations are already vulnerable to censure as speakers in this marketplace, and that all individuals do not have the same access to this marketplace as others. Yet, this concept is a central conception to our democracy.[48]

47. The concern that wealthier individuals will control public discourse through disproportionate spending has been raised before the Court, albeit without sufficient evidence to demonstrate the effects of spending limits on such discourse.[49] However, the experience of the litigation bar as it relates to online defamation clearly see this effect occurring on a regular basis. The economic nature of online defamation claims are clearly distinct from the political participation goals of s. 2(b) of the *Charter* described in case law, or the goals of realizing one's spiritual or artistic self-fulfillment.[50] This sensitive and case-oriented approach to commercial expression is what allows for greater latitude by the legislature to act in a manner that protects vulnerable groups, such as low-income populations in Ontario.

48. The tremendous imbalance between the wealthy and low-income populations directly translates into the former having greater ability to be heard in the real world. The Internet has created new and meaningful opportunities for an equal platform for every individual to be heard, including the most

[48] *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at para 68; *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139 at 173.
[49] *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 SCR 827 at paras 34-35.
[50] *Rocket v. Royal College of Dental Surgeons of Ontario*, 1990 CanLII 121 (SCC), [1990] 2 SCR 232 at 247-248.

disadvantaged ones, thus it potentially "equalizes the imbalance."[51] In contrast to the real world, in the online world every individual, who has access to Internet, is "potentially a publisher, capable of transmitting messages instantaneously to millions of readers".[52] However, the inequality in regards to Internet access among low-income individuals provides a further obstacle for full democratic participation, and with increasing sophistication of the Internet, even this platform is susceptible to power imbalances and influence from the wealthier members of society.

49. Another equitable obstacle in defamation law is the unpredictable costs and fees that are associated with defamation lawsuits, unlike non-pecuniary damages.[53] As a result, the unregulated nature of defamation lawsuits may cause low-income defendants to face serious outcomes (including imprisonment in the event of failure to pay damage awards), which in turn may discourage them (1) to speak freely on the wrongdoings that they face (2) use their right to criticize. This oppressive damage awards would not only silence individuals, but also intimidate, suppress and discourage the general public to speak up about their legitimate concerns and criticisms about matters.[54] The fact that the onus of proof is on the defendant on defamation cases, and that participating in the civil justice system is very expensive, means that defamation law penalizes and

[51] Lyrissa Barnett Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace, 49 Duke Law Journal 855-946 (2000) at 885.
[52] *Ibid.*
[53] *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 SCR 229; *Arnold v. Teno*, 1978 CanLII 2 (SCC), [1978] 2 SCR 287; *Thornton v. School Dist. No. 57 (Prince George) et al.*, 1978 CanLII 12 (SCC), [1978] 2 SCR 267.
[54] Danay, Robert, "The Medium is Not the Message: Reconciling Reputation and Free Expression in Cases of Internet Defamation", (2011) McGill Law Journal. 56. 10.7202/045697ar.

chills even fair and true speech about corporations and those with greater access to wealth and power.[55]

50. Unlike low-income individuals, corporations often have the financial and institutional resources to sue. The inequalities between the resources that individuals and corporations have created further inequalities in access to justice, since it is possible for a powerful plaintiff win a defamation action by "exhausting a defendant's ability to defend".[56] This inequality grows directly proportional to individuals' level of poverty. Corporate and wealthy interests can easily threaten individuals for a defamation action (even if they are certain that they would lose such a case) because of their greater ability to retain legal counsel, and their knowledge of the legal system.[57] This includes practical aspects, such as the considerations around dispute resolution within our legal system. The legal complexities around online defamation are often deeply disproportionate to the realistic quantum of a claim, which means that there is often little redress for those who are the most wronged.[58]

51. This problem is exacerbated further due to the lack of recognition/understanding of the reputational harm that occurs as a result of online defamation of individuals that are not wealthy corporations or individuals. For example, the LCO found that "courts and other members of the

[55] Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate. Plaintiffs" (2013) 46 UBC L Rev 529 at 557.
[56] *Ibid* at 559.
[57] *Ibid* at 562.
[58] Emily Laidlaw, Are We Asking Too Much From Defamation Law, LCO, September 2017, at 19, available at <http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf>

legal community do not always appreciate the significance of a plaintiff's online reputation, nor the extent to which online personal attacks can spread and cause reputational harm in the offline world."[59] For low-income individuals, this can create barriers to employment, prevent them from earning an income, and exacerbate their situation in poverty. Additionally, the LCO found that "Some stakeholders indicated that judges do not appreciate the power of social media to harm reputation."[60] In large measure, this is a function of the restorative nature of defamation law and tort law generally, which seeks to restore a plaintiff to their original position, which is less easily demonstrable for low-income populations.

Use of Anti-SLAPP Motions

52. The stated purpose of the anti-SLAPP provisions is:[61]

    a. To encourage individuals to express themselves on matters of public interest.

    b. To promote broad participation in debates on matters of public interest.

    c. To discourage the use of litigation as a means of limiting expression on matters of public interest.

    d. To reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

[59] Defamation Law Report at 13.
[60] *Ibid*, at 21.
[61] Section 137.1(1), CJA; See also, the court's analysis on the section in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2018 ONCA 685 at paras 35-49.

53. The proper use of Anti-SLAPP motions has been demonstrated in many levels of Canadian courts. For example, in the recent decision of *New Dermamed Inc. v. Sulaiman*, where the plaintiff (a skin care clinic) sued a past customer for a negative Google review, and the judge sided with the defendant, granting an anti-SLAPP motion where she agreed with the position of the Defendant that the matter was sufficiently related to public interest.

54. Although Anti-SLAPP motions are intended to infuse some balance into the previously one-sided realm of defamation law, the use of these motions are also being used by those with more power. This was not an unanticipated consequence. The Ministry of the Attorney General recognized this risk in its 2010 Anti-SLAPP Advisory Panel Report:

> For example, corporations sued by public interest organizations for violating privacy rules have defended on the ground that their right to communicate was being infringed, and thus that the suit was subject to the statutory remedies. Even governments have tried to use such laws to defeat lawsuits aimed at making them comply with other legislation, on the ground that they (the governments) were acting in the public interest.

55. The recent decision of *Lascaris v. B'nai Brith Canada*[62] is a good example that illustrates how anti-SLAPP motions are being improperly used by powerful parties. When overturning the lower court's decision on accepting the anti-SLAPP motion, the Ontario Court of Appeal held that the case "has none of the recognized indicia of a SLAPP lawsuit". The Court of Appeal suggested that

[62] 2019 ONCA 163, reversing 2018 ONSC 3068.

if there is any financial or power imbalances, then they would be in favour of the defendant, as a community organization with significant resources as compared to the individual plaintiff.[63]

56. The LCO Report mentions other cases, such as in *Platnick v. Bent*[64] and *Veneruzzo v. Storey*,[65] the former involving a "a lawyer's email criticizing a doctor's medical assessments for insurance claims" and the latter about Facebook posts of a police officer convicted of dangerous driving causing death, who tried to blame the deceased family for the matter.[66] In both cases, the judges held that the main characteristic of the SLAPP cases, the power imbalance, was absent.

57. Based on the limited caselaw around anti-SLAP motions, it is premature and inconclusive whether they will be an effective mechanism to rectify power imbalances between litigants in defamation actions.

Conclusions

58. The current Act is a statute that has been modified, changed, and amended numerous times, originating out of legislation in 1881. It does not reflect the modern realities of online communication, or the reputational risk involved with online defamation.

[63] *Ibid* at para 40; Omar Ha-Redeye, "Anti-SLAPP Motions Curbed Where Substantial Merit Remains," CanLii Connects, March 11, 2019, available at: <https://canliiconnects.org/en/commentaries/66018>.
[64] *Platnick v. Bent*, 2018 ONCA 687 (CanLII).
[65] *Veneruzzo v. Storey*, 2018 ONCA 688 (CanLII)
[66] Defamation Report, at 53

59. One of the most significant barriers in online defamation actions for low-income populations is the notice provisions of the Act. The public policy reasons for these provisions, namely to provide a retraction in a print publication that would subsequently be circulated close to the time of publication,[67] simply does not apply in the modern context.

60. The best course of action in this context is a clean repeal of the Act, and the creation of a new Defamation Act that fully reflects the complexities of modern communications. The government should go beyond the LCO Report and hold further consultations as to the contents of this new legislation, and provide special consideration for the interests, reputations, and access to justice implications for low-income Ontarians.

[67] S. 5(d) of the Act.

Recommendations

1) **DCLC agrees with the LCO's recommendation to repeal the LSA entirely.**

Repealing the entire LSA and establishing a new Defamation Act instead, would create an integrated system that includes both offline and online defamation complaints in Ontario, which in turn will establish a more organized framework for defamation law on Ontario.[68]

2) In the alternative, DCLC submits that sections 5 to 8 of the LSA be repealed.

According to the section 5 of the LSA, no action for libel in a newspaper or in a broadcast can be commenced unless the plaintiff has, within six weeks after the libel has come to his or her attention, given notice in writing of the complaint specifying the matter complained of. The intention of this requirement is to give the potential defendant the opportunity to publish a correction or an apology.[69]

However, rather than enforcing such a short limitation period, requiring a "reasonable time" for notice would be more appropriate and beneficial for less-powerful party of the suit, considering

[68] Defamation Law Report at 4.
[69] Richard Worsfold and Lauren Kason, "YouTube and broadcasting: Applying Libel and Slander Act to Internet", Lawyer's Daily, December 8, 2017, available at:< https://www.millsandmills.ca/wp-content/uploads/2019/06/YouTube_and_broadcasting__Applying_Libel_and_Slander_Act_to_Internet_-_The_Lawyer_s_Daily.pdf>.

their lack of sufficient resources to get legal advice and help.[70] A complete repeal of these provisions would result in a default two-year limitation under the *Limitations Act*.

3) **In the further alternative, DCLC submits that an express 2-year limitation period apply to all online defamation actions**.

Regulating online defamation in accordance to the general rule of limitations is a reasonable approach, and creates greater predictability and consistency. Therefore, the general two-year limitation period in the *Limitations Act* should be adopted to all online defamation actions for uniformity purposes.[71]

4) **Finally, as another alternative, DCLC submits that the LSA should be amended to clarify that it does not apply to online communications.**

While, the LSA has been amended several times to reflect technological advances in media, the legislature never intended for the act to apply to the technology of the internet. If the legislature intended to include internet technologies within the legislation, it would have referred to it expressly. This exclusion leads to vagueness and confusion at times. Therefore, it would be logical to amend LSA to express its exclusion of online communications.

[70] Defamation Law Report at 46.
[71] *Ibid* at 49.