

LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Defamation Law in the Internet Age



Executive Summary

March 2020

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The LCO's mandate is to promote law reform, advance access to justice and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled, and practical recommendations to contemporary legal policy issues. The LCO is located at Osgoode Hall Law School, York University, Toronto. More information about the LCO is available at www.lco-cdo.org.

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Disclaimer

The opinions or points of view expressed in the LCO's research, findings and recommendations do not necessarily represent the views of our Advisory Committee members, LSA Working Group members, funders (Law Foundation of Ontario, Osgoode Hall Law School, Law Society of Ontario) or supporters (Law Deans of Ontario, York University).

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EXECUTIVE SUMMARY

I. The LCO Defamation Law in the Internet Age Project

This is the Executive Summary of the Law Commission of Ontario's (LCO's) Final Report on Defamation Law in the Internet Age.

The LCO Final Report is the culmination of a four-year process of multi-disciplinary and multi-jurisdictional research and consultations on how best to reform defamation law in response to the social and technological revolution in written communications brought about by the internet. This project is most comprehensive analysis of Ontario's defamation law undertaken.

Early in the project, the LCO determined that incremental reform to defamation law principles and process would not suffice to bring the law into the 21st century. Instead, we adopted a broad scope to the project, analyzing both the underlying purpose and function of defamation law and how the law should accommodate social and technological developments that will continue well into the future.

The internet is the unavoidable backdrop for any meaningful law reform exercise. Accordingly, the LCO has examined defamation law taking into account, first, that the internet is now the arena in which much, if not most, defamation occurs and, second, that the internet has had an unprecedented impact on the two core values underlying defamation law: freedom of expression and protection of reputation.

A crucial and high-profile issue internationally is the role internet intermediaries such as Facebook and Google play in facilitating internet communications and the degree of legal responsibility they should have for offensive internet content. Defamatory communications are only one subset of this broader issue and we have considered defamation law reform in the context of this quickly developing, international debate.

The internet has also created new problems in the multi-national reach of defamation law. The very nature of the internet is to transcend geographic boundaries. This creates significant practical challenges for any single province or country attempting to regulate defamatory online speech, assert jurisdiction over defamation law claims and/or enforce its laws and court judgments.

The LCO is an Ontario organization and our recommendations are directed at Ontario law, including Ontario's *Libel and Slander Act* (LSA).¹ Of necessity, however, we have examined Ontario's law within the broader context of defamation law nationally and internationally. We have also examined the role of defamation law as one of several legal tools for regulating offensive internet content. Our recommendations are designed to be consistent with other areas of law that play this role, including copyright law, privacy law and nascent federal regulatory initiatives directed at internet intermediaries.

Many issues raised in this project are concurrently being examined by jurisdictions around the world and the LCO has considered how law reform in Ontario will affect, and be affected by, developments internationally.

The LCO's Final Report addresses a wide range of substantive and procedural issues. The Report makes 39 recommendations designed to update defamation law, promote access to justice and promote internet intermediary responsibility for defamatory "internet speech." Our recommendations are principled, pragmatic and forward-looking. They include both incremental reforms and significant new measures to promote quick and inexpensive solutions for protecting against online reputational harm.

A full list of recommendations is attached to the Executive Summary in Appendix A.

More information about the project can be found on the LCO defamation project webpage.²

II. The Law Commission of Ontario

The LCO is Ontario's leading law reform agency. The LCO's mandate is to promote law reform, advance access to justice and stimulate public debate. The LCO fulfills this mandate through rigorous, evidence-based research; contemporary public policy techniques; and a commitment to public engagement. LCO reports provide independent, principled, and practical recommendations to contemporary legal policy issues. Financial support is provided by the Law Foundation of Ontario, the Law Society of Ontario, Osgoode Hall Law School and York University. The LCO is located at Osgoode Hall Law School, York University, Toronto.

More information about the LCO is available at www.lco-cdo.org.

III. Why is Defamation Law Reform Important in the Internet Age?

Defamation law is designed to protect reputation from harm caused by false words. The law tries to balance two conflicting values. On the one hand, protection of reputation has been recognized as a quasi-constitutional value by the Supreme Court of Canada.³ On the other hand, there is express constitutional protection for freedom of expression under the *Canadian Charter of Rights and Freedoms*.⁴

Both values, (reputation and freedom of expression), are informed by community norms and context for their content. As a result, defamation law is particularly sensitive to and influenced by the society in which it operates. The problem is that our current body of defamation law was largely developed by the 19th century and, therefore, influenced by the community norms and context of that time. In the 19th century, reputation was valued as property to be protected through litigation as a property right. Similar social values were shared among a wider segment of society. In this social context, the law tended to place relatively more weight on protecting reputation.

In contrast, today's society is relatively pluralistic and diverse, grounded in principles of equality and individual freedoms. Our ideas about reputation and freedom of expression have evolved in response to social and legal forces such as the constitutional entrenchment of freedom of expression, human rights, globalization and the development of mass communications. Defamation law has evolved in response to these developments on a case by case basis, supplemented periodically with legislation. The legal trend has been to place relatively more weight on protecting freedom of expression.

Even prior to the internet, many commentators believed that defamation law was complex, inconsistent and confusing. It has been likened to "Frankenstein's monster"; a body of law that, even a century ago, was already considered unstable and in need of reform.⁵

The emergence of the internet in the early 1990s has had a profound impact on defamation law. Of course, the internet is not a unified concept. It is a set of protocols by which computers may communicate with each other. These capacities let users develop a vast variety of platforms, techniques and interactions, and new protocols are devised from time to time that expand these capacities. The internet includes not only the World Wide Web and email but also bulletin boards, social networking sites and peer-to-peer networks for file sharing (such as Google Groups). Certain platforms will have overlapping functions. For example, Reddit is both a social networking and news website.

The internet has revolutionized how we communicate. It instantly puts us in touch with a potentially global audience and we can, if we choose, speak to that audience anonymously. Publications are also increasingly electronic, whether they are in the form of a traditional media news story, digital media news story, blog or social media post. These developments in the nature of expression have understandably had a huge impact on a law designed to regulate expression. And the power of the internet to connect individuals and groups has transformed us into a networked society where communities of shared interests exist regardless of geography. This has influenced our understanding and expectations of reputation and privacy and called into question some of the underlying premises of defamation law.

Furthermore, defamation in the internet era is increasingly a transnational phenomenon. Where, once, defamation was primarily a local issue driven by local community standards, online defamation may occur around the world simultaneously. One consequence of this phenomenon is that there are increasingly common legal issues among different jurisdictions. Another consequence is that conflict of laws issues are increasingly occupying the courts. For example, the recent defamation law reform in England and Wales was partly motivated by a concern that the UK was becoming a libel tourism destination. Defamation law reform must address these issues, as courts have increasing begun to do.

Prior to the internet, defamation litigation was focused on newspaper articles, books, magazines and radio and television broadcasts. The paradigm defendant was a professional media organization publishing in the public interest, and subject to professional journalism standards and other checks and balances. The common law of defamation and the LSA developed primarily to address the features of these cases. And defamation law reform to date has, for the most part, also operated within the boundaries of this traditional paradigm. The Supreme Court of Canada has been active in making incremental advances in protecting free speech.⁶ In Ontario, anti-SLAPP legislation was passed to provide a procedural route for dismissing strategic lawsuits suppressing fair criticism, including defamation actions.⁷ In consultations, the LCO heard from some media lawyers that the law is fine just as it is.

However, while media law cases continue to make up a significant proportion of defamation law claims, the social and technological revolution of the past 30 years has led to a new type of defamation claim. With the evolution of internet communications, anyone can be a publisher and they can publish anything. Defamation law claims increasingly involve individual publishers posting material online that may or may not be in the public interest, not subject to checks and balances, and, in some cases, amount to vicious personal attacks. Estranged business or personal partners, annoyed consumers, opponents in election campaigns, individuals unsuccessful in a job interview and/or anyone else holding a grudge have every opportunity to vent online, with little incentive to speak responsibly, particularly where they can hide behind anonymity. Trolling, flaming and cyberbullying can all involve defamation. Social media accounts impersonating classmates and attributing false comments to them are a common phenomenon among youth. Hyper-realistic online videos purporting to show an individual saying or doing something they did not say or do (“deepfakes”) are becoming more frequent as this technology becomes more accessible to laypeople. There is increasing concern about the ease with which online reputation can be harmed and the lack of any checks and balances on the torrent of offensive content that is publicly and permanently available online. Although not always categorized as such, much of this content may be defamatory.

The traditional defamation law framework primarily designed for media law cases has strained to adapt to this new paradigm. Access to justice is a key driver of reform here. These cases are ill-suited to the civil justice system with its attendant expense and delay. Practical alternatives are needed that address the problem of anonymous publishers and allow for the resolution of defamation claims “in real time” before extensive reputational harm is able to take hold.

Defamation law reform is concurrent with, and related to, domestic and international concerns about fake news, extreme internet speech and increasing worries about platform accountability. Justice Gibson in New South Wales has called for defamation law reform that “responds to the challenges of today, not the challenges of yesterday” and goes further than “rearranging deckchairs on the Titanic.”⁸ In this Report, the LCO takes this advice to heart and makes recommendations that address defamation law within its traditional doctrinal boundaries but also in response to its new reality as one of several legal mechanisms for regulating harmful internet speech.

IV. Seven Principles Guiding Defamation Law Reform

Chapter Two of the Final Report identifies seven guiding principles or objectives for defamation law reform:

1. Defamation Law Must Re-Balance Protection of Reputation and Freedom Of Expression In The Internet Age

The LCO has concluded that a new balancing of protection of reputation and freedom of expression is necessary to accommodate the broader diversity of publications and reputational harm to which defamation law must now respond.

2. Defamation Law Needs to Be Updated; Some Statutory Reforms Are Necessary

Defamation law must evolve coherently in response to new forms of communications made possible by the internet and other technological developments. The LCO has concluded that, where possible, the same rules should apply to all publications. Accordingly, the LCO believes that the LSA should be repealed and replaced with a new *Defamation Act* that establishes a modern legal framework for resolving defamation complaints in Ontario. The new Act should adopt a flexible and integrated approach to defamation law. Subject to specified exceptions, the LCO recommends against codifying the substantive elements of defamation law in the new statute.

3. Defamation Law Is Evolving; New Reforms Must Complement These Developments

The LCO has concluded that, with some exceptions, reworking the substantive elements of defamation law is unnecessary and may tend to destabilize the balance between freedom of expression and protection of reputation achieved by recent reforms. In our view, the primary problem in the law of defamation is the procedural barriers to access to justice in the internet era. Our recommendations focus mostly (but not entirely) on these barriers.

4. Access To Justice And Dispute Resolution Must Be Improved

The court process remains crucial to protect the important legal rights at stake in defamation law claims. However, as online defamation disputes among private individuals become more common, alternative dispute resolution mechanisms are needed. The LCO's recommendations are designed to divert high volume, low value defamation claims away from the formal court system and to encourage informal, practical resolution of these claims.

5. Defamation Law Must Specifically Address Online Personal Attacks

Media law cases continue to represent a significant proportion of defamation law claims being heard by Ontario courts. However, defamation cases increasingly involve individuals publishing online personal attacks that do not engage the public interest. Where these attacks are directed at the complainant's reputation, defamation law is engaged. Traditional defamation law principles and court processes developed to respond to media law cases often fall short when applied to online personal attacks. Defamation law in Ontario must do more to encourage informal resolution of these claims and to improve access to justice for those complainants bringing legal proceedings.

6. There Must Be New Obligations For Intermediary Platforms

Intermediary platforms are a crucial control mechanism for holding online publishers to account for defamatory content. The LCO has concluded that the new *Defamation Act* must include specific obligations directed at intermediary platforms that host third party content accessible to Ontario users. Our recommendations impose two distinct duties on intermediary platforms: the obligation to pass on notice of a defamation complaint to the publisher of the content, and the obligation to take down content subject to a defamation notice if the publisher of the content does not respond to the notice.

7. Defamation Law and Privacy Law Have Distinct Objectives and Should Remain Separate

The LCO has concluded that, notwithstanding overlapping principles and values in certain respects, defamation law and privacy law continue to be functionally distinct and should remain so.

LCO Recommendations in Chapter Two Include:

- The *Libel and Slander Act* should be repealed and replaced with a new *Defamation Act*.
- Subject to the specific recommendations in this report, the substantive elements of defamation law should not be codified and should continue to develop through the common law.
- Defamation law and privacy law should remain distinct.



V. Resolving Defamation Disputes in the Internet Age: An Overview of the LCO's Proposed Reforms

At the heart of the LCO's recommendations in the Final Report is the overriding need to improve access to justice in defamation disputes in Ontario. Throughout the consultations process, we heard that there is currently no practical legal remedy available to many Ontarians victimized by online defamation. Our legal system, designed primarily to address defamation claims against media organizations, is simply not adaptable to many online defamation claims proliferating in the internet age.

At present, Ontarians who believe that they have been defamed online have three options.

First, they may try to resolve their complaint directly with the publisher. Even if the publisher is identifiable and can be contacted, there is little legal incentive for most publishers to participate.

Second, the complainant may make an online complaint to the internet platform hosting the defamatory content or another intermediary. Many platforms and search engines evaluate controversial content and take it down where it violates their terms of service. However, this is a discretionary, unaccountable and non-transparent process. Furthermore, terms of service do not typically cover defamation and for good reason. Defamation law is a highly contextual legal construct. Internet intermediaries are not well-equipped or appropriate decision-makers.

The third option is to commence a civil action in defamation. This usually involves hiring a lawyer and engaging in a costly, multi-year process during which the alleged defamation usually remains online. Even if the complainant receives a legal judgment in her favour, the reputational harm may be irreversible. Anonymous or out-of-jurisdiction defendants may also simply ignore the court ruling.

None of these options offers meaningful access to justice to complainants of online defamation.

In the Final Report, the LCO recommends a new model for addressing defamation law complaints that will address the seven principles we have outlined. The LCO recommends three procedural streams for resolving defamation complaints:

- Notice and takedown
- Informal negotiation, potentially facilitated by ODR
- Court action

The first stream, notice and takedown, is discussed in detail in chapter eight of the Report. This option would arise where a complainant notifies an intermediary platform of allegedly defamatory material being hosted on the platform. The platform would not assess the legitimacy or strength of the defamation complaint but would pass the complaint on to the publisher. The publisher would have a short time to respond. (The LCO recommends two days.) If the publisher does not respond, the platform would be required to take down the offending content. If the publisher does respond, the complainant would pursue the publisher directly, either informally or by a defamation action.

The second stream, informal negotiation, is made possible by the notice requirement discussed in chapter four. Any publisher receiving a notice would be motivated to make reasonable efforts to informally resolve the complaint. Informal negotiation could be facilitated by the creation of a voluntary online dispute resolution (ODR) tribunal as discussed in chapter nine. ODR could offer a quick and inexpensive mechanism to structure negotiations and resolve claims where possible. A range of monetary and non-monetary remedies might be made available. This mechanism need not be limited to allegations of defamation but could usefully extend to other complaints of online harm. However, the LCO's recommendation for ODR is a preliminary, long-range recommendation. The practical viability of an Ontario ODR platform should be further considered in conjunction with emerging regulatory initiatives directed at platforms.

The third stream, a court action, would be limited primarily (but not exclusively) to higher value claims and claims involving professional public interest publishers. Preliminary motions, discussed in chapter five, would assist in conserving court resources. A preliminary anti-SLAPP motion would continue to be available to defendants where the claim is an illegitimate attempt to suppress public interest speech. In the LCO's view, what is also needed, however, is a new motion for an

interlocutory takedown order where the potential for reputational harm significantly outweighs the expressive value of the publication at stake. Courts would retain their current remedial powers but, as discussed in chapter three, would be encouraged to award final takedown orders where appropriate.

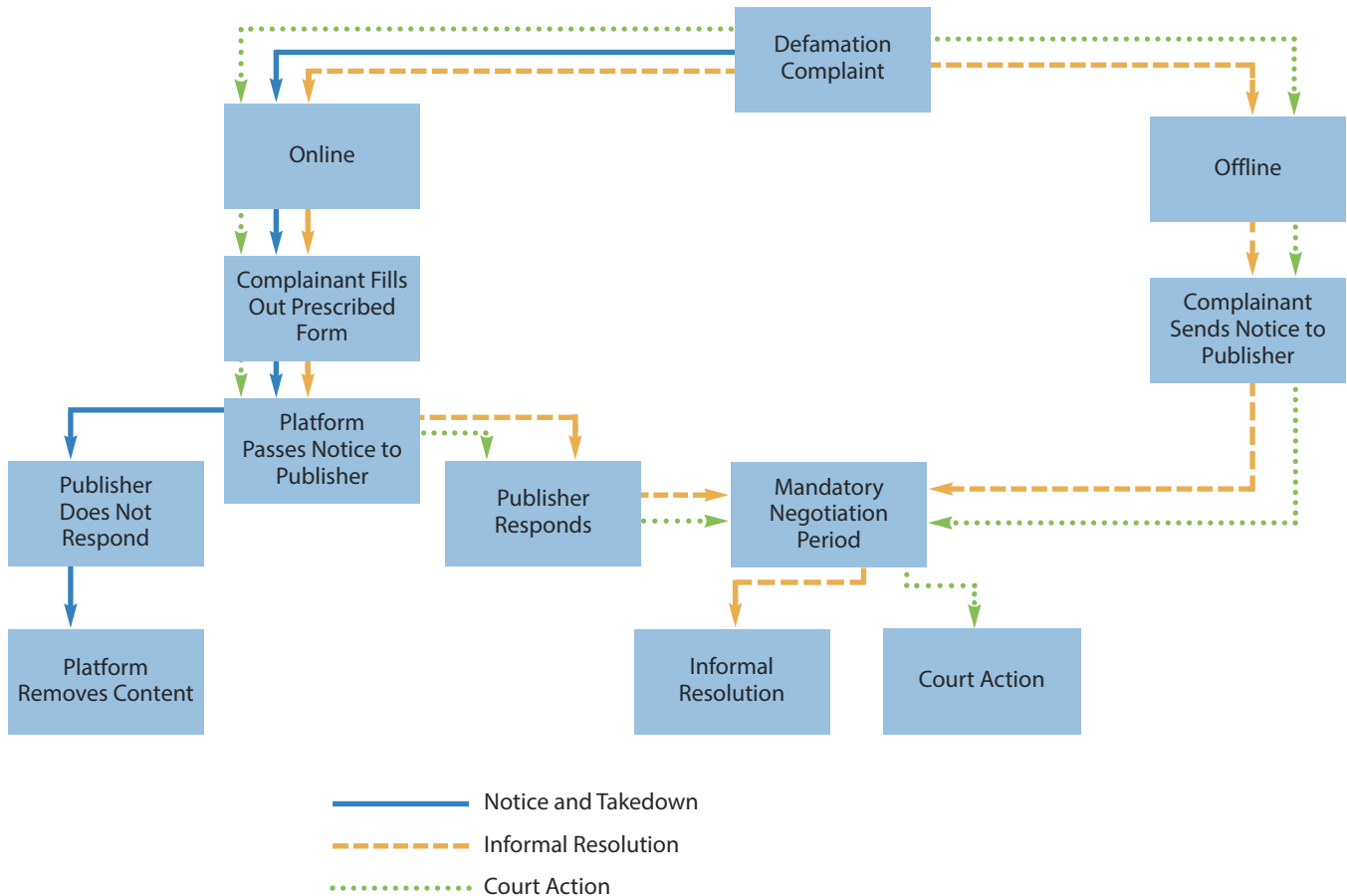
All defamation claims would begin with a mandatory notice of complaint to be sent by a complainant to the publisher of the alleged defamation. If there is no way for the complainant to contact an online publisher directly, the notice requirement would be met by sending notice to the intermediary platform hosting the content. The platform would then be required to pass notice on to the publisher, while protecting the identity of anonymous publishers. Notice to the intermediary platform would also be necessary to trigger the takedown process. Notice to a publisher and/or intermediary platform would be required at least four weeks before commencing a defamation action.

Publishers receiving a notice, either directly or via an intermediary platform, would have to decide how to respond. They might:

- Negotiate informally with the complainant.
- Ignore the notice. Online publishers ignoring the notice could have their content taken down by the hosting platform (subject to a putback option). Both online and offline publishers ignoring notice could be sued for defamation after four weeks had passed.
- Challenge the notice. In this case, online content would remain online. Both online and offline publishers could be sued for defamation after four weeks had passed.

The LCO expects most high volume, low value claims involving personal reputation and/or private publishers would more likely be resolved either by takedown or informal negotiations.

These procedural streams are summarized in the following chart and explained in more detail in the Final Report.



VI. Summary of Final Report Recommendations

What follows below is a summary of the LCO's analysis and recommendations. Readers should refer to Appendix A for the detailed list of recommendations and the Final Report for our comprehensive analysis.

Chapter Three – Substantive Elements of Defamation Law

The LCO's project is primarily concerned with online defamation and the impact of technology on reputation, freedom of expression and access to justice. However, a necessary part of any legal reform in this respect is a reconsideration of the substantive elements of defamation law as applied to both traditional offline publications and online content.

In Ontario, defamation law has developed primarily through common law supplemented by the LSA. The LSA dates from the 19th century and is sorely out of date in terms of its language and scope.

The LCO has concluded that, for the most part, recent common law and legislative reforms to the substantive elements of defamation law strike an appropriate balance between protection of reputation and freedom of expression. Therefore, we do not recommend an extensive overhaul of the substantive legal principles. (An exception is the doctrine of publication, which is addressed in Chapter Seven.)

Specific issues considered in Chapter Three include whether Ontario should maintain the common law presumption of damage or adopt a serious harm threshold (as in England and Wales); whether to maintain the common law strict liability standard and presumption of falsity; common law defences (including responsible communication); and how to promote meaningful court-based remedies for online defamation.

LCO Recommendations in Chapter Three include:

- The new *Defamation Act* should abolish the distinction between libel and slander and establish a single tort of defamation.
- The test for defamatory meaning should remain a common law standard but courts should explicitly consider the overall context of the online content and the degree of sophistication of online readers.
- The common law presumptions of damage and falsity should be maintained.
- The fair and accurate report privilege in the LSA should be made available to all publishers who post their contact information.
- The defence of fair comment should be simplified and renamed the defence of opinion.
- The responsible communication defence should be interpreted broadly to apply to all public interest communications.
- Courts should have the express authority to order mandatory takedowns and the publication of judgments in appropriate cases.



Chapter Four – A New Notice Regime and Limitation of Claims

A major focus of the LCO's consultations was the notice requirement in the LSA. This provision requires that plaintiffs provide defendants with six weeks written notice before commencing an action in relation to libel in a newspaper or broadcast. Where notice is not given in time, the plaintiff has no claim and the action will be struck out.

The purpose of the notice requirement is to alert media publishers (newspapers and broadcasters) to the alleged defamatory publication so that they may investigate and, if appropriate, publish a retraction, correction, or apology. This allows the publisher to reduce or eliminate its exposure to damages. It also benefits the plaintiff since a timely retraction, correction or apology may be preferable to a damages award. Stakeholders were united in the view that the notice provisions are outdated and require reform. However, the LCO heard a wide range of opinions on the best direction for reform.

The LCO believes that notice is important to encourage early resolution of defamation complaints. However, it is no longer appropriate to limit the notice requirement to certain kinds of publications. Nor is incremental reform to LSA notice provisions sufficient to achieve the objectives of a notice regime in the 21st century. The LCO has concluded that the existing notice requirement in the LSA should be scrapped and a new notice regime be developed that is applicable to all offline and online publications.

Chapter Four considers several issues related to a defamation notice regime, including who the notice requirement should apply to; the length of the notice period; what happens if a complainant doesn't give notice; and how to address anonymous publishers. The LCO makes recommendations on all these issues, including recommending dedicated new obligations on intermediary platforms to pass on defamation notices to anonymous online publishers.

Finally, the chapter considers the important issue of limitation periods for defamation claims and whether Ontario should adopt a single publication rule. The LCO ultimately concludes that a single publication rule, balanced with a longer limitation period, will preserve a complainant's cause of action for an appropriate period of time while protecting publishers from stale claims.

LCO Recommendations in Chapter Four include:

- The new *Defamation Act* should provide for a modern defamation notice regime specifying detailed rules for complainants, intermediary platforms, and publishers. The new statute should include provisions regarding:
 - Rules for complainants, requiring service of a prescribed notice of complaint and prohibiting the commencement of a defamation action until four weeks after notice is served;
 - Rules for intermediaries receiving a notice, including a duty to make all reasonable efforts to forward the notice to the publisher expeditiously without assessing the merits of the complaint. Intermediaries should be given the authority to charge an administrative fee but also held liable for statutory damages if they fail to comply with their notice obligations; and,
 - Rules for publishers, encouraging efforts to promote informal resolution of a complaint, thereby mitigating the plaintiff's damages in a subsequent defamation litigation.
- The new *Defamation Act* should also provide for:
 - A single publication rule commencing on the date a plaintiff discovers or ought to discover the first publication of an allegedly defamatory expression; and,
 - A two-year limitation period for all defamation actions under Ontario's *Limitation Act*.



Chapter Five – Preliminary Court Motions

The speed of communications in the internet era has, in many cases, outpaced the court’s ability to provide meaningful relief in defamation actions. Ontario needs court procedures nimble enough to protect the interests of both plaintiffs and defendants and to promote access to justice. For plaintiffs, this means that courts must have the tools to prevent the rapid spread of egregious reputational harm in appropriate cases. For defendants, this means that courts must be able to protect their freedom to express themselves effectively in an accelerated environment.

This chapter considers three preliminary motions currently used in defamation actions:

- anti-SLAPP motions;
- motions for interlocutory injunctions; and
- Norwich motions.

In each case, the LCO concludes that these motions have an important role to play in streamlining defamation actions, conserving court resources and promoting access to justice for both parties.

Anti-SLAPP legislation was introduced in Ontario in 2015 to allow for early dismissal of strategic lawsuits having an undue impact on freedom of expression. The legislation has had a significant and substantive effect on defamation law in this province. Anti-SLAPP motions have quickly become the first gambit played out in many, if not most, Ontario defamation actions. The LCO has concluded that anti-SLAPP motions strike an appropriate balance between protection of reputation and freedom of expression.

Traditionally, interlocutory injunctive relief is restricted in defamation lawsuits to the “rarest and clearest of cases”. This test was developed in the context of media defendants subject to journalistic standards and the compelling public interest in freedom of the press. The LCO has concluded the traditional test is outdated and overly restrictive in the online context. We recommend a new motion for an interlocutory takedown order be available to plaintiffs in certain cases, where the potential for reputational harm is so serious that the public interest in taking down the expression outweighs the public interest in the defendant’s freedom of expression. Accordingly, the LCO recommends replacing the “rarest and clearest of cases” test with a new two-part test for granting interlocutory takedown orders. Courts should exercise this power sparingly.

Finally, LCO consultations revealed a general satisfaction among stakeholders with the common law test that has developed in motions to identify anonymous publishers, known as Norwich motions. We recommend only one minor reform to enhance the practical value of Norwich orders.

LCO Recommendations in Chapter Five include:

- The new *Defamation Act* should provide that, on motion by a plaintiff, the court may issue an interlocutory takedown or de-indexing order against any person having control over a publication where:
 - there is strong *prima facie* evidence that defamation has occurred and there are no valid defences; and
 - the harm likely to be or have been suffered by the plaintiff as a result of the publication is sufficiently serious that the public interest in taking down the publication outweighs the public interest in the defendant’s right to free expression.
- The new *Act* should also include recommended protections for publishers subject to interlocutory takedown motions.



Chapter Six – Jurisdiction, Corporations and the Court Process

Chapter Six addresses several access to justice issues in the court system as applied to online defamation claims. The LCO's recommendations are designed to minimize costs, reduce delay and conserve resources in the court system proportionate to the interests at stake in these disputes. Issues considered in this chapter include jurisdiction and choice of law in multi-state defamation cases; standing of corporations to sue; and several procedural issues, including jury trials, small claims court, evidence, and unnecessary provisions of the LSA.

Regarding the law of jurisdiction in multi-state defamation actions, the LCO agrees, for the most part, with the Supreme Court of Canada's majority analysis in *Haaretz.com v. Goldhar*.⁹ We recommend, however, a further discretionary factor that courts may consider at the rebuttal stage of the jurisdiction analysis: whether the publication was targeted at an Ontario audience. On the choice of law issue, we adopt the analysis of Abella and Wagner JJ. in *Haaretz* and conclude that the "most substantial harm" test achieves the best balance between protection of reputation and freedom of expression.

Further, the LCO has concluded that all corporations should retain standing to sue in Ontario for defamation. The LCO wants to ensure small businesses benefit from the procedural innovations recommended in the Final Report.

LCO Recommendations in Chapter Six include:

- In determining whether presumptive jurisdiction over a multi-jurisdictional defamation action is rebutted, one factor courts should consider is whether the publication was targeted at an Ontario audience. The new *Defamation Act* should also provide that the law governing these actions is the law of the place where the most substantial harm to the plaintiff's reputation occurred.
- Corporations should retain the right to sue for defamation.
- Jury trials should continue to be available in Ontario.
- Several unnecessary or obsolete provisions of the LSA should be repealed.



Chapters Seven and Eight – New Legal Responsibilities for Intermediary Platforms and A Modern Process to Resolve Online Defamation Disputes

Chapters Seven and Eight of the Final Report address the crucial role that intermediary platforms must play in improving access to justice in online defamation disputes. The LCO has conducted a comprehensive analysis of the current defamation law principles governing intermediaries and has considered how the common law framework relates to the broader law of platform governance developing in the international arena. We have concluded that significant legal reform is necessary to ensure that intermediary platforms promote access to justice and effective remedies for online defamation.

The common law governing intermediaries as publishers was designed for an earlier era. These legal principles are ill-suited to address the unprecedented technological power of intermediary platforms and the consequential social revolution in how we communicate. Furthermore, these legal principles are premised on the formal court process which, as the LCO discusses throughout the Final Report, is too costly, slow and cumbersome to meaningfully address many online defamation disputes.

The LCO believes that new legal needs require new legal remedies. Therefore, the Final Report recommends that new legal responsibilities be imposed on intermediary platforms to replace the common law framework. In our proposal, intermediary platforms would be required to establish and administer a notice and takedown regime for defamation complaints by Ontario users. In this model, complainants would have access to a new, streamlined process requiring platforms to remove

allegedly defamatory content where the publisher of the content is unwilling to stand behind it. Complainants would also have the right to seek statutory damages against platforms failing to carry out their responsibilities. At the same time, the more formal legal protections of a defamation action would be preserved for those complainants who choose to pursue an action against the publisher.

Throughout this analysis, the LCO has been mindful of the need to appropriately balance:

- freedom of expression;
- protection of reputation;
- access to justice for both complainants and publishers; and
- technological innovation and corporate social responsibility.

The notice and takedown regime the LCO proposes will meet the primary goal of most online defamation complainants to prevent further reputational harm. It is consistent with the Supreme Court of Canada's approach to defamation law in the internet era. It is also consistent with international human rights principles and developments in the field of platform governance. Finally, and importantly, the LCO's approach will promote the policy goals underlying defamation law reform and achieve a more appropriate balance between protection of reputation and freedom of expression for defamation disputes in the internet age.

Reforming the Common Law Doctrine of Publication

In common law, publishers are understood very broadly to include not only individuals who are directly responsible for communicating a defamatory message but, also, individuals who repeat, republish, endorse or authorize it, or in some other way participate in its communication. The doctrine is increasingly incoherent in the online context, where there is a web of actors who may be peripherally involved in the communication of defamatory content but may not be considered sufficiently blameworthy to ground liability.

There are also important policy rationales for re-examining the traditional definition of publication in the internet era. The intermediary-as-publisher model involves a significant risk to freedom of expression since intermediaries have an economic incentive to remove legitimate content rather than risk liability as a publisher. It undermines technological innovation and corporate social responsibility. It also creates a legitimacy problem, since intermediaries are required to assume a quasi-judicial role in evaluating the legality of third party content.

Therefore, the LCO recommends replacing the common law with a narrower statutory definition of publisher – only actors having the intent to convey a specific expression at the time of publication should be considered publishers and, therefore, subject to liability in defamation law. Intent would require a deliberate act. Intermediaries would not become publishers simply by failing to take down third party content.

The effect of the LCO's recommended definition of publication would be to place liability for defamatory online content squarely on the shoulders of the individual posting the content, rather than the intermediary hosting it. Instead of facing common law liability, intermediary platforms (intermediaries having a direct hosting relationship with third party content publishers) would be responsible to implement the notice and takedown regime discussed in chapters Four and Eight.

In some cases, intermediaries actively manipulate third party content, taking it out of context and, therefore, making it their own. Where they undertake this intentional role, they are no longer intermediaries and should be directly liable as publishers of the new content.

The LCO has also concluded that the test for republication should be narrowed and made consistent with our recommended statutory definition of publication. Therefore, we recommend that a publisher of defamation be liable for republication by a third party only where the original publisher intends the republication.

A New Notice and Takedown Process for Online Defamation Disputes

The LCO's proposal would impose notice and takedown obligations on intermediary platforms directly hosting user-generated content (Facebook, Twitter, YouTube, Blogger, etc.). Websites publishing their own content would have notice

and takedown duties only to the extent that they also host third party content. For example, media websites (CBC News) would have notice and takedown duties in relation to comments posted by third party readers.

Internet service providers (ISPs) (Rogers, Teksavvy) and search engines (Google) would not be subject to the notice and takedown regime but would be subject to court injunctions requiring the takedown of illegal content.

Takedown would be triggered by the notice regime discussed in Chapter Four. A complainant would serve a defamation notice on the intermediary platform hosting the allegedly defamatory content. The platform would be required to pass notice on to the content publisher, who would then have the option to send a written response to the platform.

If the publisher responds to a notice within two days, no takedown would occur. In this case, if the complainant wanted to pursue the matter, she would be required to deal with the publisher directly (either through informal negotiations or by bringing a defamation action). If, on the other hand, the intermediary platform was unable to pass on notice, or if the publisher does not respond to the notice within two days, the platform would be required to take down the content expeditiously.

A notice of complaint would be a prescribed, plain language web form that would guide complainants in identifying and framing their legal process. Complainants would be able to seek takedown without the need for legal assistance.

Importantly, content publishers responding to a notice would not be required to justify their content. A response simply disagreeing with the complaint or asking that the content remain online would be sufficient to prevent takedown.

The intermediary platform would be prohibited from assessing the legality of a defamation notice or a response, and takedown would not create any inference or otherwise impact a future judicial determination about whether content is defamatory.

The takedown process would be designed to protect anonymous publishers. Platforms would be required to maintain anonymity of a publisher *vis à vis* the complainant.

Protecting Publishers Against Abuse of the Process

In addition to the opportunity to send a response, the LCO recommends three measures to protect publishers from abusive complaints. First, a putback procedure would be available where the publisher has compelling reasons for having missed the deadline and it is technically feasible to do so. Second, publishers would have a statutory damages remedy against complainants filing notices in bad faith or without a reasonable belief that the content in issue is defamatory. Third, intermediary platforms would be required to make available information resources to assist publishers in using the response process.

Enforcing Notice and Takedown Duties Against Intermediary Platforms

Notice and takedown obligations would be enforced by a provision for statutory damages payable by intermediary platforms to complainants. The court would have discretion to determine the appropriate amount of damages. The amount would not be intended to compensate complainants for reputational harm but would be in the nature of a statutory penalty.

The LCO recommends that the notice and takedown obligations be applicable to all intermediary platforms making content available to Ontario users. The legislation should specify that Ontario courts have jurisdiction to enforce the provisions of the Act.

Takedown as a Necessary Remedy for High Volume/Low Value Defamation Complaints

The LCO believes that a takedown remedy is a necessary complement to the court process for remedying defamation claims in the internet age.

The LCO's proposal would offer complainants a quick and inexpensive method of containing reputational harm in cases where publishers are not invested enough in the content to dispute its removal. This is particularly valuable in the case of anonymous publishers who are not easily engaged in a court proceeding. At the same time, the LCO's proposal would offer publishers an easy means of protecting their freedom of expression and their anonymity. Therefore, access to justice would be improved for both complainants and publishers. A takedown remedy would also conserve court resources for higher value or more difficult cases.

The LCO's Notice and Takedown Proposal in International Context

In recommending our notice and takedown proposal, the LCO has considered intermediary liability regimes currently existing in other jurisdictions but has relied primarily on the policy goals underlying both defamation law and platform governance. Our proposal is not a perfect solution to online defamation in the internet age. However, in the LCO's view, it achieves the best balance possible between competing policy goals: freedom of expression, protection of reputation, access to justice and technological innovation.

The LCO has also considered broader regulatory proposals for holding intermediaries to account for illegal and harmful online content. Some form of content regulation in the future seems likely and this may encompass defamatory content. The LCO's recommendations are consistent with these emerging initiatives. Our proposed notice and takedown regime is narrowly tailored to address alleged defamatory content as a means of improving access to justice in defamation law.

LCO Recommendations in Chapters Seven and Eight include:

Publication

- The new *Defamation Act* should provide that a “publisher” be defined to require an intentional act of communicating a specific expression.
- The new *Defamation Act* should provide that a publisher of a defamatory expression should not be liable for republication of the expression by a third party unless the publisher intended the republication.

Takedowns

- The new *Defamation Act* should provide for a takedown obligation on intermediary platforms hosting third party content available to users in Ontario. This takedown obligation should operate in conjunction with the integrated notice regime recommended earlier and should contain the following elements:
 - A publisher who receives a notice of complaint from an intermediary platform may send a response to the platform within two days, in which case, the platform shall forward the response to the complainant (maintaining anonymity where necessary) and take no further action.
 - Where an intermediary platform does not receive a response by the deadline, it shall take down the allegedly defamatory content expeditiously. If a publisher requests putback, the intermediary platform shall repost the content where there is evidence that the publisher failed to receive the notice or unintentionally missed the deadline and where it is technologically reasonable to do so.
 - Intermediary platforms shall be entitled to charge an administrative fee to complainants and be liable for statutory damages if they fail to comply with their obligations.
 - The takedown obligation shall apply to intermediary platforms directly hosting user content available in Ontario. Internet service providers, search engines and other intermediaries not directly hosting user content shall have no responsibilities under the legislation.



Intermediary Liability and Defamation Remedies – Before and After		
Issue	Current Law In Ontario	LCO Proposal
Intermediary Liability	<ul style="list-style-type: none"> • Intermediaries may be liable as publishers if they do not remove defamatory third party content 	<ul style="list-style-type: none"> • Intermediaries not liable for passive knowledge of third party content
Freedom of Expression	<ul style="list-style-type: none"> • Risk to freedom of expression • Intermediaries have incentive to remove legitimate content to manage litigation risk • No procedural protection for content publishers 	<ul style="list-style-type: none"> • Protection for freedom of expression • Responsibility for defending/removing content belongs to content publisher • Strong procedural protections for content publishers
Protection of Reputation	<ul style="list-style-type: none"> • No statutory duty on intermediaries to address online defamation • Potential damages claim against some intermediaries as publishers • Limited recourse against anonymous defamers 	<ul style="list-style-type: none"> • Statutory duty on intermediary platforms to quickly take down content if publisher will not stand behind it • Damages claim against content publisher • Duty to pass on notice facilitates takedown of anonymous defamation
Access to Justice	<ul style="list-style-type: none"> • Plaintiffs must pursue a costly court action • Remedy for online defamation can take years • Alleged defamation remains online and reputational harm spreads until litigation concludes • Unpredictable outcome 	<ul style="list-style-type: none"> • Take down process is inexpensive, does not require lawyer • Alleged defamation may be removed within days • Possibility for quick takedown of alleged defamation minimizes reputational harm • Improved legal certainty
Innovation/ Corporate Social Responsibility	<ul style="list-style-type: none"> • Intermediaries determine if content is defamatory • Intermediaries have incentive to avoid knowledge of defamatory content • Discourages technological innovation 	<ul style="list-style-type: none"> • Intermediaries do not determine legality of content; issue reserved for courts • Promotes content moderation/corporate social responsibility • Promotes technological innovation

Chapter Nine – Online Dispute Resolution

In Chapter Nine, the LCO addresses another method for informally resolving some online defamation disputes. Online dispute resolution (ODR) employs the unique qualities of the internet in bringing parties together and, either assisting them in reaching a resolution to their dispute or imposing a resolution on them. The LCO recommends that the government explore online dispute resolution (ODR) as a means of further improving access to justice in online defamation disputes. That said, ODR is not a necessary component of the LCO's recommendations for notice and takedown. Depending on the form adopted, ODR may be relatively resource-intensive and, therefore, a longer-term reform.

The LCO has intentionally refrained from recommending that government adopt a particular ODR structure. This is a quickly developing field and it is possible that some future regulatory regime might have the incidental effect of structuring and formalizing the adjudication of defamation disputes by platforms. If so, this could supplant the need for a government-created ODR tribunal or, at least, overtake it for practical purposes.

LCO Recommendations in Chapter Nine Include:

- The Government of Ontario government should explore the potential for an online dispute resolution (ODR) mechanism to improve access to justice in online defamation disputes.



VII. Project Organization

1. Project Scope

During the first stage of the project, the LCO engaged in wide exploratory research and preliminary interviews designed to establish the scope of the project. We determined that it was necessary to define the project broadly.

In addition to re-considering the doctrinal principles and procedures of defamation law, we undertook to explore the role of defamation law in relation to an array of legal tools for regulating online speech in the 21st century. Such legal tools include privacy law, intellectual property law, data protection law, and myriad laws directed at particular types of harmful speech such as child pornography and hate speech. However, we excluded from the project scope a direct examination of these related areas of law.

2. Issues Considered

In November 2017, the LCO released a comprehensive Consultation Paper in which we raised questions about the future development of defamation law and identified general areas of inquiry for the project. These include:

- The law of defamation in Ontario today and its limitations;
- How the legal, technological, and social landscape of the early 21st century influences and challenges “traditional” defamation law;
- A consideration of the legal elements of defamation in light of “internet speech”;
- Access to justice in defamation matters;
- Privacy and its relationship to defamation;
- Internet intermediary liability; and,
- Alternative dispute resolution.

This report builds on the analysis in our Consultation Paper but does not repeat it. We refer the reader to the Consultation Paper for a more in-depth discussion of the legal and policy issues underlying our recommendations

3. Consultations and Research

The LCO is committed to broad and deep public consultations in all our law reform projects. For this project, we conducted a wide-ranging, interdisciplinary and international consultations process. We met with:

- Defamation and technology law experts, practitioners, judges, government representatives and legal organizations throughout Ontario;
- Experts, practitioners and government representatives from other Canadian provinces, the United States, England, Ireland, Scotland, European Union and Australia;
- Individuals directly affected by defamation law, including complainants involved in defamation disputes, young people, traditional and new media organizations and internet-based companies.

Consultations took the form of interviews, focus groups, written submissions, conferences and speaking engagements, and a working group of defamation law experts.

Throughout the project, the LCO engaged in extensive legal, comparative and interdisciplinary research on defamation law, privacy law, international human rights law, internet governance and a host of related legal disciplines. Highlights of our research include five issue papers by leading experts in the field:

- Emily B. Laidlaw, *Are We Asking Too Much From Defamation Law? Reputation Systems, ADR, Industry Regulation and other Extra-Judicial Possibilities for Protecting Reputation in the Internet Age.*
- David Mangan, *The Relationship between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content.*
- Karen Eltis of the Faculty of Law, University of Ottawa, *Is “Truth-telling” Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age.*
- Emily B. Laidlaw and Hilary Young, *Internet Intermediary Liability in Defamation: Proposals for Statutory Reform.*
- Jane Bailey and Valerie Steeves, Co-Leaders of the eQuality Project, University of Ottawa, *Defamation Law in the Age of the Internet: Young People’s Perspectives.*

The issue papers are available at the LCO’s website.¹⁰ This report is informed by each of these papers and we are indebted to the authors for their in-depth analysis. We recommend a direct reading of these papers for further context underlying this Final Report.

The LCO also hosted two major events:

- A panel at RightsCon 2018 on intermediary responsibility for defamatory online content, consisting of experts from Canada, United States, Belgium, France and Australia.
- An international conference on defamation law reform in partnership with Professors Jamie Cameron and Hilary Young. The day involved five panel discussions, 21 speakers and approximately 150 registrants. The conference agenda is available at our website.¹¹ The conference resulted in a special issue of the Osgoode Hall Law Journal.¹²

VIII. Advisory Committees, Funding and Support

The defamation law project was led by the LCO with the support of a distinguished group of academics, practitioners, judges and justice system leaders, including:

- Dan Burnett, Owen Bird Law Corporation
- Jamie Cameron, Osgoode Hall Law School
- Peter Downard, Fasken Martineau DuMoulin
- Kathy English, The Toronto Star
- David Fewer, Samuelson-Glushko Canadian Internet Policy & Public Interest Clinic
- John D. Gregory, Retired General Counsel, Ministry of the Attorney General
- Emily Laidlaw, University of Calgary, Faculty of Law
- Brian MacLeod Rogers, Ontario lawyer
- The Honourable Wendy Matheson, Superior Court of Justice of Ontario
- Roger McConchie, British Columbia lawyer
- Tom McKinlay, General Counsel, Crown Law Office – Civil, Ministry of the Attorney General
- Julian Porter, Q.C., Ontario lawyer
- David Potts, Ontario lawyer
- The Honourable Paul Schabas, Superior Court of Justice of Ontario
- Andrew Scott, London School of Economics
- Joanne St. Lewis, University of Ottawa, Faculty of Law
- Hilary Young, University of New Brunswick, Faculty of Law

In addition, a working group of practitioners and experts advised the LCO on reforming specific provisions of the LSA:

- John Gregory, Retired General Counsel, Ministry of the Attorney General
- Brian MacLeod Rogers, Ontario lawyer
- Sean Moreman, Senior Legal Counsel, Canadian Broadcasting Corporation
- David Potts, Ontario lawyer
- Brian Radnoff, Dickinson Wright LLP

The members of the Advisory Committee and LSA Working Group hold a range of opinions on the issues canvassed in the LCO's project. The recommendations and analysis in the Final Report are those of the LCO and do not purport to reflect the views of the Advisory Committee, LSA Working Group or its members.

Funding for the project was provided by the LCO. The project was also supported by SSHRC, Osgoode Hall Law School, Law Society of Ontario, and the Osgoode Hall Law Journal.

IX. Acknowledgements

Many people and organizations were involved in the research and writing of this project. Most notably, the LCO wishes to thank LCO counsel, Sue Gratton, for leading the project. The LCO would also like to thank members of the LCO's Advisory Committee for the considerable time and effort they dedicated to this project. The LCO also owes a special thanks to Professor Jamie Cameron for her integral role in organizing the international conference and to Professor Hilary Young for her commitment at every stage of the project. Finally, many students and LCO staff contributed to the project.

X. Next Steps and How to Get Involved

The LCO believes that successful law reform depends on broad and accessible consultations with individuals, communities and organizations across Ontario. As a result, the LCO is seeking comments and advice on this Final Report and recommendations. There are many ways to get involved:

- Learn about the project on our project website¹³;
- Contact us to ask about the project; or,
- Provide written submissions or comments on the Final Report and recommendations.

The LCO can be contacted at:

Law Commission of Ontario
Osgoode Hall Law School, York University
2032 Ignat Kaneff Building
4700 Keele Street
Toronto, ON M3J 1P3

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¹ *Libel & Slander Act*, RSO 1990, c L12 [LSA].

² <http://www.lco-cdo.org/en/defamation-law>

³ *Hill v Church of Scientology*, [1995] 2 SCR 1130, para 123.

⁴ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [Charter], ss 2(b).

⁵ Matthew Collins, *Collins on Defamation*, (Oxford: Oxford University Press, 2014), Preface, ix.

⁶ *WIC Radio Ltd v Simpson*, 2008 SCC 40; *Grant v Torstar Corp*, 2009 SCC 61; *Crookes v Newton*, 2011 SCC 47.

⁷ *Protection of Public Participation Act*, SO 2015, c 23 [PPPA], enacting ss. 137.1 – 137.5 of the *Courts of Justice Act*, RSO 1990, c C43.

⁸ Justice Judith Gibson, “Adapting Defamation Law Reform to Online Publication”, Discussion Paper, Faculty of Law, University of New South Wales (21 March 2018) 26.

⁹ *Haaretz.com v Goldhar*, 2018 SCC 28.

¹⁰ <http://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/final-commissioned-papers/>

¹¹ <https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/defamation-law-and-the-internet-where-do-we-go-from-here/>

¹² <https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss1/>

¹³ <https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/>

APPENDIX A – LIST OF RECOMMENDATIONS

Chapter II – The Foundation for Defamation Law Reform

A New Defamation Act

1. The *Libel and Slander Act* (“LSA”) should be repealed and replaced with a new *Defamation Act* establishing the legal framework for resolving defamation complaints in Ontario.

Continuing Role for Common Law

2. The substantive elements of defamation law should not be codified but, subject to specific recommendations below, should continue to develop in common law.

Distinction Between Defamation and Privacy Law

3. Defamation law and privacy law serve different functions and should remain conceptually separate and distinct.

Chapter III – Substantive Elements of Defamation Law

Eliminating the Distinction Between Libel and Slander

4. The new *Defamation Act* should establish a single tort of defamation. The distinction between libel and slander should be abolished and sections 16, 17 and 18 of the LSA should be repealed.

Defamatory Meaning Online

5. In applying the common law doctrine of defamatory meaning to online communications, courts should explicitly consider the overall context of the online content and the degree of sophistication of online readers.

Presumption of Damage

6. The common law presumption of damage should continue to be an element of the tort of defamation. Ontario should not adopt a serious harm threshold.

Common Law Standard of Liability

7. The standard of liability required to establish the tort of defamation should continue as it has developed in common law.

Presumption of Falsity

8. The common law presumption of falsity should continue to be an element of the tort of defamation.

Justification

9. The new *Defamation Act* should include a provision on justification equivalent to section 22 of the LSA.

Privilege

10. The new *Defamation Act* should continue the privilege for fair and accurate reports set out in sections 3 and 4 of the LSA. The new Act should extend this privilege to all publishers who post their contact information (a current email address) in a conspicuous place (one likely to come to the attention of persons accessing the report). Subsections 3(5) and 4(2) of the LSA should be repealed.
11. The new *Defamation Act* should include a provision on the application of qualified privilege equivalent to section 25 of the LSA.

Defence of Opinion

12. The new *Defamation Act* should provide for a defence of opinion where the defendant proves that a defamatory publication is on a matter of public interest, is based on fact and is recognizable as opinion. The defence will be defeated where the plaintiff establishes that the defendant acted with express malice. The Act should abolish the common law defence of fair comment.

13. In applying the new statutory defence of opinion, courts should adopt an analysis consistent with the former common law defence of fair comment except that the common law requirement of objective honest belief should no longer be part of the defence.
14. The new *Defamation Act* should contain a provision equivalent to section 23 of the LSA.
15. Section 24 of the LSA should be repealed.

Responsible Communication

16. Courts should apply the responsible communication defence broadly to apply to all public interest communications. The criteria relevant to assessing responsible conduct will necessarily vary depending on the nature of the publisher, the medium of communication and the circumstances of publication. These criteria are best developed by courts on a case-by-case basis.

Final Takedown Orders

17. The new *Defamation Act* should provide that, where a court gives judgment for the plaintiff in an online defamation action, the court may order any person having control over the defamatory publication to take it down or otherwise restrict its accessibility.

Publication of Judgment

18. The new *Defamation Act* should provide that, where a court gives judgment for the plaintiff in a defamation action, the court may order the defendant to publish a summary of the judgment.

Chapter IV – A New Notice Regime and Limitation of Claims

19. The new *Defamation Act* should provide for a new notice regime for defamation complaints in respect of all publications. Sections 5 to 8, 9 and 20 of the LSA should be repealed. The notice regime should include the following provisions:

Complainant Obligations:

- a) Notice to Publisher – A person claiming that a publication is defamatory (a complainant) shall serve a prescribed notice of complaint on the publisher where it is reasonably possible to do so. For online publications, service may be made by sending the notice to an intermediary platform hosting the publication.
- b) Electronic Service – Service of a defamation notice by electronic means shall be effective service where there is evidence that the defendant operates a private electronic account, accesses it regularly and has accessed it recently. Electronic means shall include, but not be limited to, email, text messages and private messages to social media accounts.
- c) Contact Information – Intermediary platforms hosting third party content accessible in Ontario shall be required to post their contact information for the purpose of receiving notices of complaint in a conspicuous location on their platform.
- d) Defamation Action – No defamation action in respect of a defamation complaint may be commenced by the complainant until four weeks after the notice of complaint is served on the publisher of the alleged defamation.
- e) Contents of Notice – A prescribed notice of complaint shall include a description of the allegedly defamatory expression, the internet identifier (where applicable), the facts on which the claim is based, the resolution requested by the complainant, the complainant's contact information, and a statement of good faith. The prescribed form should be written in plain language and should guide complainants in framing their complaint.

Intermediary Platform Obligations:

- f) Forwarding a Notice – An intermediary platform receiving a notice of complaint that meets the content requirements shall make all reasonable efforts to forward the notice to the publisher of the allegedly defamatory content expeditiously.
- g) No Assessment of Merits – Intermediary platforms shall not assess the merits of a notice of complaint.
- h) Administrative Fee – Intermediary platforms may charge an administrative fee to the complainant for passing on notice in an amount to be established by regulation.
- i) Retain Records – An intermediary platform receiving a notice of complaint meeting the content requirements shall retain records of information identifying the publisher for a reasonable period of time to allow the complainant to obtain a court order requiring the release of the information.
- j) Applicable to intermediary platforms only – The notice obligation should apply to intermediary platforms hosting third party content made available to Ontario users. Internet service providers, search engines and other intermediaries not directly hosting user content should have no responsibility to pass on notice.

Publisher Obligations:

- k) Efforts to Resolve a Complaint – A publisher who receives a notice of complaint may attempt to resolve the complaint with a range of remedial actions appropriate to the circumstances. Remedial measures may include, but are not limited to, a retraction, correction, apology, takedown, right of reply or flagging the content.
- l) Effect on Court Action – Efforts by a publisher to resolve the complaint should be taken into account in a subsequent defamation action in mitigation of the plaintiff's damages. Where the publisher's efforts have been reasonable in all the circumstances, the plaintiff should be limited to recovering pecuniary loss.
- m) Timing – The publisher should not be under a specific deadline to take remedial action, but timely remedial action should be taken into account in determining what is reasonable in all the circumstances.

Single Publication Rule

20. The new *Defamation Act* should provide that:

- a) A single cause of action for defamation exists in relation to the publication of an expression and all republications of the expression by the same publisher.
- b) The limitation period for a defamation action begins to run on the date that the plaintiff discovers or should reasonably have discovered the first publication of the expression.
- c) A new cause of action for defamation will run in relation to republications of an expression where its manner of publication is materially different from the manner of the first publication. In determining what is "materially different", the court should consider, among other factors, the prominence of the expression and the extent of the republication.

Limitation Period

21. The general two-year limitation period in the *Limitations Act, 2002* should govern all defamation actions.

Chapter V – Preliminary Court Motions**Interlocutory Takedown Motions**

22. a) The new *Defamation Act* should provide that, on motion by a plaintiff, the court in a defamation action may issue an interlocutory takedown or de-indexing order against any person having control over a publication requiring its removal or otherwise restricting its accessibility pending judgment in the action, where:

- i) There is strong *prima facie* evidence (1) that defamation has occurred and (2) there are no valid defences; and
 - ii) the harm likely to be or have been suffered by the plaintiff as a result of the publication is sufficiently serious that the public interest in taking down the publication outweighs the public interest in the defendant's right to free expression.
- b) In granting an interlocutory takedown order, the court should target only the specific language the court determines to meet the test above.
 - c) In the event of an interlocutory takedown motion without notice to an affected party, if the court determines that an order is justified, it should issue the order on a temporary basis, require notice to all affected parties, and consider the test afresh on the motion to continue the order.
 - d) Provision should be made for costs consequences for the plaintiff where the court dismisses an interlocutory takedown motion.

Retention of Information

- 23. The new *Defamation Act* should provide that, on being served with notice of a motion for a Norwich order, an intermediary platform shall retain any records of information identifying an anonymous publisher for a period of one year to allow the plaintiff to obtain a court order requiring the release of the information.

Chapter VI – Jurisdiction, Corporations and the Court Process

Jurisdiction

- 24. In applying the rebuttal stage of the jurisdiction test in multi-jurisdictional defamation actions, one factor that courts should consider is whether the publication was targeted at an Ontario audience.

Choice of Law

- 25. The new *Defamation Act* should provide that the law governing multi-jurisdictional defamation actions is the law of the place where the most substantial harm to the plaintiff's reputation occurred.

Corporations

- 26. Corporations should retain standing to sue for defamation.

Jury Trials

- 27. Jury trials should continue to be available in Ontario defamation actions.
- 28. The new *Defamation Act* should include a provision equivalent to section 14 of the LSA on jury verdicts.

Evidence

- 29. The new *Defamation Act* should include a provision equivalent to section 21 of the LSA on evidence of plaintiff's character.

Provisions to be Repealed

- 30. Section 10 of the LSA, on mitigation of damages for related claims, should be repealed and the common law govern.
- 31. Section 11 of the LSA, on consolidation of actions, should be repealed and the rules for joinder of actions in the *Rules of Civil Procedure* govern.
- 32. Sections 12 and 13 of the LSA, on security for costs, should be repealed and the security for costs provisions of the *Rules of Civil Procedure* govern.
- 33. Section 15 of the LSA, on indemnity agreements, should be repealed and the common law govern.
- 34. Section 19 of the LSA, on averments, should be repealed and the common law govern.

Chapter VII – New Legal Responsibilities for Intermediary Platforms

Definition of Publication

35. The new *Defamation Act* should provide that a defamation action may only be brought against a publisher of the expression complained of. “Publisher” should be defined to require an intentional act of communicating a specific expression.
36. The new *Defamation Act* should provide that a publisher of a defamatory expression should not be liable for republication of the expression by a third party unless the publisher intended the republication.
37. Section 2 of the LSA, the statutory deeming of publication, should be repealed.

Chapter VIII – Notice and Takedown: A Quicker, Modern Process for Online Defamation Disputes

Takedown Process

38. The new *Defamation Act* should provide for a takedown obligation on intermediary platforms hosting third party content available to users in Ontario. This takedown obligation shall operate in conjunction with the integrated notice regime recommended above and should contain the following elements:
 - a) Response – A publisher who receives a notice of complaint from an intermediary platform may send a response to the platform within two days after receipt of the complaint. A response must be written but need not be in any particular format. Where the intermediary platform receives a response within the deadline, it shall forward the response to the complainant (maintaining anonymity where necessary) and take no further action.
 - b) Anonymity – Where a publisher is anonymous, the intermediary platform shall maintain that anonymity *vis à vis* the complainant.
 - c) No Assessment of Merits – Intermediary platforms shall not assess the merits of a response to a complaint.
 - d) Takedown – Where an intermediary platform is unable to forward the complaint to the publisher or does not receive a written response from the publisher within two days after forwarding the complaint, it shall take down the allegedly defamatory content expeditiously.
 - e) Content to be Taken Down – Intermediary platforms shall only take down the specific language that is alleged to be defamatory in the complaint.
 - f) Put-Back – An intermediary platform taking down content shall provide notice of the takedown to the publisher and complainant. If a publisher requests putback, the intermediary platform shall repost the content where there is evidence that the publisher failed to receive the notice or unintentionally missed the deadline and where it is technologically reasonable to do so.
 - g) Administrative Fee – Intermediary platforms shall be entitled to charge an administrative fee to the complainant for these services, the amount to be determined by regulation.
 - h) Statutory Damages – Failure by an intermediary platform to comply with its notice and takedown duties will entitle complainants to an award of statutory damages, the amount to be determined in the discretion of the court.
 - i) Applicable to Intermediary Platforms only – The takedown obligation shall apply to intermediary platforms hosting user content available in Ontario. Internet service providers, search engines and other intermediaries not directly hosting user content shall have no responsibilities under this legislation.

- j) Information Resources – Intermediary platforms hosting user content available in Ontario shall post in a conspicuous location plain language information resources developed by the Ontario government on making a defamation complaint and the notice and takedown process.
- k) Abuse – A person filing a notice of complaint in bad faith or without a reasonable belief that the impugned content is defamatory shall be liable for statutory damages in an action brought by the publisher where the notice results in takedown, the amount to be determined in the discretion of the court.
- l) Court – The Ontario Superior Court of Justice shall have jurisdiction to enforce the provisions of the legislation.

Chapter IX – Online Dispute Resolution

Online Dispute Resolution

39. The Ontario government should explore the potential for an online dispute resolution (ODR) mechanism to improve access to justice in online defamation disputes. This review should take into account the possibility that, in the future, social media councils or other regulatory models may play a similar role to ODR in informally resolving online defamation disputes.