LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

Defamation Law in the Internet Age



Final Report

March 2020

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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement between the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School, the Law Society of Ontario and the Law Deans of Ontario. The LCO is located at Osgoode Hall Law School at York University. 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. 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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I. INTRODUCTION

> *The field of defamation used to be for the protection of prominent citizens with a public reputation. Now it embraces everybody's interest in private life and business and professional life.*[1]

A. The Defamation Law in the Internet Age Project

This is the Final Report of the Law Commission of Ontario's (LCO's) Defamation Law in the Internet Age project. It 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.

The project represents the most comprehensive analysis of Ontario's defamation law framework ever undertaken. It has attracted national and international media interest and has been cited by the Supreme Court of Canada.[2] More information about the project can be found at our webpage: http://www.lco-cdo.org/en/defamation-law.

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 transcends 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 enforce its laws and court judgments.

The LCO undertook an extensive consultations process, engaging a broad range of individuals and organizations interested in these issues across Canada and internationally. Our consultations were informed by a comprehensive Consultation Paper released in November 2017. We consulted with complainants and defendants in defamation actions, traditional and new media organizations, defamation lawyers and academics, government, members of the judiciary, civil society organizations, internet companies, online review businesses and other web platforms and youth. Our consultations took the form of focus groups, interviews, qualitative studies, commissioned issue papers, forums, an international conference and other events. We made concerted efforts to hear from a range of stakeholders, including those most concerned with the pro-freedom of expression point of view and those more concerned with protecting reputation in the internet age.

The LCO is an Ontario organization and our recommendations are directed at Ontario law, including the Ontario *Libel and Slander Act* (LSA).[3] However, we have examined the 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

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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.[4] In particular, Australia's governments are currently engaged in an ambitious and coordinated defamation law reform project and the LCO has had discussions with that working group as to our respective approaches.[5]

Thus far, the only jurisdiction to have legislated extensive defamation law reform has been England and Wales with its 2013 *Defamation Act*.[6] This legislation and the case law and commentary interpreting it have been invaluable to the LCO's project. Nevertheless, our recommendations deviate from the England and Wales approach in many respects.[7] We have sought to look at defamation law holistically and to devise recommendations suited particularly to the Ontario legal landscape. In particular, Ontario's enactment of anti-SLAPP legislation in 2015 has had a significant practical impact on defamation law claims in this jurisdiction and has influenced several of our recommendations.[8]

In this Final Report, the LCO addresses a wide range of substantive and procedural issues in defamation law. We make 39 recommendations designed to update and simplify the law and to promote access to justice both for defamation complainants and those subject to defamation complaints. The recommendations are pragmatic in tone and build on previous reforms to the law over the past decade. At the same time, they propose a significant departure from the traditional court process for many defamation claims, recognizing the need for quick and inexpensive solutions for protecting against online reputational harm. They are designed to be technology neutral and, in our view, will achieve a sustainable balance between the *Charter* value of freedom of expression and protection of reputation as communications continue to evolve. A full list of our recommendations is in Appendix A.

B. About the LCO

The Law Commission of Ontario (LCO) is a unique, innovative and productive partnership between the Ontario government, the Law Foundation of Ontario, the Law Society of Ontario, Osgoode Hall Law School and the Law Deans of Ontario. The LCO was established in 2007.

The LCO provides independent, balanced and authoritative advice on some of Ontario's most complex and far-reaching legal policy issues. The LCO evaluates laws impartially, transparently and broadly. The LCO's work is informed by legal analysis; multi-disciplinary research; public consultations; social, demographic and economic conditions; and the impact of technology.

LCO reports include principled, practical, "problem-solving" recommendations that are informed by broad consultations and tested through a transparent, comprehensive review process that engages a broad range of individuals, experts and institutions. The LCO gives a voice to marginalized communities and others who should have an important role in law reform debates and discussions. Over the last five years, the LCO has engaged with thousands of Ontarians on law reform projects.

LCO reports have led to legislative amendments and policy changes, promoted access to justice and contributed significantly to public debates surrounding important law reform issues.

C. 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.[9] On the other hand, there is express constitutional protection for freedom of expression under the Canadian *Charter of Rights and Freedoms*.[10]

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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 was, 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.[11]

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 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 way we communicate have understandably had a huge impact on a law designed to regulate communication. 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.[12] Defamation law reform must address these issues, as courts have increasing begun to do.[13]

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.[14] In Ontario, anti-SLAPP legislation was passed to provide a procedural route for dismissing strategic lawsuits suppressing fair criticism, including defamation actions.[15] 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

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communications, anyone can be a publisher and they can publish anything. Publication may occur instantaneously, in the heat of the moment, without pause for sober second thought. Therefore, defamation claims increasingly involve individual publishers posting material online that may or may not be in the public interest, may not be subject to checks and balances, and, in some cases, may amount to vicious personal attacks. Estranged business or personal partners, annoyed consumers, opponents in election campaigns, individuals unsuccessful in a job interview or anyone else holding a grudge have every opportunity to vent online, with apparently 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 ("deep fakes") are becoming more frequent as this technology becomes more accessible to laypeople.[16] 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 labelled 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. Online defamation 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 spread throughout the online (and offline) world.

Defamation law reform is concurrent with, and related to, domestic and international concerns about fake news, extreme internet speech and platform accountability. Justice Gibson in Australia has called for defamation law reform that "responds to the challenges of today, not the challenges of yesterday"; reform that goes further than "rearranging deckchairs on the Titanic".[17] In this Final Report, the LCO takes this advice to heart and makes recommendations that address defamation law within its traditional doctrinal boundaries, but also in its new role as one of several legal mechanisms for regulating harmful internet speech.

D. Summary of Findings and Recommendations

The LCO's first recommendation is to repeal the Ontario *Libel and Slander Act* (LSA) and enact a new *Defamation Act* establishing an integrated framework for resolving both offline and online defamation complaints in Ontario. The new *Defamation Act* would contain a notice regime applicable to all defamation complaints, procedural and remedial provisions governing defamation actions, targeted substantive reforms (including abolishing the distinction between libel and slander) and a new takedown remedy for defamation complainants. With a few exceptions, the LCO is not recommending that the new legislation incorporate the substantive elements of defamation law. In our view, these should, for the most part, continue to be governed by the common law.

1. Reforms to Substantive Elements of the Law

The LCO recommends against significant reform to most of the substantive elements of the tort of defamation, such as the presumptions of falsity and damage. Some of these elements have been modified in other jurisdictions by statutory reform. They have also been adjusted by statutory and common law reform in Ontario to provide added protection for freedom of expression. The LCO has concluded that, for the most part, the substantive law achieves an appropriate balance between protection of reputation and freedom of expression in the *Charter* era. One notable exception to this approach is our recommendation that the definition of publication be narrowed to protect against unbounded defamation liability in the internet era. We also make recommendations to simplify and rationalize certain elements of the substantive law.

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2. Reforms to the Court Process

Much of the Final Report and recommendations address the vital need for improved access to justice for defamation complainants and publishers in Ontario. We make significant recommendations directed at defamation actions, including a new integrated notice regime, a new motion for interlocutory takedown orders for defamation complainants, a two-year limitation period and a single publication rule to make the limitation period meaningful in respect of online defamation claims. We make detailed recommendations for the repeal of obsolete and redundant provisions of the LSA. We also offer recommendations to assist courts in determining when to assert jurisdiction over multi-national defamation actions.

3. Reforms for Informal Resolution of Defamation Complaints

The LCO also makes recommendations designed to divert many online defamation claims away from the formal court system. We propose more practical avenues for resolving these claims, including a notice regime designed to encourage informal resolution by the parties. In order to facilitate informal resolution, we recommend that the government explore options for online dispute resolution (ODR). And, we recommend an important, new takedown remedy that would be administered by intermediary platforms hosting allegedly defamatory content. We have concluded that a notice and takedown regime is a crucial remedy for addressing online defamation "in real time", while ensuring that determinations of the legal rights of the parties to a defamation complaint are reserved for the courts.

A full list of our recommendations is in Appendix A.

E. Project Organization

1. Project Scope

During the first stage of the project, the LCO engaged in wide exploratory research and preliminary interviews to establish the scope of the project. We determined that it was necessary to analyze the underlying purpose and function of defamation law and to update the law to reflect social and technological developments that will continue well into the future.

In addition to reconsidering the doctrinal principles and procedures of defamation law, the LCO explored 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, the LCO excluded from the project scope a direct examination of these related areas of law.

Some areas of defamation law of interest to certain stakeholders were excluded from the project scope. The LCO's decision to approach defamation law reform in broad strokes precluded an examination of some finer-tuned issues. For example, we did not delve into notoriously technical pleadings rules, nor the quantum of damages awards. These reform projects must be left to another day.

The Project Scope is attached as Appendix B.

2. Issues Considered

In November 2017, the LCO released a comprehensive Consultation Paper in which we 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;

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- Privacy and its relationship to defamation;
- Internet intermediary liability; and,
- Alternative dispute resolution.

This Final Report builds on the analysis in the Consultation Paper but does not repeat it. The LCO refers the reader to the Consultation Paper for a more in-depth discussion of the legal and policy issues underlying our recommendations.[18] The list of questions identified in the Consultation Paper is attached as Appendix C.

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 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, Northern Ireland, Scotland, the European Union and Australia; and,
- 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. A list of organizations and individuals contributing to this Final Report is attached as Appendix D.

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 LCO 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,** *Is "Truthtelling" 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.[19] This Final Report is informed by each of these papers and we are indebted to the authors for their in-depth analysis. A summary of the Issue Papers is attached as Appendix E.

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.[20]
- 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

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conference agenda is available at our website.[21] A summary of the conference panels is attached as Appendix F. The conference resulted in a special issue of the Osgoode Hall Law Journal.[22]

F. Advisory Committee, 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 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
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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
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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 this 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.

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G. Acknowledgments

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H. 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 website: https://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/;
- 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:

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II. THE FOUNDATION FOR DEFAMATION LAW REFORM

A. Seven Principles Guiding Defamation Law Reform

The LCO heard a wide variety of opinions and suggestions from stakeholders during the consultations process. From these consultations and our research and analysis, the LCO has identified seven guiding principles or objectives for defamation law reform. These principles underlie the LCO's recommendations in this Final Report.

1. Defamation Law Must Re-Balance Protection of Reputation and Freedom of Expression in the Internet Age

The balance between protection of reputation and freedom of expression lies at the heart of defamation law. In particular, freedom of expression is guaranteed by subsection 2(b) of the *Canadian Charter of Rights and Freedoms* and is an important *Charter* value to be applied in interpreting the common law of defamation.[23] Many stakeholders in this project emphasized the importance of freedom of expression to allow human communications to flourish and to fully realize the democratizing benefits of the internet revolution.

Recent developments in the common law of defamation, as well as statutory initiatives such as Ontario's 2015 anti-SLAPP legislation, have each contributed to a re-balancing of protection of reputation and freedom of expression more conducive to the *Charter* era.[24] The LCO has concluded that these developments have been successful in the context of traditional defamation law claims involving professional public interest publishers, such as media organizations.

However, whereas the *Charter* created "ripples" in the law of defamation, the internet has arguably created a "tsunami".[25] Law reform to date has not yet fully accounted for the transformation of communications brought about by the internet.

Technological innovation in communications necessarily influences both protection of reputation and freedom of expression, and this has never been more apparent than in the emergence of the internet era. Online defamation claims increasingly involve individual publishers posting comments that do not engage the public interest, but which may spread across the social media universe to cause severe and persistent reputational harm. 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. Several of our recommendations below attempt to achieve this balance while preserving a central role for freedom of expression.

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

Increasingly, the physical world and digital world are intermingling. Reputations can be established or tarnished by both online and offline content.[26] Traditional forms of publication (speeches, newspapers, broadcasts and books) increasingly overlap with – and are indistinguishable from - online publications (email, websites, discussion forums and social media). The sting of a disparaging comment made in the course of a speech will frequently be repeated in a tweet or a Facebook post. News articles will simultaneously be published in print, posted online on media websites and summarized in an online video clip.

Meanwhile, the common law of defamation and Ontario's *Libel and Slander Act* (LSA) continue to distinguish between types or categories of publications.[27] For example, there are different rules for libel and slander. Notice provisions apply to media publications but not to other publications. Reports about some kinds of public proceedings and decisions are protected by privilege but others are not.

This status quo is untenable. The future of written communications is online and there was considerable consensus among stakeholders that defamation law must evolve accordingly. Legal rules should no longer differ depending on whether defamation is contained within a speech, book, newspaper, broadcast, blog, Facebook post, emoji or some other format yet to be invented. Looking into the future, defamation law should offer a flexible set of legal principles applicable to all publications without regard to the medium through which they are transmitted.

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The LCO agrees that defamation law must evolve coherently in response to new forms of communications made possible by the internet and other technological developments. The recommendations below are based on the principle that, where possible, the same rules should apply to all publications.

A related theme is that the law should be simplified. The current law relies too much on obsolete technical categories. As one stakeholder described it: "[t]here are gaps in the map and the edges of the map don't line up."[28] The common law has gradually (and appropriately) moved away from this approach as illustrated by the Supreme Court of Canada's creation of a new responsible communication defence.[29] The LCO has followed this lead by recommending a more flexible, principled approach to many other areas of defamation law:

- Eliminating doctrinal and procedural distinctions based on types of publications;
- Eliminating the distinction between libel and slander;
- Eliminating liability of secondary publishers and publishers by omission;
- Simplifying the fair comment defence;
- Legally recognizing the myriad ways that complainants and publishers may informally resolve a defamation complaint;
- Recognizing a broader array of court remedies;
- Clarifying when courts should exercise jurisdiction over multi-national internet defamation claims; and
- Repealing unnecessary and obsolete procedural provisions of the LSA.

To facilitate these reforms, the LCO's first recommendation is to repeal the LSA and replace it 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. It should contain provisions implementing a notice regime for all defamation law claims, procedural and remedial provisions, and a new takedown remedy for defamation complainants.

RECOMMENDATION: 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.



The best way for defamation law to continue to develop in a flexible and principled manner is through evolution of the common law. Therefore, the LCO recommends against codifying the law in a comprehensive statute. Many of our recommendations are intended to be enacted as part of the new *Defamation Act;* others are directed at Ontario courts to assist in their interpretation of the common law.

RECOMMENDATION: 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.



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

Many media stakeholders believe the current law strikes an appropriate balance between freedom of expression and protection of reputation. For the most part, the LCO heard that recent reforms shifting the balance toward freer expression of public interest communications have been successful and should be preserved.[30] We were cautioned against reforms that might disturb their balance.

Other stakeholders expressed interest in taking a "wholesale approach" to reforming defamation law. According to this view, the tort of defamation should be recreated as a negligence-based tort with the plaintiff bearing the onus of proof. In her LCO Issue Paper, Karen Eltis put forward Québec's civil law as a successful example of this approach.[31] As will be seen below, in chapter III, we considered but ultimately rejected this approach.

On balance, the LCO believes that the unique substantive elements of defamation law, such as the presumptions of damage and falsity, remain relevant today. Reputational harm is less tangible than personal injury, for example, and the presumptions were developed to accommodate the dignitary interests and evidentiary challenges involved in bringing a defamation claim. Although these presumptions protect reputation at some expense to freedom of expression, this concern has already been addressed by common law and legislative reforms. The LCO has concluded that reworking the substantive elements of defamation law is unnecessary and may destabilize the balance between freedom of expression and protection of reputation achieved by these reforms.

Furthermore, the LCO has concluded that the primary problem in defamation law is not the idiosyncrasies of substantive principles but the procedural barriers to access to justice in the internet era. Our recommendations focus mostly (but not entirely) on these barriers.

There is one important exception to our general approach to the substantive elements of defamation law. We have concluded that the common law definition of a publisher is overly broad in the internet era and, in chapter VII, we recommend a narrower definition be adopted that limits liability to those who intentionally communicate a specific expression.

4. Access to Justice and Dispute Resolution Must Be Improved

Stakeholders pointed to significant barriers in accessing the court system and remedial deficiencies once there. For example, the LCO heard, in online defamation cases, the priority of most plaintiffs is *not* a damages award but having the defamatory content taken down before further reputational harm occurs. Traditional court hearings are simply too expensive and too slow to be effective in these cases.[32]

Furthermore, certain features of defamation transmitted online make court resolution more problematic than it is for offline defamation. These are summarized in the chart on the following page.

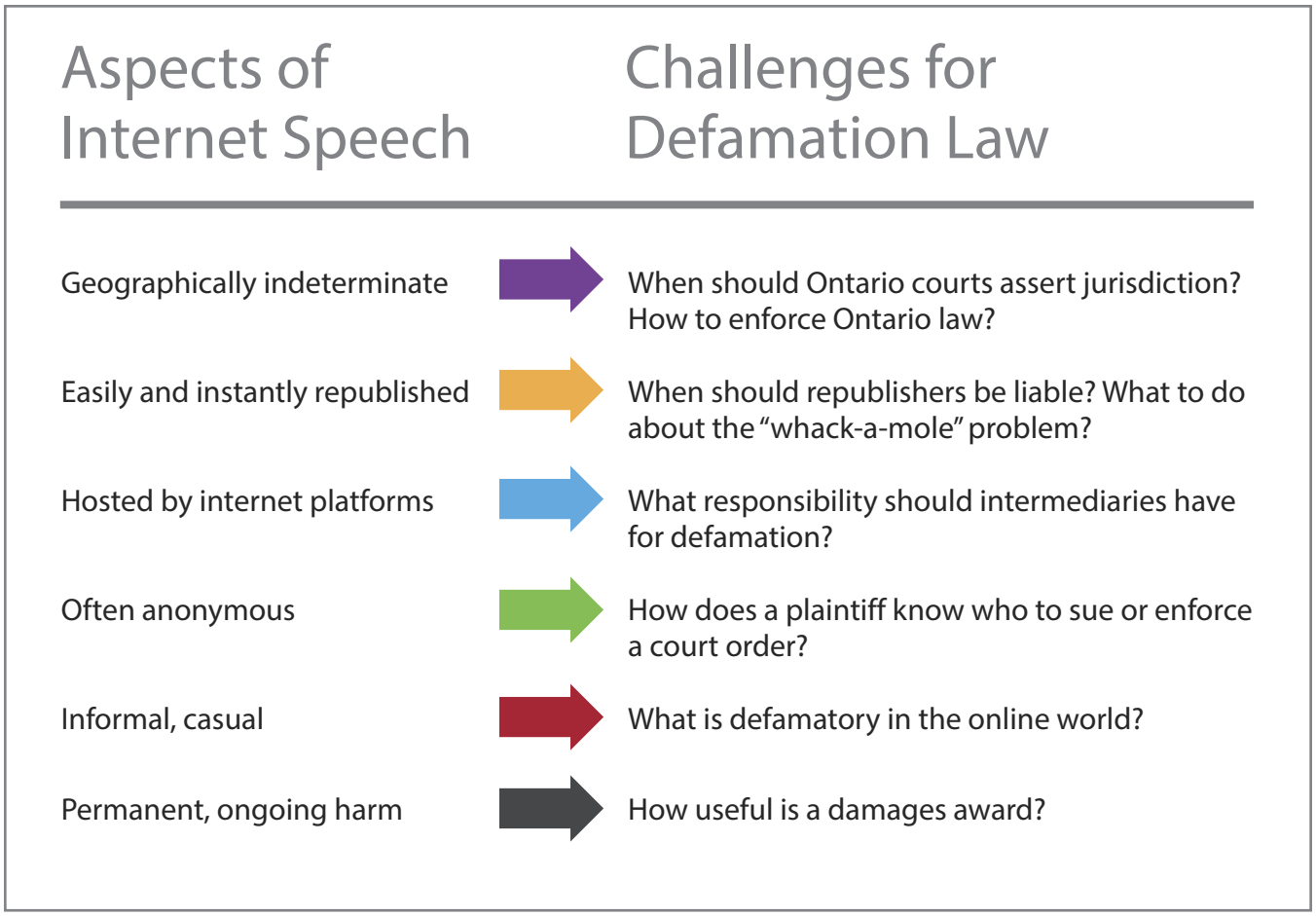
As a result of these technical features of online defamation, most online defamation claims never reach the courts.

Young people interviewed by Professors Jane Bailey and Valerie Steeves in their LCO Issue Paper understood the court system to be a last resort in addressing online reputational attacks. They felt that involving the law might escalate the situation and would do little to resolve the social and emotional harm caused by the attack.[33]

In the LCO's view, defamation law must be flexible to respond to the diversity of types and degrees of reputational harm that may occur in the internet age. 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 also 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.

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5. Defamation Law Must Specifically Address Online Personal Attacks

In the past, the archetypal defamation law claim involved a media organization or other professional publisher being sued by a prominent plaintiff. The publication would usually involve a matter of public interest. It would be subject to journalism standards and vetted by editors before being published. The *Charter* values of freedom of expression and freedom of the press are very much at the heart of these cases and much of the defamation law reform that has occurred since the introduction of the *Charter* has been directed at rebalancing the law to better protect freedom of expression.[34]

Media law cases of this sort continue to represent a significant proportion of defamation law claims being heard by Ontario courts. However, defamation cases increasingly involve individuals publishing online, on matters that do not engage the public interest.[35] The LCO refers to these kinds of cases as online personal attacks. With the internet, individuals may, with the press of a button, publish outrageous lies about others; lies that may involve very intimate aspects of their lives.[36] In some cases, these attacks are concentrated and relentless vilification campaigns designed to entirely ruin a person or a business.[37] They may involve fraudulent social media accounts or deep fake videos.[38] They are frequently posted anonymously.

Online personal attacks are a form of harmful online speech that may engage several areas of law. They may amount to hate speech, breach of privacy, revenge porn, online harassment or cyberbullying. And, where online personal attacks are directed at the complainant's reputation, defamation law is engaged.

Young people consulted by the LCO were very familiar with online personal attacks. They related examples such as:

- A social media post falsely calling a school mate "mentally handicapped";
- A fake Instagram account pretending to be a young person (including her picture) attributing sexually explicit things to her;
- A fake Instagram account impersonating a teacher with posts suggestive of illegal drugs.[39]

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Online personal attacks may also be directed at companies in the form of false negative reviews. For some small companies, a defamatory review posted on an influential online ratings platform such as TripAdvisor may be enough to put them out of business.

Defamation claims involving online personal attacks are very different from the archetypal media law case. Freedom of expression continues to be a foundational principle to be protected in these cases. However, the balance between protection of reputation and freedom of expression may be coloured by different contextual factors.

For example, internet defamers may have an intent to harm the complainant that is not typical in a classic media defamation matter. And there are usually no internal checks and balances preceding publication that would promote truth-telling and lend the publication credibility. Rather, online personal attacks may be as casual, abrupt and ill-considered as an insult preceding a street brawl. Some online platforms develop a culture and atmosphere that may encourage irresponsible and harmful attacks.[40] Other online platforms are specifically designed to incite personal attacks.[41]

Traditional defamation law principles and court processes developed to respond to media law cases often fall short when applied to online personal attacks. An exacerbating factor in many online personal attacks is that the attacker is anonymous. The victim may not be able to identify or locate their attacker, let alone name them and assert jurisdiction over them for the purpose of a lawsuit. During consultations, the LCO heard from many exasperated practitioners who must advise their clients that the law offers little or no legal remedy for these kinds of cases. According to some, courts and other members of the 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.[42]

These circumstances call for law reform to better protect Ontarians from online defamatory personal attacks. In these new paradigm defamation cases, complainants are less likely to have the resources to hire a lawyer or commence a legal proceeding. They also tend to be primarily interested in having the defamatory content taken down quickly, as opposed to monetary damages. And individual publishers of defamatory personal attacks are less likely to have the resources to comply with a damages award. In this Final Report, the LCO makes several procedural recommendations 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. All stakeholders agreed that intermediaries must play a role in reform efforts to address online defamation. However, stakeholders were divided on the best way to define this role. Some believed that intermediaries should be liable as publishers in some circumstances for defamatory content posted by their users. Others recommended imposing new responsibilities on intermediaries.

After extensive international consultations and research, 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:

- First, in chapter IV as part of a new notice regime, the LCO recommends that intermediary platforms receiving notice of a defamation complaint about third party content be required to pass the notice on to the publisher of the content.
- Second, in chapters VII and VIII, the LCO recommends that intermediary platforms be responsible for taking down content subject to a defamation notice if the publisher of the content does not respond to the notice.

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The LCO's proposal for notice and takedown is a novel one. There are two important features that distinguish it from notice and takedown regimes in other jurisdictions:

- Intermediary platforms would not be responsible for assessing the legality of third party content on their platforms; and
- Intermediary platforms would not have residual liability in defamation law as "publishers" of third party content.

Although novel, the LCO's proposal is consistent with current developments in the field of platform governance. It accords with international human rights principles and, in the LCO's view, is crucial to the protection of freedom of expression in the internet age. In relation to individual defamation disputes, our proposal would place responsibility for online defamation on the actual publisher of defamatory content. It would strike an appropriate balance between protection of reputation and freedom of expression. It would also offer a more effective and streamlined process for resolving many online defamation disputes.

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

Defamation is one of several legal claims that might apply in the case of harm caused by internet speech. Other possibilities include injurious falsehood, misappropriation of personality, cyberbullying, online harassment, revenge porn, hate speech, violation of data protection statutes and the new European "right to be forgotten". There is also a quickly developing assortment of breach of privacy claims at common law, such as intrusion upon seclusion, public disclosure of private facts and, most recently, publicity placing a person in a false light.[43] To a large extent, these new offshoots of privacy law have developed in response to the unprecedented personal privacy challenges of the internet age and are currently the subject of intense public and political interest.

In chapter VI of the Consultation Paper, the LCO examined the overlap between defamation law and privacy law in some detail.[44] We noted the shared concern for reputational interests counterbalanced in both cases by the *Charter* value of freedom of expression. We raised the possibility that legal tools developed for the purpose of protecting personal privacy may overtake or undermine the relevance of defamation law in the internet age. These issues were further explored in a valuable LCO Issue Paper by David Mangan, and by speakers at our international conference Defamation Law and the Internet: Where Do We Go From Here?[45]

We refer the reader to these sources for a detailed discussion of the issues. For the purpose of this report, we have refrained from making recommendations on these new and quickly evolving privacy law claims. There are several privacy law reform initiatives underway in Canada that address some of these questions.[46] More importantly, 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.

Although defamation and breach of privacy both involve reputational interests, they remain conceptually separate causes of action. A claim of defamation targets false statements causing reputational harm. A claim for breach of privacy targets harmful statements made in circumstances of an expectation of privacy.[47] The distinction between truth and falsity, along with an increased focus on opinion, remains crucial to the tort of defamation. In contrast, breach of privacy is focused on the violation of privacy interests. Therefore, although the overlap between some defamation/privacy claims is acknowledged, it is important to maintain a doctrinal distinction between them based on these differing functions.

Finally, the LCO is concerned about the potentially broad application of the emergent "right to be forgotten" in EU law, UK case law and, recently, the subject of recommendations by the Canadian Office of the Privacy Commissioner (OPC).[48] The right to be forgotten is based on privacy principles and should not undermine defamation law principles or process. The LCO notes that the OPC recommendations would bring defamation takedown requests under PIPEDA.[49] In the LCO's April 2018 submission to the OPC consultation process, we raised this concern and recommended further study before the OPC implements a de-indexing and source takedown regime in Canada.[50]

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RECOMMENDATION: Distinction Between Defamation and Privacy Law

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



B. Resolving Defamation Disputes in the Internet Age: An Overview of the LCO's Proposal

At the heart of the LCO's recommendations in this 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. In this section we summarize the *status quo* and introduce the LCO's recommended reforms.

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 in an informal resolution process. In fact, some media publishers apparently refuse to discuss their publication until the complainant formally waives their right to sue in defamation.

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. It is frequently impossible to determine whether a publication is defamatory on its face or whether the publisher may have a valid defence to defamation. Internet platforms are not well-equipped or appropriate decision-makers here.

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. The action may be complicated by procedural issues that tend to plague internet defamation, including jurisdictional disputes and repeated motions to unmask anonymous defendants. Even if the complainant receives a legal judgment in her favour, the reputational harm may be irreversible. At worst, an anonymous or out-of-jurisdiction defendant may ignore the court ruling.

None of these options offers meaningful access to justice to complainants of online defamation. Notwithstanding the range and complexity of substantive problems with the tort of defamation, many stakeholders told the LCO that the most pressing need was to reform the process through which defamation claims are currently resolved. In Ontario, these issues are exacerbated by the current LSA which is widely recognized to be out of date and inadequate to regulate online defamation claims.

In this Final Report, the LCO recommends a new model for addressing defamation law complaints that will address the seven principles identified above. Our recommendations contemplate 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 VIII. 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.[51] The

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publisher would have a short time to respond. (The LCO recommends two days.) If the publisher did not respond, the platform would be required to take down the offending content. If, however, the publisher did respond, the complainant would pursue the complaint against 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 IV. Offline and online publishers receiving notice would be motivated to attempt an informal resolution of the complaint in order to limit their exposure to damages should the complainant proceed with a court claim.

Informal negotiation could be facilitated by the creation of a voluntary online dispute resolution (ODR) tribunal as discussed in chapter IX. 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 that acknowledges the need for government to allocate sufficient public resources to the development of an ODR platform. We also note that 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 V, 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 III, 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 be able to decide how to respond. They might:

- Negotiate informally with the complainant. Publishers would be encouraged to negotiate a resolution in order to limit a possible damages award if the complainant chooses to bring a court action. Informal negotiations might be facilitated by an ODR mechanism.
- Ignore the notice. For online publications, this would trigger the intermediary platform's obligation to take down the allegedly defamatory content. (A putback option would protect the publisher if notice was not received in time or mistakenly ignored.) For offline publications, the complainant would have the option to commence a defamation action against the publisher after the four week negotiation period has passed.
- Challenge the notice. For online publications, a response in any format challenging or disagreeing with the complaint would be passed on to the complainant by the platform (again, protecting the identity of the publisher if anonymous) and the content would remain online. Again, the complainant would have the option to wait four weeks and commence a defamation action against the publisher.

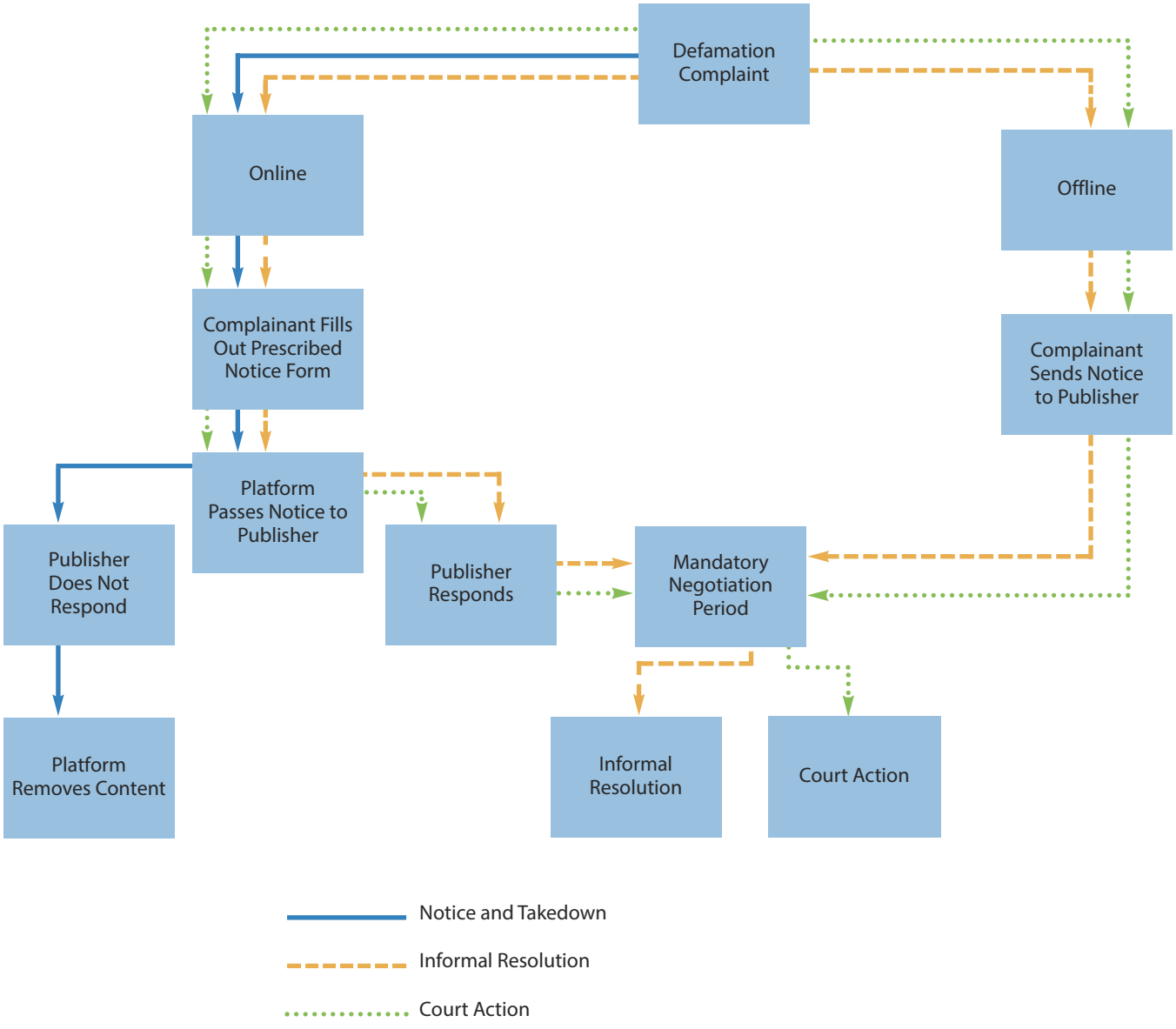
Whether or not a defamation complaint ends up in court would depend on various factors such as: whether the complainant is a private individual or someone with a public reputation, whether the publisher is a private individual or professional media publisher, whether the publication is on a matter of public interest, the monetary value of the claim and, the nature

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and the extent of reputational harm at stake. 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 developed in more detail throughout this Final Report.

C. Three Avenues for Resolving Defamation Complaints



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III. 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 is a reconsideration of the substantive elements of defamation law as applied to both traditional offline publications and online content.

Defamation law has been described as the "Galapagos Islands Division of the law of torts" since it has developed on its own without cross-fertilization with other tort law principles.[52] Many of the substantive principles of defamation law originated in the mists of the early common law.

In Ontario, defamation law has developed primarily through common law supplemented by the *Libel and Slander Act* (LSA).[53] The LSA dates from the 19th century and is sorely out of date in terms of its language and scope.

Ontario's last reform project on defamation law took place 30 years ago. An Advisory Committee appointed by the Ministry of the Attorney General (MAG) described the law as a combination of "ancient rules and procedures with nineteenth century precepts and twentieth century remedial patchwork".[54] The Committee focused particularly on traditional media organizations and whether the law should provide increased protection from defamation suits to promote responsible journalism. Although no legislative reform followed the Committee's Report, the Supreme Court of Canada (SCC) eventually developed the responsible communication defence and enhanced the fair comment defence in order to better protect responsible journalism and other forms of public interest communication.[55]

The MAG Committee also raised more fundamental issues of defamation law reform, including its strict liability nature, and the presumptions of damage and falsity. However, the Committee did not reach consensus on these issues and did not develop recommendations. In this chapter, the LCO re-examines some of these fundamental principles.

At the time of the MAG Committee's Report, the internet had not yet emerged as the predominant forum for written communication. The internet is, arguably, the single most important development to impact defamation law in history. One of the complex – and compelling – features of this project is the effort to update such an arcane and long-standing area of law in light of this development.

In this chapter, the LCO considers substantive issues in defamation law including:

- The distinction between libel and slander;
- The common law test for defamatory meaning;
- The traditional strict liability nature of defamation law;
- The common law presumptions of damage and falsity;
- The common law defences to defamation;
- Court remedies in defamation law.

Another important substantive element of defamation law, the doctrine of publication, is addressed separately in chapter VII.

A. Elements of the Current Law of Defamation

Defamation law is a complex, antiquated, and oftentimes incoherent mix of common law and statutory provisions. The elements of the tort are substantially similar in most common law jurisdictions, with the exception of the United States. In order to make out a claim of defamation, a plaintiff must establish three things:

- The words in issue refer to the plaintiff;
- The words were published by the defendant to a third party; and
- The words are defamatory in the sense that reasonable people would believe that they tend to lower the plaintiff's reputation in the community.

When all three elements are made out, there is a presumption that the words are false and that they caused the plaintiff harm. Proof of malice or fault is not necessary in order to establish defamation.[56]

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The legal threshold for establishing defamation is low. A lot of the "work" of the tort takes place in determining whether one of a list of defences may apply. Possible defences include:

- Justification (the words were substantially true);
- Absolute or qualified privilege;
- Fair comment; and,
- Responsible communication.

For some defences, the plaintiff may rebut the defence by proving that the defendant acted maliciously.

Defamation law's strict liability standard and presumptions of damage and falsity, in combination, are unique in tort law. These rules provide robust protection for a plaintiff's reputational interests. Defamation law defences, on the other hand, are intended to counterbalance reputational interests and protect the defendant's freedom of expression.

The law's balance between protection of reputation and freedom of expression has evolved over the years. Most importantly, the constitutional entrenchment of the right to free expression in s. 2(b) of the *Charter* has, in recent years, led the Supreme Court of Canada to strengthen the defence of fair comment and create a new defence of responsible communication. Both these developments were for the express purpose of providing additional protection to freedom of expression on matters of public interest. Ontario's anti-SLAPP legislation also rebalanced defamation law in favour of freedom of expression.[57]

In reviewing the substantive elements of defamation law, the LCO has focused on two particular concerns: the overall balance between protection of reputation and freedom of expression, and how successfully these elements operate in the context of internet communications. The LCO's analysis is informed by our research and consultations. We have also paid special attention to recent reforms in England and Wales culminating in the *Defamation Act, 2013*.[58]

B. Does Defamation Law Need Substantive Reform?

> *No one, starting from scratch, would devise defamation laws of the kind with which England and Wales, and the rest of the common law world, have been saddled.* [59]

There are many thoughtful critiques of modern defamation law and proposals for far-reaching reforms.[60] In the LCO's view, proposals for a complete overhaul of the substantive elements of defamation law are not appropriate or necessary at this point. This is because defamation law has already been evolving incrementally and thoughtfully as a result of common law and statutory developments. The Supreme Court of Canada has issued several decisions over the past 12 years re-examining the substantive elements of defamation law in accordance with *Charter* values and modifying the law to better protect freedom of expression.[61] Also, in 2015, the Ontario legislature enacted anti-SLAPP legislation which allows the court to preliminarily dismiss certain defamation lawsuits where they unduly interfere with freedom of expression.[62] The LCO discusses these developments in this chapter and later in the report. Together, these reforms have rebalanced the values of protection of reputation and freedom of expression.

Many stakeholders cautioned the LCO against major substantive reforms, arguing that it is unwise to upset or overturn the law's current balance.[63] For the most part, the LCO agrees. Notwithstanding the lingering doctrinal anomalies of defamation law, the LCO believes that recent common law and legislative reforms strike an appropriate balance between protection of reputation and freedom of expression, particularly in traditional cases involving professional public interest publishers.

The LCO further believes that the substantive elements of defamation law are also appropriate for online defamation disputes involving individuals posting on matters *not* in the public interest. Here, plaintiff-friendly elements of the traditional tort remain appropriate and defences intended to protect public interest publications are less likely to apply.[64]

The analysis that follows considers several important substantive defamation law issues.[65] First, the LCO recommends an important and long overdue reform: the abolition of the legal distinction between libel and slander.

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C. Abolishing the Distinction Between Libel and Slander

A classic example of an age-old technical category that lingers in Ontario law is the legal distinction between libel and slander. Defamation is a generic term encompassing these two historical torts. Libel provides a cause of action in relation to false statements that are published in a manner of some degree of permanence, such as writing or print. Broadcasts are also statutorily deemed to be covered by libel.[66] Slander relates to false statements that are spoken or otherwise impermanent and a cause of action generally arises only where the plaintiff can prove special (actual measurable) damages.

The distinction between libel and slander developed in the late 17th century and came under criticism as early as 1812.[67] It has been regularly denounced by law reformers and commentators ever since. In 1975, the Faulks Committee argued that the distinction no longer made sense in a technological era of sophisticated forms of communications.[68]

Most provinces and territories in Canada have abolished the distinction.[69] The Uniform Law Conference of Canada has also eliminated the distinction in its Uniform Defamation Act.[70] Only Ontario, British Columbia and Saskatchewan have maintained the distinction in their legislation.[71]

Overseas, the distinction has been abolished in Australia. However, it was not addressed in the *Defamation Act, 2013* and, therefore, remains the law in England and Wales.[72] The decision to maintain the distinction in the England and Wales legislation has been criticized in light of other provisions in the Act.[73]

Ontario's LSA modifies the common law distinction between libel and slander to some extent. The Act eliminates the traditional requirement to prove special damages for slander actions where the alleged slander concerns:

- words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff;[74] or
- slander of title, slander of goods or other malicious falsehood.[75]

Subject to these statutory refinements, courts continue to observe the distinction in Ontario.[76]

The vast majority of stakeholders in the LCO's consultations believed the distinction between libel and slander should be eliminated. Some emphasized that a distinction between permanent and transient communications is antiquated and technologically outdated. Others argued that the distinction is useless and unnecessarily complicated. Finally, some noted that the distinction is moot since many verbal communications now find their way onto the internet.

In 1990, the MAG Advisory Panel explained the rationale for maintaining an action for slander as "a continuing desire not to facilitate lawsuits over insults that are as impermanent as the spoken word".[77] However, this concern is now addressed by Ontario's anti-SLAPP legislation, which serves to discourage frivolous claims based on any form of communication. It is also addressed by several of the LCO's recommendations below for diverting high volume, low value defamation complaints away from the court system.

The LCO believes the traditional hierarchy between different forms of communication is no longer tenable in the internet age. Bright line distinctions between online/offline communications, news media/social media and libel/slander have become anachronistic. As a result, the LCO recommends a single legal framework that would apply to publications generally.

RECOMMENDATION: 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.



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D. Allowing Defamatory Meaning to Evolve Contextually

The test for defamatory meaning is a matter of common law. A statement is defamatory where it tends to lower a person's reputation in the eyes of a reasonable person.[78] This definition of defamation is highly contextual. For example, even a vicious insult will not be defamatory if it would not be taken seriously by a reasonable reader and, therefore, would not cause reputational harm. In practice, however, courts often infer defamatory meaning in the case of derogatory statements.[79] The LCO asked stakeholders whether this approach to determining defamatory meaning remains suitable in the online context, or whether statutory reform is needed. The internet is "... a rough and tumble medium, where language is rude, strong, confrontational and hyperbolic".[80] A disparaging statement posted to a discussion forum may mean something quite different than the same statement printed in a newspaper.[81]

The LCO heard from several practitioners that, in their experience, judicial assessments of defamatory meaning are subjective and varying. Courts were said to take an "I know it when I see it" approach.[82] This was particularly the case with online communications. Some stakeholders indicated that judges do not appreciate the power of social media to harm reputation.[83] However, stakeholders did not see legislative reform as appropriate. The predominant view was that the test for defamatory meaning should continue to evolve through common law.

The LCO agrees. The test for defamatory meaning should remain a common law standard. The existing test is flexible enough to adapt to communications through any medium. This is not to underestimate the difficulty of assessing defamatory meaning in the online context.[84] Courts are increasingly alive to this issue. For example, in *Stocker v. Stocker (2019)*, the UK Supreme Court cautioned against over-analyzing the meaning of a Facebook post given the casual nature of social media and the tendency of readers to scroll through messages without pause and reflection.[85]

Notwithstanding our conclusion that statutory reform is unnecessary, the LCO offers two comments on how defamatory meaning should be determined in the internet age.

First, judges should be sensitive to how online readers evaluate reputation online. Online reputation is a fluid concept.[86] People don't necessarily believe what they read and online communications often allow for counter-speech. In the LCO's view, the "reasonable people" in the test for defamatory meaning are best understood as "reasonable internet users". As David Rolph has pointed out, this is simply "a principled and logical extension of established principle to deal with new technology".[87]

This view may be controversial. For example, in *Trkulja v. Google LLC (2018)*, the Australian High Court took a cautious view of the knowledge to be imputed to the reasonable internet user:

> *…in the absence of tested, accepted evidence to the contrary, it must also be allowed that the ability to navigate the Google search engine, and the extent of comprehension of how and what it produces, whence it derives, and how and to what degree Google contributes to its content, may vary significantly among the range of persons taken to be representative of the hypothetical ordinary reasonable person.*[88]

The LCO acknowledges the need for caution. Nevertheless, care must be taken to ensure the law does not fall behind the technological practices of the day. The internet is no longer new and "digital natives" now represent a significant and fast-growing segment of our population. In considering whether a reasonable person would think less of the plaintiff, a general familiarity with the internet environment should be inferred.

Second, courts should also consider whether the impugned statement is fact or opinion. An endless array of personal opinions on every conceivable topic have proliferated in the online environment. In particular, online reviews have become an integral component of commercial debate. Defamation law must ensure that this form of expression is not deterred.

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In this regard, the LCO agrees with LeBel J.'s caution in *WIC Radio Ltd. v. Simpson (2008)* against assuming that the public always takes statements of opinion at face value.[89] An opinion should not be determined to be defamatory unless there is "a realistic threat that the statement, in its full context, would reduce a reasonable person's opinion of the plaintiff".[90]

For example, in *WIC Radio*, the defendant's comment that the plaintiff "would condone violence toward gay people" was found to be based on certain facts about the plaintiff. The plaintiff was a public figure who actively opposed homosexuality and used metaphors of war and violence in doing so. Some of the reputational harm suffered by the plaintiff may well have been due to these underlying facts rather than the opinion expressed by the defendant. In determining whether the opinion has a defamatory meaning, only the incremental reputational harm caused by the opinion itself should be considered.

RECOMMENDATION: 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.



E. Maintaining the Common Law Presumption of Damage

At common law, a plaintiff establishing defamation is presumed to have suffered reputational harm. The plaintiff does not need to lead evidence of damage, although the defendant may offer evidence rebutting the presumption. General damages are awarded to vindicate the plaintiff's reputation.

The Supreme Court of Canada has held that the presumption of damage is consistent with *Charter* values.[91] The presumption is justified on the ground that it is impracticable to measure the actual effects of a defamatory statement:

> *A defamatory statement can seep into the crevasses of the subconscious and lurk there ever ready to spring forth and spread its cancerous evil. The unfortunate impression left by a libel may last a lifetime. Seldom does the defamed person have the opportunity of replying and correcting the record in a manner that will truly remedy the situation.*[92]

In the human rights era, the continuing validity of the presumption is frequently challenged as inconsistent with freedom of expression.[93] In England and Wales, the presumption has been statutorily reversed and similar reform is currently being considered in other jurisdictions.[94]

The LCO heard from many stakeholders that the presumption of damage should be statutorily reversed in Ontario. Debate on this issue centered around two crucial issues: the nature and impact of online reputational harm in the internet era, and the merits of introducing a statutory serious harm threshold like that in England and Wales.[95]

In this section, the LCO will address these issues. We conclude that the presumption of damage should be maintained and that a serious harm threshold is both inappropriate and unnecessary in Ontario given the enactment of anti-SLAPP legislation.

1. Reputational Harm in the 21st Century

The LCO's consultations revealed a diverse range of harm that may be caused by defamatory online publications. For example, the LCO heard frequently about the significant damage that can occur to a business's reputation from just one false online review. Less tangible, but no less devastating, is the harm that may result from defamatory online personal attacks. Throughout this project, we have heard and read about egregious cases in which an individual's personal reputation has been maligned, causing them deep embarrassment and affecting their livelihood, family and social life. Victims of

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defamatory personal attacks told us of emotional distress, anxiety attacks, transformed personal relationships, loss of trust, fear, impact on family members, powerlessness, shame and isolation. This is in addition to more tangible consequences such as the loss of job or other opportunities. This kind of harm has always been a concern underlying defamation law and is one of the reasons the presumption of damage developed as a unique element of the tort.

Some have suggested that, in comparison to public interest communications, online personal attacks may be *less* likely to result in serious reputational harm. The LCO disagrees. Defamation engages dignitary interests. The degree of harm suffered may not necessarily relate to the degree to which the statement engages the public interest.

Nor does reputational harm necessarily relate to the means by which defamation is transmitted. A casual internet post may have little credibility and, therefore, cause little or no reputational harm. On the other hand, an internet post may go viral, increasing the resulting harm exponentially. That said, the internet has allowed many more individuals to publish indiscriminately than was once possible.

2. Common Law Presumption of Damage vs. Serious Harm Threshold

England and Wales' *Defamation Act, 2013* reversed the common law presumption of damage and introduced a serious harm threshold. Section 1 of that legislation provides:

> ***1. Serious harm***
> (1) A statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant.
>
> (2) For the purposes of this section, harm to the reputation of a body that trades for profit is not "serious harm" unless it has caused or is likely to cause the body serious financial loss.[96]

The threshold is not a self-standing element of the tort of defamation but, rather, part of the definition of defamatory meaning. The United Kingdom Supreme Court has interpreted this provision as requiring evidence of serious harm as a precondition to a statement being found to be defamatory.[97]

Similarly, Australia's Council of Attorneys-General has recently released draft public consultation legislation that would adopt a similar serious harm threshold in that jurisdiction.[98]

The question of whether to introduce a serious harm threshold in Ontario was one of the most controversial issues in our consultations. In the end, the LCO has concluded that a serious harm threshold should not be adopted into Ontario law for three reasons:

(a) Maintaining the Balance Achieved by the Current Law

First, the presumption of damage is a core element of the tort of defamation. It cannot be easily untangled from the other substantive elements which contribute to the balance between protection of reputation and freedom of expression that the Supreme Court of Canada has struck in recent decisions. During consultations, stakeholders expressed significant satisfaction with the current law as it applies to public interest communications. Attempting to recalibrate this balance would not advance the law at this stage.

(b) A Serious Harm Threshold is Unnecessary in Ontario

Second, the serious harm threshold in England and Wales was adopted as part of a major overhaul of defamation law culminating in the 2013 *Defamation Act*. This provision was adopted specifically to address a concern about trivial defamation claims.[99] The UK approach is not directly transferrable to Ontario. Ontario adopted a different approach to trivial claims with the introduction of anti-SLAPP motions in s.137.1 of the *Courts of Justice Act*.[100] Defendants to defamation actions involving expressions on matters of public interest may apply at an early stage of the proceeding to have the action dismissed. In

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order to prevent dismissal, the plaintiff must establish harm that is "sufficiently serious" to meet the public interest hurdle. Thus, by bringing an anti-SLAPP motion, defendants trigger an onus on the plaintiff to establish grounds to believe that they have suffered harm. By way of contrast, there is no anti-SLAPP legislative equivalent in the UK.

The LCO agrees with the Canadian Media Lawyers Association's (CMLA's) concern to discourage trivial cases in Ontario.[101] The CMLA illustrates its view, in part, with the example of *Bernstein v. Poon*.[102] This dispute between two competing diet doctors involved six years of litigation, eight days of trial and almost $800,000 in legal fees - all for a damages award of $10,000.

Notably, *Bernstein v. Poon* preceded the introduction of s.137.1 of the *Courts of Justice Act*. Today, this kind of case, assuming it involved public interest communications, can be tested in an anti-SLAPP motion. As the LCO discusses in chapter V below, anti-SLAPP motions have, thus far, proven reasonably effective in discouraging trivial or abusive defamation claims. Later in this report, the LCO recommends additional initiatives to divert trivial claims away from the court system, including informal negotiations, a notice and takedown process and online dispute resolution.

(c) A Serious Harm Threshold is a Barrier to Access to Justice

A final reason why a serious harm threshold is not recommended is its potential impact on access to justice. The serious harm threshold places a relatively stringent evidentiary burden on plaintiffs to prove serious harm at an early stage of the proceeding. A serious harm threshold may have the effect of front-loading litigation proceedings and the additional costs of a preliminary hearing may create significant economic and practical barriers to access to justice.[103]

This is a particular concern in defamation disputes among private individuals or organizations not having a public reputation. For example, victims of personal attacks may have difficulty assembling evidence that people think less of them as a result of the attack.[104] The LCO believes that defamation law in Ontario must evolve flexibly to apply to all defamation claims, including online personal attacks. In these kinds of cases, the presumption of damage plays a valuable role in allowing these claims to be heard.

RECOMMENDATION: 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.



F. Maintaining Defamation as a (Somewhat) Strict Liability Tort

Strict liability is a traditional component of defamation law in Canada. Once a plaintiff proves the three elements of the tort – that the words were defamatory, they were about the plaintiff and they were published – the defendant is liable unless she can raise a defence. A lack of intent on the part of the defendant to injure the plaintiff is not a defence.[105] Strict liability contrasts with the prevailing model in tort law which requires a finding of fault before liability will be imposed.

In consultations, we heard a wide range of opinions as to whether defamation should remain a strict liability tort. But what is perhaps more significant is the argument that the tort is gradually being transformed into a fault-based tort through evolution of the common law.[106] David Mangan has observed that: "[l]ibel has become less about assigning responsibility and more about tending a gate through which speech passes."[107] Certainly, the responsible communication defence and the development of the innocent dissemination rule protecting intermediaries against liability are, strictly speaking, inconsistent with strict liability even though the onus to establish them lies with defendants.

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The LCO agrees that fault has become relevant to several aspects of the tort, particularly with respect to public interest communications. In our view, this has been a beneficial development. Furthermore, our new recommended definition of publication, requiring the intent to convey a specific expression, would introduce an additional fault-based element into the tort.[108]

In this section, the LCO considers the argument that it is time to go further and explicitly redefine defamation as a negligence-based tort. We conclude that, notwithstanding the idiosyncrasies of the *status quo*, there should be no further move away from strict liability.

Although conceptually awkward, the tort represents a balancing achieved over hundreds of years of common law evolution - a balancing that most stakeholders viewed as reasonably successful for defamation cases involving professional public interest publishers. Consistent with our recommendations elsewhere in this chapter to maintain the presumptions of damage and falsity, the LCO believes that a complete overhaul of the tort may be destabilizing and, therefore, counterproductive to improving access to justice for parties to defamation disputes.

1. A Fault-Based Standard for Public Interest Communications

The plaintiff's claim in the case of an allegedly defamatory public interest publication is now based on the concept of responsibility. *Grant v. Torstar (2009)* laid the foundation for this approach by creating a defence of responsible communication in the public interest. The Court recognized that proving truth in a court of law is no easy task, and the requirement to do so may discourage publication of information that is of value for public understanding and debate. The majority held that "[t]he law must take due account of the damage to the plaintiff's reputation. But this does not preclude consideration of whether the defendant acted responsibly…".[109]

In order to rely on this defence, the defendant assumes the burden of proof of responsible action. This is logical since the defendant is in a better position to know the facts leading up to a publication.[110]

The effect of this common law reform was to impose a duty of care on individuals publishing in the public interest where they cannot prove the truth of what they published: "People in public life are entitled to expect that the media and other reporters will act responsibly in protecting them from false accusations and innuendo".[111] The responsible communications defence was a significant development in defamation law towards better protection of freedom of expression. Similar reform has taken place in other common law jurisdictions.[112]

The common law reform effected in *Grant v. Torstar* is a welcome one. It allows for a degree of flexibility in the application of defamation law principles to novel claims arising out of internet communications. It also provides public interest publishers with tangible tools to protect against defamation claims and, therefore, reduces the concern for libel chill. Professor Hilary Young comments,

> *Given the law's tendency toward rigidity and literalism, it is a step forward for courts to take a step back and simply ask: 'was it reasonable to say what was said, in all the circumstances?'.* [113]

2. Otherwise Maintaining Defamation as a Strict Liability Tort

Some commentators recommend that the law evolve further by adopting a negligence standard. The argument is that defamation is like any other interest protected by civil law and should not merit a distinct and lower standard of liability.[114] Professor Karen Eltis advised the LCO that Québec law operates well with a more straightforwardly structured tort in which harm must be established by the plaintiff.[115] Eltis argues that a more contextual approach to the tort would be more suitable in the internet era. The LCO has determined that this reform is not necessary in Ontario for two reasons.

First, there remains a sound policy rationale for a strict liability standard in defamation law generally.[116] The focus of the law is intended to be on the truth or falsity of the impugned statement, and a fault standard arguably devalues truth. The

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Supreme Court of Canada set out this argument in *Hill v. Church of Scientology (1995)*, in which the Court rejected the US approach to defamation law. According to the court, the US decision in *New York Times v. Sullivan (1964)*:

> *…shifted the focus of defamation suits away from their original, essential purpose. Rather than deciding upon the truth of the impugned statement, courts in the U.S. now determine whether the defendant was negligent. Several unfortunate results flow from this shift in focus. First, it may deny the plaintiff the opportunity to establish the falsity of the defamatory statements and to determine the consequent reputational harm… Second, it necessitates a detailed inquiry into matters of media procedure… Third, it dramatically increases the cost of litigation… Fourth, the fact that the dissemination of falsehoods is protected is said to exact a major social cost by deprecating truth in public discourse.*[117]

Second, the LCO has concluded that the truth-promoting role of defamation law is particularly cogent in online defamation disputes between private individuals or organizations without a public reputation. These kinds of cases are more likely to involve personal attacks or other communications that do not engage the public interest. Publishers are less likely to be subject to professional standards and responsible conduct may be beside the point. In these cases, the burden of proving fault should not be allowed to contribute to the costs of litigation.

RECOMMENDATION: 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.



G. Maintaining the Common Law Presumption of Falsity

Currently, the falsity of an allegedly defamatory publication is presumed unless the defendant establishes the defence of justification. This reverse burden of proof is well entrenched, dating from the 16th century.[118] The publication is viewed as the "accusation" to be proved in court and the burden is placed on the defendant publisher to prove the accusation. In this way, the presumption protects victims of reputational harm from having to prove their worth.

There is also an evidentiary rationale for the presumption. It can be difficult to "prove a negative" and, in cases of egregious reputational harm, requiring claimants to prove the falsity of the allegation may be practically impossible, therefore precluding them from receiving any remedy.[119]

David Howarth uses the example of the libel claims brought by the parents of Madeleine McCann against newspapers for alleging that they were involved in their daughter's death. Reversing the presumption of falsity would mean that the McCanns would bear the burden of proving to the court that they did not murder their daughter. This is a particularly onerous burden when even forensic investigators were unable to establish their guilt or innocence.[120]

The presumption is also thought to "inculcate a spirit of caution in publishers" against publishing statements that they could not prove to be true.[121]

In Canada, courts have found that the presumption of falsity is consistent with *Charter* values.[122] English courts have also ruled in favour of maintaining the presumption of falsity.[123]

Some commentators argue that the presumption of falsity should be reversed and that the search for truth should be at the heart of defamation law.[124] In the U.S., the presumption of falsity has been reversed in claims brought by public figures.[125]

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The LCO has concluded that the presumption of falsity should be retained. Particularly in the case of online personal attacks, it may be difficult for plaintiffs to prove that the allegations against them are false, or it may otherwise be inappropriate to require them to do so. Consider the cases described in chapter V, section B of this Final Report. In the LCO's view, the plaintiffs in *Clancy v. Farid* should not bear the onus to prove that they are not engaged in the sex trade and have not committed adultery.[126] Nor should the plaintiff in *Magno v. Balita* have been required to prove that he is not "a habitual liar".[127] In such cases, the presumption of falsity is crucial to achieving access to justice.

Furthermore, the presumption of falsity is closely intertwined with the other elements of the tort of defamation. For example, under the responsible communication defence, the onus is on defendants to prove their own responsible conduct in attempting to ascertain the truth of the statement at issue even though they cannot prove the statement is true. Reversing the presumption of falsity would be inconsistent with this common law development.

RECOMMENDATION: Presumption of Falsity

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

H. Maintaining Common Law Defences

For the most part, the LCO's consultations and research revealed that the common law defences to defamation are operating successfully. Subject to the analysis below, the LCO has concluded that these defences should not be codified in a new statute. The LCO believes codification risks disrupting the law's current balance between protection of reputation and freedom of expression. This is particularly the case in respect of public interest communications. That said, we recommend limited reforms to certain defences below.

1. Justification

Under the common law defence of justification, the defendant has the burden of rebutting the presumption of falsity and proving the substantial truth of the "sting" of the impugned statement as a matter of fact.[128] Section 22 of the LSA supplements the defence, providing that justification may succeed against one defamatory allegation even if it does not succeed against other distinct defamatory allegations, where these remaining allegations do not, on their own, materially injure the plaintiff's reputation.[129] Section 22 is a "saving provision" preventing "an overly precise and technical approach" to the justification defence.[130]

One stakeholder called the defence of justification "critically important" in providing "predictability and certainty" to the law.[131] Otherwise, the LCO received very little input on this defence and has concluded that no changes should be made.

RECOMMENDATION: Justification

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

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2. Absolute and Qualified Privilege

The common law defence of privilege protects certain occasions of privilege during which the defendant has a legal, social or moral interest or duty to communicate information to a recipient and the recipient has a corresponding interest or duty to receive it.[132] The rationale behind the defence is that "false and defamatory expression may sometimes contribute to desirable social ends."[133] The various categories of absolute and qualified privilege that have developed in common law are intended to capture those circumstances where it is socially desirable to protect communications without regard to potential reputational harm.

The defence of qualified privilege creates a presumption that the defendant communicated in good faith with an honest belief in the truth of the communication. No liability for defamation will lie unless the plaintiff is able to establish malice or that the defendant exceeded the scope of the privilege.[134] Malice means that the defendant has taken improper advantage of the qualified privilege attaching to the statement. The defendant may not have believed the statement to be true when she made it or may have acted for an improper purpose unrelated to the occasion of privilege (such as spite, vengeance or a similar motive).

Section 3 of the LSA creates a statutory qualified privilege in relation to fair and accurate reports in newspapers or broadcasts of certain public proceedings, meetings and decisions of various public interest associations.[135] This privilege does not apply where: (a) it is proved that the report was made maliciously; (b) the report is "blasphemous, seditious or indecent"; (c) the report is "not of public concern" or its publication is "not for the public benefit". In order to rely on this defence, the publisher must be willing to publish a reasonable statement from the plaintiff explaining or contradicting the defamatory report.

The common law defence of absolute privilege recognizes that there are certain narrow circumstances in which communications should be entirely immune from liability. Section 4 of the LSA supplements the defence of absolute privilege in relation to fair and accurate newspaper and broadcast reports of court proceedings where published contemporaneously with such proceedings.[136] Again, the defence is available only where the publisher publishes an explanation or contradiction of the defamatory report.

The LCO received relatively little input on the defence of privilege. For the most part, the law is well-established. Importantly, the defence is relied on by a wide range of stakeholders (including media organizations and public authorities) to govern their actions. With one important exception, the LCO has concluded that major reform in this area is unnecessary and perhaps even counterproductive.

The LCO recommends that the fair and accurate report privileges in sections 3 and 4 of the LSA be updated. The rationale for fair report privilege is that newspapers and broadcasters are in a position to quickly publish corrections or retractions. But online publications also share this attribute. In the internet era, there is no longer any principled reason to limit the protection of these provisions to publications in newspapers or broadcasts.[137] The fair and accurate report privilege should be available to all publishers who provide an address so that they may be notified by complainants requesting the publication of a reasonable explanation or contradiction of the report.[138]

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RECOMMENDATIONS: 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.



3. Opinion (Fair Comment)

The defence of fair comment protects the freedom to express certain non-malicious opinions even where they are *prima facie* defamatory. "Comment" may include any "deduction, inference, conclusion, criticism, judgment, remark or observation which is generally incapable of proof".[139] "Comment" may even include statements of so-called fact published in an editorial context that, properly construed, amount to opinion.[140]

The rationale for this longstanding defence was helpfully explained by Andrew Scott:

> *…[T]he underlying principle would appear to be that the airing of one's view is not the same as asserting a fact, and – importantly – it is not treated as such by those to whom it is communicated. People understand straightforward allegations of fact differently to how they understand statements of what another person supposes to be the facts. Where facts only are stated, truth is asserted; readers are not invited to demur. Where defamatory opinion is concerned, provided the inferential nature of the assertion is clear and the facts on which the opinion is based are made available, the possibility of reasonable readers being misled by the expressed viewpoint does not arise in the same way.*[141]

This area of defamation law, like so many others, is dense and technical but intended to serve important legal and public policy interests. From a technical perspective, in order for a defamatory statement to be protected by the defence of fair comment, the defendant must meet four criteria:

- The comment is on a matter of public interest;
- The comment is based on fact;
- The comment is recognizable as comment; and
- The comment meets the objective test: could any person honestly express the opinion on the proved facts.

Importantly, the second criteria, requires only some "nexus" between proven facts and the opinion. The defence does *not* require substantial proof or support flowing from the facts.[142]

The defence will be defeated in cases where the plaintiff proves the defendant was subjectively motived by express malice, whether or not the other elements of the defence are established.[143]

The common law is supplemented by sections 23 and 24 of the LSA. Section 23 of the LSA provides that a statement of mixed fact and opinion may be fair comment even where not every fact is proved so long as the opinion is fair comment having regard to those facts as are proved. Section 24 of the LSA provides that a defendant may rely on the defence of fair comment in relation to an opinion held by another person even where neither of them held that opinion so long as a person

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could honestly hold the opinion. Sections 23 and 24 are "saving provisions" preventing "an overly precise and technical approach" to applying the defence.[144]

The defence of fair comment was re-examined in 2008 by the Supreme Court of Canada in *WIC Radio v. Simpson*.[145] In this case, the Court held that the fourth criterion, honest belief, need not refer to the subjective belief of the speaker. Rather, it was enough if, on an objective analysis, anyone could honestly have expressed the defamatory comment on the proven facts. The effect of this decision was to promote free expression. However, it also arguably had the effect of providing additional legal protection to online trolls and others who, for no good reason, engage in reputational attacks.

The fair comment defence remains controversial within the defamation law and media community. Stakeholders were polarized on the effect of the defence in protecting some types of opinion from defamation claims. One practitioner vehemently disagreed with the modern expansion of the defence. He argued that the defence should be tightened to control vitriolic opinions published in "the new Roman circus" that is social media.[146] Another expressed concern about the extreme consequences that negative online reviews can have for small businesses. In his view, a hotel owner should have a legal remedy where an anonymous reviewer writes that the hotel was run-down or moldy, but the facts clearly contradict the review.[147]

On the other hand, some stakeholders felt that the fair comment defence remains too restrictive even after *WIC Radio v. Simpson*. Some argued that all comment should be immune from defamation claims. One stakeholder submitted a written critique of the fair comment defence, concluding that it does not adequately protect free expression.[148]

The England and Wales *Defamation Act, 2013* has taken a distinct approach to the fair comment defence by abolishing the common law defence and enacting, instead, a statutory defence of honest opinion.[149] This statutory defence is not limited to public interest comments and, instead of a malice exception, it is defeated where it is established that the publisher did not hold the opinion.[150] The Canadian law on fair comment has diverged from the English position and an equivalent provision is not recommended in Ontario.

The LCO believes that most of the elements of the defence adopted by the Supreme Court of Canada in *WIC Radio v. Simpson* remain appropriate. However, the LCO has concluded that the objective "honest belief" requirement should be eliminated. The LCO's analysis is consistent with the minority opinion in *WIC Radio v. Simpson*, written by LeBel J.[151] Like LeBel J., the LCO believes that the objective honest belief requirement is superfluous to the other elements of the fair comment defence. [152] Eliminating this requirement would not broaden the defence substantively. However, it would simplify the law and clear up lingering uncertainty in its application.[153] It would also have the effect of providing more reliable legal protection to online reviews and other forms of commentary where these are in the public interest, based on fact and made without malice. The LCO believes that this is an incremental reform that properly balances protection of reputation and freedom of expression in the *Charter* era.

Further, the current name of the defence in Canadian law, "fair comment", is misleading insofar as it may be interpreted to import a reasonableness or proportionality component into the defence. The LCO recommends that the defence should be known simply as the "defence of opinion". That said, the LCO does not recommend any substantive change to the scope of the defence.

Finally, the LCO believes s.24 should be repealed. Section 24 of the LSA was enacted in response to the Supreme Court of Canada decision in *Cherneskey*. It has been rendered unnecessary by the court's subsequent decision in *WIC Radio v. Simpson*.[154]

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RECOMMENDATIONS: 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.



4. Responsible Communication

The defence of responsible communication, adopted by the Supreme Court of Canada in *Grant v. Torstar (2009)*, was Canada's answer to a problem that had plagued defamation law in common law jurisdictions for some time – the comparative lack of legal protections for "responsible" media stories published in the public interest.[155]

In *Grant v. Torstar*, the Supreme Court of Canada crafted a defence allowing publishers "to escape liability if they can establish that they acted responsibly in attempting to verify the information on a matter of public interest."[156] The Court held this was necessary to respect freedom of expression and support "the public exchange of information that is vital to modern Canadian society", while maintaining protection for reputation.[157]

When truth cannot be proven, the responsible communication defence requires the defendant to prove that the publication was on a matter of public interest and the defendant acted responsibly in trying to verify the accuracy of the statement. Responsible conduct by the defendant is determined by reference to a list of factors.[158] In a departure from prior UK case law, the defence is not limited to media publishers but is generally available to "anyone who publishes material of public interest in any medium."[159]

In the LCO's consultations, most stakeholders applauded the Supreme Court of Canada's responsible communication defence. Some media stakeholders credited the new defence with causing a reduced number of defamation claims brought against the media.[160] However, other media stakeholders felt that the practical effect of the defence was to subject journalists to a new burden of due diligence tasks to complete before publishing a story. This was felt to impose too high a standard of care, particularly in relation to keeping online stories up to date. Other stakeholders worried about the impact of the defence on plaintiffs. They queried how plaintiffs could assess the strength of their defamation claim with little knowledge of whether the defendant had acted responsibly.

There was much discussion about who should benefit from the responsible communication defence. Some stakeholders were concerned the defence would allow bloggers and other new media to "hide behind the skirts of the journalism profession".[161] They felt there should be some way of distinguishing between online, informal publishers and professional journalists. Others argued that making the defence available to all public interest publishers is beneficial and different standards of responsible behavior would gradually develop to accommodate different types of publishers and publications.

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This debate about whether the defence extends beyond the media context may be due to a conservative approach by subsequent courts in applying the defence.[162] However, the Supreme Court of Canada was reasonably clear that the defence should extend to all public interest publishers, not merely media organizations. The LCO agrees with this broad approach. The responsible communication defence represents a successful balancing between reputation and expression in the context of public interest communications and is flexible enough that it should be available to all public interest publishers. As Hilary Young puts it, the defence can be:

> … *a defence of responsible tweeting, of responsible blogging, of responsible Facebooking, of responsible investigative journalism, of responsible restaurant reviewing, of responsible pamphleteering, of responsible satire, of responsible letter-writing, speechmaking and of every other kind of expression on matters of public interest.*[163]

The factors applied in the *Grant v. Torstar* decision, such as whether the plaintiff's side of the story was sought and accurately reported, were designed specifically for news reporting. Different standards might be appropriate for non-media publishers.[164] From a law reform perspective, the next step for the common law evolution of the defence is for courts to articulate new factors and legal criteria that are responsive to the circumstances surrounding different publications. This development is best achieved through litigation and fact-specific analysis.

For example, the defence of responsible communication may be an appropriate framework for protecting police press releases and public safety alerts where these publications are responsible in the circumstances. However, these publications are not "stories" and the factors for determining what is responsible will necessarily differ from those applicable to news reports.[165]

In addition, the responsible communication defence may provide a flexible and principled framework for public interest publications that do not meet the technical requirements for absolute or qualified privilege. For example, the England and Wales *Defamation Act, 2013* established a new statutory privilege for academic and scientific publications.[166] The LCO does not believe that this reform is necessary in Ontario.[167] Peer review is logically one criterion relevant to determining whether a defamatory academic or scientific publication was responsibly published and, therefore, legally protected under the responsible communication defence.

Instead of introducing additional categories of publications worthy of protection, the responsible communication defence may achieve a similar purpose in some cases by emphasizing the public interest nature of the publication and the responsible circumstances in which it was published.

The LCO believes the responsible communication defence is an important advancement in defamation law which provides a flexible framework for weighing protection of reputation and free expression in compliance with *Charter* values. Our recommendation is that the promise of this new defence should be fulfilled through incremental development in common law by expanding its application to all forms of responsible publication in the internet era.

RECOMMENDATIONS: 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 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.



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I. Meaningful Court Remedies for Online Defamation

Meaningful remedies for online defamation are an essential component of any modern, effective and access-to-justice-oriented defamation law reform. The LCO's remedies analysis is contained in several sections of this report. In this section, the LCO considers the range and effectiveness of court-based remedies in defamation cases. The LCO has concluded that reforms are necessary to promote meaningful court remedies, including the availability of a takedown order where a defendant is held liable for online defamation.

In other chapters, the LCO considers the need for extra-judicial remedies in high volume/low damage defamation complaints where traditional litigation and court orders are likely to be ineffective.

1. Limitations of Damages Awards

The goal of a defamation lawsuit is to vindicate the plaintiff's reputation. Traditionally, this has been achieved with a damages award. General damages are intended to compensate for reputational and social damage; vindicate the plaintiff's good name; and account for the distress, hurt and humiliation caused by the defamatory comments.[168] Aggravated damages may be awarded where the defendant's conduct has been particularly malicious or highhanded.[169] Alternative remedies such as injunctions, retractions and apologies are available only in limited circumstances.

Damages awards remain an important remedy in defamation suits.[170] However, there is overwhelming evidence damages are no longer sufficient as a remedy in the internet era.[171] Damages awards are more appropriate (and feasible) in defamation claims against professional publishers, such as media organizations, with the resources to pay these awards. Conversely, damages may be less effective where the defendant is an individual posting on social media. During consultations, several practitioners commented that the vast majority of individual defendants do not have the money to satisfy a judgment.

Furthermore, damages are no longer a sufficient remedy for reputational harm in the internet age where the harm may very well be ongoing. Even if defamatory content is originally published offline, the offending statements may spread online. A defamatory news article may appear in an online version. A defamatory statement in a book may be tweeted about or replicated on Google Books. The LCO repeatedly heard from plaintiffs and plaintiffs' counsel that, in the online context, plaintiffs are much more concerned with limiting the ongoing harm caused by having a publication remain online. In these circumstances, damages are not necessarily the plaintiff's primary concern.

A related issue is that the purpose of a damages award (to vindicate the plaintiff's reputation) may not be achieved where the defamation remains online. For example, a defamatory post may continue to appear prominently in a list of search results, while the report of a judgment for the plaintiff is buried several pages in. As David Potts puts it, there may be an "indelible reputational stain in cyberspace even when the individuals [a]re completely exonerated".[172]

Recently, courts appear to be stretching traditional remedial doctrines to provide effective relief for internet defamation. To date, however, the use of alternative remedies has been "haphazard" and their availability beyond the context of traditional media unclear.[173]

In the LCO's view, a damages remedy will frequently be insufficient to ensure meaningful access to justice for plaintiffs in online defamation actions. Although damages remain important, particularly in helping to defray the cost of bringing these lawsuits, the LCO believes courts should have a wider range of remedial tools and options designed to address ongoing reputational harm. The most logical such remedy in many cases of online defamation is a final takedown order.

2. Final Takedown Orders

The LCO has concluded that courts should grant mandatory permanent injunctions to take down defamatory content where liability for defamation has been established on the merits. Final takedown orders are not a novel remedy. Provincial superior

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courts clearly have the jurisdiction to make these orders and they occasionally do so.[174] However, final takedown orders are not as common as might be expected in online defamation cases. This may be due to one or more of the following reasons:

- First, there may be lingering confusion between final versus interlocutory takedown orders. (The latter involves restraint of speech prior to adjudication on the merits and is subject to a much more stringent legal test.)[175]
- Second, courts and parties may fail to distinguish between mandatory orders to take down defamatory content versus prohibitive "do-not-repeat" injunctions.[176] (The latter are awarded only where "there has been a campaign of defamation and a likelihood that it will continue" and/or evidence that the defendant would not be able to pay a damages judgment.)[177]
- Third, courts may be hesitant to grant final takedown orders against intermediary platforms hosting defamatory content or search engines where they are not parties to the action.

Whatever the reason, final takedown orders are an important remedy for internet defamation and courts should be encouraged to make these orders in appropriate cases. These orders may be directed at any person having control over defamatory content including the publisher, an intermediary platform or search engine, or other third party.

It is worth noting that England and Wales included a specific provision for final takedown orders in s. 13 of the *Defamation Act, 2013*:

> 13 (1) Where a court gives judgment for the claimant in an action for defamation the court may order—
> (a) the operator of a website on which the defamatory statement is posted to remove the statement, or
> (b) any person who was not the author, editor or publisher of the defamatory statement to stop distributing, selling or exhibiting material containing the statement….[178]

The LCO recommends that a similar provision be enacted in Ontario. However, in making final takedown orders, Ontario courts must be careful to target only the specific content held to be defamatory.[179]

There was some concern from stakeholders that final takedown orders might prohibit media publishers from reporting on the facts surrounding a defamatory publication. This practice, known as reportage, is generally defensible as responsible communication.[180] In order to prevent a final takedown order from being used to "erase history", a third party publisher subject to an order should have the opportunity to appear before the court and explain why takedown is not appropriate in the circumstances.

The enforceability of final takedown orders is a separate issue. There are often practical challenges enforcing takedown orders against intermediary platforms and search engines not resident in Ontario. Many of these are located in the United States, where they are statutorily immune from liability for online content appearing on their platform.[181] U.S. courts have interpreted this immunity broadly to protect them from third party orders requiring them to remove defamatory content.[182]

The LCO heard from some practitioners that, in their experience, U.S. platforms will remove defamatory content where there is an Ontario court order and where removal is politely requested rather than demanded.[183] There were conflicting views on this issue during the LCO's consultations, but it seems safe to conclude that U.S. platforms and search engines may and regularly do refuse to comply with defamation removal requests even where accompanied by a duly executed court order.[184]

It is clear that Ontario superior courts have jurisdiction to issue injunctive relief against non-parties in order to prevent them from obstructing the course of justice. In *Google Inc. v. Equustek Solutions Inc (2017)*, the Supreme Court of Canada enforced an injunction requiring Google to de-list content that violated B.C. law.[185] However, this victory for the plaintiffs was short lived. A California court refused to enforce the Canadian order.[186]

This problem of enforceability is a significant barrier to plaintiffs who have gone to the trouble and expense of a lawsuit only to find there is no way to have the defamatory content removed from the internet. Nevertheless, the answer is not to

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throw up our collective hands and allow internet companies off the hook.[187] Where an Ontario court has made a finding of defamation on the merits of an action, a final takedown order is generally appropriate. Plaintiffs should be able to rely on this order in seeking removal from U.S. platforms and search engines such as Google.

RECOMMENDATION: 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.



3. Retractions, Apologies, Corrections and Rights of Reply

Defamation claims involve intangible reputational and dignitary interests for which money is often a poor substitute. In some cases, remedies such as a retraction, correction, apology or right of reply (known as "discursive" remedies) may be more suitable than a damages award, particularly in the context of internet defamation.

The LSA encourages retractions, apologies and corrections as pre-trial mechanisms for resolving defamation disputes in certain cases. For example, the fair and accurate report privileges in sections 3 and 4 of the LSA are available to media defendants only if they publish "a reasonable statement of explanation or contradiction" in response to the defamation.[188] The LSA also limits the plaintiff's entitlement to damages in certain circumstances where a media defendant publishes a "full and fair retraction" of an allegedly defamatory statement or offers a "full apology".[189]

Courts also occasionally award a retraction and/or apology as a remedy for defamation.[190]

Some commentators argue that wider availability of discursive remedies for defamation would improve access to justice.[191] Retractions are arguably well-suited to defamation actions because they are directed at vindicating a plaintiff's reputation in the very forum where the reputational harm occurred. However, court-ordered retractions have limitations as a remedy. They are not considered appropriate in the context of opinions where "public interest is better served by continuing debate through rebuttal rather than by compulsorily bringing it to an end" and it may be seen as "invidious to be forced to recant opinions still honestly held".[192]

The LCO also heard from some stakeholders that there is limited practical value in retractions and apologies as remedies.[193] According to one stakeholder, studies indicate that apologies on Twitter get fewer hits than the original post.[194] Retractions are even less effective and do not admit to the falsehood. Stakeholders also emphasized the detrimental impact of retractions and apologies on freedom of expression.[195]

Permitting the plaintiff to exercise a right of reply as a technological remedial innovation was very popular with stakeholders, particularly as it involves more rather than less speech. On the other hand, rights of reply may be subject to the "Streisand effect".[196] This refers to the phenomenon where a reply to the defamatory statement actually backfires by drawing additional attention to the statement, thereby causing further reputational harm. Replies may also be less accessible than the original post. As one stakeholder put it: "Anyone who thinks that reputation isn't damaged online because of some kind of easy, automatic rebuttal system isn't paying attention to the vagaries of search engines."[197]

The LCO believes that retractions, apologies, corrections and rights of reply are best employed as informal solutions to defamation complaints, either negotiated as a result of the notice regime (chapter IV) or in the course of an ODR process (chapter IX). In particular, in our view, court-mandated apologies are an inappropriate incursion on freedom of expression.

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That said, there is one discursive remedy that may improve access to justice in online defamation actions without unduly restricting freedom of expression. The England and Wales *Defamation Act, 2013* introduced a new remedy requiring unsuccessful defendants in defamation actions to publish a summary of the judgment. Section 12 provides:

> 12 (1) Where a court gives judgment for the claimant in an action for defamation the court may order the defendant to publish a summary of the judgment.
>
> (2) The wording of any summary and the time, manner, form and place of its publication are to be for the parties to agree.
>
> (3) If the parties cannot agree on the wording, the wording is to be settled by the court.
>
> (4) If the parties cannot agree on the time, manner, form or place of publication, the court may give such directions as to those matters as it considers reasonable and practicable in the circumstances…[198]

This remedy is a practical tool to assist in the vindication of a plaintiff's reputation where online defamation has been established. It has been usefully applied in recent English decisions.[199] It has also been recommended by other law reform organizations.[200] The LCO recommends that a similar provision be enacted in Ontario.

RECOMMENDATION: 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.



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IV. A NEW NOTICE REGIME AND LIMITATION OF CLAIMS

A major focus of the consultations process was the notice requirement in the *Libel and Slander Act* (LSA).[201] 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.[202]

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.[203]

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.

Some stakeholders suggested that the notice provisions simply need updating. For example, the notice requirement applies to newspaper and broadcast publications, but not other publications which are clearly in the public interest. Publications such as news releases and public safety notices issued by public authorities should also benefit from the notice requirement and the LSA limitation period.[204]

Many stakeholders spoke about the need to clarify whether the notice provisions apply to online publications. The Ontario Court of Appeal has held that the notice requirement applies to online media publications, but the issue has not yet been resolved in relation to other online publications.[205] The time is past due for legislative direction.[206]

Some stakeholders believed that the notice requirement should be extended to online publications. They argued that notice is all the more crucial in the internet era where defamation may spread more quickly, most plaintiffs just want harmful posts taken down, and takedowns are now technologically available.[207] Other stakeholders submitted that the notice requirement should be eliminated altogether.[208] They argued that most plaintiffs do not know about the notice requirement and it operates as a significant barrier to access to justice.[209] It is noteworthy that there is currently no notice requirement in British Columbia, New Brunswick or in the Uniform Law Conference of Canada's Uniform Defamation Act.[210] Nor does the United Kingdom require notice of a defamation action.[211]

Among those stakeholders favouring a notice requirement, most felt that notice was just as beneficial in respect of online blogs as in traditional news stories and broadcasts.[212] Basing the notice requirement on the medium through which publications are transmitted was felt to create unnecessary legal uncertainty and litigation.

Media stakeholders emphasized the importance of a timely notice requirement in protecting freedom of expression.[213] The notice requirement helps to prevent the abuse of defamation claims by complainants who are not sincerely concerned with reputational harm but threaten legal action to extort a money settlement from publishers. The longer they can draw out their threat, the greater chill this may have on journalists publishing in the public interest. One stakeholder commented:

> *A publisher has a reasonable expectation that if a party they are writing about has a complaint they should fairly promptly hear the gist of the complaint and be given a chance to remedy the situation by correction and if they do so their exposure to damages should be reduced.*[214]

The LCO agrees that notice is important to encourage early resolution of defamation complaints. We also agree that it is no longer appropriate to limit the notice requirement to certain kinds of publications. Incremental reform to the LSA notice provisions is not 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 replaced with a new notice regime that is applicable to all offline and online publications.

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In this chapter, the LCO starts from first principles and proposes an integrated notice regime that should encourage informal resolution of many defamation complaints. We address several issues for the enactment of this new regime:

- What are the benefits and purpose of a new notice regime?
- Who should the notice requirement apply to?
- The content of defamation notices.
- How long should the notice period be?
- What happens if a complainant does not give notice?
- How to give notice to anonymous publishers?

In this chapter, the LCO also addresses the related and important issue of the limitation period for defamation claims. We recommend that the standard two-year limitation period in the *Limitations Act, 2002* apply to defamation claims.[215] In order to make this limitation period meaningful in the internet era, we recommend the enactment of a single publication rule. This rule will prevent the limitation period from recommencing every time the allegedly defamatory post is republished online. The LCO has concluded 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.

A. The Purpose of a Notice Regime

There are two key reasons for a new notice regime. First, a notice requirement advances the policy goal of promoting the truth by giving publishers an opportunity to correct errors. Retraction and other informal remedies are valuable and should be encouraged. Second, a notice requirement advances access to justice since it encourages the early resolution of disputes and avoidance of the court process.

The LCO shares the goal expressed by England and Wales' Joint Committee in its report preceding the *Defamation Act, 2013*:

> *We want to see the development of a culture in which expensive legal action is the last rather than the first resort. We believe that a tougher approach is required to ensure that the potential for early resolution is properly explored in all cases. There should be straightforward alternative means of dispute resolution which form the starting point for any complainant, unless there are exceptional reasons for going directly to court.*[216]

Recall that defamation law promotes societal as well as private interests. There is a public interest in the truth and the protection of reputation.[217] In the LCO's view, a mandatory period to allow for informal resolution of defamation complaints before invoking the legal process will promote these values by encouraging quicker resolution of claims.

It is noteworthy that the same conclusion was reached by the Australian Council of Attorneys-General in their current defamation law reform project. Their recently released proposed amendments to the *Model Defamation Act* would introduce a new mandatory notice regime in that jurisdiction similar to that being recommended by the LCO.[218] There too, the goal is to promote swift resolution of defamation disputes without recourse to litigation.[219] One of the stakeholders in that project summed up the goal of a mandatory notice regime in terms of access to justice:

> *If aggrieved persons are required to notify publishers of their concerns as a mandatory first step, they may be encouraged to think more seriously about what they are seeking to achieve or claim before they commence proceedings. This may reduce the number of trivial claims that enter the court system. Publishers would also be afforded the opportunity to review the matter complained about and reconsider the publication before either party is put to the expense of litigation.*[220]

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The benefits of a notice regime apply regardless of the type of publication. Media are merging. Similar versions of news broadcasts are often aired on television, posted on the broadcaster's website, transcripted in an online article and summarized on the broadcaster's Facebook page.[221] In these circumstances, the LCO agrees that it would be "absurd" to apply different notice regimes.[222]

A key challenge in an integrated notice regime is ensuring that notice gets into the hands of online publishers where they may be anonymous, or are identifiable but there is no means of contacting them. As discussed below, the LCO's recommended notice regime makes notice to anonymous publishers possible by taking advantage of the intermediary role of internet platforms in connecting complainants and online publishers.[223] Platforms have long relied on their intermediary nature to avoid liability for online defamation. In contrast, the LCO's recommended notice obligations are intentionally designed to take advantage of their intermediary status.

Therefore, the LCO recommends a new integrated notice regime applicable to all defamation complaints. The current notice provisions in the LSA should be repealed and replaced by a regime that:

- Is mandatory for complainants but does not preclude them from accessing the formal court process;
- Encourages parties to agree on a range of informal remedies appropriate to the internet era; and
- Operates consistently in respect of both offline and online publications.

B. The LCO's Proposal

The LCO spent considerable time considering the elements of a new notice regime. Most stakeholders framed their input on this issue in relation to the existing regime in the LSA. However, the LCO's proposal is for a new notice regime developed from first principles and our recommendations are best understood in this light. That said, for ease of understanding, we conclude this section with a diagram demonstrating the differences between the current and proposed notice regimes.

1. Initiating a Complaint

The notice regime would require a complainant to serve a prescribed notice of complaint on the publisher of an alleged defamatory publication (both offline and online) four weeks before commencing a civil action for damages against that publisher.[224] This rule would apply so long as the publisher is reasonably identifiable or, for online publications, where service is possible by sending the notice to an intermediary platform hosting the publication.

The notice would identify the specific content complained of, assert that it is defamatory and include basic information to support the claim. The notice would also indicate what the complainant is seeking in order to resolve the claim. By receiving a notice, the publisher would be invited to take action to informally resolve the complaint. If the claim proceeds to trial, any remedial action taken by the publisher and other relevant circumstances of the publication would be considered by the court in mitigation of the plaintiff's damages. Where the publisher's actions have been reasonable, the plaintiff would be limited to recovering damages for pecuniary loss.

Importantly, unlike the notice requirement in the LSA, plaintiffs failing to serve a notice of complaint would not lose their right of action. They would simply be prevented from commencing an action for damages until the four week negotiation period has concluded. The mandatory notice period would not preclude the plaintiff from seeking interlocutory injunctive relief where appropriate and necessary to prevent reputational harm pending adjudication of the action.

For online publications, the complainant would typically serve the defamation notice on the publisher via the intermediary platform hosting the publication. There are three reasons to require the intermediary platform to pass on notice. First, where the publisher is anonymous, the intermediary platform would act as a go-between, ensuring that notice gets into the hands of the publisher. Second, as a go-between, the platform would be in a position to protect the anonymity of the publisher *vis à vis* the complainant. Third, serving notice on an intermediary platform would initiate the platform's takedown obligation.

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Takedown is a new and important remedy described below and discussed in more detail in chapter VIII. However, notice to the intermediary platform would not be necessary if the notice can be served on the publisher directly and the complainant does not seek a takedown remedy.

In the following, we discuss the elements of this notice regime in more detail.

2. Content of the Notice

The LSA does not specify what should be included in a defamation notice. Ontario case law requires that the content of the notice be assessed on the facts. The notice must "identify the offending remarks to sufficiently enable the defendant to know which they are, to investigate, and amend or issue an apology or otherwise mitigate damages".[225] This is too vague a standard for the purpose of the LCO's recommended notice regime.

Instead, the LCO has looked to other statutory notice regimes directed at internet intermediaries. In particular, Emily Laidlaw and Hilary Young's proposal in their LCO Issue Paper offers helpful detail on the degree of specificity that should be required of a defamation notice.[226] They suggest that a notice of complaint include:

- The allegedly defamatory content and internet identifier (where there is one);
- Some information regarding the legal basis for the defamation claim (e.g. that the content is not true);
- What the complainant wants, such as content removal, an apology and so on;
- The complainant's contact information; and,
- A statement that the complaint is made in good faith as to its accuracy.[227]

These suggestions are appropriate for the integrated notice regime recommended here and the LCO adopts them accordingly. The LCO does not adopt the requirements for a valid notice of complaint under England and Wales' *Website Operators Regulation*.[228] Nor do we adopt the requirements for a Letter of Claim under England and Wales' *Pre-Action Protocol for Media and Communications Claims*.[229] These forms of notice require a degree of technical language that may be difficult for complainants to meet without legal advice.

The LCO also recommends that a standardized form of notice be developed to make it easier for intermediary platforms to comply with their obligation to pass on notice.[230] A form of notice containing language modelling the elements of a defamation claim and possible defences would have the additional benefit of assisting complainants to "understand and diagnose their problem, and frame their complaint".[231]

3. Electronic Service of the Notice

In order for an integrated notice regime to be effective, it must be possible for defamation notices to be served on publishers effectively and efficiently. In the LCO's view, service by electronic means should be permitted in certain circumstances to meet these goals. Electronic service may include service by email, text, or private messaging to a social media account.

Currently, electronic service of a defamation notice is not permitted in Ontario. The LSA requires that a defamation notice be served in the same manner as a statement of claim under Ontario's *Rules of Civil Procedure* (the "Rules").[232] Under Rule 16, a statement of claim must be served personally (physically delivering the document to the defendant), or by an alternative to personal service (for example, leaving a copy of the document at the defendant's place of residence and mailing another copy to the defendant). Neither personal nor alternative service allows for service by electronic means.[233]

The only way electronic service of a defamation notice may be effective under the current Rules is where the complainant brings a motion to the court for substituted service. Under this Rule, the court has discretion to allow electronic service where it finds that it is "impractical for any reason to effect prompt service" by personal or alternative service.[234] Courts are increasingly making orders for electronic service under this Rule.[235] However, this requires a court motion; something that would be contrary to the whole purpose of an integrated notice regime for defamation complaints.

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In consultations, several stakeholders stated that the prohibition against electronic service of a defamation notice is outdated and overly onerous for complainants.[236] In practice, apparently some internet intermediaries *require* that they receive notice through online means so that they can then easily pass the notice on to the applicable website moderator.[237] There is also a growing call in the literature for civil procedural rules to be updated to reflect the online world.[238]

Electronic service of defamation notices would have several benefits over traditional means of service. It would have the potential to significantly reduce the complainant's costs of service and, in most cases, would effectuate notice immediately. Furthermore, social media and email accounts can be accessed anywhere in the world the user has access to an electronic device and internet connection, offering the advantage of convenience for both the complainant and publisher. Most importantly, there is a strong argument that electronic service would actually improve the likelihood that publishers receive the notice. According to a 2019 study, cell phones are owned by 96% of all Americans and 99% of 18-49 year-olds.[239] At least one social media platform is used by 72% of Americans, 82% of 30-49 year-olds and 90% of 18-29 year-olds.[240] It is reasonable to assume that the numbers are similar in Ontario.

Of course, a rule allowing for electronic service of defamation notices must ensure natural justice to the publisher. Our legal system is predicated on the principle that defendants be given notice of legal proceedings against them and an adequate opportunity to respond. Where notice is sent to an electronic account, there are concerns about verifying that the publisher is, indeed, the registered owner of the account, as well as ensuring that the publisher will actually access the account to receive the notice. Where the publisher does not receive notice, there is a significant risk that inappropriate default judgments will result. Some have also questioned whether electronic notice is sufficiently formal to ensure that the recipient appreciates the serious nature of the legal proceeding.[241]

In the LCO's view, each of these concerns can be addressed in permitting electronic service for defamation notices. First, where allegedly defamatory words are published on an individual's online account, there is less concern about verifying the identity of the account holder. The appropriate recipient of the notice will typically be the publisher operating from that account. In *Theralase v. Lanter (2020),* the court reasoned:

> *Where…people are hiding behind internet anonymity to make allegedly defamatory comments on a website, service through the website using the coordinates and the identifiers that the users themselves provided to the website operator strikes me as both reasonable and just. If notice does not reach the users, it is because they choose not to access the accounts from which they made their comments or the email addresses that they provided to the website operator.*[242]

Second, there are technological means for ensuring that the publisher accesses the account and receives the notice. Many electronic accounts, including Facebook private messages, Twitter direct messages, and some email accounts, send a 'read' receipt to the sender once a message has been opened or viewed. Other accounts may be configured to do so. Alternatively, receipt of a defamation notice might be inferred from subsequent user activity indicating that the publisher has become aware of the defamation complaint. This might include the user deleting the impugned content, blocking another user, or changing privacy settings.[243] Absent evidence that the publisher actually received the notice, a reasonable inference of receipt of notice might be drawn from the publisher's continued use of the account. Evidence of continued user activity might include "time stamps" of account logins, content uploads, friend requests, messages and other engagement.

Third, the formal nature of defamation notices may be enhanced using electronic signals of authority and legitimacy in place of traditional mechanisms such as stamps, seals and signatures. Formality is a challenge shared by many forms of electronic transactions and should not, on its own, prevent the benefits of allowing for electronic service of defamation notices.

Therefore, the LCO recommends that, if the complainant knows the publisher's email address, emailing the defamation notice should be effective service with evidence that the publisher accesses the email account regularly and has accessed it relatively recently.[244] Service by text message should be permissible in analogous circumstances. If the publisher has an

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online presence such as a social media account that allows for private messaging (i.e. Facebook, Instagram, Twitter or LinkedIn) and, again, this is accessed by the publisher regularly and has been accessed recently, private messaging the defamation notice to that account should similarly be effective service.[245]

The LCO recommends that electronic service of defamation notices be directed to private electronic accounts (accounts that are personal to the publisher alone). Generally, complainants should not post defamation notices publicly. This may cause unfair prejudice to the publisher. It may also backfire by drawing attention to the impugned statement and thereby exacerbating any reputational harm.[246] However, an exception is where the notice is posted to the same public account hosting the allegedly defamatory statement. In this case, the publisher has arguably waived any right to confidentiality and public notice may be valuable in mitigating any reputational harm suffered by the complainant.

Justice David Brown, of the Ontario Court of Appeal, has advocated for civil adjudication reform "reflect[ing] and incorporat[ing] the best of the extraordinary changes in information management and process design" over the last 30 years.[247] His model would make use of "electronic documents and electronic file management/scheduling". The LCO believes that electronic service rules for defamation notices would be a useful first step in this process.

4. A Four Week Negotiation Period

Currently, the LSA requires that complainants serve defamation notices related to newspaper and broadcast publications within six weeks of becoming aware of the alleged defamation, failing which they lose their right of action.[248] Complainants alleging defamation in respect of other kinds of publications are not subject to any notice period.

During consultations, there was heated debate among stakeholders as to the appropriate length of a notice requirement. Media publishers emphasized "the extremely fast-paced world of the media" and the need for publishers to be able to preserve evidence in order to defend themselves in a defamation action.[249] The Canadian Broadcasting Corporation noted that the defendant's burden to establish defences such as justification and responsible communication becomes "more difficult over time (as sources die or become unavailable, journalists move on in their careers, etc.)."[250] The Canadian Media Lawyers Association/Ad IDEM submitted that the current notice provisions in the LSA are important to maintain the balance between protection of reputation and freedom of expression. They further submitted that the Ontario provisions work well and are preferable to the notice regimes in other provinces. They recommended that the current six week notice period be extended to internet publications.[251]

Some plaintiffs' lawyers argued that there is less need for defendants to worry about preserving tapes or broadcasts that are online.[252] A longer notice period would allow plaintiffs time to "cool down" and consider whether they really want to bring a claim before putting the litigation process in motion. Other stakeholders found the current notice period to be effective in resolving disputes before the issuance of a statement of claim.[253]

The debate over the appropriate length of a notice requirement hinges on the fact that, under the LSA, failure to meet the notice requirement results in eliminating the plaintiff's right of action. This means of enforcing notice is effective in promoting early notice of defamation complaints, but drastic in consequences. The current rule creates a second, earlier, limitation period for certain defamation actions.[254] In respect of other publications, there is no LSA notice period and, therefore, complainants will only lose their cause of action if they fail to meet the two-year general limitation period.[255]

Until now, notice has only been required of plaintiffs suing in relation to media publications. Plaintiffs in these traditional cases are most likely to have a lawyer. However, the LCO's recommended notice regime would apply equally to unrepresented individuals complaining of a personal attack in a social media post. Such complainants are less likely to seek legal advice and, therefore, less likely to be aware of the need for notice. The consequences for failure to meet the notice deadline must be appropriate for both these contexts. At the same time, there must be sufficient incentive for complainants to meet the notice requirement so that the notice regime functions as intended.

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The LCO has concluded that a provision automatically striking a plaintiff's cause of action for failure to meet the notice requirement is overly harsh and inflexible. Our conclusion is in line with the considered opinion of several law reform bodies. In its 1969 *Report on Limitation of Actions*, the Ontario Law Reform Commission recommended that failing to meet the LSA notice requirement not bar an action where a court finds that such a result would be unjust.[256] The Uniform Law Conference of Canada decided not to include a notice requirement in its 1996 Uniform Defamation Act. The Commissioners tasked with considering the notice provision concluded that the objectives of notice were not served by removing the plaintiff's right of action. Nor would defendants be unduly prejudiced by the failure to give notice.[257] Similarly, the Law Reform Commission of British Columbia recommended against a notice requirement in its *Report on Defamation*.[258]

Defamation legislation in Quebec and Saskatchewan includes notice periods that must be met before a plaintiff may bring a claim, but these do not act to eliminate the plaintiff's action as in Ontario.[259]

The LCO has concluded that a fixed notice period preceding the commencement of a legal action, as in Quebec and Saskatchewan is the best-suited approach. This reform will ensure that publishers have the opportunity to negotiate an informal resolution before being subjected to legal proceedings for damages. It will also preserve plaintiffs' right to bring a legal action if a negotiated resolution is not possible. In our view, this approach will not weaken the notice regime, but will give it the flexibility to respond to the diversity of complainants and publishers in the internet age.

The LCO recommends that a complainant who has provided notice be required to wait for a four week period before commencing a defamation action for damages. If the limitation period for the action is due to expire before the end of the negotiation period, the limitation period should be extended accordingly.[260] Furthermore, notwithstanding the notice period, plaintiffs should be permitted to seek interlocutory injunctive relief where necessary and appropriate to prevent future reputational harm.

5. Assessing the Publisher's Actions in Response to the Notice

One purpose of the LCO's recommended notice regime is to encourage parties to informally resolve defamation disputes where possible. In the LCO's proposal, publishers would be encouraged to informally resolve a claim in order to limit the plaintiff's damages to pecuniary loss in the event of a subsequent lawsuit. The LCO has considered what publishers would need to do to trigger this limitation of damages.

The current notice regime in the LSA specifies a retraction as the action to be taken by a publisher in order to limit a potential damages award.[261] Elsewhere in the LSA, publishers are encouraged to offer a written apology in order to mitigate the plaintiff's damages.[262] Whatever the historical context for distinguishing between these methods of reparation, the LCO has concluded that there is no need to do so in an integrated notice regime. We heard evidence that flexibility in informally resolving defamation disputes is important in the media context.[263] The notice regime should (1) encourage the parties to find a resolution that meets their particular needs, and (2) take advantage of technological remedies offered by the internet.

As discussed above, the complainant sending a defamation notice will propose an informal resolution in the prescribed notice of complaint. A publisher wishing to negotiate a resolution to the complaint (and, therefore, limit her exposure to a damages award) may agree to the complainant's proposal, or offer some other means of resolving the complaint. In the online context, a publisher might offer to take down the offending content, tag the content as disputed or provide the complainant a venue for responding to the content (perhaps by linking the response to the content or embedding it alongside the content). A publisher might also take steps to prevent the further spread of the offending content. As the online environment continues to evolve, new technological means of informally resolving defamation disputes will become available.

It will be for the court in a subsequent defamation action to assess whether the publisher's efforts to resolve the complaint were sufficient to trigger the statutory limitation of damages. The LCO proposes a reasonableness standard. So long as the publisher takes action that is reasonable in all the circumstances, the plaintiff's damages will be limited to pecuniary loss. A reasonableness standard is more flexible than the "full and fair" standard provided for in the LSA and is, therefore, more

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appropriate to govern the range of possible ways that online defamation disputes might be resolved.[264] However, the LCO's proposal is intended to be generally consistent with the common law on assessing damages in these circumstances.[265]

The LCO suggests the new *Defamation Act* include an illustrative list of common approaches to resolution that may be reasonable depending on the circumstances. These might include retractions, apologies, takedown, rights of response and so on, but without precluding other possibilities. There is one factor that perhaps should be explicitly mandated in the legislation since it is novel to the online context. A reasonable response to a notice of complaint is one that does not unduly draw additional attention to the alleged defamation, thereby exacerbating the alleged reputational harm and undermining one of the goals of the notice regime.[266]

There is no need for the legislation to specify a deadline within which the publisher must take remedial action in response to a defamation notice.[267] The timeliness of the publisher's response is best assessed as part of the court's determination of what is reasonable in the circumstances.

6. Comparison of the LCO's Proposal versus the Current LSA Notice Regime

Current LSA Notice Requirement	LCO's Proposed Notice Regime
Applies to allegations of libel in a newspaper or broadcast	Applies to all defamation complaints
Must be served within six weeks of discovering the claim	Must be sent four weeks before bringing an action
Operates as a limitation period restricting the plaintiff's right of action	Operates as a mandatory negotiation period preceding an action
Formal notice typically drafted by a lawyer	Prescribed web form with plain-language instructions to assist complainants in understanding and framing their legal problem
Must be served personally or by alternative to personal service	May be sent by email or other electronic means
Where publisher is anonymous, plaintiff must bring a court motion for substituted service and/or a Norwich order	Where publisher is anonymous, complainant may send notice to intermediary platform to pass on to publisher
Publishers encouraged to make a "full and fair retraction" within three days	Publishers encouraged to negotiate a range of techno-legal solutions to the dispute (retraction, apology, takedown, right of reply, flag, etc.)

C. Dedicated Notice Rules for Intermediary Platforms

The LCO's proposed notice regime would be facilitated by imposing a new duty on intermediary platforms to pass notices received from complainants to online publishers. The LCO firmly believes that modern defamation law reform must include such provisions in order to be effective. As a result, the LCO's notice proposal contemplates that, in respect of online publications, complainants have the ability to serve notice on the publisher via an intermediary platform hosting the publication (where there is one).[268] There are three reasons to involve intermediary platforms in the notice regime.

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1. Intermediary Platforms Can Pass Notice on to Anonymous Online Publishers

Serving notice directly on online publishers may be difficult, particularly where the publisher is anonymous. Online content is also easily distributed so that a complainant may be unable to distinguish between countless publishers of republished content.

The LSA currently requires newspaper and broadcast publishers to identify themselves in a conspicuous place in their publication.[269] Professional media publishers and other institutional publishers should continue to do so both online and offline. It is to their benefit to facilitate operation of the notice regime. Nevertheless, many defamation complaints will involve individual publishers and, in particular, anonymous publishers. It is not possible to require that all publishers identify themselves so that they may be served with notice. This would likely be an impermissible incursion on their online privacy interests.[270] It would also be impractical to create a rule directed at the billions of individuals posting internet content worldwide.

How then to get notice of a defamation complaint into the hands of these publishers? The only effective way is by involving the intermediary platform hosting the allegedly defamatory content. Requiring platforms to pass on notice of a defamation complaint leverages the intermediary role that platforms play in connecting their users.[271] The LCO recommends, therefore, that where an intermediary platform receives a defamation notice in relation to content that it hosts, the platform be required to use all reasonable efforts to pass the notice onto the content publisher. This obligation on intermediary platforms will facilitate defamation claims directly against publishers. The platform is involved only as a go-between.

This proposal is directed specifically at intermediaries that provide platforms for user-generated content (intermediary platforms). It does not impose obligations on internet service providers (ISPs) or search engines to pass on notice.[272]

The LCO believes that intermediary platforms should be entitled to charge a reasonable administrative fee for carrying out their notice obligation.[273] As CIPPIC has submitted in respect of Canada's copyright notice and notice regime, "…forwarding notices can be time-consuming and complex, and especially burdensome for small service providers."[274] Just as in the copyright context, the financial burden of alerting publishers to defamation complaints should rest with those seeking to enforce their rights, rather than with intermediary platforms.

Many plaintiffs' lawyers that the LCO consulted spoke of the difficulty of contacting platforms in order to make content removal requests.[275] Our proposed notice regime would require that intermediary platforms hosting third party content available in Ontario post their contact information in an easily accessible location.[276]

Laidlaw and Young recommend that intermediary platforms have discretion not to forward a notice of complaint in certain circumstances.[277] The LCO agrees that notices should not be forwarded where they do not meet the procedural requirements or where the complainant does not pay the required administrative fee. However, the LCO disagrees that platforms should determine whether a complaint is "plausible". Our concern is that this may be a "slippery slope", encouraging the intermediary platform to assess the viability of the complaint and, thereby, undermining the procedural nature of their notice obligation.

Once in the hands of the publisher, a notice of complaint relating to online content will have the same effect as an offline notice. The notice will invite the publisher to make efforts to informally resolve the complaint. This might include taking down the offending content, issuing a retraction or correction of the content, embedding the complaint alongside the offending content or otherwise settling the complaint. If the plaintiff is eventually successful in a defamation action, these remedial actions should be considered by the court in mitigation of the plaintiff's damages. Where the publisher's actions have been reasonable in all the circumstances, the plaintiff should be limited to recovering pecuniary loss.

2. Intermediary Platforms as Go-Betweens to Protect Anonymous Publishers

Intermediary platforms passing notices of complaint to anonymous publishers should have a duty to protect the anonymity of the publisher *vis à vis* the complainant. The benefit is that complainants may seek a remedy for online defamation without necessarily having to identify their defamer. We discuss the challenges associated with identifying anonymous defamers for the purpose of bringing court proceedings in chapter V.

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Ultimately, the LCO's notice proposal might be extended to require intermediary platforms to pass on statements of claim and other court documents for the purpose of facilitating defamation actions against anonymous publishers. A plaintiff may proceed with a defamation action and obtain a final takedown order without ever having to identify the defendant.[278] Although a plaintiff would not be able to directly enforce a final takedown order against an anonymous defendant, the takedown order would be enforceable against the intermediary platform hosting the content pursuant to the LCO's recommendation in chapter III above.[279]

In addition to the obligation to pass on notice to anonymous publishers, intermediary platforms would also be required to retain any records containing information identifying the publisher. This recommendation is analogous to the obligation to preserve records in Canada's copyright notice and notice regime.[280] Although the intermediary platform would retain the identifying information for the purpose of any future court action, it would be prohibited from releasing the information except in response to a court order. We discuss this recommendation further in the section on Norwich motions in chapter V below.

3. Notice to Intermediary Platforms Necessary for the Takedown Remedy

Whether or not online publishers are directly identifiable, complainants wishing to trigger a takedown remedy should be required to serve notice on the intermediary platform hosting the allegedly defamatory content. This new and important remedy for complainants of online defamation is discussed in detail in chapter VIII.

RECOMMENDATION: Notice Regime

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.



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RECOMMENDATION: Notice Regime (continued)

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.

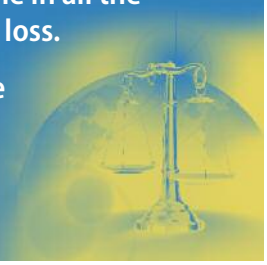
j) Applicable to Intermediary Platforms Only – The notice obligation should apply to intermediary platforms hosting third party content made available to Ontario users. Internet service providers, search engines and other intermediaries not directly hosting user content should have no responsibility 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.



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D. Limitation of Actions and the Single Publication Rule

The comprehensive new notice regime recommended in this chapter must be consistent with the limitation of defamation actions. Currently, defamation claims in relation to media publications must be commenced within three months of the date when the plaintiff became aware or should reasonably have been aware of the publication.[281] Other defamation claims are subject to the two-year limitation period in the *Limitations Act*.[282]

Disparate limitation periods for different types of publication are no longer justifiable in the internet era. The LCO recommends that there be a single limitation period applicable to all defamation claims. The more complex issue is what the limitation period should be. This depends, in part, on how the limitation period is triggered.

1. Single Publication Rule

The common law rule in defamation is that every publication commences a new cause of action. This multiple publication rule continues to be the law in Ontario.[283] However, it has attracted much criticism from courts and commentators in the online context.[284] The traditional rule has arguably rendered limitation periods meaningless given the fluid way in which content is communicated online. Content may be posted and reposted (shared, liked, pinned, embedded, or linked) continually and the limitation period will begin all over again with each republication. This defeats a key goal of limitation periods: to create certainty to the commencement of actions so that both complainants and publishers may order their affairs.[285]

The US has addressed this problem by adopting a single publication rule.[286] This rule provides that a plaintiff has a single cause of action in defamation which arises at the first publication of an alleged defamatory statement, regardless of how many copies of the publication or republication occur. The result is that a single limitation period applies and a defendant's scope of liability is contained to any republications occurring within that single limitation period. (Republication occurring beyond the limitation period may still be relevant for the purpose of assessing damages.)

England and Wales followed suit by adopting a statutory single publication rule in section 8 of the *Defamation Act, 2013*.[287]

There are strong policy reasons in favour of a single publication rule. The rationale for the rule was articulated by a U.S. court and quoted by the Ontario Court of Appeal as follows:

> *The single publication rule prevents the constant tolling of the statute of limitations, effectuating express legislative policy in favour of a short statute of limitations period for defamation. It also allows ease of management whereby all the damages suffered by a plaintiff are consolidated in a single case, thereby preventing potential harassment of defendants through a multiplicity of suits…Finally the single publication rule is more consistent with modern practices of mass production and widespread distribution of printed information than the multiple publication rule.*[288]

This was a divisive issue during the LCO's consultations. Most stakeholders were of the view that Ontario should adopt a single publication rule.[289] They argued that the rule was necessary to reduce the chill on freedom of expression created by allowing plaintiffs an unlimited time to bring defamation claims. In their view, online publishers are exposed to the risk of a claim indefinitely and are thus motivated to pull controversial material from the internet regardless of whether it may be said to be defamatory.

However, other stakeholders, including several prominent plaintiffs' counsel, emphasized the danger that a single publication rule would arbitrarily limit claims by victims of online defamation. They pointed out that, with the indefinite duration of many internet publications, the time period during which a defamatory post may cause harm to a complainant has potentially expanded. For example, Google's search algorithm may cause a post to rank high in a list of search results even if it is many years old. In the view of these stakeholders, it is important to ensure that plaintiffs are not denied their right to bring a claim in relation to new reputational harm flowing from these posts.[290]

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The LCO has concluded that a single publication rule should be adopted to limit a publisher's potential exposure to liability arising from multiple publications of the same statement. However, the rule must be qualified to protect the right of plaintiffs to seek a remedy for related, but distinct, defamatory publications causing new reputational harm. The England and Wales *Defamation Act, 2013* addresses this concern by providing that a new cause of action arises in relation to a successive publication where it is "materially different" than the original publication causing harm.[291] The LCO agrees that this solution achieves an appropriate balance between protection of reputation and freedom of expression. Publications that are "materially different" should be understood as new publications in relation to which a new limitation period will begin to run.[292]

Unlike the England and Wales Act, the LCO recommends that the discovery principle continue to apply to defamation claims in Ontario.[293] The discovery rule provides that a limitation period begins to run only when the material facts on which the plaintiff's claim is based were discovered or ought reasonably to have been discovered by the plaintiff.[294] In the defamation context, this rule requires that the limitation period commence on the date that the plaintiff discovered or should reasonably have discovered the publication.

2. A Two-Year Limitation Period

The remaining issue is what period is reasonable as a uniform limitation period governing all defamation actions. The LCO has concluded that the general two-year limitation period in the *Limitations Act* should be adopted.[295] A two-year limitation period is appropriate for two reasons. First, it will preserve plaintiffs' claims for a reasonable length of time, especially given the effect of the single publication rule. Second, a two-year period will allow the parties time to explore informal means of resolving their dispute without compromising an eventual court claim. The LCO has concluded that a two-year limitation period accords with the modern, balanced approach to limitations legislation adopted by law reformers and the Supreme Court of Canada.[296]

There is also value in consolidating limitation periods as occurred in relation to most limitation periods when the *Limitations Act* was introduced. Defamation disputes have evolved beyond the media context to encompass many more claims involving private individuals. In this context, there is no longer any compelling reason to single out defamation claims for a specialized limitation period.[297]

RECOMMENDATIONS: Single Publication Rule and Limitations

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.

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



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V. PRELIMINARY COURT MOTIONS

The speed of communications in the internet era has, in many cases, outpaced the courts' 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.

In our 2017 Consultation Paper, the LCO invited input on the use of preliminary motions and hearings in defamation actions as a means of encouraging early resolution of disputes and furthering access to justice.[298] Specifically, we asked about the possibility of borrowing from the English system where defamation claims are heavily case-managed by specialized judges. Several stakeholders supported this kind of reform, particularly given the complexity of defamation law and the high cost of defamation proceedings.[299] Others felt that further preliminary hearings would undermine access to justice for plaintiffs.[300]

The Ontario Superior Court of Justice submission provided some important context around the work of the Court and its available resources.[301] According to the submission, over a ten-year period, defamation proceedings comprised only 0.3% of the total number of civil proceedings commenced. Furthermore, the Court prioritizes criminal, family and child protection cases. In this context, the Court submitted that English-style case management and specialized judges were not feasible. This was especially the case in rural locations where the Court relies on the breadth of experience of generalist judges.

There was a general consensus among stakeholders that summary judgment motions work reasonably well in the defamation context. Summary judgment motions are a well-established and appropriate tool for improving access to justice where there is no genuine issue requiring a trial.[302]

For these reasons, the LCO does not recommend creating new preliminary motions or other procedures specific to defamation claims. Instead, as discussed in chapter IX, the LCO recommends any new resources be directed towards resolution of online defamation claims outside the court process through the creation of an online defamation tribunal.

In this chapter we consider three preliminary motions currently used in defamation actions:

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

We conclude that each of these motions has an important role to play in streamlining defamation actions, conserving court resources and promoting access to justice for both parties.

Anti-SLAPP motions were introduced in 2015 through amendments to the *Courts of Justice Act* (CJA).[303] These motions allow defendants to seek early dismissal of strategic lawsuits that have an undue impact on freedom of expression. During LCO consultations, the debate about anti-SLAPP motions tended to revolve around two issues: the feasibility of the evidentiary burden that s.137.1 of the CJA imposes on plaintiffs; and, more generally, whether the legal test achieves an appropriate balance between protection of reputation and freedom of expression. After the consultation process was mostly concluded, the Ontario Court of Appeal delivered a series of detailed judgments interpreting the new legislation.[304] Two of these decisions were appealed to the Supreme Court of Canada in November 2019.[305]

The LCO has concluded that the anti-SLAPP legislation is an appropriate and valuable tool for weeding out weak or unmeritorious defamation claims that unduly infringe freedom of expression. The developing case law will direct the future course of anti-SLAPP motions to ensure that reputation and free expression remain in balance.

In the case of interlocutory injunction motions, stakeholders debated whether courts should have more leeway in defamation actions to order the takedown of harmful online content while the wheels of justice inch toward resolution. The LCO has concluded that reform is necessary. We recommend a new motion for an interlocutory takedown order be

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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.

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 as a result.

We discuss anti-SLAPP motions, interlocutory takedown motions and Norwich motions in turn.

A. Anti-SLAPP Motions

Anti-SLAPP motions, introduced in 2015 under the *Protection of Public Participation Act* (PPPA), are a fast-track summary procedure to identify and dismiss strategic lawsuits.[306] These motions are a powerful tool for protecting freedom of expression and defendants in Ontario defamation actions. It is not an exaggeration to say that anti-SLAPP motions are gradually revolutionizing defamation law in this province.

The paradigm SLAPP case involves an individual speaking truth to power. For example, *United Soils Management Ltd. v. Mohammed* involved an Ontario teacher who posted critical remarks about United Soils on two Facebook groups. She was concerned that a gravel pit operated by United Soils was contaminating groundwater in the community and could "poison" the town's children. United Soils embarked on an aggressive litigation strategy to silence Ms. Mohammed even after she apologized and retracted her statement. On an anti-SLAPP motion brought by her lawyer, the court not only applied section 137.1 to dismiss the action but awarded Ms. Mohammed $7,500 in damages for the stress of being subjected to the action.[307] The Ontario Court of Appeal upheld this award.[308]

1. The Legal Test

The stated purposes of anti-SLAPP motions are:

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 unduly limiting expression on matters of public interest; and
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.[309]

The legislation establishes a three-stage test to determine whether defamation actions should be dismissed as SLAPPs.

First, the motion is available where the defamation action arises from "an expression made by the person that relates to a matter of public interest".[310] This is the public interest threshold test. This test focuses on the objective effect of the expression rather than the subjective intent of the speaker. The onus is on the applicant (the defendant in the main action) to establish that its case crosses the public interest threshold.

Second, once the public interest threshold is established, the judge is required to order dismissal unless the respondent (the plaintiff in the action) meets two further tests. The plaintiff must establish "grounds to believe" that the proceeding has "substantial merit" and the defendant has "no valid defence".[311] This is the merits-based test.

Third, the plaintiff must establish that the harm resulting from the expression is "sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression".[312] This is the balancing test. At this balancing stage of the test, the defendant's motives in publishing the expression are relevant to balancing the value of the expression against the harm to the plaintiff.

Defendants may bring a motion any time after a proceeding has been commenced and, therefore, need not wait to file a Statement of Defence. The motion is then supposed to be heard within 60 days although this deadline is apparently more honoured in the breach.[313] Once a motion is filed, no further steps may be taken in the proceeding until the motion, and any appeal, is disposed of.

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The legislation uses cost provisions to encourage defendants to make use of the new procedure. Where a defendant is successful in having a proceeding dismissed, there is a statutory presumption that she will be awarded her costs of the motion and the proceeding on a full indemnity basis. However, where a plaintiff is successful in defending her action, the presumption is the opposite – she will not be awarded costs on the motion. Both presumptions are subject to the judge's discretion.

Unlike anti-SLAPP motions in some jurisdictions, in Ontario it is not necessary for the defendant to establish that the plaintiff was acting improperly in bringing the action. However, where a defendant does establish that the plaintiff was acting in bad faith or for an improper purpose, subsection 137.1 (9) provides for a damages award in favour of the defendant.

In March 2019, British Columbia joined Ontario by enacting virtually identical anti-SLAPP legislation.[314]

2. Significance of Anti-SLAPP Motions

Although anti-SLAPP motions are technically a procedural mechanism, the legal test has important implications for the substantive elements of defamation law in Ontario. This is particularly the case for the common law presumption of damage. Section 137.1 provides that, once the defendant has established that the action involves a matter of public interest, the plaintiff must establish sufficient potential reputational harm to merit allowing the action to proceed. Although the plaintiff's evidentiary burden is necessarily a preliminary one, unless the plaintiff is successful on the motion, the action is dismissed. Therefore, the practical effect of the motion is to reverse the common law presumption of damage and impose a serious harm threshold on plaintiffs before they can proceed with a defamation action.[315]

In consultations, anti-SLAPP motions were characterized very differently by different stakeholder groups. For media stakeholders and others primarily concerned with expressive freedom, the motion is a valuable means of discouraging trivial defamation claims that would otherwise cast a significant chill on freedom of expression. For plaintiffs, the motion is an overbroad mechanism with the extreme consequence of denying some defamation victims a legal remedy even where they would have been able to prove that defamation occurred.

The majority of stakeholders either favoured the legislation or were resigned to its existence.[316] The primary concern for some was the practical challenges for plaintiffs in establishing the merits of their case at a very early stage of the proceeding. Other stakeholders argued eloquently that the motion unduly favours defendant publishers and allows too much defamation "past the gate".[317]

The significance of this legislation for the future of defamation law in Ontario should not be underestimated. Since its introduction, an anti-SLAPP motion has quickly become the first gambit played out in many, if not most, Ontario defamation actions. Already a wealth of case law has been generated.[318]

From a defamation law reform perspective, the importance of anti-SLAPP legislation is that it denies a legal remedy to plaintiffs with legitimate defamation claims where there is insufficient preliminary evidence of serious reputational harm. As a result, the legislation represents a significant encroachment on the reputational interests traditionally protected by defamation law. This is deemed necessary to better protect freedom of expression in relation to public interest communications:

> *…the message to be taken from the enactment of s. 137.1 is that not every foot over the defamatory foul line warrants dragging the offender through the litigation process. By enacting s.137.1, the Legislature acknowledged that, in some circumstances, permitting the wronged party to seek vindication through litigation comes at too high a cost to freedom of expression.*[319]

The anti-SLAPP legislation in Ontario is only five years old and remains subject to judicial interpretation. Two decisions from the Supreme Court of Canada addressing the legislation are pending as of early February, 2020.[320] That said, the Ontario Court of Appeal has issued a number of important decisions on point and we discuss these next.

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3. Judicial Interpretation of the Legislation to Date

In August 2018, after the LCO's consultations were largely complete, the Ontario Court of Appeal released six companion decisions interpreting the new anti-SLAPP legislation.[321] These companion decisions go a long way to clarifying uncertainties and providing a thoughtful framework for finding the difficult dividing line between a legitimate defamation action and a SLAPP. The Court devoted significant attention to elucidating the evidentiary burden on plaintiffs. It laid out various "hallmarks" of SLAPP-suits that courts may consider in applying the s.137.1 test. And it interpreted the public interest threshold requirement in light of the Supreme Court of Canada jurisprudence on this issue.[322]

Of the six companion cases, the Court dismissed four cases as SLAPPs. Two of these cases, *Pointes Protection* and *Fortress*, resembled classic SLAPP scenarios involving critical public interest commentary about the activities of real estate developers.[323] The other two cases, *Armstrong* and *Able* involved political speech directed at the suitability of election candidates for public office.[324] In each of the four cases found to be SLAPPs, the Court had little trouble finding that the public interest threshold was met and that the public interest in protecting the speech outweighed any reputational harm suffered by the plaintiff.

The remaining two cases, *Platnick* and *Veneruzzo,* were held by the Court not to be SLAPPs. The distinguishing features of these cases is instructive. One involved a lawyer's email criticizing a doctor's medical assessments for insurance claims.[325] The other involved Facebook posts by a police officer convicted of dangerous driving causing death, who tried to shift blame for the death onto the deceased and her family.[326] In both cases, the hallmarks of a classic SLAPP suit were absent. In particular, there was no "financial or power imbalance" strongly favouring the plaintiff.[327] Although, the court recognized that this is not the test for identifying a SLAPP, it is a relevant factor in balancing the competing public interests under subsection 137.1(4)(b).[328] The LCO agrees that taking into account the presence or absence of the indicia of SLAPP suits, particularly a financial or power imbalance favouring the plaintiff, is a valuable addition to the analysis in these cases.

On the issue of the evidentiary burden on plaintiffs, the Court emphasized the screening function of section 137.1 and cautioned against making determinations on the merits of the defamation action.

The Supreme Court of Canada has heard appeals in two of the six companion cases and these decisions will allow for further development of this legal test.[329]

Meanwhile, a further series of Court of Appeal decisions has followed *Pointes Protection* and its companion cases.[330] These have continued to interpret this new legislation.

4. The Anti-SLAPP Legislation Strikes an Appropriate Balance Overall

The LCO has concluded that Ontario's anti-SLAPP legislation works reasonably well. Stakeholders had differing opinions on whether the right result was reached in each of these cases. However, this is unavoidable in a preliminary motion where the court is asked to balance weighty issues such as reputational harm and expressive freedom, and where the consequence is to "close the courtroom door" on a potentially meritorious claim.[331]

One issue for the Supreme Court of Canada in the joint appeal of *Pointes Protection* and *Platnick* is whether the Ontario courts have deviated from the legislative purpose of anti-SLAPP motions. Some have argued that the courts have interpreted the legal test too leniently in favour of plaintiffs due to a reluctance to dismiss claims at an early stage of the proceedings.[332]

The LCO does not share this concern. However, even if the Supreme Court concludes otherwise, this does not justify statutory reform. The legislation has been carefully crafted and the Supreme Court will have the opportunity to provide further direction on its interpretation. Overall, the legislation is a valuable tool for protecting freedom of speech by discouraging strategic defamation actions in matters of public interest.

Finally, it is important to emphasize that Ontario's anti-SLAPP legislation will continue to impact the evolution of defamation law in this province and the balance the law strikes between protection of reputation and freedom of expression. The LCO

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has taken this into account in crafting the recommendations in this Final Report. Most particularly, the LCO's conclusion that a serious harm threshold should not be adopted in Ontario is based, in part, on the fact that serious harm is a factor weighed in the balancing test in the anti-SLAPP legislation. See the LCO's discussion on this point in chapter III above.

B. Interlocutory Takedown Motions

An important theme throughout the LCO's project has been the limitations of the court system for resolving "new paradigm" defamation claims, involving online personal attacks by individual publishers. Online personal attacks may be capable of harming reputation instantly, repeatedly and irreparably. The longer a harmful post remains online, the more likely it is to reach new readers and cause exponentially more harm. A court action, which may take two or three years to reach judgment, is often not the preferred process for resolving these claims. As a result, in this Final Report, the LCO recommends a comprehensive series of proposals designed to provide alternative pathways for addressing these cases. These include informal negotiation (chapter IV), ODR (chapter IX) and a new takedown remedy (chapter VIII). One of the purposes of these reforms is to address online defamation quickly, before serious reputational harm can take hold.

Notwithstanding these recommendations, there will always be some online defamation claims that proceed through the court system. Therefore, the LCO has concluded that targeted reform of the court system is needed to respond to online personal attacks. Again, a key goal here is to control the spread of reputational harm by addressing online defamation claims quickly.

The traditional court-based mechanism for limiting ongoing damage to the plaintiff's interests pending the resolution of a lawsuit is an interlocutory injunction. In defamation cases, interlocutory injunctions are restricted to the "rarest and clearest of cases" since they amount to a prior restraint of speech. So long as the defendant pleads that the statement is true (or defensible on some other ground), freedom of expression is paramount and the statement must be allowed to stand pending judgment.[333]

In this section, the LCO considers whether this common law rule should remain the legal standard for online defamation cases. After considerable analysis and much debate among stakeholders, the LCO has concluded that this "rarest and clearest" test is outdated and overly restrictive in the case of interlocutory motions for the removal of allegedly defamatory online content. Instead, the LCO recommends a new statutory test that would balance the potential for and extent of online reputational harm suffered by the plaintiff against the public interest in protecting freedom of expression in the circumstances.

This recommendation is controversial because it is a departure from a long-established and widely-accepted common law rule. More significantly, it would require a more contextual weighting of the balance between protection of reputation and freedom of expression. Several stakeholders strongly cautioned against any lessening of the test for injunctions in order to preserve freedom of expression.[334] That said, the LCO is convinced that a new test for interlocutory takedown orders is necessary to preserve a meaningful role for the court system in resolving defamation law cases in the internet era. In our view, the recommended test achieves this objective while preserving freedom of expression.

1. The "Rarest and Clearest of Cases" Test

The "rarest and clearest of cases" test dates from 1891.[335] The rule prohibits interlocutory injunctive relief unless the impugned words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. It is typically enough for a defendant to raise justification or any other defence to prevent an injunction from issuing. Justice Sharpe's extra-judicial statement of the test has been widely cited in the Canadian case law:

> *There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded...*

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> *The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [i.e. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.*[336]

In recent decisions, the test has been characterized as a "guiding principle…that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases".[337]

In general, the rule against interlocutory injunctions in defamation cases except in the "rarest and clearest of cases" continues to be steadfastly applied in Ontario and throughout the common law world.[338] The rule has been applied to deny interlocutory takedown orders in internet defamation cases involving personal attacks as well as public interest publications.[339] However, in the case of online personal attacks, there are increasingly instances of courts granting the injunctive relief that they are convinced justice demands.[340] There has also been some suggestion that the rule is no longer appropriate in the internet context.[341]

2. New Kinds of Online Reputational Harm

Increasingly, courts are seeing cases of online defamation that are far-removed from the traditional paradigm of a public interest article published by a professional media organization. Online personal attacks may come out of nowhere and are often anonymous. They may be motivated by a personal grudge, professional jealousy, extortion, a bitter custody battle or for no other reason than a perverse craving for controversy. They may involve blatant lies about the most intimate details of a person's life. They often involve "vilification campaigns", a relentless onslaught of online attacks, popping up on platform after platform and only worsening when the victim confronts them.

The open court process can exacerbate the reputational harm suffered by victims of defamation. The LCO heard several examples of defendants in defamation actions using the process to further advertise their defamation campaign against the plaintiff.[342]

The following Ontario cases illustrate the unprecedented potential for egregious reputational harm made possible by online personal attacks:

- An anonymous individual carried out personal vendettas by making false online posts against 50 different plaintiffs. The posts accused the plaintiffs of having engaged in a litany of illegal and dishonest behavior, including having been convicted of crimes such as sexual assault and drunk driving. Many of allegations directed at female plaintiffs involved alleged sexual behavior. This "salacious, outrageous and malevolent defamation" appeared on numerous different websites including blogger.com, cheatersareus.com, and datingcomplaints.com.[343] The victims suffered extreme emotional distress, depression and fear. Some lost business opportunities. One family member believed the posts and spread them more widely among the plaintiff's community of family and friends. One plaintiff changed the spelling of her name in response. Some plaintiffs were afraid to access the internet.[344]
- An ex-business partner posted statements describing his ex-partner as an "internet/eBay Scammer" and redirected all internet searches of the plaintiff's website to the defamatory webpage. This webpage remained online for seven years and put the plaintiff virtually out of business. At trial, the court found the words to be "completely and utterly false" and that the post was "deliberate and malicious". The plaintiff suffered "damages, distress and humiliation" causing him to spiral into a "tailspin" of depression and seclusion.[345]
- A well-respected businessman within the Filipino community was subjected to a malicious vilification campaign. This "all-out cyber attack" was orchestrated by a journalist with a community newspaper but was "personal and nasty" in nature. In 35 articles, posts and emails that continued even after the action was

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commenced, the plaintiff was called "an arrogant gasbag, a shameless bully, a habitual liar, a fraudster". The defamation appeared on the newspaper's website, Facebook, YouTube, Twitter and an online forum directed at the Filipino community. The plaintiff was eventually successful in a summary judgment motion. However, judgment was received more than five years after the attacks began.[346]

The personal and vindictive nature of these attacks differentiates them from the alleged harms at the center of most defamation claims against traditional media publications.

3. Re-evaluating the "Rarest and Clearest of Cases" Test

In this context, the LCO believes it is important to consider whether the "rarest and clearest" test for injunctions remains an appropriate legal standard for online defamation cases. The LCO has concluded that it is not, for the following reasons:

- First, the "rarest and clearest of cases" test was developed in the context of the traditional paradigm of defamation law claims involving media publishers subject to journalistic standards and the compelling public interest in freedom of the press.[347] Today, many individual online publishers are not bound by professional (or even personal) ethical standards. The reality is that a plaintiff may be subject to vicious personal attacks, causing serious reputational harm, that have no grounding in truth and no kernel of public interest whatsoever.
- Second, the potential reach and impact of online defamatory attacks was simply unimaginable at the time that the traditional rule against interlocutory injunctions in defamation claims was adopted.
- Third, the high threshold for the "rarest and clearest of cases" test is based on the presumption that a damages award at trial is sufficient to vindicate the plaintiff's reputation. The test is intended:

…to balance the freedom of the press and the right of the claimant to protect his reputation, by confining the plaintiff to the post-publication remedies to which he may prove himself entitled at a trial. The media are at liberty to publish if they are willing to take the risk of liability in damages.[348]

Today, the reality is that many individual defendants responsible for personal defamatory attacks will not have the resources to satisfy a damages award. The availability of injunctive relief in appropriate cases is all the more necessary in this context.

- Fourth, the "rarest and clearest of cases" test was also premised, in part, on the fact that defamation trials were traditionally heard by juries, something that is relatively infrequent these days.[349]
- Fifth, speed has become paramount in controlling the spread of reputational harm online. Plaintiffs should not necessarily be required to wait for years or spend thousands of dollars to obtain a judicial order requiring that damaging personal attacks be removed from the internet. The "rarest and clearest of cases" test creates too high a barrier for plaintiffs seeking interlocutory relief in such cases.

In sum, the LCO's view is that the traditional rule is no longer appropriate for the internet era where defamatory speech has been set loose from the relatively civilized environment of professional media publications. That is *not* to say that freedom of expression is any less important in the new paradigm defamation case. Freedom of expression remains a pivotal consideration that will render interlocutory takedowns inappropriate in most cases, especially where public interest publications are involved. However, the LCO believes that the potential severity and spread of reputational harm is also a relevant factor to take into account in determining whether an interlocutory takedown order is warranted in the internet age.

Andrew Scott has pointed out that the barrier against interlocutory injunctive relief disappears in defamation actions where the defendant is anonymous and, therefore, does not allege justification or otherwise defend the action.[350] In the LCO's view, this does not alleviate the need for a new legal test. Rather, the *status quo* creates an unjustifiable situation where an

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anonymous post causing relatively minimal reputational harm may be subject to an interlocutory takedown order, but an identified post causing egregious and irreversible harm must be allowed to stand.

4. The RJR MacDonald Test

As discussed above, the LCO has concluded that the "rarest and clearest of cases" test for interlocutory injunctive relief in defamation claims is outdated and no longer suitable to address online defamation. The LCO also rejects the standard three step test for interlocutory injunctions in regular civil matters (the "RJR MacDonald test") as inappropriate to the defamation context.[351]

The RJR MacDonald test requires the court to consider whether the plaintiff has demonstrated (1) a serious question to be tried (or a strong *prima facie* case in the case of mandatory injunctions), (2) irreparable harm and (3) that the balance of convenience weighs in favour of the injunction. In *Liberty Net,* the Supreme Court of Canada held that this test, developed for balancing interests in commercial cases, is inappropriate for defamation actions involving non-commercial speech:

> *… it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in s. 2(b) of the Charter. The reason for this is that the speaker usually has no tangible or measurable interest other than the expression itself, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.*[352]

The Supreme Court's reasoning in *Liberty Net* was significant in differentiating the public law dimensions of defamation law from the private law considerations at play in commercial actions. The LCO agrees that the irreparable harm (as a binary determination) and balance of convenience tests are inappropriate in determining whether interlocutory injunctions should be granted in defamation actions. A protective stance towards free speech is more important than ever in the *Charter* era. However, that is not to say that evidence of potential harm to the plaintiff should be entirely irrelevant to the analysis. There is a strong public interest in the protection of reputation which merits consideration. Therefore, we believe that a third option is necessary.

5. A New Test for Interlocutory Takedown Orders in Defamation Actions

The LCO has concluded that a new legal test for interlocutory takedown orders in defamation actions should be adopted that takes into account the non-commercial nature of speech interests, as well as the egregious reputational harm possible as a result of online personal attacks. We recommend a new two-part test:

First, the plaintiff would be required to make out a strong *prima facie* case of defamation. This is consistent with the standard for mandatory interlocutory injunctions generally.[353] The standard requires as follows:

> *[U]pon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.*[354]

In adapting this standard to defamation actions, it is necessary to take into account the defence-oriented nature of liability in defamation law. Although a plaintiff may meet the preliminary threshold to establish defamation, it is only in the absence of a valid defence that liability is established. Therefore, the burden must be on the plaintiff to show a strong *prima facie* case both that defamation has occurred *and* that the defendant has no valid defence.[355]

Second, the test should require that the reputational harm resulting or likely to result from the impugned expression is sufficiently serious that the public interest in granting the takedown order outweighs the public interest in protecting the expression. This latter test is analogous to the balancing test in the anti-SLAPP legislation, discussed above, and courts may benefit from the jurisprudence interpreting that test.

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In other areas of law engaging freedom of expression, harm to the plaintiff is counterbalanced against freedom of expression (for example, in applying s.1 of the *Charter* to cases of hate speech).[356] The LCO believes that this kind of balancing exercise is also appropriate in a new test for interlocutory takedowns in online defamation actions.

Interlocutory takedown orders should be available against the poster of the expression, the intermediary platform hosting the expression or any other third party having control of the expression.[357]

Of course, the evidence at an interlocutory takedown motion would be preliminary. Courts would be faced with the challenge of having to make an important determination about the parties' rights without a full evidentiary record. However, this is not a reason to deny plaintiffs a remedy in appropriate cases. Just as the court is tasked with making preliminary determinations of harm and the public interest in free expression in anti-SLAPP motions, it is reasonable that this analysis be undertaken in granting interlocutory takedown orders in appropriate circumstances.

6. Procedural Requirements Necessary to Protect Publishers

There are four procedural requirements necessary to ensure that motions for interlocutory takedown orders protect the interests of publishers:

- First, these motions should be made on notice to the defendant publisher where possible. In rare cases where an *ex parte* order is necessary, the *ex parte* order should be for a limited time period to give the plaintiff time to provide notice to all affected parties.
- Second, once the motion is brought on notice, the court must consider both stages of the test *de novo* on the evidence filed by the parties.
- Third, in granting an interlocutory takedown order, the court should target the specific language determined to meet the test above.[358]
- Fourth, provision should be made for costs consequences directed at unsuccessful plaintiffs to discourage dubious motions and protect freedom of expression.[359]

7. Section 2(b) of the Charter

It is crucial in creating a new motion for interlocutory takedowns to ensure compliance with freedom of expression as protected by section 2(b) of the *Charter*. There are several issues to consider.

First, it is important to note that the LCO is not recommending a direct prohibition of certain types of speech by the state, but rather a "means by which individuals can hold one another civilly accountable for what they say".[360]

Second, the balancing test the LCO proposes should ensure that most public interest speech will continue to be safe from interlocutory injunctions. Only in cases where the public interest value of the expression is relatively low (as in the case of online personal attacks), will the public interest weigh in favour of an injunction.[361] At some point, offensive speech exceeds a threshold of harm such that it is no longer demonstrably justified in a free and democratic society. As Professor Cameron puts it in the academic context:

> *Suffice to say that the threshold will be reached when there is a pattern of behavior that is persistent and targeted enough to pose a risk of harm that outweighs the interest in protecting academic and expressive freedom. Whether characterized as harassment, bullying, fighting words, or hate speech, conduct that is regulated under these headings must also be defined narrowly and with care to avoid unnecessary interference with these freedoms.*[362]

The test the LCO is proposing offers exactly this balancing exercise between reputational harm to the plaintiff and the public interest in preserving freedom of expression. In our view, this proposal offers a thoughtful, measured basis for narrowly targeting defamatory personal attacks while protecting freedom of expression.

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Therefore, although the interlocutory takedown motion is necessarily a constraint on freedom of expression, the LCO believes that it would be a reasonable limit under the section 1 *Oakes* test.[363] The objective of the new motion is to provide courts with a more nuanced and targeted interlocutory tool for limiting severe reputational harm in cases where the public interest value in protecting free expression is relatively minimal. This objective is pressing and substantial and the proposed motion is rationally connected to this objective.[364] The two branches of the test, combined with the proposed procedural requirements, should be sufficient to meet the *Oakes* minimal impairment test. Finally, an interlocutory motion for a takedown order would target only that subcategory of speech where the reputational harm involved outweighs the public interest value of the speech. In other words, the proportionality test under section 1 of the *Charter* would be subsumed within the proposed test for injunctive relief.

The LCO underscores that the power to issue an interlocutory takedown order should be applied by courts very sparingly. However, there are cases where the severity and effect of an online personal attack causes such egregious reputational harm that it should not be permitted to infiltrate and spread throughout the online universe for the two or three years it may take for the court process to wind its way to judgment. Notably, our recommendation is consistent with the takedown remedy recommended in chapter VIII. In the LCO's view, access to justice requires that plaintiffs have a meaningful opportunity to seek a timely takedown order in the course of a court action, just as would be available through our recommended notice and takedown regime.

RECOMMENDATION: 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.



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C. Norwich Motions

An individual wishing to sue an anonymous online publisher in defamation must generally bring one or more motions to identify the publisher.[365] In Ontario, Rule 31.10 of the *Rules of Civil Procedure* provides for a court order for discovery of a non-party "who there is reason to believe has information relevant to a material issue in the action" so long as the information cannot otherwise be obtained and, on balance, fairness requires it.[366] It is also possible even before commencing an action to bring a motion for an equitable bill of discovery known as a Norwich order.[367]

Norwich orders are often directed at internet intermediaries. Internet platforms may have identifying information for users where this was provided as a requirement of registering for the service. Even where this information is not directly available, platforms are often able to link particular content to the internet protocol (IP) address of the computer or other device used to post the content. Once the IP address is known, the internet service provider (ISP) will be able to link that address to the particular subscriber who registered that computer or device.

Norwich motions have become routine in online defamation cases. The legal test to be applied was established by the Ontario Divisional Court in *Warman v. Wilkins-Fournier*.[368] In this case, the Court held that the *Rules of Civil Procedure* must be interpreted in a manner consistent with *Charter* rights and values, including the right of freedom of expression and privacy interests. In particular, the court suggested that anonymous speech is worthy of some degree of protection as a component of freedom of expression. Protection for anonymous speech encourages more speech. This enhances public discourse, particularly in cases where public interest speech is motivated by fear of persecution or social ostracism. Anonymous speech also allows the author's message to heard without being coloured by the author's identity and permits sensitive information to be conveyed without embarrassment.

The Court then established a four-part test for determining whether a third party must disclose the identity of an anonymous online user. The court must consider whether:

- The unknown alleged wrongdoer had a reasonable expectation of anonymity;
- The applicant had a *prima facie* case of defamation and was acting in good faith[369];
- The applicant had taken reasonable steps to identify the anonymous party and had been unable to do so; and,
- The public interest favouring disclosure outweighed the freedom of expression and privacy interests of the unknown alleged wrongdoers.

Most stakeholders felt this test appropriately balanced interests in anonymous free speech, reputation, privacy, a broad discovery process and the administration of justice. The LCO also heard about several cases in which Norwich orders led to the successful identification of publishers who could then be named as defendants in defamation actions. Although some stakeholders expressed frustration with the cost and delays involved in bringing Norwich motions, most seemed resigned to this as an inevitable consequence of invoking the court process.[370] These motions are normally not opposed in the court process.[371]

The main concern expressed by stakeholders was the limited usefulness of Norwich orders in some cases. As discussed in the LCO Consultation Paper, a Norwich order may reveal the identity of the owner of an IP address at the time the communication was posted. However, this may or may not be the individual who actually posted the communication.[372] The Supreme Court of Canada recently acknowledged this frustrating reality in the context of anonymous copyright violation.[373]

The concern about the practical limitation of Norwich orders does not reveal a problem with the court process *per se*. Instead, it is an illustration of the natural limits of the court process in addressing certain cases of anonymous online defamation. The most practical solution to this problem is to develop alternative mechanisms to resolve these claims.

The LCO's recommended notice and takedown regime, discussed in chapters IV and VIII, is designed specifically for this purpose. This process would bring defamation complaints to the attention of anonymous publishers while preserving their

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anonymity. It would give anonymous publishers the option to stand behind their post. Posts would only be taken down if the anonymous publisher chose not to stand behind them.

It is important to note that the LCO's notice and takedown proposal has implications for Norwich motions. Norwich motions are typically heard *ex parte*. However, under the LCO's proposal, where a plaintiff has triggered notice and takedown prior to bringing a defamation action, the intermediary platform would have notice of the claim. In some cases, platforms may wish to seek standing in a Norwich motion to protect the privacy interests of its publishers.[374]

Finally, there is an additional, minor reform that the LCO proposes to enhance the practical value of Norwich orders. The LCO heard from several stakeholders that internet platforms have varying policies about the length of time that they preserve records of the IP addresses associated with online posts.[375] Some platforms retain records of IP addresses for months. Others retain these records for only a few days. If and when an internet platform has overwritten these records, the purpose of seeking a Norwich order is defeated.

For this reason, the LCO recommends that filing a notice of motion for a Norwich order should automatically put intermediary platforms on notice that they must preserve evidence of the IP address at issue. This would be similar to the provision for record retention in Canada's copyright notice-notice regime.[376]

RECOMMENDATION: 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.



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VI. JURISDICTION, CORPORATIONS AND THE COURT PROCESS

At the heart of this Final Report is the overriding need to improve access to justice in defamation disputes in Ontario. Many of the LCO's recommendations are designed to achieve this by diverting certain high volume, low value defamation claims away from the formal court system and encouraging, informal, practical resolution of these claims. However, the court process remains crucial to protect the important legal rights at stake in many defamation law claims. In chapter V, above, the LCO made recommendations for reforming preliminary court motions to improve access to justice. In this chapter, the LCO addresses several other access to justice issues in the court system as applied to online defamation claims. The goal is to manage the court process to minimize costs, reduce delay and conserve resources relative to the interests at stake in the dispute.

A. Jurisdiction and Choice of Law in Multi-State Defamation Cases

The law of jurisdiction has an important impact on access to justice in multi-state defamation cases. The societal values and public law elements driving the balance between protection of reputation and freedom of expression differ across jurisdictions. Unless jurisdiction is appropriately circumscribed, a concern for libel tourism arises; that is, plaintiffs may act strategically in choosing a plaintiff-friendly forum for bringing their action. To the extent that libel tourism occurs, it impinges on freedom of expression and creates a libel chill by subjecting defendants to a lawsuit in a jurisdiction to which they have little or no connection.

Although jurisdiction is renowned as a complex area of law generally, there are unique problems that arise in the context of online defamation actions. Under the existing law in Canada, the tort of defamation is committed everywhere that a defamatory statement is read, accessed or downloaded by a third party. But online defamation may be read simultaneously in jurisdictions around the world. How is an Ontario court to know when it should assume jurisdiction over a tort that is potentially committed everywhere at once?

The LCO's Consultation Paper examined the existing law established in 2012 by a trilogy of Supreme Court of Canada decisions.[377] We described the uncertainties in the law that lingered after the trilogy was decided, particularly as demonstrated by the divided Ontario Court of Appeal decision in *Goldhar v. Haaretz.com (2016)*.[378] The facts in that case are illustrative of the problem of jurisdiction in the internet age.

Mr. Goldhar is a prominent Canadian businessman who purchased and managed an Israeli soccer team. He was described as a celebrity in Israel and owned residences in both Toronto and Israel. Haaretz is an Israeli newspaper which published an article critical of Goldhar, both in print and on its website. The focus of the article was Goldhar's management of the Israeli team; but it also referenced his Canadian business and criticized his management practices generally. The online version of the article was published in English and was read by 200-300 people in Canada and approximately 70,000 people in Israel. Mr. Goldhar brought a defamation action against Haaretz in Ontario. The dilemma for the Ontario courts was how to apply the law of jurisdiction and *forum non conveniens* in a global internet economy where reputational harm may occur in multiple jurisdictions simultaneously.

Subsequent to the release of the LCO's Consultation Paper, the Supreme Court of Canada released its decision in *Haaretz.com v. Goldhar (2018)*, reversing the Ontario Court of Appeal decision.[379] The majority concluded that Ontario courts had jurisdiction over the action, but that Israel was clearly the more convenient forum for hearing the claim. Although the Court unanimously affirmed the legal framework established in the 2012 trilogy, it issued five sharply divided opinions and split on a number of issues.[380]

In this section, the LCO considers the extent to which *Haaretz* has addressed the uncertainties in jurisdiction motions and resolved concerns about access to justice. For the most part, the LCO agrees with the Supreme Court's majority decision on the legal tests for establishing jurisdiction over multi-state defamation claims and the most convenient forum for hearing

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these claims. However, the LCO makes two recommendations designed to lend further predictability to the legal framework. First, the LCO suggests an additional, non-exhaustive factor to be considered at the rebuttal stage of the analysis. Second, the LCO recommends that the "most substantial harm" test be adopted for determining the law applicable to multi-state defamation claims.

1. The Legal Framework after *Haaretz v. Goldhar*

Ontario's current common law test for jurisdiction was set out by the Supreme Court of Canada in the 2012 trilogy decisions and, for the most part, confirmed by the Court in *Haaretz*. The analysis is made up of three parts:

- *Presumptive Jurisdiction* – Does the court have presumptive jurisdiction over the claim?
- *Rebuttal* – If so, is the presumption rebutted in the circumstances?
- *Forum Non Conveniens* – If not, should the court exercise its jurisdiction or defer to another more convenient forum for hearing the claim?

a) Presumptive Jurisdiction

A court has jurisdiction over a claim where there is a real and substantial connection between the claim and the jurisdiction. This test is met in a tort claim where the court finds that at least one of four non-exhaustive presumptive connecting factors exists:

- The defendant is domiciled or resident in the province;
- The defendant carries on business in the province[381];
- The tort was committed in the province; or,
- A contract connected with the dispute was made in the province.[382]

These connecting factors are objective in nature and, at this stage of the analysis, the emphasis is on underlying principles of order, stability and predictability.[383]

In multi-state defamation cases, the third presumptive factor, that the tort was committed in the province, is easily met. So long as a defamatory statement is read, accessed or downloaded by a third party in Ontario, the tort is committed in Ontario and the Ontario court will presumptively have jurisdiction. This sets a very low threshold for establishing jurisdiction. However, the risk of jurisdictional overreach is tempered by the opportunity for the defendant to rebut the presumption.

b) Rebuttal Analysis

The defendant may seek to rebut the presumption of jurisdiction by arguing that the connecting factors establish only a weak relationship between the claim and the forum. This will be the case where it would not be reasonable to expect that the defendant would be called to answer the claim in that jurisdiction.[384]

The rebuttal analysis is important in internet defamation cases where presumptive jurisdiction will almost always arise. This analysis is intended to be distinct from the *forum non conveniens* analysis.

In *Haaretz*, the majority suggested that the presumption might be rebutted where the plaintiff has no reputation in the chosen jurisdiction. However, the majority declined to specify further particular factors to be assessed at the rebuttal stage.[385]

c) Forum Non Conveniens

Even if jurisdiction is established under the first two stages of the analysis, the court may still decline to exercise its jurisdiction if the defendant can show why another forum is clearly more appropriate to hear the claim. *Forum non conveniens* is a discretionary analysis designed to ensure that both parties are treated fairly and that the process for resolving their litigation is efficient.[386] It is intended "to temper any potential rigidity" in the jurisdiction analysis.[387] In multi-state defamation cases where the threshold for establishing jurisdiction is particularly low, the motions judge should conduct "a robust and carefully scrutinized review" of the *forum non conveniens* issue.[388] The court must respect the principle of comity and refrain from leaning too instinctively in favour of its own jurisdiction.[389]

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Factors relevant to establishing the most convenient forum may include:

- The comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- The law to be applied to issues in the proceeding;
- The desirability of avoiding a multiplicity of legal proceedings;
- The desirability of avoiding conflicting decisions by different courts;
- The enforcement of an eventual judgment; and
- The fair and efficient working of the Canadian legal system as a whole.[390]

Choice of law, the second factor in the *forum non conveniens* analysis, has been the subject of much judicial and academic debate. In *Haaretz,* the majority applied the traditional choice of law test (*lex loci deliciti,* or the place where the tort was committed).[391] However, the majority felt that choice of law should not weigh heavily in multi-state defamation cases since *lex loci delicti* inevitably pointed to the chosen jurisdiction.[392]

A competing approach to the choice of law analysis was proposed by Abella and Wagner JJ. in their concurring opinions in *Haaretz*. They argued that the traditional test should be replaced with the most substantial harm test.[393] This would prevent Ontario courts from automatically assuming jurisdiction "regardless of the strength of the connection to Ontario".[394] It would ensure that only one law would apply to a defamation claim rather than "potentially dozens" under the *lex loci deliciti* rule.[395] Abella J. reasoned that this approach was more realistic in the context of internet defamation and would strike a better balance between freedom of expression and harm to reputation.[396]

The three dissenting members of the Court in *Haaretz* preferred the traditional choice of law test. In their view, the most substantial harm test was not appropriate for four reasons: it did not predictably point to one jurisdiction; it would lead to complex preliminary motions; it received only limited support in Canadian academic literature and case law; and its adoption in Australia was an insufficient basis for overhauling Canadian law.[397]

2. Promoting Further Certainty in Jurisdiction Motions

The LCO agrees with the majority of the Supreme Court of Canada in *Haaretz* that the legal framework set out in the trilogy should continue to apply to multi-state defamation cases, and that the *forum non conveniens* analysis should be applied robustly and thoughtfully to decline jurisdiction in cases where fairness and efficiency demands it.

The England and Wales *Defamation Act, 2013* takes a very different approach, essentially deferring to other jurisdictions unless the plaintiff can establish that England and Wales is the most appropriate forum for hearing the claim.[398] This restrictive test was adopted as a way of addressing a perceived problem with libel tourism in that jurisdiction.[399] In contrast, LCO consultations did not reveal a significant concern with libel tourism in Ontario. The real and substantial connection test is well-established in Canada and has been reinforced by the Supreme Court in *Haaretz*. The LCO sees no reason to move away from this general legal framework.

However, the LCO believes that the legal framework for jurisdiction motions would benefit from further precision. The same framework was applied by appellate courts in *Haaretz* to reach different results on the *forum non conveniens* analysis. This fact, along with the sharply divided opinions at both levels of court, suggests that there remains a need to reduce uncertainty and promote access to justice in these motions. The LCO believes that the Supreme Court of Canada missed an opportunity. Two justices (McLachlin C.J., dissenting, and Wagner J.) referred to the LCO's Consultation Paper in their reasons and acknowledged the potential for further reform to the law.[400] The LCO accepts this implicit invitation and makes two proposals for clarifying the law.

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The LCO agrees with the majority in *Haaretz* that an expansive approach to the first stage of analysis, the presumptive jurisdiction test, is necessary to promote order and stability. The LCO does not, therefore, recommend any reform at this stage. However, in the LCO's view, reform is needed at the second and third stages of the analysis to improve certainty and, correspondingly, improve access to justice in internet defamation actions.

a) Adding Predictability to the Rebuttal Analysis

The rebuttal stage of the jurisdiction analysis remains ill-defined, even after the *Haaretz* decision. The LCO proposes an additional, non-exhaustive factor that courts may find relevant in rebutting the presumption of jurisdiction. In assessing the reasonable foreseeability of a defendant being subject to a defamation action in Ontario, it may be relevant that the publication was not targeted at an Ontario audience.

This targeting factor is borrowed from U.S. jurisprudence.[401] However, the LCO does *not* propose that the U.S. version of the targeting test be adopted in Ontario. U.S. courts have not yet fully developed the factors to be taken into account in determining when targeting is established on the facts and there are many significant differences between U.S. and Ontario law on jurisdiction.[402] Rather, the LCO suggests that whether a publication was targeted to an Ontario audience may be an additional, discretionary factor building on the Supreme Court's rebuttal analysis in *Haaretz*.

b) Adopting the "Most Substantial Harm" Test for Choice of Law

The LCO has further concluded that the choice of law governing defamation actions should be determined by the most substantial harm test. We adopt the choice of law analysis of Abella and Wagner JJ in *Haaretz* [403] for the following reasons:

- The LCO agrees with Karaksatsanis J. as to the rationale underlying the choice of law test. The question in assessing choice of law as a component of *forum non conveniens* is "whether the plaintiff's chosen jurisdiction would be applying foreign law, which may diminish efficiency and raise a risk of forum shopping".[404] This is also relevant to access to justice. The expense of proving foreign law may create a significant barrier to proceeding with a defamation claim in Ontario.
- The most substantial harm test advances the purpose of defamation law to protect reputation. In connecting claims with the forum where the most substantial harm has occurred, the test achieves an appropriate balance between protection against that harm and the law of freedom of expression applicable in that jurisdiction.
- The most substantial harm test is more predictable than the *lex loci deliciti* test and is more consistent with the reasonable expectations of the publisher.
- The LCO believes that the most substantial harm test is more respectful of international law and comity. This perspective was not emphasized in the Supreme Court's reasons in *Haaretz*.

A key factor cited by the dissenting judges in *Haaretz* for rejecting the most substantial harm test was the concern that it would lead to preliminary mini-trials for establishing most substantial harm. In their view, these mini-trials would drive up costs and delay a hearing on the merits. The LCO acknowledges this concern but believes that it is outweighed by the significant advantages of claims being heard in the forum most closely connected to the dispute.

Finally, the LCO notes that, although we recommend the "most substantial harm" test as the best of the available options for assessing choice of law, it will not solve some problems inherent to asserting jurisdiction in internet defamation disputes. As our virtual world continues to expand, it will increasingly be the case that a plaintiff's reputation will exist virtually. In such a case, the reputational harm suffered may not have a significant connection to any territorial jurisdiction. This reality underlines the need for extra-judicial options for resolving these disputes and reinforces the LCO's recommendation for a notice and takedown regime.

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RECOMMENDATION: Jurisdiction and Choice of Law

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.**

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.**



B. Standing of Corporations to Sue

Currently, corporations have standing to sue for defamation in Ontario.[405] Defamation law generally treats corporate plaintiffs the same as individual plaintiffs.[406] Corporations benefit from plaintiff-friendly devices unique to defamation law, including the presumption of damages and the presumption of falsity.

Some commentators believe that the tort of defamation, designed to protect intangible dignitary interests, should not protect corporate reputation. Instead, corporations should rely on torts such as injurious falsehood, which are specifically designed to protect economic interests. These experts argue that the extension of defamation law to protect corporate reputation was an error that should be remedied by legislation.[407]

Legislative reform restricting the right of corporations to sue in defamation has been adopted in certain jurisdictions. The England & Wales *Defamation Act, 2013* provides that corporations may sue for defamation only where they establish "serious financial loss".[408] In Australia, only small corporations, defined as corporations employing fewer than 10 persons, are permitted to sue.[409]

A third approach to the issue of corporate standing to sue was proposed during consultations in the LCO's project. Several stakeholders suggested that the evidentiary presumptions of damage and/or falsity in defamation law be reversed in the case of corporations.[410]

In this section, the LCO reconsiders the current Ontario law allowing corporations to sue for defamation without restriction. On balance, we recommend that all corporations continue to have full standing to sue in defamation law. This recommendation is primarily driven by access to justice considerations. For many small business owners, the reputation of their business is inextricably intertwined with their own reputation. Removing or restricting their right to sue in defamation may unduly hamper their ability to seek a remedy for reputational harm. The LCO is particularly concerned to ensure that small businesses benefit from the procedural innovations in defamation law recommended in this Report. Given the proliferation of defamatory consumer reviews in the internet age, now is not the time to impose new burdens on small businesses seeking access to justice.

1. Arguments Against Allowing Corporations to Sue for Defamation

Although several arguments have been advanced against allowing corporations to sue for defamation, these tend to reduce to two key concerns: 1) a doctrinal argument based on the proprietary nature of corporate reputation and a more pragmatic concern for the abuse of defamation actions by powerful corporate plaintiffs.

a) The nature of corporate reputation and the purpose of defamation law

Corporate reputation is a form of property. The economic losses suffered by defamed businesses relate less to social relationships and more to "advertising, public relations and image".[411] Consequently, some have argued that corporate

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reputation should weigh less heavily in the balance between freedom of expression and reputation. According to Hilary Young, "there is no reason to make it easier to recover for injury to corporate property than for injury to other property".[412]

Several torts have been specifically designed to protect commercial interests against economic loss. These include injurious falsehood, conspiracy to injure, procuring a breach of contract and interference with trade by unlawful means. The tort of injurious falsehood requires a plaintiff to prove that the impugned statement was false and that it was made with malice. It also requires proof of economic loss.[413] This is a much more restrictive test for determining when corporate reputation should be legally protected. It is argued to be a more appropriate tool for regulating corporate reputational harm and one that is more consistent with freedom of expression.[414]

In the LCO's view, this argument is persuasive in theory. However, at its heart, the issue is one of policy.[415] And the policy considerations depend to some extent on the size of the corporation being defamed.

In the case of small businesses operated by an individual or family, it is not easy to distinguish the corporation's reputation from the individual reputations at stake.[416] Furthermore, the higher evidentiary burden in an injurious falsehood action may dissuade smaller businesses from incurring the expense of bringing a court action. At the core of the LCO's Report is a concern for improving access to justice in defamation actions. In our view, the concern for doctrinal congruity in the law is outweighed by the need to ensure that small business owners can protect against the personal and financial devastation that may result from online defamation.

b) SLAPP litigation by corporate plaintiffs chilling free expression

A more pragmatic concern about the right of corporate plaintiffs to sue for defamation is their use of the law to chill free expression. Corporations occupy a prominent position in public life. Public criticism of corporate, labour, environmental or other policies is very often in the public interest. It helps facilitate informed consumer decision-making, provides a check on abusive corporate behaviour, and improves transparency. Defamation suits can deter such criticism. This concern is illustrated by the infamous "McLibel" case.[417]

This is a valid argument. The "serious financial loss" threshold adopted in the England and Wales *Defamation Act, 2013* was intended to protect free speech from abusive lawsuits by powerful corporations.[418]

This concern is directed primarily at larger corporations who have the resources necessary to weaponize defamation law. However, unlike England and Wales, Ontario has anti-SLAPP legislation that protects expression on matters of public interest from trivial defamation lawsuits.[419] Therefore, there is no compelling need in Ontario to restrict corporations from suing in defamation on this ground.

2. Should Large Corporations be Restricted From Suing in Defamation?

There is a reasonable argument that the right to sue in defamation should be limited to small corporations. Larger corporations are more likely to have a corporate reputation that is clearly distinct from the reputations of the individuals running them. Larger corporations are also more likely to have the financial resources to use defamation lawsuits to unfairly suppress criticism.

As mentioned above, Australia has adopted a targeted approach corporate defamation suits. The right of "for profit" companies to sue for defamation is restricted to those employing fewer than 10 people.[420] This provision is currently being reconsidered by the Australian Council of Attorneys-General as part of its review of defamation law. However, the reforms proposed by the Council to date would retain this distinction between large and small corporations. [421]

Australia's approach of drawing a bright line distinction between large and small corporations in order to eliminate the right of large corporations to sue in defamation has been criticized as arbitrary.[422] As Ontario's *Anti-SLAPP Advisory Panel* pointed out: "In principle, the size of an organization should not be determinative of its access to a legal procedure intended to

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protect legal values important to all.[423] In the LCO's view, it is preferable to let large corporations continue to sue in defamation than to impose arbitrary divisions between large and small corporations.

3. Protecting Access to Justice for Small Businesses

The issue of a corporation's standing to sue in defamation law has acquired more importance in the era of online reviews. The issue is no longer primarily one of abuse of process (addressed by anti-SLAPP legislation) or doctrinal clarity. Because of the proliferation of online reviews, the legal model best suited to protecting corporate reputation has become an important issue.

The majority of stakeholders that the LCO consulted felt that corporations should retain standing to sue for defamation in Ontario law.[424] This was seen to be a matter of fairness and as an acknowledgement of the financial devastation that can be caused to small businesses by business defamation. Particularly in the online environment, it is very easy for a vindictive competitor to publish defamatory statements capable of devastating the business and wiping out the owner's livelihood.

The LCO acknowledges that there are other torts that protect corporate reputation. However, the LCO is recommending significant reforms to defamation law in Ontario that promote access to justice and avoid the drawbacks of a long and expensive trial process. Our recommended notice regime and takedown remedy should be available to small businesses in Ontario just as they are to Ontario individuals. Therefore, the LCO recommends that corporations retain standing to sue in defamation law.

Finally, the LCO rejects the proposal by some stakeholders that the presumptions of damage and falsity be reversed for corporate plaintiffs. This would add needless complexity to the law and raises the same access to justice concerns discussed throughout this section. Furthermore, as the LCO discusses in chapter III above, the presumption of damage is already effectively reversed in relation to public interest publications for both individual and corporate plaintiffs as a result of Ontario's anti-SLAPP legislation.

RECOMMENDATION: Corporations

26. Corporations should retain standing to sue for defamation.



C. Anonymizing Plaintiffs

There is a strong presumption in Ontario, as elsewhere in the common law world, that court proceedings should be open and accessible to the public and media. Public access extends not only to court hearings themselves, but also to the names of parties and the content of court documents. The open court principle is deeply entrenched in our democracy and *Charter*, including our right to freedom of expression.

In some cases, defamation proceedings may pose a dilemma for open justice. The reputational harm caused by defamation may be exacerbated by the public process brought to remedy it. Therefore, some plaintiffs seek orders to restrict publicity. One possibility is an order for "anonymization" which disguises the plaintiff's identity through the use of initials.

In the Consultation Paper, the LCO discussed in detail the tension that exists between the open court principle and the concern that complainants may be dissuaded from defamation litigation for fear of suffering additional reputational harm.[425] We received little input on this issue. Although commentators have starkly opposing viewpoints on the desirability of allowing anonymized plaintiffs in defamation claims, most stakeholders agreed that these applications are highly fact-specific.[426] The LCO has concluded that the principles to be applied in deciding whether to grant anonymization orders are best left to incremental development in common law.[427]

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D. Role of the Jury

The LCO heard differing views on the importance of retaining the jury trial as an option in defamation proceedings. This debate is more a matter of principle than practice. The number of Ontario defamation actions that proceed to trial by jury is low and the number of actions determined by juries even lower.[428] The LCO did not hear any compelling reason to change the existing law and we do not recommend any reform here.

RECOMMENDATIONS: 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.



E. Ontario Small Claims Court

Defamation actions are increasingly finding their way to Small Claims Court in an effort by complainants to keep costs low. However, the jurisdiction of the Small Claim Court is limited. The Small Claims Court cannot order injunctive relief.[429] Nor can deputy judges grant orders dismissing defamation actions as SLAPP proceedings.[430]

Several stakeholders felt that the jurisdiction of the court should be expanded to facilitate defamation claims.[431] At least one commentator has also suggested small claims hearings as a proportionate response to some online defamation disputes.[432]

However, other stakeholders felt that defamation claims were too legally complex to be effectively adjudicated by deputy judges.[433] Some stakeholders pointed out the cost savings of litigating defamation claims in Small Claims Court.[434] Others indicated their opinion that any costs savings were negligible.[435]

The Ontario government recently increased the claim limit for Small Claims Court from $25,000 to $35,000 with the intent to "make it faster, easier and more affordable for people and businesses to resolve their disputes in front of a judge".[436] Commentators are divided as to whether this reform will be effective to improve access to justice in Ontario.[437] One stakeholder estimated that small claims proceedings take approximately one year to reach trial.[438] The LCO notes that, although access to justice may be relatively quicker in the Small Claims Court, this is still a long period in "internet time" during which reputational harm may spread.

The LCO believes that, rather than expanding the jurisdiction of the Small Claims Court, low value claims are best addressed by the extra-judicial mechanisms the LCO recommends in this Report for informal resolution of online defamation disputes. These include informal negotiations facilitated by the notice regime in chapter IV, some form of ODR discussed in chapter IX and, most importantly, the takedown remedy discussed in chapter VIII.

F. Evidence

Section 21 of the *Libel and Slander Act* (LSA) requires the defendant to provide the plaintiff with particulars of evidence to be adduced at trial in certain circumstances, where the evidence concerns the plaintiff's character or the circumstances of publication.[439] The LCO has concluded that this provision continues to be important and should be retained in the new *Defamation Act*.

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RECOMMENDATION: Evidence

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



G. Unnecessary or Obsolete Provisions of the LSA

Several procedural provisions of the LSA have been superseded by Ontario's *Rules of Civil Procedure* or development of the common law. For these procedures, the LCO has concluded that the special provisions in the LSA are outdated and should be repealed.

RECOMMENDATIONS: 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.



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VII. NEW LEGAL RESPONSIBILITIES FOR INTERMEDIARY PLATFORMS

This and the following chapters 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 this 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, in the next two chapters, the LCO recommends that 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 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.

Our proposed responsibilities for intermediary platforms are consistent with prevailing developments in the field of platform governance.[440] They accord with international human rights principles and, most importantly, would establish a more appropriate balance between protection of reputation and freedom of expression for defamation disputes in the internet age.

The following chapter discusses these new legal responsibilities for intermediary platforms in detail. In this current chapter VII, the LCO sets the stage for this analysis by demonstrating why the traditional common law of publication fails to promote access to justice in online defamation disputes. Therefore, these two chapters must be read and understood in relation to one another.

A. Introduction to the LCO's Proposal on Intermediary Liability

One of the core requirements for liability in defamation law is the publication of a defamatory message. 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.[441] In the offline world, this includes commercial publishers and editors of defamatory material, but has also been found to include intermediaries more remotely connected to the communication, such as book sellers and news agents. In the online world, some courts have extended this broad definition of publisher, by analogy, to include internet intermediaries who provide the technical means for communicating messages or the platforms on which online messages are posted. A key question in the LCO's Consultation Paper was whether the common law approach to intermediary liability requires reform in order to respond to the novel ways online content is communicated.[442]

In this chapter we discuss a number of problems with the common law approach. First, there is a strong argument that the common law of publication is over broad, even in the traditional offline context. Courts have attempted to narrow the common law scope of liability by creating exceptions for certain publishers such as innocent disseminators. Statutory reform in England and Wales has also attempted to narrow the scope of liability by creating defences for certain publishers and

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eliminating defamation claims against these publishers in certain circumstances.[443] These "backdoor" solutions have led to significant confusion and inconsistency in the case law.

Second, this general problem of overbreadth in the common law doctrine of publication has become particularly evident with the advent of internet communications. There is a new and diverse range of intermediaries which play varying roles in the communication of online defamation. Courts are already struggling to determine which of these should be characterized as publishers and subject to liability in defamation law. The common law doctrine of publication is likely to become increasingly incoherent as the technology evolves and new intermediaries appear.

In the LCO's view, instead of indiscriminately capturing all intermediaries within the category of publisher and then choosing who should be exempt from liability, a better solution is to limit the definition of publisher upfront to capture only those who should be responsible in law. This approach is consistent with, and logically progresses from, the Supreme Court of Canada's analysis in *Crookes v. Newton (2011)*.[444] Therefore, the LCO recommends replacing the common law definition of publisher with a narrower statutory definition: only actors who have the intent to convey a specific expression at the time of publication should be considered publishers and, therefore, subject to liability in defamation law.

This narrower definition of publisher will generally preclude internet intermediaries from being liable for defamatory third party (user-generated) content. This is an appropriate and necessary result to prevent intermediaries from managing their litigation risk by indiscriminately removing controversial user content, with a consequent chill on freedom of expression.

In this Final Report, the LCO is focused on one form of intermediary in particular – intermediary platforms. Platforms have a complex relationship with the content they host. In some cases, platforms may be publishers in the sense that they intentionally and actively edit or manipulate user content to make it their own. However, the LCO has concluded that, where platforms are acting as intermediaries (that is, there is no intent by the platform to communicate any particular message), the platform is not a publisher and should not be held liable for third party defamation.

Instead of facing common law liability, intermediary platforms should be responsible under the notice and takedown regime discussed in chapters IV and VIII. These new responsibilities for intermediary platforms are more modern and effective legal tools for regulating defamatory speech and preserving freedom of expression in the internet age.

As Tarleton Gillespie has written:

> *…the discussion about content moderation needs to shift, away from a focus on the harms users face and the missteps platforms sometimes make in response, to a more expansive examination of the responsibilities of platforms, that moves beyond their legal liability to consider their greater obligations to the public.*[445]

B. Offline and Online Intermediaries

Intermediaries are entities that provide the medium through which messages are communicated. They enable the originator of a message to disseminate it over a distance to an audience, and "thus amplify both the content providers' possibilities to express their thoughts and ideas and the recipients' opportunities to receive such information".[446]

Intermediaries have always been involved in the communication of defamatory messages by third parties. Printers, distributors, book stores and libraries all play an intermediary role in facilitating the communication of a defamatory statement in a book. Furthermore, intermediaries have always been capable of influencing the effect of a defamatory message on its audience.[447] As Marshall McLuhan wrote in 1964, "[t]he medium is the message".[448]

The internet has engendered a wide range of new intermediaries for facilitating the communication of content online. These internet intermediaries are the gatekeepers to the internet.[449] By definition, they do not create content. [450] However, they do play a vast array of different roles in relation to online content. They may play a purely passive role as conduits for the

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transmission of electronic signals (such as internet service providers (ISPs)) or they may exercise varying degrees of control over content as platforms, hosts, moderators or curators. We are just beginning to understand how powerful an influence some internet intermediaries may have on how we receive and understand online messages.[451]

As the internet continues to evolve, new intermediaries will emerge. During the LCO's consultations, numerous stakeholders cautioned against over-simplifying the concept of intermediary. The LCO agrees. Recommendations directed at intermediaries must not be based on static categories. They must be adaptable to the highly fluid ecosystem of the internet.

For the purpose of this Final Report, the LCO has adopted the functional taxonomy of internet intermediaries developed by Jaani Riordan in his treatise, *The Liability of Internet Intermediaries*.[452] This functional approach "reflects the complex layering of responsibilities produced by the interposition of internet services between uploaders and recipients of digital information".[453] Riordan's taxonomy distinguishes between:

- Physical layer services;
- Network layer services (such as ISPs); and,
- Application layer services (such as platforms and search engines).[454]

In this Final Report, the LCO is interested primarily in intermediary platforms since these have a direct hosting relationship with the users posting content to the platform.[455] Intermediary platforms include a wide range of social media sites such as Facebook, YouTube and Twitter, discussion forums, online review sites, blogging platforms, gaming sites, and any website that permits user comments. Platforms may have both a direct role in communicating their own content as well as an intermediary role in communicating third party content. For example, an online newspaper may post its own articles but also allow third parties to comment on these articles.

Platforms may also actively manipulate third party content, taking it out of context and, therefore, making it their own.[456] Where they undertake this intentional role, they are no longer intermediaries and may be liable as publishers of the new content.

Intermediary platforms are often targeted in online defamation cases.[457] No one disputes that the person who posts defamatory content should be primarily responsible for it. However, an action against the primary publisher of online content will frequently not achieve a complainant's goals. This is for at least two reasons:

- First, in most cases, a complainant's immediate goal is to prevent or minimize the reputational harm caused by the content being seen. As intermediaries, platforms are in the unique position of being able to remove the content or prevent access quickly and easily.[458] Therefore, it makes sense for complainants to seek this relief from the platform directly (either through a court action or informally).

- A secondary goal for many complainants is a damages award. However, the primary publisher of online defamation is frequently anonymous and/or judgment proof. In contrast, some major platforms (Facebook) have very deep pockets.[459] Therefore, where defamatory content is posted online, complainants sometimes seek damages against these intermediaries as secondary publishers or publishers by omission in defamation law.

In spite of the practical benefits for plaintiffs seeking to hold intermediary platforms liable for online defamation, there are some significant problems with characterizing them as publishers. In what follows, the LCO describes these problems with the law and policy of intermediary liability. We conclude that the best avenue for reform is to impose new and significant responsibilities on intermediary platforms to facilitate actions against the publishers of online defamation, and to take down allegedly defamatory content where the publisher is unwilling to stand behind it. Intermediary platforms who fail in their responsibilities should be subject to statutory damages. In our view, this notice and takedown remedy will meet the primary goal of most complainants to prevent further reputational harm. It is consistent with the Supreme Court of Canada's jurisprudence and is a more appropriate legal model for the future of defamation law. Finally, and importantly, the LCO's approach will promote freedom of expression while encouraging corporate social responsibility and technological innovation.

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C. The Publication Doctrine Should Not Include Intermediaries

In common law, intermediaries involved, even unknowingly, in the communication of defamation may be liable as publishers of the defamation.[460] An intermediary's inaction may also lead to liability as a "publisher by omission" where a failure to remove defamation is deemed to be an endorsement of it.[461] Together, these principles traditionally cast a wide net of liability over intermediaries. This broad scope of liability has been mitigated to some extent over the years. For example, the innocent dissemination defence was developed for intermediaries in circumstances where they do not know of the defamatory content and were not negligent in their lack of knowledge.[462] More recently, courts have found that some degree of "knowing involvement" in the process of publication is necessary to ground liability as a publisher.[463] Professors Emily Laidlaw and Hilary Young have provided a valuable analysis of the common law of publication in their LCO Issue Paper for this project.[464]

In spite of the gradual evolution of the common law doctrine of publication, it remains, clumsy and overinclusive when applied to the unique functioning of the internet.[465] In the online environment, 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".[466] Whether a particular intermediary has sufficient knowledge and control over defamatory content to render it liable as a secondary publisher or publisher by omission is highly fact-specific.

Courts have attempted to adapt the common law to internet intermediaries largely by reference to pre-internet analogies, such as book-sellers, libraries, news vendors and printing presses. This has led to a proliferation of new confusing descriptors intended to differentiate among internet intermediaries: secondary publishers, subordinate distributors, facilitators, hosts, passive instruments and mere conduits. As Laidlaw and Young point out, the result has been a body of case law that is complex, confusing and sometimes unprincipled.[467]

Overall, courts have proven reluctant to hold internet intermediaries liable for third party defamation.[468] Internet service providers (ISPs), such as Rogers or Telus, are most likely immune from common law liability, either because they are not publishers or because they have an innocent dissemination defence.[469] For intermediary platforms and search engines, liability likely depends on their knowledge of and control over the defamatory content. A platform or search engine may be liable as a publisher by omission if it becomes aware of defamation but does not remove the content within a reasonable period.[470]

The expansion of the doctrine of publication to encompass intermediaries was arguably "a profound misstep in the development of the law", even in pre-internet times.[471] There is even more reason to rectify this problem in the internet era. A particular problem with applying the common law to internet intermediaries has been the tendency to simply equate failure to remove content with endorsement of the content.[472] The LCO disagrees with this trend. Platforms who passively host third party content should not be deemed to adopt the content as their own.

In their LCO Issue Paper, Laidlaw and Young recommend narrowing the definition of publisher to preclude intermediaries from being liable as publishers on the basis that "their role in causing reputational injury is insufficient to justify their liability in defamation".[473] They also share a concern for freedom of expression:

> *Although the rule that secondary publishers are responsible for defamatory content (subject to defences) may once have been a justifiable limit on free speech, it is difficult to defend in the 21st century. Changes in technology, and the movement toward greater freedom of speech protections (reflected in the enactment of the Charter among other things), and away from strict liability in tort support the conclusion that secondary publishers should no longer be treated as publishers at all.*[474]

At its core, the publication doctrine is concerned with differentiating between intermediaries who are sufficiently connected to defamatory content to be considered blameworthy in law, and those who are more remotely connected with the content and for whom liability is deemed inappropriate. In this sense, Jan Oster has noted that the publication doctrine may be analogized to the concept of causation under the tort of negligence.[475] The operative concepts in determining the

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boundaries of tort liability are knowledge and control, but the division is ultimately a policy choice. In the following section, the LCO discusses the policy considerations that justify replacing the common law regime with a more responsive, contemporary regime that imposes new statutory responsibilities on intermediary platforms.

D. Holding Intermediaries Liable As Publishers Restricts Freedom of Expression and Undermines Technological Innovation

The Supreme Court has acknowledged that the traditional definition of publication must be re-examined for the internet era. In *Crookes v Newton (2011)*, the majority of the Supreme Court exempted hyperlinks from the traditional publication rule on the basis that hyperlinks are more in the nature of references than an intent to communicate defamatory content.[476] The Court recognized the chilling effect that a broad publication rule could have on freedom of expression. It also reasoned on policy grounds that the traditional rule should not be allowed to undercut the functioning of the internet:

> *The Internet cannot, in short, provide access to information without hyperlinks. Limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression. The potential "chill" in how the Internet functions could be devastating, since primary article authors would unlikely want to risk liability for linking to another article over whose changeable content they have no control. Given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity.*[477]

Crookes v. Newton involved secondary publication by hyperlink, rather than secondary publication by an intermediary. However, the same policy concerns are at play in intermediary liability. Imposing liability on secondary publishers, whether they be hyperlinkers (who merely reference third party content) or intermediaries (who host third party content), unduly restricts freedom of expression and undermines technological innovation.

The Court's concern for freedom of expression is well warranted in the context of intermediaries. A broad definition of publisher encompassing internet intermediaries arguably amounts to "collateral censorship". This occurs where a private intermediary, with no vested interest in the content of speech, is legally responsible for it and restricts the speech in order to prevent liability.[478]

The Court's concern for the functioning of the internet is also an important one. Commentators have argued that the doctrine of intermediary liability as applied to the internet industry amounts to a restrictive innovation policy.[479] They suggest that a broad scope of liability creates a real risk of stifling business development by disproportionately burdening small and medium sized companies.[480]

In the LCO's view, the time has come to dispense with outdated analogies to pre-internet concepts and redefine publication to meet the policy goals underlying defamation law in the internet age.[481] Intermediaries should no longer be subject to liability as publishers in defamation law. Instead, the LCO recommends new legal responsibilities for intermediary platforms that reflect the manner in which these actors operate and the way human beings communicate in the 21st century. The LCO believes its proposal will effectively regulate defamatory speech and promote access to justice in online defamation disputes.

1. The Difference Between Publishers and Platforms

Some offline publishers, such as newspapers, have always been liable not only for their own content but also for third party content, such as letters to the editor and commercial ads.[482] The LCO heard from some stakeholders that internet platforms such as Facebook should be treated similarly.[483] However, the position that newspapers play in relation to the content they publish is different from that of other offline intermediaries, and even more distinct from that of online intermediaries such as platforms. Newspapers and platforms are significantly different in at least three ways:

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The Product - Newspapers create a product made up of their own content. They commission it, pay for it, approve it, edit it and stand behind it. They are subject to professional standards in doing so. Although a newspaper may include some third party content, such as letters to the editor and commercial ads, this content is vetted and approved internally just as news articles are.[484] In this manner, newspapers stand behind all their content. Their credibility (and ultimately their profitability) depends on it. In contrast, the product offered by internet platforms is the platform itself. As one commentator has observed, "the essential value of the internet is conversation, not content".[485] Intermediary platforms are not typically expected to know about or endorse the content that they host, and a takedown has no effect on their credibility. The centuries-old formula of "filter, then publish" is reversed. For platforms, the formula is "publish, then filter".[486]

The Scale – Newspapers are capable of controlling the content for which they are responsible. In contrast, many platforms are dealing with an unlimited stream of content, far beyond the capacity of human or even algorithmic moderators to reliably vet. Every *minute* on the internet, there are more than 500 hours of video uploaded to YouTube, 510,000 comments and 136,000 photos posted to Facebook, and 3.8 million searches on Google search.[487]

The Technology – Newspapers faced with a defamation complaint cannot "unpublish" the content. Their only option is to print a retraction, which requires them to stand against the content. Therefore, newspapers must assess the legality of content one way or the other. They do not have the option of remaining neutral. In contrast, intermediary platforms have the advantage of technology that allows for content to simply disappear. Therefore, they need not take a position on controversial content. By taking content down, they reduce their litigation risk while remaining neutral.[488]

As Ivar A. Hartmann has written, these "[p]rofound changes in the conditions of information flow as well as the tools for its moderation require a new framework of regulation".[489] The intermediary-as-publisher legal framework suitable for regulating defamation in newspapers is simply not appropriate for regulating defamation hosted by intermediary platforms, and other offline and online intermediaries.

2. Legal and Policy Problems with Intermediaries-as-Publishers

A key problem with characterizing intermediaries as publishers is the issue of collateral censorship. Collateral censorship occurs where a private intermediary, with no vested interest in the content of speech, is legally responsible for it and will, therefore, tend to restrict the speech for the express purpose of managing litigation risk.[490] Intermediaries typically have no vested interest in the content of user posts. When faced with defamation complaints, intermediaries have a clear and understandable economic incentive to take the content down rather than face potential legal liability.[491]

Collateral censorship is less of a problem in the case of newspapers where it makes sense to treat the newspaper and the speaker as the same entity for the reasons discussed above. Although intermediary platforms tend to have a direct contractual relationship with their users, in most cases they cannot and should not be legally equated with these users.

Further problems with the intermediary-as-publisher model arise because liability depends on the intermediary's knowledge of defamatory content. Basing liability on knowledge is problematic for at least three reasons:

First, the intermediary-as-publisher model encourages intermediaries to avoid liability by avoiding knowledge of defamatory content. As a result, the model undermines corporate social responsibility by discouraging them from making proactive efforts to monitor and reduce defamatory content. This is one reason why the England and Wales *Defamation Act, 2013* limits intermediary liability.[492] The Joint Committee studying the draft defamation bill noted:

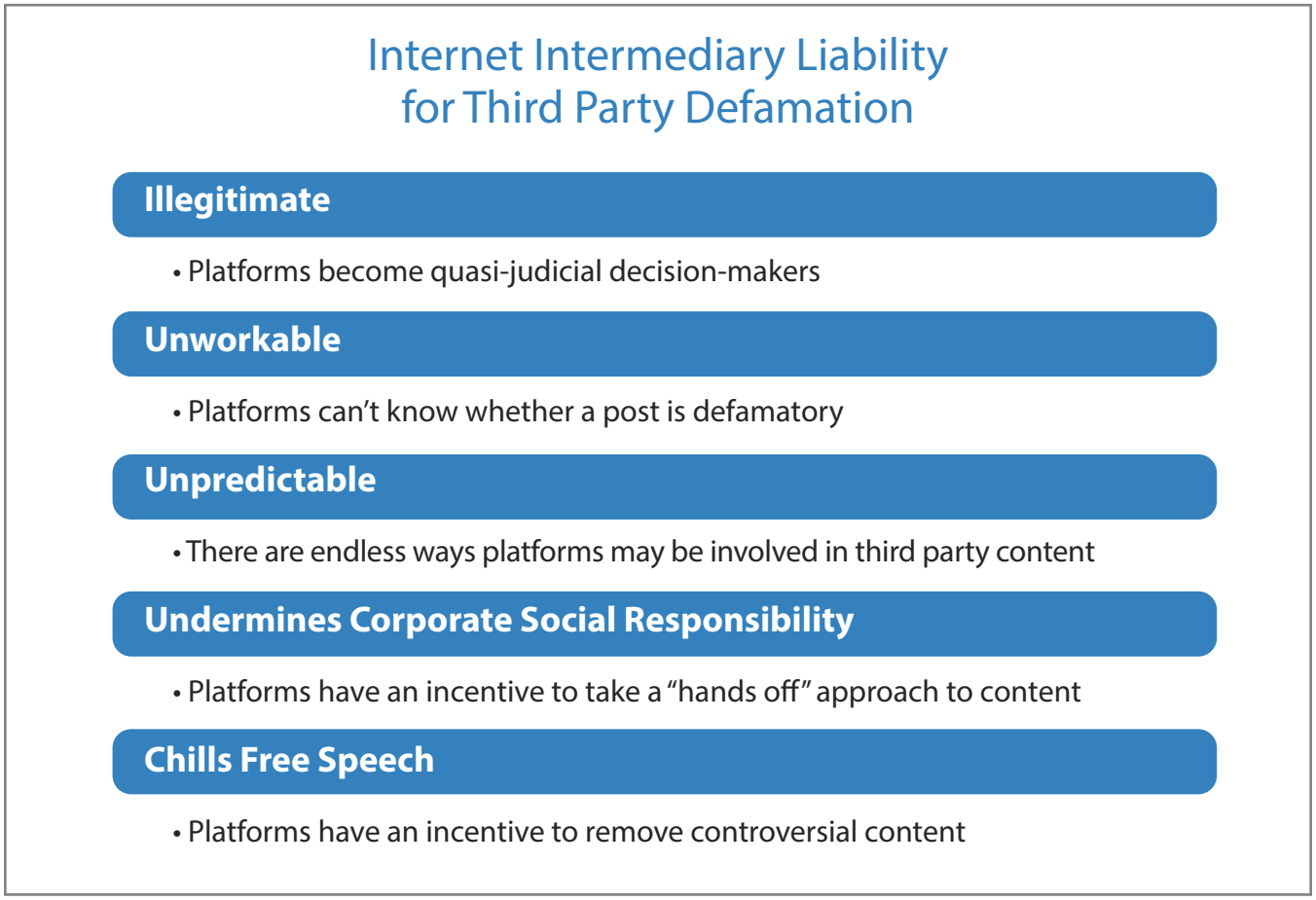
> *As the law stands, far from encouraging service providers to foster legitimate debate in a responsible manner and remove the most extreme material, it encourages them to ignore any dubious material but then to remove it without question following a complaint.*[493]

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Second, intermediaries are not in a position to know whether a defamation complaint is legally sound. Knowledge as a basis for liability works better in the case of copyright violations and hate speech since these are relatively evident on their face. But knowledge of illegality in the case of defamation is highly contextual and depends on the availability of several defences.[494]

Third, knowledge as a basis for liability creates a legitimacy problem. Intermediaries are asked to assume a quasi-judicial role and evaluate evidence received from one or both parties. Although intermediaries perform a similar role in enforcing their internal terms of service, they do not purport to make legal determinations, nor would it be legally legitimate for them to do so.

For all of the above reasons, the LCO recommends that intermediaries no longer be characterized as publishers and, thereby, subject to liability in defamation law. In the next section, we describe how a new statutory definition of publisher will accomplish that result.



E. Defining Publisher to Preclude Intermediary Liability

In their LCO Issue Paper, Laidlaw and Young propose a new, narrower definition of publisher in defamation law that would preclude intermediary liability. In their view, publication should require the intentional act of conveying specific words. The LCO agrees with this approach and recommends that the common law publication rule be replaced with a new statutory definition accordingly.

The LCO's recommended definition of publication would transform publication into an intentional act. The common law category of "secondary publishers" would be abolished. As a result, intermediaries unintentionally hosting defamatory content would not be considered publishers of the content.[495] Similarly, the common law category of "publishers by omission"

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would be abolished. Intermediaries would not become publishers by failing to take down allegedly defamatory content, even after becoming aware of it.[496] This is a significant but necessary deviation from the common law. Intermediaries are not capable of determining whether particular content is defamatory, nor should they be. Therefore, their legal duties should not hinge on making such a determination. Furthermore, as Laidlaw and Young note:

> *Tort law imposes few positive duties to act and we are not convinced there should an exception for removing third party content. When people sue intermediaries on the basis of the publication by omission doctrine, we believe they are usually saying "you have to take it down", not "you have defamed me".*[497]

The effect of the LCO's recommended definition of publication would place liability for defamatory online content squarely on the shoulders of the individual posting the content, rather than the intermediary hosting it. As one stakeholder explained, "liability should focus on the primary publisher, not the entity that provides internet access. This holds the person who created the content responsible".[498]

The concept of intent in our proposed definition of publisher refers to an intent to communicate the particular expression.[499] In order to ground liability, a publisher must have knowledge of the particular expression and control over whether it is communicated.[500] Intent would not include carelessness or negligence in conveying the expression but would include willful blindness.[501] Intent would require a deliberate act rather than mere failure to remove defamatory content.[502] Intent would not require that the speaker intended the expression to have a defamatory meaning.[503] Nor would it require that the speaker intended to cause harm.

The LCO's new definition of publisher would apply to the law of defamation generally, in respect of both offline and online communications, and in the context of internet intermediaries as well as others tangentially involved in defamatory content. This definition would clear up confusion around the practice of some public authorities posting to their website submissions received from members of the public.[504] Although these public authorities may become aware of defamatory content contained in a public submission, they would not be a publisher of, and thus liable for, the defamation merely by failing to remove it.

A narrower definition of publisher would also prevent a decision such as *Voller v. Nationwide News Pty Ltd. (2019)* in which an Australian court held a media organization directly liable for defamatory comments posted on its Facebook page by third party users.[505]

Search engines and other intermediaries automatically indexing or disseminating third party content using tools such as Autocomplete and other AI algorithms would not be publishers so long as they did not change the context of third party content.[506] On the other hand, platforms who intentionally use automated tools to manipulate content, thereby taking it out of context, may exceed their intermediary role and become directly liable for the new content as its publisher.[507] In such cases, "the employer of a tool is responsible for the results obtained by the use of the tool" and "the requisite intention flows from the programming and use of the computer".[508] Importantly, in our proposal platforms using bots to generate new content would be legally responsible for this content.[509]

In the LCO's view, narrowing the definition of publisher to those who intentionally communicate a specific expression creates an appropriate boundary to the scope of liability in defamation law and accords with the policy goals underlying defamation law in the internet age.

F. Limiting Liability for Republication

The traditional doctrine of publication also encompasses the act of repeating or republishing defamatory content. In reconsidering liability as a publisher in the internet age, it is also necessary to reconsider liability for republication.

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In the pre-internet era, the republication of defamatory content was a distinct, isolated event. However, republication is now a core attribute of how the internet functions. Anyone posting online content is well aware of the possibility that the content may be easily and instantly republished by liking, sharing, retweeting, pinning, framing or hyperlinking. This possibility is as likely as the degree to which the content is interesting to its audience.[510] In fact, it is the business model on which social media platforms operate. This potential for unbounded liability needs re-examination given the fluid, instantaneous and limitless way that defamatory content may be replicated online.

There are two legal principles engaged here. First, in certain circumstances a plaintiff may look to a republisher of defamatory content for a remedy rather than, or in addition to, the original publisher of the content. Second, in certain circumstances a plaintiff may look to the original publisher of defamation for a remedy for republication by a third party. Together, these principles cast a potentially wide net of liability.

The first principle, liability of a republisher, was re-examined by the Supreme Court of Canada in *Crookes v. Newton (2011)* and was held not to apply to hyperlinks of defamatory content. The majority held that the spread of reputational harm online could be effectively addressed by limiting the concept of publication to hyperlinks that actually repeat the defamatory content.[511] The Supreme Court's reasoning is broadly consistent with the LCO's analysis of intermediary liability above. However, our proposed definition of publisher would take this analysis one step further by requiring that publication involve an intentional act of conveying a specific expression. In order to "close the circle" on this area of reform, the LCO recommends that liability for republication similarly require an intentional act of conveying a specific expression.

What would this mean for the second principle, liability of the original publisher for republication by a third party? Generally, a publisher is not liable for intervening, voluntary acts of third parties over which the publisher had no control. However, there are three established heads of liability for republication in exception to the general rule:

- *Authorization* – the content creator intended or authorized the republication expressly or implicitly;
- *Natural or Probable Consequence* – the republication was the "natural and probable consequence" of the original publication; or
- *Duty* – the content creator knew that the third party would be under a moral, legal or social duty to republish the content.[512]

These heads of liability have the potential for unbounded liability in the internet context. For example, the "natural and probable consequence" test was applied by a British Columbia court in *Pritchard v. Van Nes (2016)* to hold a Facebook poster liable for all of the shares, reposts and so on that her post attracted.[513] This result arguably creates a chill in freedom of expression. Individuals may understandably be reluctant to post content where it might be subject to "the pile-on effect".[514]

On the other hand, more than one stakeholder felt that the traditional approach to liability for republication remains appropriate:

> *I don't see any injustice in making the party that launches the lie be on the hook for the damages arising from its spread. If that puts them in the position that they have to take steps to deal with the spread - and that's hard in the internet age - well that sounds about right from a moral point of view. You knew that when you launched.*[515]

The LCO has concluded that the current approach to the liability of original publishers of defamation for republication by third parties is also "a square archaic peg in the hexagonal hole of modernity".[516] It must be narrowed in order to prevent impairing the free flow of information over the internet. The question is how best to do so.

In their LCO Issue Paper, Laidlaw and Young suggest an analogy to principles of accessory liability in tort law.[517] However, accessory liability principles are usually applied to impose tort liability on an accessory actor where liability does not otherwise exist. Alternatively, in his treatise on defamation law, Raymond Brown recommends that the "natural and probable

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consequence" head of liability should simply be eliminated from defamation law.[518] However, Brown's proposal would still result in a broad scope of liability in the internet context under the other two grounds for liability listed above.

The LCO has concluded that the test for republication should be narrowed and made consistent with our recommended statutory definition of publication (intent to communicate a specific expression). Therefore, we recommend that a publisher of defamation be liable for republication by a third party only where the original publisher intends the republication. Requiring "intent" to ground liability also imports the "authorization" and "duty" heads of liability under the traditional approach above. However, *implicit* intention should no longer be enough to ground liability. The LCO's recommended definition of publication requires deliberate intent and so, therefore, should liability for republication.

This narrowing of the definition of both publication and republication is consistent with the evolution of the common law and, most importantly, provides a logical limit to the specter of unbounded liability in a medium where content is replicated fluidly and instantaneously.

G. No Statutory Presumption of Publication

Finally, the LCO has concluded that there should be no statutory presumption of publication in relation to any form of communication. This is consistent with a technology-neutral approach to defamation law. Online communications are quickly evolving and are simply not suited to bright line legal presumptions. Rather, the contextual factors set out by Deschamps J. in *Crookes v Newton (2011)* are most appropriate for determining whether an inference of publication should be made in particular circumstances.[519] Therefore, the LCO recommends that a finding of publication require evidence that online content was received and understood by a third party user.

RECOMMENDATIONS: 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.



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VIII. NOTICE AND TAKEDOWN: A QUICKER, MODERN PROCESS FOR ONLINE DEFAMATION DISPUTES

> *The greatest single failure of defamation and reputation law remedies is to be found in the absence of effective relief for victims of internet/social media vilification campaigns... In particular, consideration should be given to comprehensive legislation for easier take-down procedures...*[520]

This chapter continues to consider the crucial role of internet intermediaries in addressing online defamation disputes. In chapter VII, the LCO concluded that new legal responsibilities must be imposed on intermediary platforms to address the access to justice barriers in defamation actions in the internet age. The LCO recommended that the common law framework governing intermediaries (common law liability as publishers) be replaced with a notice and takedown regime. This is a new, modern legal framework that would operate quickly and cheaply to remedy many defamation complaints for which the court system is not suited. In this chapter, the LCO elaborates on notice and takedown and explains how it would operate as a powerful new remedy for defamation complainants.

The LCO is grateful to Professors Emily Laidlaw and Hilary Young for their LCO Issue Paper analyzing notice and takedown obligations for intermediary platforms in the defamation context. The LCO has substantially adopted their recommendations. The LCO also benefited from the wealth of discussion on these issues that took place during the LCO's consultation process and, in particular, the panels on intermediary responsibility at the LCO's International Defamation Conference and at RightsCon 2018.[521]

A. Introduction to the LCO's Proposal for Notice and Takedown

Intermediary platforms profit from third party content and have "considerable power to mediate between those who post content and those who object to it".[522] Given the ongoing reputational harm possible when defamation is posted online, the LCO believes platforms should be required to implement and administer a new statutory notice and takedown regime. This regime would impose statutory duties on intermediary platforms to:

- Pass on notices complaining of defamatory content to publishers (the "notice obligation" discussed in chapter IV as part of the new notice regime);
- Take down the content where publishers fail to respond to notice (the takedown remedy discussed in this chapter); and,
- Pay statutory damages if they don't comply.

The LCO's proposal for a notice and takedown regime would make use of the unique power that intermediary platforms wield in controlling third party content appearing on their platforms. These statutory duties would be imposed on all platforms making third party content available to Ontario users. These duties would be enforced by a provision giving Ontario courts the authority to award statutory damages if they do not comply.

The LCO's proposal for a notice and takedown regime can be understood from two different perspectives:

- For intermediary platforms, it creates new statutory duties to implement and administer notice and takedown in response to online defamation complaints; and,
- For defamation complainants and online publishers, notice and takedown would operate as an important legal remedy and an informal means of resolving online defamation disputes.

There are several important benefits to the LCO's proposal. Among these, a takedown remedy would serve the primary goal of most defamation complainants to have defamatory content removed from the internet quickly and inexpensively. It would allow anonymous publishers to preserve their anonymity, but would place responsibility for online defamation squarely on their shoulders, where it belongs. Most importantly, it would achieve a better balance between protection of reputation and freedom of expression in the internet age.

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It should be noted that the LCO's recommendations contemplate and are consistent with the likelihood that intermediaries may become subject to federal statutory duties in relation to harmful online content generally (which may encompass defamatory content). We discuss emerging federal and international regulatory initiatives in this regard in the final section below.

B. Analogous but Distinct Statutory Duties Governing Internet Intermediaries in Other Jurisdictions

Statutory regimes have been introduced in several jurisdictions to regulate internet intermediaries in relation to defamatory and other illegal content. These range from broad immunity for intermediaries (United States), to complex notice and takedown (NTD) regimes (England and Wales and European Union).[523] Laidlaw and Young engage in a detailed analysis of the advantages and disadvantages of these regulatory regimes. The LCO summarizes and expands on elements of this analysis in the following chart. It is important to point out that many of these statutory regimes were introduced in the early days of the internet. They are widely viewed as outdated and are actively being reconsidered in several jurisdictions.[524]

Intermediary Liability Regimes Compared

Name	Content Targeted	Intermediaries Targeted	Liability in Damages	Statutory Duties	Notes
United States **s. 230, Communications Decency Act, 1996**	Illegal content (excluding copyright infringement)	• ISPs, • Intermediary platforms, • Search engines	None	None	• No effective remedy for online defamation • Online defamatory content not removed • Reputational harm persists • Maximum protection for free speech/tech innovation • Legal certainty • Maximum protection for publishers • Lack of access to justice for potential plaintiffs
United States **Digital Millennium Copyright Act, 1998**	Copyright Infringement	• ISPs, • Intermediary platforms, • Search engines	• No liability if no knowledge • Safe harbor from liability if statutory duties fulfilled	• If notice received, must take down infringing content expeditiously • Some duty to pass on notice to publisher, counter-notice and put back procedure	• Some copyright infringement removed • Restricts free speech • Encourages over-removal of content • Limited protection for publishers
European Union **E-Commerce Directive, 2000**	Illegal content (excluding copyright infringement)	• ISPs, • Intermediary platforms, • Probably search engines	• No liability if no knowledge • Safe harbor from liability *if* statutory duties fulfilled	• If knowledge of illegal information, must take it down expeditiously • No duty to pass on notice to publisher	• Some illegal content removed • Residual damages claim against intermediary • Restricts free speech • Encourages over-removal of content • Discourages content moderation • No protection for publishers

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Intermediary Liability Regimes Compared (continued)					
Name	**Content Targeted**	**Intermediaries Targeted**	**Liability in Damages**	**Statutory Duties**	**Notes**
England and Wales **Defamation Act, (Operators of Websites) Regulations, 2013**	Defamatory content	Intermediary platforms	• No liability where publisher is identifiable • Safe harbor from liability *if* publisher not identifiable and statutory duties fulfilled	• For anonymous content only • If notice received, must pass to publisher • If publisher does not provide contact info, must take down content	• Provides for removal of some anonymous online defamation • Residual damages claim against intermediary platform for anonymous content • Lack of access to justice for potential plaintiffs where publisher is identifiable • Complex and not used in practice
Canada **Copyright Act, 2015**	Copyright Infringement	ISPs	• None • Subject to statutory damages for failure to comply	• If notice received, must pass on to publisher	• No removal of copyright infringement • Strong protection for freedom of expression • Lack of access to justice for rights holders • Protects publishers
Ontario **Current Common Law**	Defamatory content	Those deemed to be publishers based on their role in communicating defamation	Liability based on degree of knowledge of and control over defamatory content	None	• Direct damages claim against intermediaries who are publishers • Restricts freedom of expression • Discourages technological innovation • Encourages over-removal of content • Discourages content moderation • Lack of access to justice for potential plaintiffs • No protection for publishers
LCO's Recommended Regime for Ontario	Defamatory content	Intermediary platforms	• None • Subject to statutory damages for failure to comply	• If notice received, must pass on to publisher • If no response in 2 days, must take down content • Counter-notice and put back requirement	• Fast, inexpensive process/remedy for online defamation • Remedy against anonymous publishers • No residual damages claim against intermediary platform • Strong protection for freedom of expression • Promotes technological innovation • Promotes access to justice for potential plaintiffs • Strong protection for publishers • Success depends on intermediary implementation/infrastructure

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In the LCO's view, the US approach of broad immunity for intermediaries, established by s.230 of the *Communications Decency Act,* is not an appropriate model for Ontario.[525] We agree with Laidlaw and Young that "[t]he balance between free speech and other rights is tipped differently in Canada than America".[526] The reputational harm that may result from online defamation is a pressing social problem, the legal responsibility for which must be shared by intermediaries as well as government and other public actors. As US First Amendment scholar Jack Balkin has argued, "[c]ompanies that once viewed themselves purely as technology companies are beginning to understand their public responsibilities as twenty-first-century media companies".[527] Although the best model for translating this responsibility into legal obligations remains under development, the LCO has concluded that broad or full statutory immunity is not the answer.

At the other end of the spectrum, the LCO also rejects the EU NTD model for regulating intermediaries hosting defamatory content.[528] Laidlaw and Young point out that this regulatory model shares the same drawbacks as the intermediary-as-publisher model in common law. Internet intermediaries are not institutionally capable of "knowing" what is or is not defamatory and an NTD regime that requires intermediaries to assess the legality of content leads to over-removal.[529] As such, it represents an inappropriate incursion on freedom of expression. Furthermore, the EU's NTD regime is quickly becoming technologically outdated.[530]

The LCO further rejects the England and Wales approach to intermediary liability in the *Defamation Act, 2013*.[531] This legislation removes the court's jurisdiction to hear defamation actions against intermediaries where the publisher is identifiable by the complainant.[532] Where the publisher is not identifiable, an action may be commenced against the intermediary. However, the intermediary may avoid liability by complying with a complex notice and takedown regime in the *Website Operators Regulation*.[533]

The effect of the England and Wales Act is to provide complainants with two avenues for relief. If the publisher is identifiable, the complainant must proceed against the publisher in court. If the publisher is not identifiable, the complainant may have a takedown remedy under the Regulation or a residual court action against the intermediary.

From a theoretical perspective, the England and Wales approach has been characterized as a residual indirect liability model with instrumental advantages.[534] However, in the LCO's view, the drawbacks associated with this model outweigh any benefits.

First, the England and Wales regime discourages anonymous online speech, emphasizing as it does the identification of the publisher.[535] Although there is no doubt that anonymity can act as a cloak for defamatory speech, it is also an element of the right to privacy that attracts some degree of *Charter* protection.[536] Online anonymity is also protected by international human rights standards.[537] A regulatory regime that does not account for these rights is not appropriate for Ontario.

Second, basing a safe harbour regime on the existence of a remedy against the publisher is problematic as it is arbitrary to base the liability of a third party on the absence of a remedy against the blameworthy party. As Laidlaw and Young state:

> *Liability dependent on the existence of other parties creates uncertainty and unfairness, in that defendants' responsibility for third-party content depends on factors completely outside their control. On principle, the law should not encourage the pursuit of deep-pocketed but non-blameworthy parties simply because the alternative is to leave someone without a remedy.*[538]

Third, the England and Wales regime denies the complainant the benefit of a takedown remedy where the publisher is identifiable. As will be discussed later in the chapter, there are significant advantages to a takedown remedy over a court action in many cases and, in the LCO's view, it is not fair to deny this remedy to complainants for an equally arbitrary reason.

There is also anecdotal evidence that the England and Wales safe harbour regime is regarded as unworkable by many platforms and, thus, rarely used in practice.[539] Apparently, given the complexity of the notice and takedown regime, platforms would rather take their chances in court.

For all these reasons, the LCO has concluded that the England and Wales model is not appropriate for Ontario.

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C. A New Notice and Takedown Process for Online Defamation Disputes

1. Introduction to the LCO's Proposal

Laidlaw and Young propose a novel form of NTD regime designed specifically for the online defamation context. The LCO substantially adopts the Laidlaw and Young proposal.[540]

Under this proposal, some intermediaries (intermediary platforms) would have a statutory duty to pass on notice of allegedly defamatory content to the publishers of the content.[541] Publishers would have an opportunity to respond to the notice. The platform would not assess the merits of the complaint. Instead, the platform would have a procedural obligation to remove the content only where is it not possible to pass on notice, or where no response from the publisher is received.

This proposal imposes two distinct legal obligations on intermediary platforms. First, there is an obligation to pass on notice. This is a self-standing obligation that the LCO recommends as part of a new integrated notice regime for all defamation claims in chapter IV above. Second, there is an obligation to take down content where no response from the publisher is received. However, we emphasize that the notice obligation can and should be adopted as part of the new notice regime above whether or not the takedown obligation is also adopted. In the following sections, the LCO elaborates specifically on the takedown obligation.

2. Only Intermediary Platforms Should Have a Takedown Duty

Laidlaw and Young recommend that only intermediaries that provide platforms for user-generated content should be subject to notice and takedown obligations.[542] The LCO agrees. Under Riordan's taxonomy, discussed in Chapter VII, intermediary platforms include social networks (Facebook, Twitter), media sharing platforms (YouTube), publishing services (Blogger) and other services having a direct hosting relationship with users.[543] Intermediary platforms may also have a direct publishing role. For example, media websites (CBC News) are publishers of their own content, but are intermediary platforms in relation to third party content (such as reader comments). ISPs (Rogers, Teksavvy) and search engines (Google) would not subject to the notice and takedown regime since they are not directly connected with online publishers.[544] Of course, both ISPs and search engines may be subject to a court injunction to take down illegal content.[545]

3. How Takedown Should Operate

Takedown would be triggered by the notice regime discussed in Chapter IV above. 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 publisher of the content who would then have the option to send a written response to the platform. If the publisher responds within two days, no takedown would occur. If the complainant pursues the matter, she would be required to deal with the publisher directly (either through informal negotiations or by bringing a defamation action). The platform would be required to take down the content only if (i) despite all reasonable efforts, the platform was not able to identify the publisher for the purpose of passing on notice, or (ii) the publisher does not respond within two days.

Allowing the publisher an opportunity to respond to a defamation complaint accords with procedural fairness principles. As the House of Commons Standing Committee on Industry, Science and Technology recently commented in the copyright context:

> *The Committee finds it questionable…that an OSP's content management policies would require taking down or de-monetizing content uploaded on a platform before giving its uploader the opportunity to respond to allegations of copyright infringement.*[546]

The intermediary platform would not assess the legality of a defamation notice. The decision to take down content would essentially be a binary one. If a response is received from the publisher within two days, the platform would notify the complainant and would not act further. If a response is not received in two days, the platform would take down the content.

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With a few exceptions, the LCO agrees with Laidlaw and Young's recommendations for the operation of the takedown process.[547] In particular, intermediary platforms should only disable access to content where it is not possible to pass on notice or the publisher fails to respond to the notice within a two day period. This relatively short time frame is necessary to contain the reputational harm that may result from the publication.

The takedown obligation must be narrowly interpreted by the platform to ensure minimal impairment of the publisher's right to free expression. Only the specific language alleged to be defamatory should be removed. Specific content should be removed, rather than entire URLs, threads, groups, and so on.[548] The platform should replace the removed content with a flag indicating that content has been removed under the takedown process.[549]

On removing content, the intermediary platform should be required to send further notice to the publisher and complainant alerting them to the removal. A putback procedure should be available where the publisher has compelling reasons for having missed the deadline for responding and where it is technically feasible to do so.

Laidlaw and Young propose that a publisher's response to a defamation notice be in the form of a counter-notice/dispute and should provide options for the publisher to assert the truth of the publication or raise other defences to the complaint. The LCO is concerned that this imposes too great an onus on publishers to justify the content of the publication. Requiring publishers to comply with a particular format may dissuade some from engaging in the process and thereby protecting their right to free expression. Therefore, the LCO recommends that no particular format be mandated for a valid response. It should be sufficient for a publisher simply to indicate his or her wish that the content remain posted or, alternatively, assert that he or she does not agree with the complaint.[550] This provision for a "bare" response also reinforces the principle that intermediary platforms should not be invited to assess the legitimacy or legality of either the complaint or the publisher's response.

Where the intermediary platform does not receive a response from the publisher within the two-day deadline, an obligation to remove the content will be triggered. At this point, the platform should have a further reasonable time period to put takedown into effect. Determining what is reasonable here depends very much on the institutional capacity of the particular intermediary platform. This capacity varies dramatically between industry leaders such as Facebook, and small emerging platforms.[551] Takedown provisions in the EU *E-Commerce Directive* and the US *Digital Millenium Copyright Act* (DMCA) require only that content be removed "expeditiously".[552] England and Wales' *Website Operators Regulation* requires that content be removed within two plus five days, a timescale that has been argued to be "too short".[553] Further input would be needed from platforms before choosing a specific deadline for content removal. Instead, the LCO recommends that takedown be required to take place expeditiously.

It is important to emphasize two attributes of the LCO's recommended takedown process: (1) takedown does not create any inference or otherwise impact a future judicial determination about whether content is defamatory, and (2) takedown is designed to protect anonymous publishers. If an anonymous publisher sends a response to the platform, the complainant must be notified but anonymity is to be maintained.

The LCO takes no position on certain recommendations in Laidlaw and Young's Issue Paper where these would impose obligations on intermediary platforms that extend beyond the defamation context (*i.e.* rules for publishing content restriction policies and encouraging self-regulation). As discussed below, the LCO's recommendations are limited to notice and takedown of allegedly defamatory content as a targeted means of alleviating access to justice problems inherent in the court process. The LCO does not make recommendations on the broader question of intermediary responsibility for illegal or harmful online content.

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Intermediary Liability and Defamation Remedies – Before and After		
Issue	**Current Law In Ontario**	**LCO Proposal**
Intermediary Liability	• Intermediaries may be liable as publishers if they do not remove defamatory third party content	• Intermediaries not liable for passive knowledge of third party content
Freedom of Expression	• Risk to freedom of expression • Intermediaries have incentive to remove legitimate content to manage litigation risk • No procedural protection for content publishers	• Protection for freedom of expression • Responsibility for defending/removing content belongs to content publisher • Strong procedural protections for content publishers
Protection of Reputation	• No statutory duty on intermediaries to address online defamation • Potential damages claim against some intermediaries as publishers • Limited recourse against anonymous defamers	• 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	• 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	• 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	• Intermediaries determine if content is defamatory • Intermediaries have incentive to avoid knowledge of defamatory content • Discourages technological innovation	• Intermediaries do not determine legality of content; issue reserved for courts • Promotes content moderation/corporate social responsibility • Promotes technological innovation

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4. Protecting Publishers Against Abuse of the Process by Complainants

In a comprehensive study of the operation of the US DMCA notice and takedown regime, Jennifer Urban and colleagues express concern for the ease with which the regime can be abused by senders filing questionable complaints.[554] Their report offers valuable lessons on the US experience with notice and takedown and the LCO has adapted two of their recommendations to protect publishers in our recommended takedown process.

First, publishers should have an effective remedy against complainants who abuse the takedown process.[555] Therefore, the LCO recommends that anyone filing a notice of complaint in bad faith or without a reasonable belief that the impugned content is defamatory should be liable to the publisher for statutory damages where the notice results in takedown. Bad faith would be determined by a court in a subsequent proceeding brought by the publisher against the complainant. The amount of statutory damages should be sufficiently high that complainants are encouraged to exercise care in deciding whether to send a notice. This is an important freedom of expression safeguard. Note that the LCO does not suggest there be a remedy for improper notices where takedown does not occur. Publishers sending a response to an improper notice can expect to have their rights protected by the court if the complainant chooses to bring an action.

Second, intermediary platforms should be required to make available to Ontario users information resources explaining the basic elements of defamation law and the takedown process.[556] This will assist complainants in assessing the legitimacy of their defamation claim before filing a notice. It will also encourage publishers to use the response process to avoid takedown where they believe that their publication is legal. These information resources should be written in plain language. They should be prepared or approved by the Ontario government in a uniform format so that all Ontario users receive accurate and consistent information.[557]

5. Enforcing Notice and Takedown Duties against Intermediary Platforms

The LCO recommends that notice and takedown obligations be enforced by a provision for statutory damages. Where an intermediary platform fails to comply with notice and/or takedown, a complainant would have the option of seeking a court award in the form of statutory damages against the platform. This claim would most likely arise as a third party claim in a subsequent defamation action against the publisher.[558]

Courts would have discretion to determine the appropriate amount of damages to be awarded. In order to encourage corporate social responsibility, the platform's terms of service and remedial mechanisms for disputes, etc. should be taken into account by courts in assessing the suitability or amount of a statutory damages award. However, statutory damages would not compensate complainants for reputational harm. Instead, they would be in the nature of a statutory penalty.

Provision for statutory damages is a novel enforcement remedy intended to bind intermediary platforms offering third party content to Ontario users to an Ontario notice and takedown regime. Statutory damages would replace the risk of common law liability as a means of enforcing notice and takedown duties, thereby alleviating the problems with the common law intermediary-as-publisher model of platform governance (discussed at length in chapter VII above).

Although novel in the defamation context, there is precedent for the use of statutory damages as an enforcement mechanism for imposing statutory duties on intermediaries. Specifically, the notice and notice regime in the Canadian *Copyright Act* contains a statutory damages provision directed at internet service providers (ISPs) for non-compliance with the notice obligations in that legislation. Section 41.26 of the *Copyright Act* reads, in part:

> **Obligations related to notice**
>
> 41.26 (1) A [provider of a network service] who receives a notice of claimed infringement that complies with subsections 41.25(2) and (3) shall, on being paid any fee that the person has lawfully charged for doing so,

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a) as soon as feasible forward the notice electronically to the person to whom the electronic location identified by the location data specified in the notice belongs and inform the claimant of its forwarding or, if applicable, of the reason why it was not possible to forward it; and
b) retain records that will allow the identity of the person to whom the electronic location belongs to be determined,…

(3) A claimant's only remedy against a person who fails to perform his or her obligations under subsection (1) is statutory damages in an amount that the court considers just, but not less than $5,000 and not more than $10,000.

This provision was recently interpreted by the Federal Court in *ME2 Productions v. Doe (2019)*.[559] The Court held that the provision was intended to operate quickly and efficiently. Therefore, the statutory damages claim did not require a separate court application against the ISP, but could be determined in the course of a pre-existing action between a complainant and alleged copyright infringers:

> *Parliament chose to insulate ISPs from any liability for copyright infringement by their subscribers and instead it imposed a regime of statutory damages in order to ensure compliance with the notice and notice regime. This is consistent with the deterrence and balancing of interests objectives identified by the SCC in Rogers Communications. The amendments do not prescribe any particular procedure for such claims. The [case management judge] in this case adopted a sensible and practical approach, drawing on the analogous situation of a contempt of court proceeding.*[560]

The LCO recommends a similar statutory damages provision be directed at intermediary platforms for failure to comply with the notice and takedown duties recommended for online defamation disputes. A claim for statutory damages against a platform might similarly be heard in the course of a defamation action by a complainant against the online publisher ultimately responsible for the allegedly defamatory content.

Intermediary platforms vary widely in size and resources, arguably more so than ISPs. Therefore, the amount of a statutory damages award directed at intermediary platforms in the defamation context should not be specified in legislation but left to the discretion of the court.

6. Impact of Takedown on Corporate Social Responsibility

Two key advantages of a narrowly-designed takedown remedy for allegedly defamatory content are:

- It relieves intermediary platforms from the responsibility to make quasi-judicial determinations about what amounts to defamation; and,
- It does not incentivize intermediary platforms to remove controversial content as a risk management technique to avoid liability.

These features should ensure that the LCO's recommended takedown process does not detract from corporate social responsibility measures for limiting harmful content, including content moderation policies. Content moderation policies are discussed in more detail in chapter IX. For the present purpose, it is important to note that these policies are based on contractual terms of service existing between intermediary platforms and their users. They do not purport to apply legal principles. Content moderation policies and practices are separate and distinct from a takedown obligation in respect of allegedly defamatory material.

D. Enforcing Notice and Takedown Against Intermediary Platforms Outside Ontario

The LCO recommends that the notice and takedown obligations recommended in this Final Report be made applicable to all intermediary platforms making third party content available to Ontario users. The legislation should specify that Ontario courts have jurisdiction to enforce the provisions of the Act.

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Under constitutional principles, Ontario legislation enacting the takedown remedy will be applicable to an out-of-province platform where there is a "real and substantial connection" between Ontario and the platform's activities.[561] This test will be met where an intermediary platform physically located outside Ontario carries on a commercial activity in Ontario through advertising or other operations.[562] Similarly, Ontario courts will have jurisdiction to enforce notice and takedown obligations against intermediary platforms meeting the "real and substantial connection" test.[563]

This is not to say that an out-of-province intermediary platform will necessarily comply with an Ontario court order.[564] However, there are good policy reasons for notice and takedown obligations being enforceable against out-of-province platforms making content available to Ontario users:

> *The Internet has changed the way we live, work and communicate with each other and the world… In the face of [emergent global] threats, we need to recognize the importance of nations and their courts determining what is necessary to protect their citizens. Given the global threats from online sources, this will necessarily have to involve some continued evolution of extra-territorial application of local laws and court orders to address these threats.*[565]

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

The LCO believes that a takedown remedy as proposed in this chapter is a necessary complement to the court process for remedying defamation claims in the internet age. As one stakeholder put it, a key problem with internet defamation is the proliferation of communications made possible by the internet. "If you are able to shut it down at its source, you have solved 90% of your client's problem".[566] A number of Ontario practitioners consulted by the LCO noted that content removal requests have become a larger part of their defamation practice than lawsuits.

The potential for the extreme reputational harm made possible by internet communications will only increase in the future. Take, for example, the recent emergence of "deep fakes" – images, videos and audio that are doctored to create a hyper-realistic depiction of someone saying or doing something that they did not say or do. A recent article by Bobby Chesney and Danielle Citron offers a sobering thought experiment on the potential for deep fakes to cause widespread individual and social harm, including what they refer to as "reputational sabotage":

> *Deep-fake videos could depict a person destroying property in a drunken rage. They could show people stealing from a store; yelling vile, racist epithets; using drugs; or any manner of antisocial or even embarrassing behavior like sounding incoherent. Depending on the circumstances, timing, and circulation of the fake, the effects could be devastating. It could mean the loss of romantic opportunity, the support of friends, the denial of a promotion, the cancellation of a business opportunity, and beyond.*[567]

The authors go on to discuss how harm is exacerbated in the social media ecosystem where phenomena such as information cascades and filter bubbles reinforce the lie.[568] They make a compelling argument that defamation law principles are, currently at least, seriously inadequate to deter and redress reputational harms. The authors highlight two obstacles in particular: attribution ("[c]ivil liability cannot make a useful contribution to ameliorating the harms caused by deep fakes if plaintiffs cannot tie them to their creators") and jurisdiction.[569] These are obstacles that the LCO grapples with throughout this Final Report and that takedown is designed to combat. In short, the LCO believes that new legal needs require new legal remedies.

Under the LCO's proposal, complainants would typically trigger notice and takedown prior to invoking the court process. Only if the publisher responds to a notice of complaint within the deadline, and the content remained online, would the complainant be motivated to file a court claim. Therefore, notice and takedown would be an effective means of filtering some defamation complaints. The court process would more likely be engaged in difficult cases, where reputational harm and freedom of expression are more evenly weighted.

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The LCO believes that notice and takedown strikes an appropriate balance between protection of reputation and freedom of expression. It also achieves a fair balance in the triadic relationship among publishers, intermediary platforms and complainants, a balance based on compromise and sharing responsibility.[570] The remedy would place the onus of responding to notice of complaints on the publisher of the content and would alleviate any onus on intermediary platforms to assess the legality of complaints. It is consistent with international human rights principles which emphasize clear, unambiguous rules and procedural fairness.[571]

The LCO's proposal is an effective means of addressing many new paradigm defamation complaints involving individual publishers. It offers 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 a low-cost procedure to protect their freedom of expression. Consider the trend for trivial online defamation claims experienced by an Australian legal clinic, LawRight.[572] The clinic observed an "overarching theme" in the 27 defamation claims for which it assisted individual defendants over a two-year period. These claims tended to involve "short, nonsensical 'rants' on social media or in email correspondence" which, although "inflammatory", were unlikely to cause lasting reputational harm. After serving a defence or response to a demand letter, it was typical to hear nothing more from these plaintiffs. Under the LCO's proposal, publishers in these circumstances could respond to complaints without the need for legal assistance or the courts. Access to justice would be improved for both complainants and publishers.

The LCO's proposal would also protect anonymous expression. The intermediary platform, acting as a go-between, would shield the identity of an anonymous publisher from the complainant. In the LCO's view, the obligation on publishers to send a written response to a notice of complaint is a proportionate mechanism for minimal impairment of freedom of expression and is, therefore, justifiable under s.1 of the *Charter*. Freedom of expression would be additionally protected by:

- the option for publishers to request put back of removed content;
- the civil remedy for abuse of the process; and
- the requirement that complainants attest to their good faith in sending notices.

F. Three Criticisms of the LCO's Proposed Notice and Takedown Regime

The LCO's consultations revealed three criticisms of our proposed notice and takedown regime. The first two raise important questions about whether this model can be effective. The third criticism raises a more fundamental, principled criticism. The LCO addresses each issue below.

1. Will Publishers Respond?

One drawback to the proposed takedown remedy is the possibility that publishers will fail to respond, even where the content is not defamatory or where expressive freedom outweighs the reputational harm complained of. Publishers might fail to respond because they are intimidated by the process, miss the deadline or do not receive the notice of complaint. They may also fear losing their anonymity even though the process is designed to protect it.

Where publishers miss the deadline or fail to receive the notice, they should have an opportunity to alert the intermediary platform and request that the content be reposted (or put back). A put back option provides reasonable protection to the publisher's freedom of expression.

Where, on the other hand, the publisher fails to respond due to intimidation, fear or simple inertia, content that is not defamatory may be removed and freedom of expression compromised. This is a significant drawback.[573] However, in the circumstances, the LCO believes that this concern is appropriately mitigated where it is the publisher of the content, rather

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than the intermediary platform, who ultimately controls whether the content is taken down. Of course, the takedown process would impose a reverse burden on publishers to respond to a complaint. However, this reverse burden is a modest one. The publisher is merely obligated to serve a written response in any convenient format. There is no obligation on the publisher to justify the impugned content. A statement that the publisher wishes the content to remain up or the publisher disagrees with the complaint will suffice.

Some stakeholders suggested that intermediary platforms be given discretion to override a publisher's failure to respond and authority to leave the allegedly defamatory content up if there is a clear public interest in doing so.[574] The LCO rejects this suggestion. This would undermine the procedural nature of the takedown obligation and would compel intermediary platforms to make legal determinations. The responsibility to protect freedom of expression is best placed in the hands of the publisher.

It should also be noted that the concern for over-removal of allegedly defamatory content already exists as a result of discretionary content moderation policies currently operated by intermediary platforms. The LCO believes the procedural and targeted nature of our proposal is preferable to these practices (although they would continue to exist).

2. The Whack-a-Mole Problem

A second drawback to the LCO's proposal is that it does not address the possibility that the publisher will simply re-post content that has been removed. Thus, we are left with the whack-a-mole problem that courts and commentators have identified as endemic to online defamation.[575] In the LCO's view, this is a necessary limitation of our proposal.

In England and Wales, the *Website Operators Regulation* attempts to address the whack-a-mole problem by providing for automatic takedown of content that is the same or substantially the same as content that has already been the subject of two or more notices of complaint.[576] The LCO recommends against a similar provision in Ontario. Our proposed takedown process is intended to be streamlined and to preclude intermediary platforms from assessing allegedly defamatory content. A provision for automatic takedown would complicate the process and lead intermediary platforms down a slippery slope of assessing what amounts to the same or substantially the same content.

Repeated instances of online defamation, or vilification campaigns as some have called them, are most appropriately addressed through the court system.[577] The court system will be more effective in dealing with such complaints with the addition of a new interlocutory takedown motion as recommended in chapter V.

3. The Moral Responsibility Problem

Some stakeholders expressed fundamental concern about moving away from a liability-based model for platform governance in relation to defamatory content. Their opinion was that platforms properly bear moral responsibility for all content that they host and should be viewed as publishers for this purpose. Some even expressed the concern that the LCO proposal was tantamount to an endorsement of legal immunity for internet intermediaries more broadly. As has been noted elsewhere, this is categorically *not* the LCO's intent.

The LCO considered the "moral responsibility" criticism carefully but ultimately rejected it for reasons of principle and practice.

First, as a matter of principle, the LCO has concluded that legal liability should be commensurate with the degree to which intermediaries are connected with particular defamatory content. In the LCO's view, where intermediary platforms passively host third party content, with no intent to convey a particular message, they are too remotely connected to the content to be considered blameworthy in law. Imposing statutory duties on intermediary platforms to implement notice and takedown are a more appropriate means of addressing their responsibility for third party defamatory content. On the other hand, where platforms intentionally and actively manipulate or endorse third party content, they are no longer acting as intermediaries. They are connected to the content as publishers and will be directly liable for the content accordingly. Thus, moral responsibility for online defamation remains.

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Second, as a matter of practice, the LCO is mindful of duties (moral and otherwise) to complainants and victims of online defamation who do not have the ability to pursue court actions or hire counsel. In the LCO's view, the justice system must provide an effective, accessible remedy if we are to provide these complainants with a modicum of access to justice. We have concluded that judicial assessments about the legal liability of intermediary platforms in the course of individual court actions are simply ineffective to achieve the policy goals underlying defamation law in the internet age.

G. A Test Case: Online Review Websites

An effective crucible for testing the viability of the notice and takedown regime is the example of online review websites. Online reviews are an important application of freedom of expression in the internet age, and the opportunity to publish negative reviews is clearly in the public interest. One stakeholder pointed out that fair comment is the foundation of online review websites and needs to be protected.[578] How would takedown operate in this context?

There is a possibility that businesses targeted by negative online reviews would file notices of complaint as a matter of course, even where they do not believe the reviews are defamatory. Engaging with the complaints process would become a logical risk management tool, the cost of which would be subsumed in the normal course of business. The possibility of being held liable for abusing the process and ordered to pay statutory damages would be one risk to be factored into this analysis.

If this occurs, it might have a significant impact on the business operations of online review websites in two respects. First, it might be expected to increase the cost of operating these websites since processing notices and taking down content would become an integral component of doing business. A similar problem has been identified with the counter-notice process required of platforms in the US copyright regime:

> *As an operational matter, the counter-notice process requires a commitment of personnel and internal tracking systems – whether ad hoc or especially built by the company. Tracking multiple communications with copyright owners and counter-notice providers can be difficult in practice, since parties may send multiple communications by different channels, without including consistent identifying information. At small scale, this is a manageable problem. At large scale, it requires bespoke internal tools, significant time commitment by employees, or both.*[579]

A second, more serious, concern is that the LCO's notice and takedown proposal might undermine the very raison d'être of online review websites to the extent that notices of complaint dissuade consumers from posting reviews. And it seems very possible that the receipt of a notice of complaint alleging that a review is defamatory may intimidate some consumers.[580] Consumers may be motivated to withdraw the review or take no action, at which point the online review website will become obligated to take down the review. This scenario, if unchecked, could very well have an undue systemic impact on freedom of expression.

However, these concerns could be effectively addressed by integrating the notice and takedown process into the business model of online review websites. First, the procedural nature of the notice and takedown process proposed by the LCO is well suited to being automated. The cost of developing automated processes should not be disproportionate to the cost of responding to defamation complaints on an individual basis, as is now the practice of some of these businesses.[581] Second, the information resources that online review websites could provide to users would help consumers understand the process and the ease with which they may respond to a complaint. As businesses, online review websites and consumers became acclimatized to the notice and takedown process, the balance between protecting reputation and preserving freedom of expression should settle appropriately.

The opposite concern might also be raised. Notice and takedown might become so automatic that it has little real value in targeting online defamation.[582] However, as in the case of all complaints of online defamation, receipt of a notice by a

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consumer would encourage the consumer to reconsider whether the negative review is supportable or not. If the consumer concludes that there is little basis for the complaint, she may allow the review to come down in order to reduce the risk of a lawsuit. Otherwise, the consumer may send a response and stand behind her negative review. In the LCO's view, this opportunity for sober second thought is an appropriate means of asking consumers to take a modicum of responsibility for the harmful impact their review may have on reputation while protecting their freedom of expression. Furthermore, the LCO's recommendation for a modest filing fee to be charged to complainants seeking to access notice and takedown should assist in dissuading frivolous or bot-generated complaints.

The LCO has concluded that the notice and takedown process recommended here is a proportionate response to the problem of online defamation given the extreme reputational harm possible online, the prevalence of anonymous publishers, and the institutional limitations of the court system to address defamation in the online content.

H. The LCO's Notice and Takedown Proposal in International Context

In section B above, the LCO discussed various legal regimes that exist internationally for regulating internet intermediaries in relation to illegal online content. The notice and takedown proposal for online defamation disputes recommended in this chapter resembles some of these but is novel and distinct from all of them. This is not surprising. Several of the intermediary liability regimes currently in existence were created early in the evolution of the internet. They are actively being re-examined world-wide.

In recommending the new notice and takedown proposal in this chapter, the LCO has borrowed from existing regimes but has relied primarily on the policy goals underlying both defamation law and platform governance. Here, the LCO notes a blog by Daphne Keller, an expert on intermediary liability laws internationally, entitled *Build Your Own Intermediary Liability Law: A Kit for Policy Wonks of All Ages*.[583] Keller sets out a number of considerations for creating pragmatic and well-tailored laws designed to balance:

- Harm prevention
- Protection of speech and public participation
- Technological innovation and economic growth.

According to Keller, a successful law governing internet intermediaries adjusts the various "doctrinal dials and knobs" to achieve the best policy trade-offs among these three goals. The notice and takedown process recommended in this chapter 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 the competing policy goals underlying defamation law in the internet era.

I. The LCO's Proposal is Consistent with Potential Future Regulation of Intermediaries

The LCO recommends a notice and takedown process as a targeted means of regulating defamatory online content. However, notice and takedown obligations are not necessarily the *only* form of regulation to which intermediaries should be subject in relation to illegal content. The LCO takes no position on this broader issue.

1. Evolving Role of Intermediaries in Relation to Online Content

Public understanding of the role that intermediaries should play in relation to illegal content is currently evolving.[584] Laidlaw and Young observe that social networking providers such as Facebook, Twitter or Reddit, do not tend to create content, although they do tend to "employ technical processes to make the content accessible and searchable and to facilitate users doing things with the content (sharing, remixing, embedding, promoting etc.), often through automated means".[585] The reference to "technical processes" and "automated means" arguably ascribes a relatively neutral role to platforms in relation to the content they host.[586] However, other commentators note that social networking providers

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and search engines "curate" content in a way that did not occur when existing regulatory models were adopted.[587] Jack Balkin argues that curation is unavoidably content-based and that existing regulatory regimes are based on outdated concepts:

> *Because companies like Facebook and Google act as curators and personalizers, they cannot really avoid making decisions about content… Familiar concepts like content and viewpoint neutrality are simply unhelpful in describing their responsibilities in the emerging global system of free expression. Above all, these curators need to be trustworthy providers of search and communications services and nonarbitrary in their governance of communities.*[588]

Although the LCO recommends that intermediaries should not be considered publishers in defamation law, the question of how much involvement in harmful content renders an intermediary sufficiently "blameworthy" to ground legal obligations remains an open one.

2. Future Regulation May Encompass Online Defamation

There are increasing concerns world-wide that new regulatory models are necessary to hold intermediaries to account for illegal and harmful online content. Several regulatory proposals have resulted.[589] These would impose a statutory duty of care on intermediaries to take reasonable steps to prevent harm caused by online content.[590] For example, a 2018 report by the Canada House of Commons Standing Committee on Access to Information, Privacy and Ethics proposes a proactive regulatory approach to disinformation on social media platforms.[591] A 2019 U.K. White Paper is similar, although more developed.[592] It would involve codes of practice developed by a regulator that "outline the systems, procedures, technologies and investment… that companies need to adopt to help demonstrate that they have fulfilled their duty of care to their users".[593] In some cases, the duty of care would require companies to have effective user complaints mechanisms which may include an independent review mechanism. The regulator would oversee the companies' exercise of their duty of care and would have the power to levy fines among other remedies.

A future regulatory regime evolving from these early proposals may well encompass defamatory online content. The Canadian House of Commons proposal would expressly regulate online defamation by creating a duty:

> *…[t]o adhere to a code of practices that would forbid deceptive or unfair practices and require prompt responses to reports of harassment, threats and hate speech and require the removal of defamatory, fraudulent, and maliciously manipulated content (e.g. "deep fake" videos)*[594]

The Canadian proposal also contemplates a takedown regime for "manifestly illegal content" that would arguably include defamation.[595]

These regulatory initiatives are beyond the direct purview of the LCO and we take no position on their merit. Certainly they are contentious.[596] However, whether or not these proposals take hold, it is important to point out that some form of content regulation in the future seems likely and this may encompass defamatory content. This underscores the need for the LCO to refrain from overreaching in its recommendations and, instead, to narrowly target the notice and takedown regime to alleged defamatory content as a means of improving access to justice in defamation law. The recommendations in this chapter are intended to strike this balance.

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RECOMMENDATIONS: Notice and 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.



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RECOMMENDATIONS: Notice and Takedown Process (continued)

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.



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IX. ONLINE DISPUTE RESOLUTION

An important theme throughout the LCO's project has been the limitations of the formal court process in resolving the high volume, low value online defamation disputes proliferating in the internet age. At the heart of this Final Report are two recommendations designed to improve access to justice in these cases by looking beyond the court system. First, in chapter IV, the LCO recommends a notice regime for encouraging informal negotiation and resolution of both offline and online defamations claims before a formal court action may be launched. Second, in chapter VIII, the LCO recommends a notice and takedown process designed to address some online defamation complaints without the need for a court action. Of course, court actions must continue to be available as an option in all cases to preserve procedural fairness and the formal authority of the courts.[597]

In this chapter the LCO addresses another, complementary 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 their own resolution, 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. For example, the negotiations between a defamation complainant and publisher, encouraged by the notice regime recommended in chapter IV, might be structured through ODR. That said, the LCO stresses that the clear priority for procedural reform is a notice regime and takedown remedy. 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. Most of the discussion during the consultation process focused on a formal, government-created ODR tribunal, modeled on B.C.'s Civil Resolution Tribunal but adapted to defamation disputes. This is the model recommended by Emily Laidlaw in her LCO Issue Paper on this topic.[598] However, there is another, recently emerging alternative to an ODR tribunal that should be explored before deciding on the best avenue for reform.

Many online defamation disputes are already informally resolved through online complaints processes administered by intermediary platforms. In making decisions whether or not to take down disputed content, platforms wield enormous power – not only to resolve private disputes, but also to regulate online speech and, thereby, shape public participation in democratic culture.[599] Over the last year or so, there has been growing international pressure to ensure that these "new governors" are exercising their power to moderate content in accordance with international human rights standards.[600] A range of regulatory structures have been proposed with varying degrees of governmental involvement. All such initiatives remain preliminary. But one feature they tend to share is a call for transparency and accountability in the platform's decision-making process. And, in some cases, this is interpreted to require some degree of participation in the process by individual users, both those complaining of questionable content and those who posted it.

These recent regulatory proposals emphasize the public law dimensions of content moderation decisions. They are primarily directed at ensuring that "platform law" is implemented in accordance with freedom of expression.[601] However, these proposals may also have the incidental effect of structuring and formalizing the adjudication of defamation disputes by platforms. In this sense, they may operate as a form of *de facto* ODR mechanism. Therefore, this chapter also considers the possibility that future regulation of platform complaints processes will render a government-created ODR tribunal superfluous.

Section A discusses the potential for ODR generally to improve access to justice in online defamation disputes. In section B, the LCO endorses, in principle, Laidlaw's proposal for a government-created ODR tribunal dedicated to online defamation disputes. However, in section C, the LCO considers the recent global push for regulation of platform complaints processes and the extent to which this may, in the long term, overtake the role of any such government-created ODR mechanism.

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A. Potential for ODR to Improve Access to Justice in Online Defamation Disputes

Throughout this Report, the LCO has pointed out challenges involved in resolving online defamation disputes. The formal court system is often ill-suited to addressing these challenges. And even where the court system is able to accommodate the vagaries of online defamation disputes, there is strong evidence, both anecdotal and empirical, that many plaintiffs don't want what courts traditionally have to offer. The LCO heard in consultations that the primary goal of most plaintiffs is simply to have the defamatory post taken down as quickly as possible.

Therefore, alternative dispute resolution (ADR) is of particular interest in the context of online defamation. ADR has benefits over a court action in terms of remedial flexibility, speed of resolution, containment of reputational harm, erasure of online defamation and lower costs.[602] ADR also has the advantage of more easily accommodating cross-border disputes and of involving expert facilitators.[603]

ODR, a technology-driven form of ADR, was much discussed among stakeholders over the course of the LCO's project. ODR is currently in vogue as a means of alleviating some of the barriers to access to justice in the formal court system.[604] A groundbreaking Canadian initiative is the recent roll out of the Civil Resolution Tribunal in British Columbia.[605]

ODR is particularly useful in resolving disputes arising virtually, where the parties are not situated in the same geographic location. Compared to court actions, "ODR…better facilitates techno-legal solutions and reaches the online communities where the harm took place".[606] For example, ODR would be more likely than the court system to resonate with young people. Youth reportedly consider law to be a "last resort" for dealing with online reputational attacks. In their LCO Issue Paper, Professors Jane Bailey and Valerie Steeves recommend community-based responses to defamation for this reason.[607]

An ODR regime might adopt a restorative justice approach, promoting the rehabilitation of online attackers through reconciliation with their victims and the wider community. This approach would ideally allow for creative resolutions and would minimize the likelihood of repeat offences.[608]

An ODR regime might also be beneficial in addressing allegedly defamatory online reviews. The LCO heard in consultations concerns that a libel chill exists in the online review industry, with some consumers concerned about posting legitimate reviews or even being bullied by companies. An ODR platform could be designed to educate consumers and businesses about the public interest nature of consumer reviews and the possibility of a fair comment defence.

ODR might also be made available for complaints arising out of offline publications where the parties agree. Willingness to participate in ODR might be a factor relevant to assessing damages in any eventual court claim.

There are at least two challenges with ODR as a means of resolving online defamation disputes. First, ODR is most commonly employed in the resolution of small commercial transactional disputes. These tend to be straightforward and easily translatable into monetary settlements or awards. In contrast, defamation disputes often involve ongoing relationships and high emotion. They may be relatively legally complex and less adaptable to technology-assisted resolution.[609] Even where technology is able to structure the abstract factors at play in defamation disputes, the concern is that ODR may be too impersonal to lead to a resolution acceptable to the parties.[610]

However, most stakeholders consulted by the LCO believed that ODR could be successfully adapted to relationship disputes such as online defamation. For example, many platforms already have in place private ODR mechanisms for resolving user disputes involving reviews or ratings.[611]

A second challenge is that, unlike most commercial disputes, the parties to an online defamation dispute are unlikely to have a contractual relationship. This makes it difficult to enforce ODR as a dispute resolution mechanism binding both parties. What would prevent a publisher from ignoring the process? Many publishers post anonymously and there is no way to identify them without involving intermediary platforms. Furthermore, publishers may be outside the province and unwilling to submit to the jurisdiction. Publishers might have some incentive to participate in ODR in order to discourage

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the complainant from filing a court claim. However, avoiding a formal action is unlikely to be sufficient incentive for publishers who believe that they can hide behind a cloak of anonymity.

Again, however, this drawback to ODR in the defamation context should be surmountable. The government-created ODR tribunal discussed in the next section would make use of the contractual relationship existing between the intermediary platform hosting the disputed content and its users to bind the parties to ODR.

B. Government-Created ODR Tribunal

In assessing the potential for ODR to improve access to justice in online defamation disputes, it is important to distinguish between the different forms that ODR might take. In her LCO Issue Paper, Laidlaw discusses examples of company-led or private ODR, government-created ODR, and government-pushed ODR. Her recommendation is for government-created ODR, in part because it would ensure that principles of good regulation (transparency, accountability, proportionality, consistency and accessibility) would be respected.[612]

Government-created ODR is currently in operation in British Columbia. The Civil Resolution Tribunal (CRT) was created to resolve small claims (under $5000) and condominium disputes.[613] The CRT has been well-received by commentators in British Columbia and elsewhere.[614] Since its launch, the CRT's jurisdiction has been expanded to include motor vehicle accident claims up to $50,000 and society and cooperative association claims.[615] As of October 2019, user participation feedback indicated that 80% of CRT users felt that they were treated fairly throughout the process.[616]

Laidlaw recommends the introduction of an ODR system based on the CRT as a means of resolving high volume, low value online defamation claims.[617] This remedial option would exist alongside existing platform complaints processes and a new notice and takedown regime.

Laidlaw's recommended model would be voluntary for complainants and would emphasize informal resolution of disputes by agreement. Focus would be on the interests of the parties rather than their legal rights. Adjudication would be available where conciliation fails. No legal representation would be permitted at the early phases of diagnosing and negotiating a dispute, but legal representation would be permitted at the adjudication phase. The tribunal would be staffed by experts and decisions would be publicly available so that a jurisprudence might develop. Intermediaries would be required to provide a link to the ODR mechanism to Ontario users. Remedies would be crafted in response to the particular circumstances of the parties and could include a range of techno-legal solutions. Damage awards would be possible but not emphasized. An award would have the force of a court order and would be subject to appeal.

The panelists at the LCO's International Defamation Conference and many other stakeholders supported the creation of a government-created ODR tribunal.[618] This model would enjoy the benefits of ADR aligned with a quasi-judicial administrative tribunal for the adjudication of tough cases. A government model would ensure that legal principles and standards of procedural fairness were observed. Adjudication decisions would have the power of a court order, leading to legal certainty.

The problem of enforceability, discussed in the previous section, would be a particular challenge with this model. Without a contract governing the relationship between complainant and publisher, there would be no direct means of forcing a publisher to participate in ODR and be bound by the outcome. However, Laidlaw suggests that ODR could be indirectly enforced by requiring intermediary platforms to provide as a term of service that Ontario users participate in ODR where their dispute is not resolved by the platform's internal complaints process.[619]

A second challenge with government-created ODR would be in establishing its scope. Most people experiencing reputational harm online do not stop to consider whether that harm constitutes defamation, invasion of privacy, cyberbullying, revenge porn and/or online harassment. Although the ODR process may be geared to defamation complaints, the likelihood is that it would attract related complaints about other harmful online materials. Although such claims are outside the scope of the LCO's project, there is an apparent need for informal mechanisms to resolve these other disputes as well. It is possible that a single ODR tribunal could serve a more general function.

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A third challenge is in establishing the business case for a government-created ODR tribunal. Laidlaw acknowledges that the business case is currently unclear.[620] Certainly, on the costs side, establishing an ODR tribunal would be a relatively resource-intensive solution to the problem of online defamation.

Resource constraints aside, the LCO agrees with Laidlaw that a government-created ODR tribunal similar to the CRT has strong potential for improving access to justice in resolving online defamation disputes in Ontario. However, the regulation of online content disputes is a rapidly developing area and the LCO is concerned that new regulatory initiatives might have the eventual practical effect of supplanting a government-created ODR mechanism. We explore this possibility next.

C. Regulating Platform Complaints Processes as a De Facto ODR Mechanism

1. How Platform Complaints Processes Currently Work

Many intermediary platforms are currently involved in resolving disputes arising among their users. Formalized ODR mechanisms are used by major platforms such as eBay to resolve millions of user disputes annually.[621] Most of these disputes are transactional, involving non-payment by a buyer or failure to deliver by a seller. However, some of these are disputes over content such as user reviews.[622]

In addition to formalized ODR processes, many intermediary platforms also informally resolve disputes about user-generated content through internal complaints processes. User complaints are one method for triggering content moderation, that is, a determination by a moderator as to whether particular content violates the platform's internal guidelines or terms of service.[623] Platform complaints processes do not purport to be an ODR mechanism *per se*. A moderator assessing a user complaint does not typically consider evidence received from either the complainant or the user who posted the content. Indeed, the user who posted the content is not typically involved in the process or even notified of the complaint. However, platform complaint processes do provide a rough and ready solution to high volume, low value defamation claims and are "virtually the only way to resolve defamation disputes for some people".[624]

Large social media hosts, such as Facebook and Twitter, have devoted extensive resources to their complaints processes. For example, Facebook receives approximately 1 million requests to remove content daily and it employs roughly 30,000 moderators to process them.[625]

The guidelines or terms of service that platforms employ in deciding whether to take down content do not purport to be legal instruments. Rather, they are part of the contractual relationship between the platform and its users. Requiring users to agree to a code of conduct promotes a safe environment which, in turn, attracts users and furthers the site's commercial success.[626]

Content guidelines may encompass a wide spectrum of harmful content, ranging from misleading advertising to hate speech. Although legal terminology may not be used, guidelines often encompass content that, if subjected to a court action, would be characterized as defamatory.

Where a platform decides that content violates its guidelines, a range of internal enforcement tools may be triggered. Platforms may, at their discretion, remove the content or restrict the privileges of the user who posted the content. Some platforms have appeal processes.

2. Legal Limitations of Platform Complaint Processes

Currently, platform complaint processes are either entirely unregulated or subject only to rudimentary self-regulation. As they stand, they are entirely unsuitable as an ODR mechanism for improving access to justice in online defamation disputes. This is so for at least three reasons: the process involved, the principles applied and the (lack of) accountability achieved.

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First, the process applied by platforms in resolving user complaints is not a suitable stand-in for a legal process. As Tarleton Gillespie describes:

> *…human review must be handled fast. "Fast" here can mean mere seconds per complaint – approve, reject, approve – and moderators are often evaluated on their speed as well as their accuracy… To speed things along, and also for reasons of privacy, the images and posts are usually detached from their original material. Moderators are generally unaware of the identity of the user and are provided little of the surrounding context – the back and forth of a conversation, that user's previous posts, and so on. Users expect these judgments to weigh competing values, show cultural sensitivity, and appear to the user as fair and consistent. Instead, they are being distilled from their meaningful context and compressed by the weight of this enormous and endless queue of complaints.*[627]

These processes have few of the hallmarks of procedural fairness and none of the authoritativeness of a judicial decision.[628] Crucially, there is no attempt by the content moderator to evaluate the rights or even the interests of the parties or to give them an opportunity to participate. Laidlaw observes:

> *Principles of due process that we expect of a court system, such as notice, a right to be heard and to hear the case against you, transparency, a right to confront witnesses, and access to a neutral decision maker, aren't even notionally replicated in most company dispute resolution systems, particularly in the social networking context.*[629]

Furthermore, the vast and growing number of user complaints received by platforms means that they are increasingly being resolved through algorithms without human involvement. These processes may serve an important function, but it is not a legal function.[630]

Second, the terms of service or community guidelines applied by platforms making decisions about disputed content do not necessarily reflect legal principles. These guidelines may approximate legal principles against certain online harms such as some sexual content, graphic or violent content, harassment or trolling, hate speech, speech encouraging illegal activity and self-harm.[631] However, the ultimate goal of platforms is to regulate for their commercial interests. Coopting online complaints processes to serve as an ODR mechanism for online defamation would risk shifting the values of protection of reputation and freedom of expression "from what helps consumers to what helps corporations".[632]

To the extent that platform complaint processes do involve the application of legal principles, at least indirectly, these are unlikely to be Canadian legal principles. Most large platforms are global corporations with little connection to Canada or Canadian law. United States legal principles based on the First Amendment, or even Chinese legal principles, are more apt to be reflected in content moderation decisions. In defamation law, this distinction may have a significant impact on outcome.

Third, platform complaint processes are highly discretionary and unaccountable. A recent UK House of Lords Committee found that content moderation is often "ineffective" in removing illegal content and provides "little recourse" for a user seeking to reverse a decision.[633]

Even where there is some legal foundation for platform complaints processes, as is the case with de-listing requests under the European Union's "right to be forgotten" (RTBF), these are not accountable. According to 2018 Google transparency reports, only about two percent of Google's de-listing decisions were appealed to a national data protection authority.[634] This has led one commentator to conclude that "the main judge and architect of the RTBF is, as of today, Google itself".[635]

Therefore, the LCO agrees with Laidlaw's conclusion that current platform complaints processes do not provide the legal protection or procedural fairness necessary for improving access to justice in online defamation disputes.[636]

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3. Proposals to Regulate Platform Complaints Processes

The significance of content moderation decisions for public values such as freedom of expression, as well as the tremendous power that private platforms wield in this respect, has resulted in growing international pressure for government regulation. As part of this broader call for accountability, there have been various initiatives to improve the fairness of platform complaints processes. We discuss four examples:

Guidelines for "Right to be Forgotten" Decisions

A co-regulatory but non-binding model for structuring platform content decisions is the European Union guidelines for "right to be forgotten" (RTBF) de-listing requests.[637] Directed at search engines, the guidelines incorporate certain attributes of procedural fairness. These include requirements for making de-listing requests, reasons for decisions to refuse de-listing and avenues for appealing decisions. Importantly, publishers of content are generally not involved in the process. However, search engines may contact publishers where necessary "to get a fuller understanding about the circumstances of the case". The guidelines strongly encourage transparency in the decision-making process.
De-listing requests are privacy-based and would not typically involve defamatory content. And these RTBF guidelines emphasize public values over the specific interests of the parties to a content dispute. However, they do illustrate a general trend for regulating procedural fairness in content moderation decisions.

Facebook's Oversight Board

Facebook is in the process of developing a self-regulatory Oversight Board to supervise its content moderation practices and policies.[638] This is intended to be an independent board charged with guiding policy for and hearing appeals from Facebook's internal content moderation decisions. Facebook describes the board using the language of human rights law and administrative justice:

> *The purpose of the board is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies. The board will operate transparently and its reasoning will be explained clearly to the public, while respecting the privacy and confidentiality of the people who use Facebook… It will provide an accessible opportunity for people to request its review and be heard.*[639]

The Oversight Board Charter contemplates at least some rudimentary level of procedural fairness by allowing (in its discretion) users impacted by the content to make submissions.[640] Ultimately, however, the Board remains a corporate construct, subject to Facebook's commercial aims.[641]

Although Facebook's Oversight Board contemplates some adjudicative elements, it is probably not a promising model of ODR in the absence of a more direct focus on the interests of the parties.[642] Furthermore, it does not contemplate any supervisory role for government.

Social Media Councils

In 2019, Article 19 proposed the creation of voluntary social media councils as a multi-stakeholder accountability mechanism for platform content decisions. Councils would apply human rights principles in an "open, transparent, accountable and participatory forum".[643] One possible function of social media councils would be to adjudicate content disputes:

> *Individual users who are directly affected by a content moderation decision will be able to send a complaint to the Social Media Council, which will then decide whether in the particular circumstances of the case the decision made by the social media platform conformed to the requirements of international human rights standards.*[644]

Although this proposal remains in the study stage, the idea has attracted wide support.[645] However, others question whether any self-regulatory model can provide democratic legitimacy to content moderation.[646]

EU Directive on Copyright in the Digital Single Market

A co-regulatory approach to complaints about copyright infringement has been adopted by the European Union.[647] The Directive mandates that platforms implement a number of procedural safeguards to protect users from over-removal of

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content, including an "effective and expeditious complaint and redress mechanism" in respect of content disputes.[648] Complainants invoking this mechanism must justify their removal requests and platforms must use humans to review these requests. Furthermore, Member States are required to put into place "impartial out-of-court redress mechanisms for the further resolution of disputes.[649] This co-regulatory model may well operate as a *de facto* ODR mechanism.

None of these four examples, as currently formulated, are appropriate models for improving access to justice in online defamation disputes. First and foremost, with the exception of the EU Copyright Directive, each of these examples are voluntary models without the benefit of government standard-setting and oversight. Second, it is not yet possible to say whether any of these examples would offer the advantages of ODR. There are at least four concerns here:

- It is not clear that these models would fully engage with the private interests of the users (as opposed to applying public law principles). Except for the ADR mechanism contemplated by the EU Copyright Directive, none would require platforms to hear from both complainants and publishers in deciding whether content should be removed. [650]
- It seems unlikely that these models would offer users the same degree of control over their own dispute. Therefore, access to justice elements such as dispute avoidance and dispute containment would be missing.
- These models emphasize some elements of procedural fairness (notice to affected users, transparency of process, appeal rights) but pay less attention to other elements (the right to be heard).
- It is not clear that these models would offer a speedy, low cost resolution as would be possible under a dedicated ODR tribunal.

On the other hand, a regulatory model such as a social media council would potentially have some advantages over a government-created ODR tribunal:

- A social media council would likely be able to address multi-jurisdictional disputes more effectively than a government-created ODR tribunal;
- A social media council would operate within the contractual relationship between platforms and their users, thereby binding publishers to the process.
- Techno-legal remedies such as red-flags and the modulation of views could be directly implemented by the platform.[651]

It remains to be seen what form of platform regulation will take hold in the future. This issue lies beyond the mandate of the LCO in this project. However, it is possible that future regulation of platform complaints processes will supplant the need for a government-created ODR tribunal or, at least, overtake it for practical purposes. Although the LCO endorses ODR as a valuable complement to the other access to justice reforms recommended in this Final Report, it is premature to settle on the best form of ODR mechanism at this time. It is important that the rapidly developing regulatory environment be taken into account before moving forward on ODR.

RECOMMENDATION: 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.



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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.

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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.

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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:

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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.

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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.

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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.

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APPENDIX B – PROJECT TERMS OF REFERENCE

Issues to be Addressed

The LCO has adopted a broad approach to this project. We will re-examine many foundational principles of defamation law and the policies on which they are based with the goal of developing a new, principled conception of defamation law that makes sense in the internet age. The challenge for the LCO will be to balance competing principles and objectives in an appropriate and thoughtful manner.

Background

There are two catalysts for this project:

The first catalyst is the constitutional enshrinement of freedom of expression in the *Canadian Charter of Rights and Freedoms*. Over the past decades, incremental adjustments have been made to defamation law giving increased weight to freedom of expression. The LCO will consider whether these developments have gone far enough (or, alternatively, too far) in protecting freedom of expression given the countervailing interest in protection of reputation.

The second catalyst is the emergence of the internet. The internet represents the future of human written communications and is an indispensable lens through which the LCO will examine issues in this project.

Ontario courts and, indeed, courts throughout the world, have been gradually adapting defamation law principles to contemporary circumstances. However, legislative reform in Ontario has been limited and Ontario's *Libel and Slander Act* is now significantly outdated. Ontario has the opportunity to learn from legislative and policy developments in other parts of the world. For example, England and Wales engaged in an extensive defamation law reform process over several years that culminated with the 2013 enactment of a new *Defamation Act*. Although an important advancement, the new Act in many respects responds to local circumstances and specific problems in the existing UK law. Notably, the reform did not undertake a re-examination of defamation law principles within their modern social and technological context. Therefore, it is clear that there is both ample room and, indeed, a need for thoughtful, comprehensive legislative reform of Ontario defamation law in addition to incremental advances in the common law.

Themes and Contexts

The LCO's analysis in this project will be informed by a number of important themes and contexts.

- ***Social and Technological Implications of Internet:*** The internet represents a technological and social revolution with far-reaching implications for human communications generally, including the use of law to regulate reputational harm. It will be crucial in this project to have a strong understanding of how the internet and its various platforms and programs operate, as well as their resulting impact on freedom of expression, privacy and reputation.
- ***Charter Values:*** The balance between freedom of expression and protection of reputation continues to be the core issue underlying any reform of defamation law. This project will consider the balance between free speech and protection of reputation and if, or how, Ontario's defamation laws must adapt to meet changing social and cultural norms.
- ***Access to Justice:*** In this project, the LCO will develop recommendations that promote access to justice for both plaintiffs and defendants; the LCO will also consider dispute resolution mechanisms beyond court actions.

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- ***Globalization:*** Internet defamation has quickly become an international issue that transcends geographic and doctrinal boundaries. At the same time, defamation law is inherently grounded in local social norms and values around freedom of expression, reputation and privacy. Foreign developments will inform, but not determine the LCO's analysis.
- ***Defamation as a Form of Internet Speech:*** It is important to understand defamation law in the broader context as a tool for regulating internet content. There are numerous forms of offensive internet speech that the law attempts to regulate in a variety of ways, including cyberbullying, hate speech, breach of privacy, online harassment, the right to be forgotten and breach of copyright, among others.

Issues that the LCO May Address

The LCO has identified several issues and questions that may be addressed in the course of this project:

1. ***When is internet speech defamatory?***
2. ***Do defamation law's presumptions of falsity and damage remain appropriate?***
3. ***Are hyperlinks and other secondary forms of online communications forms of publication?***
4. ***When should internet intermediaries such as web hosts, search engines and internet service providers (ISPs) be liable for defamatory content posted by others?***
5. ***How should defamation law account for anonymous defamatory posts?***
6. ***Should the law continue to distinguish between media and other internet publishers?***
7. ***Should defamation law distinguish between types of plaintiffs?***
8. ***Should Ontario adopt a single publication rule?***
9. ***What are appropriate remedies for defamation actions in the internet age?***
10. ***Is there a need to harmonize Ontario law with the law in other provinces and countries?***

Issues Excluded from the Project Scope

The following issues are excluded from the scope of the project.

1. ***Criminal Defamation:*** Criminal defamation under section 300 of the *Criminal Code* is a matter of federal jurisdiction and outside the mandate of the LCO.
2. ***Related Claims Involving Internet Speech:*** Generally speaking, the LCO will not address other legal claims for harm caused by internet speech (such as the right to be forgotten and cyberbullying). However, these related claims may be indirectly relevant to the project as part of the context in which internet defamation operates. The LCO may examine breach of privacy claims involving disclosure or publication of information to the extent that these are inextricably linked with defamation claims.

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APPENDIX C – CONSULTATION PAPER QUESTIONS FOR CONSIDERATION

In November 2017, the LCO released the Defamation Law in the Internet Age Consultation Paper. A list of the questions for consideration from that paper is included here.

1. What lessons are to be learned from the law and law reform efforts of other jurisdictions on the issues in this project? How applicable are these lessons to the Ontario context?

2. Can or should defamation law reform in Ontario differentiate between the following and, if so, how:
   a) Traditional communications and internet communications,
   b) Reputational harm on the internet and reputational harm offline,
   c) Different forms of internet communications,
   d) Traditional media publishers, bloggers/citizen journalists and other internet publishers

3. Are there new or emerging technologies or issues that the LCO should consider when analyzing the impact of the internet on defamation? What considerations should the LCO take into account to ensure that our recommendations are likely to remain relevant as technology changes?

4. How is our understanding of freedom of expression interests, issues or expectations different in the internet era? What, if any, significance does this have for defamation law reform in Ontario?

5. Has our understanding of truth and falsity changed in the internet era and how should this affect defamation law reform in Ontario?

6. Are reputational or privacy interests, issues or expectations different in the internet age? If so, what significance does this have for defamation law reform in Ontario?

7. Would legislative reform of the test for defamatory meaning be appropriate or should this area of defamation law continue to evolve incrementally through case law? If a new test were adopted, what elements should be part of this test?

8. Should Ontario adopt a statutory definition of "publisher" that would require an intentional act of communicating specific words?

9. Should the statutory presumption of publication in newspapers and broadcasts be extended to some forms of internet publication?

10. Should the multiple publication rule be replaced with a statutory single publication rule, as in the UK? If so, what limitation period should be applicable to defamation claims?

11. Should a fault requirement be introduced into the tort of defamation in Ontario? If so, at what stage of the analysis should fault be considered?

12. Is the presumption of falsity in defamation law still appropriate? Should the law require plaintiffs to prove falsity?

13. Is defamation law's emphasis on the distinction between true and false communications still appropriate in the internet age?

14. Is the presumption of harm in defamation law still appropriate?

15. Should Ontario adopt a serious harm threshold similar to that adopted in the England and Wales *Defamation Act, 2013*?

16. Should the common law defences for defamation be reformed or codified as has occurred in the England and Wales *Defamation Act, 2013*?

17. What principles should be applied in adapting damages awards and injunctions to internet defamation?

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18. Should Ontario adopt legislation creating new remedies for defamation that more directly vindicate the reputation of a successful plaintiff and are responsive to the nature of internet defamation?

19. Should Ontario continue to maintain the distinction between libel and slander? If so, should internet communications be considered libel or slander?

20. Should corporations retain standing to sue for defamation in the internet age? Should they continue to be entitled to rely on the presumption of damage and presumption of falsity?

21. What evidence is there of libel tourism or inappropriate forum-shopping occurring in Ontario?

22. Does the current common law test for assuming jurisdiction strike an appropriate balance between protection of reputation and freedom of expression? Should Ontario adopt a statutory provision similar to s.9 of the England and Wales *Defamation Act, 2013* for multi-jurisdictional defamation actions?

23. Should the notice period in ss. 5(1) of the LSA be eliminated from Ontario law? If not, how long should the notice period be and how long should the publisher have to respond to the notice? Should notice/retraction be made available in relation to a broader range of publications?

24. Should the special limitation period in s. 6 of the LSA be eliminated so that all defamation claims are subject to the two year general limitation period in Ontario's *Limitations Act*?

25. What are the best options for reducing cost and complexity and promoting access to justice in defamation proceedings?

26. Is Rule 20 of the *Rules of Civil Procedure* an appropriate and sufficient mechanism for the preliminary hearing of issues in defamation proceedings? Should Ontario adopt UK-style preliminary issues hearings or summary disposal measures?

27. What impact has the PPPA had on the process and outcome of defamation lawsuits in Ontario? Does the PPPA achieve an appropriate balance between the interests of parties to defamation proceedings?

28. What is current practice on the use of juries on Ontario defamation trials? Should the right to a jury trial for defamation actions be limited in Ontario?

29. Does the current test for obtaining a Norwich order appropriately balance anonymous free speech, privacy interests, the value of a broad discovery process and the administration of justice? Would legislation addressing the identification of anonymous defendants be appropriate?

30. What principles should be applied in deciding whether to grant anonymization orders to plaintiffs in defamation proceedings in the internet age?

31. What impact does the evolution of privacy law have on defamation? Should the LCO consider statutory reform similar to New Zealand's *Harmful Digital Communications Act*?

32. What principles or factors should guide the analysis of intermediary liability and how should intermediaries be categorized for this purpose?

33. In what circumstances, if any, should internet intermediaries bear legal responsibility for defamatory content created by someone else?

34. Do recommendations 1 to 3 in the Laidlaw & Young LCO Issue Paper represent desirable reform in this area? Why or why not?

35. Should Ontario adopt legislative provisions regulating the role of internet intermediaries in relation to third party content?

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36. If so, what kind of regulatory regime is recommended:
    a) Liability-based regulation such as
        i. broad immunity from liability (as in s.230 of the US *Communications Decency Act*) or
        ii. a notice and takedown regime (as in the England and Wales *Defamation Act, 2013* or the EU *Directive*);

    b) Regulation based on statutory penalty such as
        i. a notice and notice regime (as in Canada's *Copyright Act*) or
        ii. a notice and notice plus regime (as in the Laidlaw & Young proposal).

37. In your experience how successful are online complaint processes at resolving disputes over offensive online content? What role, if any, should online complaint processes play as an extra-judicial tool for resolving online defamation disputes?

38. Should a statutory dispute resolution mechanism be made available for some defamation claims as an alternative to the court process? If so, what considerations are important to its design? Should specialized rules or procedures be developed for offensive content involving children?

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APPENDIX D – ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

Many organizations and individuals contributed to this project. The LCO has greatly benefited from their input.

Project Advisory Committee

The project's Advisory Committee provided crucial support and advice throughout the project. The Advisory Committee members were:

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

LSA Working Group

A working group of practitioners and experts advised the LCO on reforming specific provisions of the *Libel and Slander Act*:

- John Gregory, Retired General Counsel, Ministry of the Attorney General
- Brian MacLeod Rogers, BMR Law
- 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 canvased in the LCO's project. The recommendations and analysis in this 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.

LCO Issue Papers

The LCO benefited from extensive legal, comparative and interdisciplinary research in the form of LCO Issue Papers from the following experts:

- 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, *Is "Truthtelling" Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age.*

Electronic copy available at: https://ssrn.com/abstract=3565327

- 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.*

International Conference on Defamation Law Reform

The LCO hosted a conference in partnership with Professors Jamie Cameron and Hilary Young. The day involved five panel discussions with 21 speakers, as follows:

- Daithi MacSithigh (Conference Rapporteur), Queen's University Belfast
- Bram Abramson, Mozilla Foundation, Open Web Fellow
- Christina Angelopoulos, University of Cambridge, Faculty of Law
- Jane Bailey, University of Ottawa, Faculty of Law, Common Law Section
- Jamie Cameron, Osgoode Hall Law School, York University
- Giuseppina D'Agostino, Osgoode Hall Law School, York University
- Peter A. Downard, Fasken Martineau DuMoulin LLP
- Kathy English, The Toronto Star
- Trevor Farrow, Osgoode Hall Law School, York University
- Ethan Katsh, National Center for Technology and Dispute Resolution; University of Massachusetts (Amherst)
- Andrew Kenyon, University of Melbourne Law School
- Emily Laidlaw, University of Calgary, Faculty of Law
- Julia Lefebvre, Bersenas Jacobsen Chouest Thomson Blackburn LLP
- Madam Justice Wendy Matheson, Superior Court of Justice of Ontario
- Brian Rogers, Barrister, Toronto; Adjunct Professor, Ryerson University School of Journalism
- Paul Schabas, Blakes LLP
- Andrew Scott, London School of Economics
- Randall Stephenson, Ph.D. and author
- Darin Thompson, Ministry of Justice, British Columbia; Adjunct Professor, Osgoode Hall Law School and University of Victoria
- Hilary Young, University of New Brunswick, Faculty of Law
- Maanit Zemel, Zemel van Kampen LLP

RightsCon 2018

The LCO convened an expert panel at RightsCon Toronto in May 2018. The panel, *Reforming Intermediary Responsibility: Testing a Human Rights Centred Framework Beyond the Liability and Immunity Divide,* was made up of the following members:

- Sue Gratton, LCO Counsel and Defamation Project Head;
- Emily Laidlaw, University of Calgary, Faculty of Law;
- Hilary Young, University of New Brunswick, Faculty of Law;
- Paul Schabas, Blakes LLP;
- Joris van Hoboken, Vrije Universiteit Brussels;
- Michael Geist, University of Ottawa, Faculty of Law
- Bertrand de la Chapelle, Secretariat of the Internet & Jurisdiction Policy Network;
- Daphne Keller, Center for Internet and Society, Stanford University; and
- Sunita Bose, Change.org

Youth and Defamation Study

The LCO collaborated with Professor Hilary Young at University of New Brunswick, Faculty of Law and Professor Emily Laidlaw at University of Calgary, Faculty of Law on a qualitative study of young people and their experience with online reputation

Electronic copy available at: https://ssrn.com/abstract=3565327

and defamation. The LCO thanks the students of Professor Young and Professor Laidlaw who conducted these interviews and the young people who generously shared their experiences.

Focus Groups and Interviews

The LCO held focus groups and conducted interviews with a broad range of stakeholders from Ontario (from both urban and rural communities), across Canada and internationally. These included plaintiff and defence counsel, judges, defamation and technology law experts, legal organizations and government representatives. The LCO also consulted numerous individuals and organizations directly affected by defamation law, including complainants involved in defamation disputes, young people, traditional and new media, and internet-based companies.

In accordance with the LCO's Privacy Policy, the names of contributing individuals are not listed here. Focus groups included sessions with the following groups:

- Members of the Ontario Bar Association
- Members of Canadian Media Lawyers Association/Ad IDEM
- Plaintiff and defence counsel representatives in Ottawa
- Plaintiff and defence counsel representatives in Toronto
- Individuals who are or were defamation plaintiffs

Formal Submissions

Those listed below made formal submissions in response to the Consultation Paper:

- Canadian Broadcasting Corporation
- Canadian Media Lawyers Association/Ad IDEM
- Ontario Superior Court of Justice
- Charles Campbell
- City of Toronto's Clerk and Insurance Risk Management
- Toronto Police Services Board

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APPENDIX E – SUMMARY OF LCO ISSUE PAPERS

The LCO benefited from extensive legal, comparative and interdisciplinary research in the form of LCO Issue Papers from the following experts:

- **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*. Available online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf

  If an individual or company is defamed online, they have two options to resolve the dispute, absent a technical solution. They can complain to an intermediary or launch a civil action. Both are deficient for a variety of reasons. Civil litigation is often unsuitable given the nature of online communications (across different platforms, jurisdictions, involving multiple parties, and spread with ease), the length and cost of litigation, and the ineffectiveness of traditional remedies. Intermediary dispute resolution processes can sometimes be effective, but lack industry standards and due process, place intermediaries in pseudo-judicial roles, and depend on the changeable commitments of management. At its core, the problem is the high-volume, low-value, and legally complex matrix of online defamation disputes. In this paper, the author asks: Are there alternative ways to resolve disputes that would improve access to justice and resolution for complainants? The key to resolving some of these problems, the author argues, is revisiting the basic issue of what complainants want in the resolution of a defamation dispute and then connecting this with innovations in dispute resolution. Ultimately, the author recommends the creation of an online tribunal as a complement to traditional court action. In coming to this conclusion, the author explores various issues and proposals for reform, including the challenges wrought by online defamation, what defamation claimants want when they sue, the role of technology in resolving such disputes, streamlined court processes, online dispute resolution, and the regulatory role of intermediaries.

- **David Mangan,** *The Relationship between Defamation, Breach of Privacy and Other Legal Claims Involving Offensive Internet Content*. Available online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Mangan.pdf

  A comprehensive survey of privacy-related torts in Canada and the UK, as well as European data protection regulation. The author successfully ties together these disparate claims with the underlying point that the tort of defamation is inadequate on its own as a means of remedying reputational harm. The author includes thoughtful points about the strict liability nature of defamation, the nature of internet publication and the developing role of defamation in "tending a gate through which speech passes".

- **Karen Eltis,** *Is "Truthtelling" Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age. Available online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Eltis.pdf*

  The author argues for a move to a civilianesque test of "contextual reasonableness" for establishing defamation as more suited to the digital environment. She supports this with the observation that reputation (or reputational privacy as she puts it) is increasingly being understood in terms of "impression management" rather than the right not to be lied about. Impression is all about context. The author proceeds to examine the problems of anonymity and intermediary liability from this contextual perspective. She emphasizes the access to justice problem with anonymity and suggests that a finding of liability need not wait for the defendant to be unmasked. With respect to intermediary liability, she suggests that the contextual approach would favour liability where a sufficient degree of control over the content is established.

Electronic copy available at: https://ssrn.com/abstract=3565327

- **Emily B. Laidlaw** and **Hilary Young**, *Internet Intermediary Liability in Defamation: Proposals for Statutory Reform*. Available online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf

  Given the broad meaning of publication in defamation law, internet intermediaries such as internet service providers, search engines, and social media companies may be liable for defamatory content posted by third parties. This paper argues that current law is not suitable to dealing with issues of internet defamation and intermediary responsibility because it is needlessly complex, confusing, and may impose liability without blameworthiness. Instead, the paper proposes that publication be redefined to require a deliberate act of communicating specific words. This would better reflect blameworthiness and few intermediaries would be liable in defamation under this test. That said, intermediaries profit from content, and they have the capacity and flexibility to respond to defamation in a way that courts cannot. The paper therefore also proposes a regulatory framework called notice-and-notice-plus. This would require intermediaries to forward a notice of complaint to content creators, and only to remove content in limited circumstances.

- **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*. Available online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf

  This report is based on interviews that were conducted with 20 young people between the ages of 15 and 21 in Ontario during the winter of 2017. The purpose of the interviews was to explore young people's attitudes toward and experiences with online defamation, reputation and anonymity, including their opinions on the benefits and drawbacks of existing mechanisms for addressing online defamation. The study offers the following "takeaways" for defamation law reform:

  In an online world characterized by misinformation, alternative facts, non-consensual disclosures of personal information and images, and group-based hate, defamation law's focus on falsity and individual reputation, and its distinction between opinion and fact may weaken its contribution to reputational protection. Furthermore, legal protections for privacy are a critical aspect of reputational well-being and protection.

  Law reform efforts that provide more support for individual or community-based responses, improve accountability of social media platforms, and encourage educational approaches that enhance awareness of rights and responsibilities may provide more relevant support to young people dealing with reputational harm than civil litigation or criminal prosecution (except in the most serious cases).

  Interventions by social media platforms that affect the balance between free expression and other rights are matters of concern for public policymakers.

  In terms of legal process, anonymity may help to encourage young people who have been defamed to seek a legal remedy, and to help young people who have defamed to rehabilitate.

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APPENDIX F – SUMMARY OF LCO DEFAMATION LAW REFORM CONFERENCE

It has been said that almost every concept and rule in the field of defamation law has to be reconsidered in light of the Internet. The Law Commission of Ontario's "Defamation Law and the Internet: Where Do We Go From Here?" conference, held on May 3, 2018, considered whether or how defamation law should be reformed in light of fast-moving and far-reaching developments in law, technology and social values.

Topics discussed included defamation, online speech and reputation, the relationship between freedom of expression and privacy, whether or how internet intermediaries (such as Facebook or Google) should be responsible for online defamation, internet "content moderation", dispute resolution, and access to justice.

The conference was incredibly successful, with 21 speakers from Ontario and across Canada, United States, United Kingdom, Europe and Australia, sharing their expertise. Over 140 registrants, in person and via live webcast, contributed to the discussion. The LCO owes a special thanks to Professor Daithi MacSithigh for his role as Conference Rapporteur.

The LCO funded over 30 law students from a number of Ontario law schools to participate in the conference. The LCO is grateful to all these students for their role in live tweeting about the conference, preparing notes on each of the panels and contributing the following blogs:

Panel 1: Rethinking Defamation Law: The Setting for Reform

By Isabel Dávila, Student, Osgoode Hall Law School

The speakers for the panel titled 'Rethinking Defamation Law: The Setting for Reform', were, Jamie Cameron, professor at Osgoode Hall Law School, York University; Brian Rogers, Toronto barrister, and adjunct professor at Ryerson University's School of Journalism, and Andrew Scott, associate professor in Law at the London School of Economics.

Jamie Cameron began her intervention by explaining the need for setting a theoretical structure for defamation law if we are to reform it for the digital age and the need to consider 5 key points: nature of reputation, nature of defamation, concept of the community, principle of accountability and manageability challenge. Brian Rogers then criticized the current common law of defamation, particularly the presumption of harm, and the lack of a cap in damages. Finally, Andrew Scott referred to the possibility of innovative solutions and having to face the question of whether or not the legal forum is the appropriate forum to deal with defamation in the digital age.

Solutions are urgent, especially when it comes to the harm presumption, in order to protect the Charter right of freedom of speech. Online solutions such as the right to reply or mandatory corrections are highly practical, but we must be careful since the use of such in excess and untamed may cause even more of a chilling effect on freedom of expression. Undoubtedly, it is time for the legislature to take steps in correcting and reforming the law of defamation, especially if we are to catch up with the digital age in time.

Panel 2: The Harms and Values Underlying Defamation Law in the Internet Age

By Justin Khorana-Medeiros, Student, University of Toronto, Faculty of Law

What are the objectives of defamation law and how do those objectives overlap with privacy concerns? The conference's second panel held a spirited and insightful discussion on these questions. First, Professor Jane Bailey, University of Ottawa, presented her research regarding young Canadians' interactions with internet defamation. The interviewees offered frank commentary on the upsides and downside of anonymity, the way in which reputation differs depending on the social media platform, and their fears of being punished for youthful indiscretions by future employers.

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Professor Andrew Kenyon, University of Melbourne, overviewed his impressive comparative empirical work across both common and civil law jurisdictions, noting the high degree of variety in defamation and privacy jurisprudence. Dr. Kenyon brought out the important ways in which privacy and defamation are distinct yet often related interests; for instance, the defence of truth is clearly appropriate for one, and inappropriate for the other.

Dr. Randall Stephenson underlined the degree to which defamation is undertheorized across the common law world. Dr. Stephenson advocated reviving Biasi's theory of the 'Checking Value of the Press', which may, depending on the specific political-institutional context of a given nation state, call for a threshold as high as 'actual malice' or even 'absolute privilege' to protect press freedom.

While the panelists generally shared a consensus that plaintiffs should have to prove harm, Dr. Bailey sounded a note of caution, observing that a higher burden of proof on the plaintiff disadvantages poorer complainants (who rarely have access to justice via the tort of defamation to begin with). Several of the questions from the audience revolved around the right to be forgotten, which moderator Peter Downard noted involves not only defamation law, but equally a failure to regulate "Big Internet" – this requires us to determine whether companies like Google are more akin to publishers, or are merely "intermediaries".

Lunchtime Debate on Key Issues

By Emily OKeefe, Student, University of Windsor, Faculty of Law

The lunchtime panel consisted of three outstanding and engaging professionals: practitioners Paul Schabas and Maanit Zemel, and Kathy English, Public Editor of the Toronto Star. All three panelists raised questions about the inherent difficulties implicit in defamation law and the double-edged sword that is anonymity. On one side of the sword, Maanit Zemel spoke passionately about the power that anonymity can give us on the internet, allowing us to have almost a carte blanche to express our views. The problem emerges when we want to bring those who make defamatory statements to justice and are effectively blocked by what Maanit eloquently described as the "veil of anonymity." Kathy English brought to light the very different plight of those who wish to be forgotten on the internet, or to use the term she coined "unpublished." This raises several thought-provoking questions such as who has the right to delete a matter of public record, and if we exercise this right are we harming or helping the public? Interwoven through all three discussions was the notion that defamation is an expensive business.

Paul Schabas discussed the issues that arise when there is a clash of jurisdictions in defamation cases, peppering this conversation with examples of cases he has worked on and the lingering effects of the Van Breda decision. Maanit Zemel explained the incredible expense related to obtaining Norwich Orders and made a fascinating suggestion that independent tribunals should be set up to deal with identifying those online who post defamatory content to save time and money for plaintiffs. What I found personally interesting was the discussion surrounding the appropriate remedy in defamation cases and how this differs from classic civil litigation. While I agree that a monetary award is unable to truly repair the damage from defamatory statements, I can't help but wonder what other remedies the courts have the power to enforce. Each speaker did an exceptional job in outlining how reputation transcends the constraints of money, judicial action, and anonymity in today's modern world.

Panel 3: Responsibility for Defamation and the Problem of Intermediaries

By: Kiran Waterhouse, Student, University of Toronto, Faculty of Law

Throughout the conference, speakers described the Internet using a variety of metaphors. These ranged from understandings of the Internet as the sum of interactions between actors, to one notable description of it as an unattached, nebulous orb floating in cyberspace. Creative liberties aside, these descriptions highlight the fact that aspects of the Internet defy description because they are unlike anything that has come before. This theme was particularly relevant in Panel Three's discussion on the growing role of Internet intermediaries in defamation law.

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Panel Three, Responsibility for Defamation and the Problem of Intermediaries, was comprised of Professor Hilary Young from University of New Brunswick, Cambridge Lecturer Christina Angelopoulos, and Mozilla Open Web Fellow Bram Abramson. Professor Giuseppina D'Agostino acted as moderator. While each speaker tackled the issue of intermediaries using a different theoretical approach, there were two common themes that resonated across the panel. What is the nature of intermediaries' responsibility for defamatory content posted online, and what liability should they hold for this content?

The panel was clear in its conclusions that intermediaries should continue to play a facilitative function, and should not be presumed to be responsible as publishers for defamatory statements that pass through their control. Just as an illiterate printing-press operator's act of configuring his machine should not give rise to his own liability for the defamatory statements that emerge from the hot press, nor do we want to capture intermediaries for defamatory statements of which they have no knowledge or no intent to facilitate.

The solutions proposed by the panel revolved around a need for increased regulation. Ideally, this regulation would strike an appropriate balance between the interests of intermediaries, the complainant and the publisher, while also tackling some of the broader legal issues raised by online defamatory content.

Panel 4: Resolving Online Defamation in the Internet Age

By: Michael McNeely, Student, Osgoode Hall Law School

In the frontier of online defamation, it can seem as if we lack adequate policies and procedures to resolve conflicts. Even in the Wild West, there were "civil" rules of how to have a duel at high noon. In an engaging panel moderated by Professor Trevor Farrow, and including Professors Emily Laidlaw, Ethan Katsh, and Darin Thompson, we discussed potential ways of addressing defamation conflicts outside of the traditional court system.

As Professor Laidlaw expressed, traditional methods of dispute resolution take a very long time and are less able to keep up with events and concerns that need attention immediately (i.e. today's 8 AM posting of an unwanted image online may cause great reputational harm by the time I am able to go to court). Furthermore, people suing for defamation are less likely to want pecuniary damages, and as such, traditional litigation is not necessarily helpful. Professor Laidlaw proposes reform that allows for an online dispute resolution (ODR) tribunal to address these kinds of conflicts – with the technological capacity to address a large variety of defamation conflicts quickly and accurately. Professor Katsh and Darin Thompson illustrated two types of ODR (which they helped to create) – the eBay dispute resolution mechanism and the British Columbia Civil Resolution Tribunal, respectively.

I agree with the panel members that reform is sorely needed in this area. Solutions need to invoke confidence in the process amongst disputants. I spoke with a lawyer today who lost a client because of unfounded and vindictive reviews online, and was unsure of what process to follow to preserve her reputation and career. It is important that knowledge be consolidated within an easily-accessible forum and process, and why not have it online – after all, that is the terrain to which it will bring law and order.

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ENDNOTES

Chapter I

1 LCO Stakeholder Interview (8 December 2015).

2. *Haaretz.com v Goldhar*, 2018 SCC 28 [*Haaretz*], paras 144, 203; Rosa Marchitelli, "'A Year and a Half of Hell': Cutomers, Businesses Pay Price for Online Reviews", *CBC News* (26 October 2017), online: **https://www.cbc.ca/news/business/go-public-online-reviews-lawsuit-backlash-1.4369246;** Michaela Whitbourn, "NSW Pushes for Historic Overhaul of Defamation Laws", *The Sydney Morning Herald* (7 June 2018), online: **https://www.smh.com.au/national/nsw/nsw-pushes-for-historic-overhaul-of-defamation-laws-20180607-p4zk0k.html.**

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

4 **Australia:** Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),* (12 November 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf** [Draft Legislation]; Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),*Background Paper (December 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf** [Background Paper]; Australia Defamation Law Reform Working Group, *Review of Model Defamation Provisions*, online: https://www.justice.nsw.gov.au/defamationreview [Review].

Scotland: Scotland, *Defamation and Malicious Publication (Scotland) Bill* (3 December 2019), online: **https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20(Scotland)%20Bill/SPBill61S052019.pdf;** Scottish Law Commission, *Report on Defamation*, Scot Law Com No 248 (December 2017), online: **https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/.**

Ireland: Ireland Law Society Gazette, "Minister Pledges to Reform Defamation Law in 2020" (14 November 2019), online: **https://www.lawsociety.ie/gazette/top-stories/minister-pledges-to-reform-defamation-law-early-in-2020/.**

Northern Ireland: *Report pursuant to section 3(17-20) of the Northern Ireland (Executive Formation etc) Act 2019* (21 October 2019), online: **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840990/EF_Report_-_21_Oct.pdf;** Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016), online: **https://www.finance-ni.gov.uk/publications/review-law-defamation.**

5 Australia, Draft Legislation, note 4; Australia, Background Paper, note 4.

6 **England and Wales:** *Defamation Act 2013* (UK), c 26 [England and Wales *Defamation Act*].

7 The England and Wales approach to defamation law reform has been criticized for failing to promote access to justice. According to one commentator, the reform has been detrimental to the "man of the street" and has increased the cost of defamation claims. In his view, the reform has "done absolutely nothing to address the problem of online publishers and social networks": Kate Beioley, "BuzzFeed Legal Case Shows Dublin's Draw for Foreign Libel Claimants", *The Irish Times* (5 December 2019), online: **https://www.irishtimes.com/business/media-and-marketing/buzzfeed-legal-case-shows-dublin-s-draw-for-foreign-libel-claimants-1.4105676.** Also see, Andrew Scott, "'O! they have lived long on the alms basket of words': Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes" (2019) 56 OHLJ 80, 82-83.

8 *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 [CJA]; *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685, appeal heard and judgment reserved (25 November 2019) (SCC).

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

10 *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).

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

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12 UK, House of Lords and House of Commons, *Joint Committee on the Draft Defamation Bill,* Session 2010-12 (London: 12 October 2011), online: **https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/20302.htm** [Joint Committee Report].

13 *Haaretz,* note 2*; Éditions Écosociété Inc v Banro Corp*, [2012] 1 SCR 636 [*Banro*]; *Breeden v Black* [2012] 1 SCR 666 [*Black*].

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

15 PPPA, note 8.

16 The dangers of online defamation in the form of "deep fakes" are forcefully described by Robert Chesney and Danielle Keats Citron in "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2019) 107 California L Rev 1753.

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

18 See, in particular, the discussion on the perspectives underlying the LCO's work on this project: Law Commission of Ontario, *Defamation Law in the Internet Age Consultation Paper* (November 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [Consultation Paper], pages 19-20.

19 LCO, Defamation Law in the Internet Age, online: **http://www.lco-cdo.org/en/our-current-projects/defamation-law-in-the-internet-age/final-commissioned-papers/.**

20 LCO, Reforming Intermediary Responsibility: Testing a Human Rights Centred Framework Beyond the Liability and Immunity Divide, RightsCon 2018, online: **https://rightscon2018.sched.com/event/EHnu/reforming-intermediary-responsibility-testing-a-human-rights-centred-framework-beyond-the-liability-and-immunity-divide.**

21 LCO, Defamation Law and the Internet: Where Do We Go From Here? (3 May 2018), online: **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/.**

22 OHLJ Special Issue, Reforming Defamation Law in the Age of the Internet (2019) 56 Osgoode Hall Law Journal, online: **https://digitalcommons.osgoode.yorku.ca/ohlj/vol56/iss1/.**

Chapter II

23 *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).

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

25 Johathan Kroft, Ashley Kaufmann and others, "Frontier Justice: Protecting Reputations in the Age of the World Wide Web", in Mr Justice Todd L Archibald, ed, *Annual Review of Civil Litigation* (Thomson Reuters, 2019).

26 Jane Bailey and Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives", LCO Issue Paper (June 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf.** [Young People], 5, 78, 92. Youth interviewed during the LCO consultation process tended to equate disengagement from social media with social ostracization: LCO/University of Calgary Law School, *Youth and Defamation Study* (April 2017) and LCO/University of New Brunswick Faculty of Law, *Youth and Defamation Study* (April 2017) [Youth and Defamation Study].

27 *Libel & Slander Act*, RSO 1990, c L 12, [LSA].

28 LCO Stakeholder Interview (26 November 2015).

29 *Grant v Torstar*, note 24.

30 These reforms include the Supreme Court of Canada's introduction of the responsible communication defence in *Grant v Torstar*, note 24, reform to the fair comment defence in *WIC Radio*, note 24, as well as the introduction of anti-SLAPP legislation in the PPPA, note 24.

31 Karen Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age," LCO Issue Paper (July 2017) 26, online:

Electronic copy available at: https://ssrn.com/abstract=3565327

http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Eltis.pdf.

32 Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017), online: http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf [LCO Consultation Paper], 62-63, 65-67, 115-116.

33 Bailey and Steeves, Young People, note 26, 67.

34 *Grant v Torstar*, note 24; PPPA, note 24. The same emphasis on media law cases is evident in England and Wales defamation law reform to date.

35 In Hilary Young's empirical examination of Canadian defamation actions, she found that the percentage of defamation actions involving traditional media publications (as compared to non-journalistic publications) was significantly lower in the first decade of this century than in the 1970s. Today, the defendant in a defamation action is just as likely to be an individual blogger, tweeter or troll, as an established media outlet: Hilary Young, "The Canadian Defamation Action: An Empirical Study," (2017) 95 Can Bar Rev 591.

36 *Pritchard v Van Nes*, 2016 BCSC 686. The LCO does *not* suggest that defamation law can be divided in a binary way between media law cases and online personal attacks. These are simply two prominent paradigms among an infinite number of scenarios that might lead to a defamation claim.

37 *St. Lewis v Rancourt*, 2015 ONCA 513.

38 *AB v Bragg*, 2012 SCC 46. In our consultations with young people, the LCO heard several stories of reputational attacks involving the creation of fake social media accounts: Youth and Defamation Study, note 26.

39 The LCO was struck by the vulnerability of youth to online personal attacks. Although we recognize this unfortunate reality, the LCO's recommendations are not directed at particular vulnerable groups. Instead, we have sought to adopt legal principles that are sufficiently flexible to address any context.

40 *Baglow v Smith*, 2015 ONSC 1175.

41 The Dirty, https://thedirty.com.

42 LCO Stakeholder Interview (21 December 2017); LCO Stakeholder Interview (16 January 2018).

43 *Jones v Tsige*, 2012 ONCA 32; *Jane Doe 72511 v Morgan*, 2018 ONSC 6607; *Yenovkian v Gulian*, 2019 ONSC 7279.

44 LCO Consultation Paper, note 32.

45 David Mangan, "The Relationship Between Defamation, Breach Of Privacy And Other Legal Claims Involving Offensive Internet Content", LCO Issue Paper (July 2017), 20, online: http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Mangan.pdf. In their LCO Issue Paper, Bailey and Steeves reported that legal protections for privacy may be a critical component of protecting reputation: Bailey & Steeves, Young People, note 26, 92-93.

46 The Uniform Law Conference of Canada has established a subcommittee to develop uniform legislation addressing non-consensual disclosure of intimate images, online: https://www.ulcc.ca/images/stories/2018_pdf_en/2018ulcc0001.pdf. Online reputation and privacy was also the subject of a consultation process by the Office of the Privacy Commissioner of Canada (OPC), online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/completed-consultations/consultation-on-online-reputation/pos_or_201801/ [Online Reputation].

47 Andrew Kenyon, "Defamation, Privacy and Aspects of Reputation" (2019) 56 OHLJ 59.

48 OPC, Online Reputation, note 46. Also see Daphne Keller, "The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation" (2018) 33 Berkeley Tech LJ 287.

49 *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [PIPEDA].

50 Law Commission of Ontario, Submission to Office of the Privacy Commissioner of Canada Consultations (April 2018), online: https://www.priv.gc.ca/en/about-the-opc/what-we-do/consultations/completed-consultations/consultation-on-online-reputation/submissions-received-for-the-consultation-on-online-reputation/or/sub_or_28/.

51 Note that, in this Final Report, an online "publisher" is an individual who posts online

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content. Intermediaries who passively host third-party content will not be publishers under the definition of publication recommended in chapter VII below.

Chapter III

52 Matthew Collins, *Collins on Defamation* (2014: Oxford University Press) [Collins on Defamation], 3.

53 *Libel and Slander Act*, RSO 1990, c L 12 [LSA].

54 Ministry of the Attorney-General Advisory Committee, *Report on the Law of Defamation* (November 1990) [MAG Final Report].

55 *WIC Radio v Simpson*, 2008 SCC 40 [*WIC Radio*]; *Grant v Torstar*, 2009 SCC 61 [*Grant v Torstar*].

56 Peter A Downard, *The Law of Libel in Canada,* 4th ed (LexisNexis 2018) [Downard], 3-4.

57 *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 [CJA].

58 *Defamation Act 2013* (UK), c 26 [England and Wales *Defamation Act*].

59 Collins on Defamation, note 52, Preface, ix.

60 See, for example, Karen Eltis, "Is 'Truthtelling' Decontextualized Online Still Reasonable? Restoring Context to Defamation Analysis in the Digital Age", LCO Issue Paper (July 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Eltis.pdf** [Truthtelling], and Eric Descheemaeker, "Defamation Outside Reputation: Proposals for the Reform of English Law" (2010) 18 Tort Law Review 113.

61 *WIC Radio*, note 55; *Grant v Torstar*, note 55; *Crookes v Newton*, [2011] 3 SCR 269 [*Crookes*].

62 PPPA, note 57.

63 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

64 Our research and consultations did reveal significant *procedural* barriers to access to justice in these online cases, particularly where they involve anonymous communications. As a result, later in this Final Report, the LCO makes recommendations to provide greater protection for reputational interests in these matters.

65 A key exception is the LCO's recommendation for a narrower definition of publication to protect against unbounded defamation liability in the internet age. We address the common law doctrine of publication and its application to secondary publishers and publishers by omission, including internet intermediaries, in chapter VII.

66 LSA, note 53, s 2.

67 *Thorley v Kerry* (1812) 128 ER 367.

68 UK, *Report of the Committee on Defamation* (London: Her Majesty's Stationary Office, 1975), 18-19 [Faulks Committee Report].

69 Alberta, Manitoba, New Brunswick, Nova Scotia, PEI, Newfoundland, Yukon, Northwest Territories: Downard, note 56, 349.

70 ULCC, Uniform Defamation Act (1994), online: **http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/200-josetta-1-en-gb/uniform-actsa/defamation-act/384-defamation-act .**

71 The Law Reform Commission of British Columbia recommended that the distinction between libel and slander be abolished in its 1985 report: LRCBC, Report on Defamation, LRC 83 (October 1985). However, this recommendation was not taken up and the distinction continues to be observed in that province.

72 The distinction does not apply in Scots law. It has been abolished in Ireland but continues to apply in England, Wales and Northern Ireland: Collins on Defamation, note 52, 57-58.

73 See, for example, Collins on Defamation, note 52, 58.

74 LSA, note 53, s 16.

75 LSA, note 53, s 17.

76 See, for example, *Romano v D'Onofrio* (2005), 77 OR (3d) 583 (CA).

77 MAG Final Report, note 54.

78 *Grant v Torstar*, note 55, para 28.

79 Hilary Young, "But Names Won't Necessarily Hurt Me: Considering the Effect of Disparaging Statements on Reputation" (2011) 37 Queen's LJ 1 [But Names]; David Mangan, "The Relationship Between Defamation, Breach Of

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Privacy And Other Legal Claims Involving Offensive Internet Content", LCO Issue Paper (July 2017), 20, online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Mangan.pdf**, [Defamation, Privacy], 5-6.

80 *Baglow v Smith*, 2015 ONSC 1175, para 55.

81 Spencer Keys, "Reconceptualizing Reputation and Defamation for Cyber Speech: An analysis of Baglow v. Smith", Ad IDEM 2016 Freedom of Expression Writing Prize (September 11,2016), online: **https://canadianmedialawyers.com/wp-content/uploads/2019/05/Spencer_Keys_-_Ad_IDEM_Essay_Revised_2016_09_11.pdf** Gary Chan Kok Yew, "Reputation and Defamatory Meaning on the Internet: Communications, Contexts and Communities" (2015) 27 SALJ 694.

82 LCO Stakeholder Interview (21 December 2017).

83 LCO Stakeholder Interview (21 December 2017).

84 Online, the same statement may be transmitted to readers in very different locations, circumstances and cultures. Note, however, that abbreviations like LOL ("laugh out loud") as well as emojis 🙄 were created to fill in the contextual picture and assist with determining the meaning of online statements.

85 *Stocker v Stocker*, [2019] UKSC 17.

86 This is particularly evident from the interviews with youth conducted by Bailey and Steeves in their LCO Issue Paper: Jane Bailey and Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives," LCO Issue Paper (June 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf,** [Young People].

87 David Rolph, "The Ordinary, Reasonable Search Engine User and the Defamatory Capacity of Search Engine Results in *Trkulja v Google Inc* (2017) 39 Sydney L Rev 601, 609.

88 *Trkulja v Google LLC*, [2018] HCA 25.

89 *WIC Radio*, note 55, para 73; Young, "But Names", note 79, 27-29.

90 *WIC Radio*, note 55, para 78.

91 *Hill v Church of Scientology*, [1995] 2 SCR 1130, para 164 [*Hill*].

92 *Hill*, note 91, para 166.

93 See for example, Thomas Gibbons, "Defamation Reconsidered" (1996) 16 OJLS 587, 612.

94 Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),* (12 November 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf** [Australia Draft Legislation]; Scotland, *Defamation and Malicious Publication (Scotland) Bill* (3 December 2019), online: **https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20(Scotland)%20Bill/SPBill61S052019.pdf.**

95 England and Wales *Defamation Act*, note 58, s 1.

96 England and Wales *Defamation Act*, note 58, s 1.

97 *Lachaux v Independent Print Ltd*, [2019] UKSC 27.

98 Australia Draft Legislation, note 94, clause 7A.

99 David Rolph, "A Critique of the Defamation Act, 2013", (2016) 21 Communication Law 116 [Critique].

100 CJA, note 57, s 137.1.

101 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

102 *Bernstein v Poon*, 2015 ONSC 2125.

103 Mathilde Groppo, "Serious Harm: A Case Law Retrospective and Early Assessment" (2016) 8 Journal of Media Law 1; Iain Wilson and Tom Double, "Business as usual?"(2017) Inforrm Blog, online: **https://inforrm.org/2017/09/16/business-as-usual-the-court-of-appeal-considers-the-threshold-for-bringing-a-libel-claim-in-lachaux-v-independent-print-ltd-iain-wilson-and-tom-double/.** For an opposing view, see Nicola Cain, "Lachaux, Seriously limiting serious harm," (2017) Inforrm Blog, online: **https://inforrm.org/2017/09/14/lachaux-seriously-limiting-serious-harm-nicola-cain/.**

104 "[I]t is generally impractical for a claimant to seek out witnesses to say that they read the words complained of and thought the worse of the claimant": *Ames v. Spamhaus Project* [2015] EWHC 127 (QB).

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105 Cameron Doley and Alastair Mullis, *Carter-Ruck on Libel and Privacy*, 6th ed, (London, LexisNexis: 2010) [Carter-Ruck], 35.

106 Hilary Young, "'Anyone… in any medium'? The Scope of Canada's Responsible Communication Defence" in Andrew T Kenyon, ed, *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press, 2016) 17, 32 [Anyone]; Eric Descheemaeker, "Protecting Reputation: Defamation and Negligence" (2009) 29 OJLS 603 [Protecting Reputation].

107 Mangan, Defamation, Privacy, note 79, 10.

108 See our recommendation for a new narrower definition of publication in chapter VII below.

109 *Grant v Torstar*, note 55, para 61.

110 *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127 (HL), per Lord Nicholls [*Reynolds*].

111 *Grant v Torstar*, note 55, para 62.

112 *Grant v Torstar*, note 55, para 61.

113 Hilary Young, "Reynolds v Times Newspapers Ltd (1999)" in David Rolph, ed, *Landmark Cases in Defamation Law* (Hart Publishing, 2019) [Reynolds].

114 Eric Descheemaeker, "'A Man Must Take Care Not to Defame His Neighbour': The Origins and Significance of the Defence of Responsible Publication" (2015) 34 U of Queensland LJ 239, 263-264; Descheemaeker, "Protecting Reputation" note 106.

115 Eltis, Truthtelling, note 60.

116 See David Mangan's caution about moving to a more overt negligence standard for defamation: Mangan, Defamation, Privacy, note 79, 8.

117 *Hill*, note 91, paras 128-131.

118 Eric Descheemaeker, "Truth and Truthfulness in the Law of Defamation" in Anne-Sophie Hulin, Robert Leckey and Lionel Smith, eds, Les apparences en droit civil (Montreal 2015), 13.

119 David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 845, 865 [Libel].

120 Howarth, "Libel", note 119; Owen Gibson, "Express Newspapers forced to apologise to McCann family over Madeleine allegations" (19 Mar 2008), online: **https://www.theguardian.com/media/2008/mar/19/dailyexpress.dailystar.**

121 Faulks Committee Report, note 68, 36.

122 *Bank of British Columbia v Canadian Broadcasting Corp* (1995), 10 BCLR (3d) 201 (CA). The presumption continues to be applied: *Nazerali v Mitchell*, 2018 BCCA 104 [*Nazerali*], para 38.

123 *Berzovsky v Forbes Inc*, [2001] EWCA Civ 1251.

124 Gibbons, note 93. Also see the arguments summarized by David Milo in *Defamation and Freedom of Speech* (Oxford: Oxford University Press, 2008), 156-184.

125 Collins on Defamation, note 52, 654.

126 *Clancy v Farid*, 2018 ONSC 7482.

127 *Magno v Balita*, 2018 ONSC 3230.

128 Downard, *Libel*, note 56, 113.

129 LSA, note 53, s 22.

130 *Skafco Limited v Abdalla*, 2020 ONSC 136, para 61.

131 LCO Focus Group (7 March 2018).

132 *Hill*, note 91, para 143.

133 *Grant v Torstar*, note 55, para 30.

134 Downard, *Libel*, note 56, 168.

135 LSA, note 53, s 3.

136 LSA, note 53, s 4.

137 Even in 1990, the Ontario Ministry of the Attorney General Advisory Committee suggested that the fair and accurate report privilege be extended to all publications: MAG Final Report, note 54.

138 This conclusion is consistent with submissions received from the Toronto Police Services Board (12 June 2019) and City of Toronto's Insurance Risk Management Section and the City Clerk (14 June 2019).

139 *WIC Radio*, note 55, para 26.

140 *WIC Radio,* note 55, para 26.

141 Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016), online: **https://www.finance-ni.gov.uk/publications/review-law-defamation** para 2.19. Also see Scottish Law Commission,

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Report on Defamation, Scot Law Com No 248 (December 2017), online: **https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/,** para 3.14.

142 *WIC Radio*, note 55, paras 38-40.

143 *WIC Radio*, note 55.

144 *Skafco Limited v. Abdalla*, 2020 ONSC 136, para 61.

145 *WIC Radio*, note 55.

146 LCO Stakeholder interview (18 April 2018).

147 LCO Stakeholder interview (30 May 2018). This stakeholder felt that the answer lay in a better system for incentivizing settlement. See the LCO's recommendation for a new notice regime in chapter IV below.

148 M Jay Smith-Hayward, "The Unfairness of Fair Comment: How the Defence to Defamation Went Wrong in Canada and How to Fix It", Submission to the LCO (March 2018).

149 England and Wales *Defamation Act*, note 58.

150 England and Wales *Defamation Act*, note 58, Explanatory Notes.

151 *WIC Radio*, note 55, per LeBel J, paras 81-99. Rothstein J agreed with LeBel J.'s analysis on this point: para 109.

152 In the LCO's view, the objective "honest belief" requirement adds little to the fair comment defence. If an opinion is not motivated by malice and is based on a factual foundation, then surely there is someone who could honestly believe it. The objective "honest belief" requirement is also implicated in the prior defamatory meaning test. Recall that an opinion is only defamatory if a reasonable person would think less of the plaintiff as a result. But it is contradictory to conclude that a reasonable person would think less of the plaintiff if no one could honestly hold the opinion on the proven facts. Also see Young, "But Names", note 79; Steven Frankel, "Case Comment: *WIC Radio v Simpson*" (2009) 67 U Toronto Faculty Law Rev 93.

153 See, for example, *Gichuru v Pallai*, 2013 BCCA 60; *Weaver v Corcoran*, 2017 BCCA 160; *Awan v Levant*, 2016 ONCA 970; *Walsh Energy Inc v Better Business Bureau of Ottawa-Hull Incorporated*, 2018 ONCA 383.

154 *The Libel and Slander Amendment Act*, 1980, SO 1980, c 35, s 2; *Cherneskey v Armadale Publishers Ltd*, [1979] 1 SCR 1067.

155 *Grant v Torstar*, note 55. In England see *Reynolds*, note 110, and *Jameel v Wall Street Journal*, [2006] UKHL 44 [*Jameel*]. More recently, the UK test has been abolished and restated in the England and Wales *Defamation Act*, note 58. Section 4 creates the defence of publication on a matter of public interest. Among other differences, the UK defence extends to statements of opinion as well as fact. See generally, Paul Schabas & Adam Lazier, "Defamation Law in Canada and England: Emerging Differences", ch 6 in Weisenhaus &Young, eds, *Media Law and Policy in the Internet Age* (Hart, 2017).

156 *Grant v Torstar*, note 55, para 85.

157 *Grant v Torstar*, note 55, para. 86.

158 These include: a) the seriousness of the allegation; b) the public importance of the matter; c) the urgency of the matter; d) the status and reliability of the source; e) whether the plaintiff's side of the story was sought and accurately reported; f) whether the inclusion of the defamatory statement was justifiable; g) whether the defamatory statement's public interest lay in the fact that it was made rather than its truth ('reportage'); and h) any other relevant circumstances: *Grant v Torstar*, note 55, paras 110-126.

159 *Grant v Torstar,* note 55, para 96.

160 LCO Focus Group (7 March 2018).

161 LCO Stakeholder Interview (7 December 2015).

162 Young, "Anyone", note 106.

163 Young, "Reynolds", note 113.

164 Carter-Ruck, note 105, para 12.95.

165 Toronto Police Services Board, Submission to the LCO (12 June 2019).

166 England and Wales *Defamation Act*, note 58, s 6.

167 Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 Modern Law Rev 87 [Tilting], 98: "It is not obvious why [this limited category of academic speech] should be considered worthy of greater protection than is accorded to other forms of public interest speech."

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168 *Young v Toronto Star Newspapers Ltd* (2003) 66 OR (3d) 170, para 212, affirmed (2005) 77 OR (3d) 680 (CA).

169 Punitive damages are a distinct head of damages directed not at compensating the plaintiff's reputational harm but at punishing the defendant for reprehensible conduct: Raymond E Brown, *Defamation Law: A Primer*, 2d ed (Carswell, 2013), 363.

170 *Hill*, note 91; *Nazerali*, note 122.

171 Andrew Scott reviews the limitations of damages in securing vindication of a plaintiff's reputation in both the offline and online context in: Andrew Scott, "'O! they have lived long on the alms basket of words': Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes" (2019) 56 OHLJ 80 [O!].

172 David Potts, Cyberlibel, 2d ed., referring to Richard Peltz, "Fifteen Minutes of Infamy: Privileged Reporting and the Problem of Perpetual Reputational Harm" (2008) 34 Ohio Northern University Law Review 717 at 718-719.

173 Andrew Scott, "Ceci n'est pas une pipe: the autopoietic inanity of the single meaning rule" in Andrew T Kenyon, ed, Comparative Defamation and Privacy Law (Cambridge: Cambridge University Press, 2016), 52.

174 See, for example, *St Lewis v Rancourt*, 2015 ONCA 513; *Nazerali* note 122.

175 Judges have sometimes confused these tests. The LCO discusses the availability of interlocutory takedown orders below in chapter V.

176 Hilary Young, "Injunctions Paper", in draft, copies available from the author on request: **hyoung@unb.ca**.

177 *St Lewis v Rancourt*, 2015 ONCA 513, para 16. Also see *Astley v Verdun*, 2011 ONSC 3651.

178 England and Wales *Defamation Act*, note 58, s 13.

179 *Labourers' International Union of North America, Local 183 v Castellano*, 2020 ONCA 71.

180 Peter Downard, "The Defence of Responsible Communication" (2010) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 51, online: **https://digitalcommons.osgoode.yorku.ca/sclr/vol51/iss1/7.**

181 *Communications Decency Act*, 47 USC, ss 230

182 *Hassell v Bird*, 234 Cal Rptr 3d 867 (2018), cert denied, 139 S Ct 940 (2019).

183 LCO Stakeholder Interview (20 December 2017).

184 Chris Silver Smith, "Google thaws (a little) on defamation cases," (20 March 2017), online: **https://searchengineland.com/google-thaws-little-defamation-cases-271612.**

185 *Google Inc v Equustek Solutions Inc,* 2017 SCC 34. Also see *Cartier International AG v British Telecommunications*, [2018] UKSC 28.

186 Barry Sookman, "US Court Thumbs Its Nose at Supreme Court of Canada: *Google v Equustek*" (2018) 30 IPJ 375.

187 Barrick Gold Corp v Lopehandia (2004), 71 OR (3d) 416 (CA), para 75.

188 LSA, note 53, ss 3(7), 4(1).

189 LSA, note 53, ss 5(2), 9. Also see s 20.

190 See *Ayotte c Chiaramonte*, 2019 QCCS 851.

191 Scott, "O!", note 171; Mullis & Scott, "Tilting", note 167, 107.

192 John G Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 UBC L Rev 15, 25.

193 Flags might be ordered in the case of disputed content but this remedy is only effective so long as it is not overused: LCO Focus Group (25 January 2018).

194 LCO Focus Group (25 January 2018).

195 Canadian Medial Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

196 Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), para 3.75.

197 Charles Campbell, Submission to the LCO (19 October 2018).

198 England and Wales *Defamation Act*, note 58, s 12.

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199 *Turley v UNITE the Union & Anor*, [2019] EWHC 3547 (QB) at paras 187-188; On the other hand, the remedy may not be appropriate where there is evidence that publication of the judgment would not reach the users who read the original defamatory statement: *Monir v Wood*, [2018] EWHC 3525 (QB), paras 243-244.

200 Scottish Law Commission, note 141, para 6.44; Scott, note 141, para 2.125.

Chapter IV

201 *Libel and Slander Act*, RSO 1990, c L 12 [LSA], s 5.

202 *John v Ballingall*, 2017 ONCA 579, leave to appeal refused, 2018 CanLII 43780 (SCC) [*Ballingall*].

203 *JK v The Korea Times & Hankookilbo Ltd (The Korea Times Daily)*, 2016 ONCA 375.

204 Toronto Police Services Board Submission to the LCO (12 June 2019); City of Toronto's Insurance Risk Management section and the City Clerk Submission to the LCO (14 June 2019).

205 *Ballingall,* note 202; *Nanda v McEwan*, 2019 ONSC 125.

206 "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": *Shtaif v Toronto Life Publishing Co*, 2013 ONCA 405 [*Shtaif*], para 20.

207 LCO Focus Group (7 March 2018).

208 LCO Stakeholder Interview (9 January 2018).

209 LCO Focus Group (15 February 2018); LCO Stakeholder Interview (15 November 2017).

210 *Libel and Slander Act*, RSBC 1996, c 263 [BC Act]; *Defamation Act*, RSNB 2011, c 139 [NB Act]; ULCC, Uniform Defamation Act (1994).

211 *Defamation Act 2013* (UK), c 26, [England and Wales *Defamation Act*].

212 LCO Focus Group (7 March 2018).

213 LCO Focus Group (7 March 2018).

214 Charles Campbell, Submission to the LCO (19 October 2018).

215 *Limitations Act, 2002*, SO 2002, c 24, Sched B [Limitations Act].

216 UK House of Lords and House of Commons, *Joint Committee on the Draft Defamation Bill*, Draft Defamation Bill, Session 2010-12 (London, 12 October 2011), online: **https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf** [Joint Committee Report], 47. Also see, Andrew Scott, "'O! they have lived long on the alms basket of words': Enhancing Efficacy and Reducing Cost by Limiting the Role of Law and Lawyers in Defamation Disputes" (2019) 56 OHLJ 80 [O!] As of October 1, 2019, the England and Wales High Court has established a new Pre-Action Protocol for Media and Communications Claims, with the intent of encouraging the "early and appropriate resolution" of defamation and other media claims: **https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_def** [Pre-Action Protocol]. The LCO's recommended notice regime is intended as a less formal mechanism that would be more accessible to unrepresented complainants.

217 "Protection of reputation is conducive to the public good": *Reynolds v Times Newspapers Ltd*, [2001] 2 AC 127, 201.

218 Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),* (12 November 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf** [Draft Legislation]; Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),*Background Paper (December 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf** [Background Paper].

219 Australia, Background Paper, note 218, 13.

220 LawRight, Submission to Australia Review (30 April 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-lawright.pdf.** Also see Australian Taxpayer Alliance (ATA) Submission to Australia Review (3 May 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-aust-taxpayers-alliance.pdf.**

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221 LCO Focus Group (7 March 2018).

222 *Ballingall*, note 202, para 25.

223 The LCO's approach builds on the notice obligations recommended by Emily Laidlaw and Hilary Young, "Internet Intermediary Liability in Defamation: Proposals for Statutory Reform," LCO Issue Paper (July 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf** [Internet Intermediaries].

224 Note that the concept of publisher here and throughout this report refers to the LCO's recommended definition of publisher which involves the intentional publication of a specific expression: see chapter VII, below. Under this definition, internet intermediaries, acting in an intermediary role, are not publishers.

225 *Ballingall*, note 202.

226 Laidlaw & Young, Internet Intermediaries, note 223.

227 This last requirement as proposed by Laidlaw and Young was specifically intended to prevent abuse in relation to defamation notices served on intermediary platforms. However, the LCO recommends that it be included in all notices whether these are served on publishers or intermediary platforms (as discussed below). In both cases, this declaration operates as a check on abuse of the notice regime. See, for example, notice claims under the US copyright notice and takedown regime: Jennifer M Urban, Joe Karaganis, Brianna L Schofield, *Notice and Takedown in Everyday Practice* (American Assembly, 2016), 128.

228 Under the England and Wales Website Operators Regulation, a notice of complaint must set out, among other things the meaning attributed to the impugned statement, and elements of the statement which are factually inaccurate or opinions not supported by fact: The Defamation (Operators of Websites) Regulations 2013, SI 2013/3028, s 2.

229 England and Wales, Pre-Action Protocol, note 216.

230 See the Canadian Network Operators Consortium's brief discussing the need for a standardized form of notice under Canada's copyright notice and notice regime: Canadian Network Operators Consortium Inc (CNOC), Brief Submitted to INDU, House of Commons Statutory Review of the Copyright Act (20 August 2018), online: **https://www.ourcommons.ca/Content/Committee/421/INDU/Brief/BR10008277/br-external/CanadianNetworkOperatorsConsortiumInc-e.pdf.** Also see the Committee Report: Report of the Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act,* 42nd Parliament, 1st Session (June 2019), online: **https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf,** recommendation 25.

231 Emily Laidlaw, "Notice-and-Notice-Plus: a Canadian Perspective Beyond the Liability and Immunity Divide", Giancarlo Frosio (ed), *The Oxford Handbook of Intermediary Liability Online* (OUP, 2019).

232 LSA, note 201, ss 5(1).

233 Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, [Ontario Rules], Rules 16.01(1), 16.02, 16.03. The Rules do permit email service of other court documents in certain circumstances: Rules 16.01(4)(b)(iv) and 16.06.1.

234 Ontario Rules, note 233, Rule 16.04(1).

235 *Theralase Technologies Inc v Lanter*, 2020 ONSC 205 [*Theralase*]; *Burke v John Doe*, 2013 BCSC 964. Also see Patricia Barrett, "Facebook: a substitute for personal service,"(2015) Western University Report, online: **https://westernreport.fims.uwo.ca/index.php/facebook-a-substitute-for-personal-service/.**

236 LCO Focus Group (15 February 2018).

237 LCO Focus Group (15 February 2018).

238 Andrew C Budzinski, "Reforming Service of Process: An Access to Justice Framework" (2019) 90 U Colo L Rev 167.

239 Pew Research Center, Mobile Fact Sheet (12 June 2019), online: **https://www.pewresearch.org/internet/fact-sheet/mobile/.**

240 Pew Research Center, Social Media Fact Sheet (12 June 2019), online: **https://www.pewresearch.org/internet/fact-sheet/social-media/.**

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241 Angela Upchurch, "Hacking Service of Process: Using Social Media to Provide Constitutionally Sufficient Notice of Process," (2016) 38 UALR L Rev 559, 585.

242 *Theralase,* note 235, para 23.

243 John G Browning, "Your Facebook Status – Served: Service of Process Using Social Networking Sites," (2012) 2 Reynolds Ct & Media LJ 159, 164.

244 For example, service by email should be effective if the complainant and publisher have an online relationship and are in regular email contact.

245 Mark Donald, "Speaker's Corner: Rebalancing Defamation Law in an Online Age" (12 December 2016) Law Times, online: **https://www.lawtimesnews.com/archive/speakers-corner-rebalancing-defamation-law-in-an-online-age/262353.**

246 LCO Focus Group (15 February 2018). This is known as the "Streisand effect". See, for example, Sue Curry Jansen and Brian Martin, "The Streisand Effect and Censorship Backfire" (2015) 9 International Journal of Communication 656.

247 Honourable Justice David M Brown, "Red Block, Yellow Block, Orange Block, Blue: With So Much Competition, What Do We Do?" (2019) 38 Advocates' Journal 14.

248 LSA, note 201, ss 5(1).

249 Canadian Broadcasting Corporation (CBC), Submission to the LCO (29 March 2018).

250 CBC, note 249.

251 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

252 LCO Focus Group (1 March 2018).

253 LCO Focus Group (15 February 2018).

254 Similar notice periods have been described as "a limitation period within a limitation period": *Crimson v Toronto (City)*, 2010 ONCA 44, para 6. Also see Ontario Law Reform Commission (OLRC), *Report on Limitation of Actions* (1969), online: **https://digitalcommons.osgoode.yorku.ca/library_olrc/13,** 81.

255 Limitations Act, note 215.

256 OLRC, note 254, 84-85.

257 Uniform Law Conference of Canada (ULCC), Proceedings of the Sixty-Ninth Annual Meeting (August 1987) Appendix C, Defamation, Report of the Saskatchewan Commissioners, 142-143.

258 Law Reform Commission of British Columbia (LRCBC), *Report on Defamation*, LRC 83 (October 1985), 62.

259 Québec, *Press Act*, CQLR c P-19, s3; Saskatchewan, *Libel and Slander Act*, RSS 1978, c L-14, s 15.

260 A similar provision has been proposed by Australia's Council of Attorneys-General in its proposed Model Defamation Act: Australia, Background Paper, note 218, 14.

261 LSA, note 201, ss 5(2).

262 LSA, note 201, ss 9, 20.

263 LCO Focus Group (7 March 2018).

264 The LSA provides, among other conditions, that a defendant offer a "full and fair" retraction in order to take advantage of the limitation of damages provision. LSA, note 201, ss 5(2).

265 Peter A Downard, *The Law of Libel in Canada,* 4th ed (LexisNexis 2018) [*Libel*], 297-303.

266 Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), paras 3.34, 3.75.

267 The LSA generally requires that a retraction be published within three days of receiving the notice: LSA, note 201, ss 5(2).

268 Notice to the intermediary platform would not be necessary if the notice can be served on the publisher directly and the complainant does not seek a takedown remedy.

269 LSA, note 201, s 8.

270 For a discussion of anonymity as a component of online privacy, see *R v Spencer*, 2014 SCC 43. Also see *Warman v Wilkins-Fournier*, 2010 ONSC 2126 (Div Ct), para 17.

271 In fact, one of the functions of some intermediary platforms, in particular social networks, is to act as "identity providers", "allowing users to authenticate around the web using a single account": Riordan, note 266, para 2.62.

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272 Laidlaw & Young, Internet Intermediaries, note 223, 98-99.

273 The Supreme Court recently upheld an order allowing Rogers to recover the reasonable costs of complying with a Norwich order: *Rogers Communications Inc v Voltage Pictures*, 2018 SCC 38. In a subsequent hearing, the Federal Court found that a fee of $67.23 plus HST was reasonable in the circumstances: *Voltage Pictures v. Salna*, 2019 FC 1047.

274 CIPPIC, Brief Submitted to INDU (14 December 2018), 5, online: **https://cippic.ca/sites/default/files/File/CIPPIC_Copyright_Review_Submission-Dec2018.pdf.**

275 LCO Stakeholder Interview (9 January 2018).

276 An analogous provision in the UK *Electronic Commerce (EC Directive) Regulations 2002* requires service providers to provide details, including an email address, by which users can contact them directly and effectively: UK SI 2002 No 2013, ss 6(1)(c); Riordan, note 266, para 3.49.

277 Laidlaw & Young, Internet Intermediaries, note 223.

278 *Theralase*, note 235.

279 Of course, the platform may choose not to comply with the court order. This private international law quandary is further discussed in Chapter III above.

280 *Copyright Act*, RSC 1985, c C-42, ss 41.26 (1)(b).

281 LSA, note 201, s 6.

282 Limitations Act, note 215, s 4.

283 *Shtaif*, note 206; *Ballingall*, note 202; *Torgerson et al v Nijem*, 2019 ONSC 3320 [*Torgerson*].

284 A recent Alberta Court of Appeal decision upheld the current multiple publication rule but with a dissent favouring the single publication rule: *AARC Society v Canadian Broadcasting Corporation*, 2019 ABCA 125, leave to appeal refused 2019 CanLII 99449 (SCC).

285 The Supreme Court of Canada has recognized three purposes to limitation periods: the certainty, evidentiary and diligence rationales: *Pioneer Corp v Godfrey*, 2019 SCC 42 [*Pioneer*], para 47.

286 See, for example, *Churchill v State of New Jersey* (2005), 876 A (2d) 311 (Sup Ct of NJ, App Div) [*Churchill*], and the discussion in *Shtaif*, note 206, paras 27-29

287 England and Wales *Defamation Act*, note 211, s 8.

288 *Churchill*, note 286, 316, as quoted in *Shtaif*, note 206, paras 27-29.

289 LCO Stakeholder Interview (26 January 2016); Canadian Media Law Association/Ad IDEM, Submission to the LCO (13 April 2018); Canadian Broadcasting Corporation, Submission to the LCO (29 March 2018).

290 LCO Focus Group (15 February 2018).

291 England and Wales *Defamation Act*, note 211. This provision has also been recommended for Northern Ireland and Scotland: Andrew Scott, *Reform of Defamation Law in Northern Ireland: Recommendations to the Department of Finance* (2016), online: **https://www.finance-ni.gov.uk/publications/review-law-defamation,** para 2.110; Scotland, *Defamation and Malicious Publication (Scotland) Bill* (3 December 2019), s 32, online: **https://www.parliament.scot/S5_Bills/Defamation%20and%20Malicious%20Publication%20(Scotland)%20Bill/SPBill61S052019.pdf;** Scottish Law Commission, *Report on Defamation*, Scot Law Com No 248 (December 2017), online: **https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/,** 70.

292 The Explanatory Notes accompanying the England and Wales *Defamation Act* provides the following example of a "materially different" publication: "where a story has first appeared relatively obscurely in a section of a website where several clicks need to be gone through to access it, but has subsequently been promoted to a position where it can be directly accessed from the home page of the site, thereby increasing considerably the number of hits it receives.": *Defamation Act*, Explanatory Notes, para 63. *Gatley on Libel and Slander*, 12th ed (2017: Sweet & Maxwell), para 6.8, notes that another possible example is an open access publication of an academic article that was previously only available by subscription.

293 In Ontario, see *Torgerson*, note 283. For the England and Wales approach, see *Deman v Associated Newspapers Ltd & Ano*, [2016] EWHC 2819 (QB).

294 *Pioneer*, note 285.

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295 Limitations Act, note 215, s 4.

296 *Novak v Bond*, [1999] 1 S.C.R. 808, paras 65-67; *Pioneer*, note 285.

297 Charles Campbell, Submission to the LCO (19 October 2018).

Chapter V

298 Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [LCO Consultation Paper], 78-79.

299 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018); LCO Focus Group (7 March 2018).

300 LCO Focus Group (25 January 2018).

301 Ontario Superior Court of Justice, Submission to the LCO (9 April 2018).

302 *Skafco Limited v Abdalla*, 2020 ONSC 136, paras 45-46. Other recent online defamation decisions granting summary judgment include *Labourers' International Union of North America, Local 183 v Castellano*, 2019 ONSC 506, appeal allowed in part on other grounds, 2020 ONCA 71, and *Zoutman v Graham*, 2019 ONSC 2834.

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

304 *1704604 Ontario Ltd v Pointes Protection Association*, 2018 ONCA 685, appeal heard and judgment reserved, 12 November 2019 (SCC) [*Pointes Protection*]; *Able Translations Ltd v Express International Translations Inc*, 2018 ONCA 690 [*Able*]; *Armstrong v Corus Entertainment Inc*, 2018 ONCA 689 [*Armstrong*]; *Platnick v Bent* 2018 ONCA 687, appeal heard and judgment reserved, 12 November 2019 (SCC) [*Platnick*]; *Fortress Real Developments Inc v Rabidoux*, 2018 ONCA 686 [*Fortress*]; *Veneruzzo v Storey*, 2018 ONCA 688 [*Veneruzzo*].

305 *Pointes Protection*, note 304; *Platnick*, note 304.

306 PPPA, enacting CJA ss 137.1 – 137.5, note 303. Note that the legislation applies not just to defamation actions but to any proceeding arising out of an expression on a matter of public interest.

307 *United Soils Management Ltd v Mohammed*, 2017 ONSC 4450, affirmed 2019 ONCA 128, leave to appeal dismissed, 2019 CanLII 94476 (SCC) [*United Soils*].

308 *United Soils,* note 307.

309 CJA, note 303, ss 137.1(1).

310 CJA, note 303, ss 137.1(3).

311 CJA, note 303, ss 137.1(4)(a).

312 CJA, note 303, ss 137.1(4)(b).

313 LCO Focus Group (25 January 2018).

314 *Protection of Public Participation Act*, SBC 2019, c 3.

315 See, for example, *New Dermamed Inc v Sulaiman*, 2019 ONCA 141 and *United Soils,* note 307.

316 Interestingly, a 2018 Law Times poll found that 67% of respondents thought that the Ontario anti-SLAPP legislation was working well, **https://www.lawtimesnews.com/poll/ruling-on-anti-slapp-legislation/668.**

317 That is, the "gate" of judicial scrutiny.

318 As of February 4, 2020, Canlii.org's Ontario database contained 111 decisions citing s.137.1 of the *Courts of Justice Act.*

319 *Armstrong,* note 304, para 90.

320 *Pointes Protection,* note 304*; Platnick*, note 304.

321 *Pointes Protection*; note 304; *Armstrong*, note 304*; Platnick*, note 304; *Veneruzzo*, note 304; *Fortress*, note 304; *Able*, note 304. The Supreme Court of Canada appeal decisions from *Pointes Protection* and *Platnick* remain pending as of February 4, 2020.

322 *Grant v Torstar*, 2009 SCC 61.

323 *Pointes Protection*, note 304; *Fortress*, note 304. However, the *Pointes Protection* case was not a classic SLAPP since it presented as a breach of contract case.

324 *Armstrong*, note 304; *Able*, note 304.

325 *Platnick*, note 304.

326 *Veneruzzo*, note 304.

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327 *Platnick*, note 304, para 99.

328 *Platnick*, note 304, para 98; *Pointes Protection*, note 304, paras 102-103.

329 *Pointes Protection*, note 304; *Platnick*, note 304.

330 *Levant v Day*, 2019 ONCA 244; *Montour v Beacon Publishing Inc*, 2019 ONCA 246; *United Soils*, note 307; *Bondfield Construction Company Ltd v The Globe & Mail Inc*, 2019 ONCA 166; *Lascaris v B'Nai Brith Canada*, 2019 ONCA 163; *New Dermamed Inc v Sulaiman,* 2019 ONCA 141; *Raymond J Pilon Enterprises Ltd v Village Media Inc,* 2019 ONCA 981; *Ontario College of Teachers v Bouragba*, 2019 ONCA 1028.

331 *Amorosi v Barker*, 2019 ONSC 4717, para 53.

332 See Carrie Swiggum, "No Harm in Free Speech," (14 May 2019) Canadian Bar Association, online: **https://nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2019/no-harm-in-free-speech.**

333 *Canada (Human Rights Commission) v Canadian Liberty Net*, [1998] 1 SCR 626 [*Liberty Net*]; *Canada Metal Co Ltd v Canadian Broadcasting Corp* (1975), 7 OR (2d) 261; *Rapp v McClelland & Stewart Ltd*, (1981) 34 OR (2d) 452 [*Rapp*].

334 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

335 *Bonnard v Perryman*, [1891] 2 Ch 269.

336 Robert J Sharpe, *Injunctions and Specific Performance* (2d ed 1992 (loose-leaf)) paras 5.40-5.70, quoted in *Liberty Net*, note 333, para 49.

337 *Liberty Net*, note 333, para 49, quoting from *Champagne v Collège d'enseignement général et professionnel (CEGEP) de Jonquière*, [1997] RJQ 2395; *R v Canadian Broadcasting Corporation*, 2018 SCC 5 [*R v CBC*], paras 19-20.

338 *Asselin v McDougall*, 2013 ONSC 1716; *Fortress Real Developments Inc v Franklin*, 2018 ONSC 296; *Green v Associated Newspapers*, [2004] EWCA Civ 1462 [*Green*]; *Australian Broadcasting Corporation v O'Neill*, [2006] HCA 46. Also see Matthew Collins, *Collins on Defamation* (2014: Oxford University Press) [Collins on Defamation], para 20.02.

339 *Beidas v Pichler (Legassé)*, 2008 ONSC (Div Ct) paras 47-54; *Romana v The Canadian Broadcasting Corporation*, 2017 MBQB 163.

340 *Bagwalla v Ronin*, 2017 ONSC 6693 (Div Ct); *Canadian National Railway Company v Google Inc*, 2010 ONSC 3121; *Peoples Trust Company v Atas*, 2016 ONSC 5911; *Busseri v Doe*, 2012 ONSC 5385; *Clancy v Farid*, 2018 ONSC 7482; *Elaschuk v Thelwell*, 2019 ONSC 1998; *The College of Pharmacists of Manitoba v Jorgenson*, 2019 MBQB 87; *Slater Vecchio LLP v Arvanitis*, 2019 BCSC 1156; *Richardson v Hunter*, 2014 BCSC 1960; *Holden v Hanlon*, 2019 BCSC 622; *Olds College v Huxley,* 2019 BCSC 2111.

341 *Boyd v Automattic Inc*, [2019] FCA 86, para 21: "Given the ease of publication of defamatory matters on the internet, it may be questioned if principles going back to Bonnard remain appropriate in a world in which reputations can be damaged in an instant. Cases such as the present may lead policy makers to consider whether the Courts should be given a larger capacity to make pull down orders in respect of matters published in the virtual world pending the determination of a proceeding brought in circumstances such as that which Mr Boyd has placed before the Court." Also see *Tansey v Gill*, [2012] IEHC, 24: "Life has changed in that regard since the arrival of the Internet…and it seems to me that whatever judicial hesitation has existed in the matter of granting an interlocutory injunction to restrain publication pending trial should be eased in order to provide an effective remedy for any person in this State who is subjected to unscrupulous, unbridled, scurrilous and defamatory material published on a website which can, without any editorial control by the host of the website, seriously damage him or her either in his/her private or business life. In my view, the ready availability of such a means of defaming a person by any person who for any reason wishes to do so has such a capacity to cause insult and immediate and permanent damage to reputation means that the Courts should more readily move to restrain such activity at an interlocutory stage of the proceedings in these types of proceedings, particularly where an award of damages is considered likely to provide an empty remedy."

342 *St Lewis v Rancourt*, 2015 ONCA 513.

343 *Clancy v Farid*, 2018 ONSC 7482.

344 LCO Focus Group (15 February 2018).

345 *Ironside v Delazzari*, 2014 ONSC 999. The action was commenced in 2007 and only resolved in 2014 after the defendant passed away.

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346 *Magno v Balita*, 2018 ONSC 3230. For further examples of online personal attacks causing reputational harm, see *St Lewis v Rancourt*, 2015 ONCA 513 and *Zoutman v Graham*, 2019 ONSC 2834. *Zoutman v Graham* raises the concern that anti-SLAPP motions may be used by defendants in cases of egregious personal attacks to further delay judgment in these matters.

347 See, for example, Hilary Delany, "Prior Restraint Order and Freedom of Expression: Towards a Unified Approach?" (2005) 40 Irish Jurist 148; *Green*, note 338.

348 *PNM v Times Newspapers*, [2017] UKSC 49, para 19.

349 *Rapp*, note 333, para 12.

350 Andrew Scott, "An Unwholesome Layer Cake: Intermediary Liability in English Defamation and Data Protection Law," in David Mangan & Lorna E Gillies, eds, *The Legal Challenges of Social Media* (Cheltenham, UK: Edward Elgar, 2017) 242; *CN Railway v Google*, 2010 ONSC 3121, paras 31-32.

351 *RJR Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311.

352 *Liberty Net, note 333*.

353 *R v CBC,* note 337, para 15.

354 *R v CBC,* note 337, para 17.

355 As one court reasoned, "[t]he object of the exercise must surely be to assess the likelihood of a plaintiff succeeding at trial. That is dependent both on what a plaintiff must show in order to succeed and what a defendant must demonstrate in order to make out a defence": *Seafarers' International Union of Canada v International Longshore and Warehouse Union Canada, Local 400*, 2009 BCSC 1269, para 22 [*Seafarers*]. Also see *Kent v Martin*, 2012 ABQB 507. Analogous is the two elements of the preliminary merits test in the anti-SLAPP legislation discussed above.

356 *Saskatchewan (Human Rights Tribunal) v Whatcott*, 2013 SCC 11 [*Whatcott*].

357 This would allow for interlocutory takedown orders to be enforced against intermediary platforms in cases involving unidentifiable publishers: *Canadian National Railway Co v Google Inc*, 2010 ONSC 3121; In respect of summary judgement, see Theralase *Technologies v Lanter,* 2020 ONSC 205 [*Theralase*].

358 *Labourers' International Union of North America, Local 183 v Castellano*, 2020 ONCA 71.

359 See, for example, the cost provisions applicable to anti-SLAPP motions: CJA, note 303, ss 137.1(7), 137.1(8).

360 *Grant v Torstar*, note 322, para 51.

361 For example, the proposed interlocutory takedown test would not be met on the facts of *Seafarers' Union* where the publication was part of a "legitimate battle underway for the hearts, minds and wallets of union members": *Seafarers,* note 355, para 23.

362 Jamie Cameron, "Giving and Taking Offence: Civility, Respect, and Academic Freedom", in James Turk, ed, *Academic Freedom in Conflict: The Struggle Over Free Speech Rights in the University* (Canadian Association of University Teachers, 2014).

363 *R v Oakes*, [1986] 1 SCR 103; *R v Lucas*, [1998] 1 SCR 439 [*Lucas*]; *Whatcott*, note 356; *Crouch v Snell,* 2015 NSSC 340.

364 *Lucas*, note 363, para 48.

365 But see *Theralase*, note 357.

366 Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, [Ontario Rules], Rule 31.10.

367 *Norwich Pharmacal Co v Customs and Excise Commissioners*, [1974] AC 133 (HL).

368 *Warman v Wilkins-Fournier*, 2010 ONSC 2126. A slightly different version of the test has been applied in the copyright context*: Rogers Communications v Voltage Pictures*, 2018 SCC 38 [*Voltage*], para 18.

369 There has been debate about the evidentiary standard required here. Subsequent courts have found that a *bona fide* claim is sufficient to seek a Norwich order: *Voltage,* note 368, para 18; *1654776 Ontario Ltd v Stewart*, 2013 ONCA 184. However, in the context of mandatory injunctive relief, the Supreme Court of Canada has held that the more stringent strong *prima facie* standard of proof is appropriate: *R v CBC*, note 337.

370 LCO Focus Group (25 January 2018); LCO Focus Group (1 March 2018); LCO Stakeholder Interview (11 February 2016); LCO Stakeholder Interview (28 November 2017).

371 Ontario Superior Court of Justice, Submission to the LCO (9 April 2018).

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372 LCO Consultation Paper, note 298; LCO Focus Group (1 March 2018); LCO Stakeholder Interview (8 December 2015).

373 *Voltage*, note 368, para 41.

374 In the copyright context, see *ME2 Productions v Doe*, 2019 FC 214.

375 LCO Focus Group (15 February 2018); LCO Stakeholder Interview (20 December 2017).

376 *Copyright Act*, RSC 1985, c C-42, s 41.26(1)(b).

Chapter VI

377 *Club Resorts Ltd. v Van Breda* 2012 SCC 17 [*Van Breda*]; *Banro Corp v Éditions Écosociété Inc,* 2012 SCC 18 [*Banro*]; *Black v Breeden*, 2012 SCC 19 [*Black*].

378 *Haaretz.com v Goldhar*, 2018 SCC 28, reversing 2016 ONCA 515 [*Haaretz*].

379 *Haaretz,* note 378.

380 Cote J. wrote the majority decision in *Haaretz* for herself, Brown and Rowe JJ. Karakatsanis, Abella and Wagner JJ each wrote separate concurring reasons. McLachlin CJ wrote dissenting reasons on behalf herself, Moldaver and Gascon JJ.

381 See *Google Inc v Equustek Solutions Inc*, 2017 SCC 34.

382 *Van Breda*, note 377, para 90.

383 *Haaretz*, note 378, paras 28-31.

384 *Haaretz*, note 378, para 43.

385 *Haaretz*, note 378, Cote J at para 44.

386 *Haaretz*, note 378, para 28.

387 *Haaretz*, note 378, paras 32, 47.

388 *Haaretz*, note 378, para 48.

389 *Van Breda*, note 377, para 112.

390 *Van Breda*, note 377, para 105.

391 The majority rejected the "most substantial harm" test for determining the applicable law on the basis that the evidence and submissions before the court were not sufficient to ground the creation of a new legal test: *Haaretz,* note 378, paras 91-93.

392 *Haaretz*, note 378, para 90.

393 *Haaretz*, note 378, para 105.

394 *Haaretz*, note 378, para 106.

395 *Haaretz*, note 378, para 113.

396 *Haaretz*, note 378, para 119.

397 *Haaretz*, note 378, para 198.

398 *Defamation Act 2013* (UK), c 26 [England and Wales *Defamation Act*], s 9; *Wright v Ver*, [2019] EWHC 2094.

399 UK House of Lords and House of Commons, *Joint Committee on the Draft Defamation Bill*, Session 2010-12, Report (London: 12 October 2011), online: **https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf** [Joint Committee Report].

400 *Haaretz*, note 378, paras 144, 203.

401 *Young v New Haven Advocate*, 315 F 3d 256 (4th Cir 2002).

402 Sara Solmone, "The Access-Based Jurisdictional Principle in Internet-Related Cases" (2017: GigaNet: Global Internet Governance Academic Network, Annual Symposium).

403 Abella J goes on in *obiter* to suggest that "most substantial harm" also be applied in addressing the issue of jurisdiction: *Haaretz,* note 378, paras 120 etc. The LCO does not agree with these *obiter* comments.

404 *Haaretz*, note 378, para 100.

405 The exception is municipal corporations which are precluded from suing in defamation: Hilary Young, "Rethinking Canadian Defamation Law as Applied to Corporate Plaintiffs" (2013) 46 UBC Law Rev 529 [Rethinking], 539.

406 A distinction is recognized only when it comes to damages. Corporations can only suffer damage in respect of their commercial interests. Therefore, corporations may be awarded general damages but not aggravated damages which are intended to remedy harm to feelings*: Barrick Gold Corp v Lopehandia* (2004), 71 OR (3d) 416 (CA).

407 See, for example, Young, "Rethinking", note 405, and David Howarth, "Libel: Its Purpose and Reform" (2011) 74 MLR 859. Young, and others

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taking this position, focus on eliminating the standing to sue of "for profit" corporations. Most do not dispute the current entitlement of "not-for-profit" corporations to sue in defamation law. Similarly, the LCO's discussion in this section focuses on "for-profit" corporations.

408 England and Wales *Defamation Act,* note 398, ss 1(2). This is consistent with the "serious harm threshold" applied to individual plaintiffs in ss 1(1) of that Act. See the discussion in chapter III above.

409 The proposed amendments to Australia's Model Defamation Act would clarify that independent contractors count as employees for the purpose of the legislation. The draft legislation would also adopt England & Wales' "serious financial loss" threshold for corporations: Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),* (12 November 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/consultation-draft-of-mdaps.pdf** [Draft Legislation]; Australia Council of Attorneys-General, *Model Defamation Amendment Provisions 2020 (Consultation Draft),*Background Paper (December 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-final-background-paper.pdf** [Background Paper].

410 Canadian Media Lawyers Association/Ad IDEM, Submission to the LCO (13 April 2018).

411 Howarth, note 407, 873.

412 Young, "Rethinking", note 405, 551.

413 *Lysko v Braley* (2006), 79 OR (3d) 721 (CA).

414 The tort of injurious falsehood will not always be more protective of free speech. David Rolph points out that corporations are more likely to be granted interlocutory injunctive relief under a malicious falsehood claim, thereby resulting in corporations "stopping speech altogether": David Rolph, "A Critique of the Defamation Act, 2013: Lessons For and From Australian Defamation Law Reform", Sydney Law School Legal Studies Research Paper (December 2017) [Critique].

415 Rolph, "Critique", note 414, 7.

416 This connection between individual and business reputation is not necessarily restricted to small businesses: *Malak v Hanna*, 2019 BCCA 106, paras 78-79.

417 In the "McLibel case" (*McDonald's Corporation v Steel & Morris*, [1997] EWHC QB 366), McDonald's sued two individuals for defamation in a leaflet criticizing the company. McDonald's succeeded in the action but spent an estimated £10 million in legal costs over the course of a two and a half year trial; all for a damages award of £60,000: **https://www.theguardian.com/law/2019/jul/08/landmarks-in-law-mclibel-and-the-longest-trial-in-british-legal-history.** See, also, Erik Descheemaeker, "Three Errors in the Defamation Act, 2013" (2015) 6 JETL 24, 29 [Three Errors].

418 England and Wales *Defamation Act*, note 398, ss 1(2). A similar provision has been proposed in Scotland: *Defamation and Malicious Publication (Scotland) Bill*, SP Bill 61 s 1 (2 December 2019). The Joint Committee Report preceding the England and Wales Act intended the "serious financial loss" threshold to address "the inequality of financial means between the corporation and the publisher": Joint Committee Report, note 399, 57. The England and Wales Act has been criticized for distorting the rhetoric of defamation law by using the definition of defamation as the vehicle for restricting a corporation's right to sue: Descheemaeker, "Three Errors", note 417, 30. This criticism is warranted. The Act has the effect of continuing protection for corporate reputation in defamation law, but merely restricting the scope of this protection to more extreme cases of loss. Although this approach arguably takes care of the "McLibel" problem (note 417 above), it perpetuates confusion as to the purpose of defamation law.

419 See chapter V above.

420 Australia, *Model Defamation Provisions,* 2005, clause 9.

421 The proposed reforms would clarify that employees include independent contractors. The reforms would further restrict the standing of small corporations to sue in defamation by adding a "serious financial loss" threshold as in England and Wales: Australia, Draft Legislation, note 409, sections 7A, 9.

422 Rolph, "Critique", note 414.

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423 Ontario Anti-SLAPP Advisory Panel, *Report to the Attorney General* (Toronto: Ministry of the Attorney General, 28 October 2010), para 63, online: **https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html.**

424 LCO Focus Group (25 January 2018); LCO Stakeholder Interview (20 January 2016); LCO Stakeholder Interview (30 May 2018).

425 Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [LCO Consultation Paper], 89-90.

426 Charles Campbell, Submission to the LCO (19 October 2018).

427 Apparently, there is also an initiative within the profession to develop procedural guidelines governing anonymization motions: LCO Stakeholder Interview (28 November 2017).

428 Ontario Superior Court of Justice, Submission to the LCO (9 April 2018).

429 *Bruyea v Canada (Veteran Affairs)*, 2019 ONCA 599 [*Bruyea*], para 18.

430 *Bruyea*, note 429.

431 LCO Focus Group (15 February 2018).

432 Kim Gould, "Small Defamation Claims in Small Claims Jurisdictions: Worth Considering for the Sake of Proportionality" (2018) 41 UNSWLJ 1222.

433 LCO Stakeholder Interview (26 January 2016); LCO Focus Group (25 January 2018); LCO Focus Group (1 March 2018).

434 LCO Focus Group (1 March 2018).

435 LCO Focus Group (25 January 2018); LCO Focus Group (7 March 2018).

436 Ontario, Ministry of the Attorney General, News Release, "Ontario Making It Faster, Easier, More Affordable to Settle Small Claims" (23 October 2019).

437 See, for example, Jon Pinkus, "Expanding Small Claims Court Will Not Increase Access to Justice", The Star (24 July 2019), online: **https://www.thestar.com/opinion/contributors/2019/07/24/expanding-small-claims-court-will-not-increase-access-to-justice.html.**

438 LCO Stakeholder Interview (13 December 2017).

439 *Libel and Slander Act*, RSO 1990, c L 12 [LSA], s 21.

Chapter VII

440 Daithí Mac Síthigh, "The Road to Responsibilities: New Attitudes Towards Internet Intermediaries"(2019) Information & Communications Technology Law, DOI: 10.1080/13600834.2020.1677369.

441 *Gatley on Libel and Slander*, 12th ed (Sweet & Maxwell, 2017), para 6.10.

442 Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017), 45-50, online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [LCO Consultation Paper]; Emily Laidlaw & Hilary Young, "Internet Intermediary Liability in Defamation: Proposals for Statutory Reform", LCO Issue Paper (July 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf** [Intermediary Proposals]; also see, Emily B Laidlaw and Hilary Young, "Internet Intermediary Liability in Defamation," (2019) 56 OHLJ 112 [Intermediary OHLJ].

443 *Defamation Act, 1996* (UK) c 31 [*Defamation Act 1996*], s 1; *Defamation Act, 2013* (UK) c 26 [*Defamation Act 2013*], ss 5, 10.

444 *Crookes v Newton*, 2011 SCC 47 [*Crookes v Newton*].

445 Tarleton Gillespie, *Custodians of the Internet* (Yale University Press, 2018), 189; David Kaye, *Speech Police* (Columbia University Press, 2019), 116.

446 Jan Oster, "Communication, Defamation and Liability of Intermediaries" (2015) 35 Legal Stud 348.

447 Oster, note 446.

448 Marshall McLuhan, *Understanding Media* (1964: McGraw-Hill Education), quoted by Oster, note 446.

449 Emily B Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility*, (Cambridge, 2015).

450 Jaani Riordan adopts the term "internet intermediary" in part for its neutrality. "It reflects that fact that some services may be

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intermediaries properly called, while others may act as primary authors or intervene in wrongdoing in deliberate and calculated ways": Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), para 2.08.

451 See, for example, Jack M Balkin, "Free Speech is a Triangle" (2018) 118 Columbia L Rev 2011 [Triangle]; Michal Lavi, "Taking out of Context" (2017) 31 Harv JL & Tech 145.

452 Riordan note 450.

453 Riordan, note 450, para 2.41.

454 Riordan, note 450, chapter 2, section 3.

455 Riordan refers to user-created content, note 450; Jennifer M Urban, Joe Karaganis, Brianna L Schofield, *Notice and Takedown in Everyday Practice* (American Assembly, 2016), 50.

456 Lavi, note 451.

457 Some platforms encourage defamatory user content as part of their business model and there is a good argument that they should be directly responsible for it. But these are the exceptions.

458 Laidlaw and Young point out the advantages that intermediaries have over courts in regulating content. Specifically, intermediaries are better able to manage the high volume, low value nature of many complaints, the anonymity of many posters and jurisdictional problems: Laidlaw and Young, Intermediary Proposals, note 442, 80. Also see Jack Balkin's distinction between old school and new school speech regulation: Balkin, "Triangle", note 451.

459 It is important to keep in mind that, in contrast with the major platforms that are front and center in the public's attention, many platforms are small and have limited resources. Law reform must take into account the diversity of intermediaries and not unduly stifle technological innovation.

460 *Crookes v Newton*, note 444, para 18.

461 *Byrne v Dean*, [1937] 1 KB 818.

462 *Crookes v Newton*, note 444, para 20.

463 *Bunt v Tilley*, [2006] EWHC 407 [*Bunt*], para 23; *Crookes v Newton*, note 444, para 21.

464 Laidlaw & Young, Intermediary Proposals, note 442; Laidlaw & Young, "Intermediary OHLJ", note 442.

465 In England and Wales, statutory reforms have tended to perpetuate the confusion generated by the common law: Defamation Act 1996, note 443, ss 1(1), England and Wales *Defamation Act 2013*, note 443, ss 5, 10.

466 Laidlaw & Young, Intermediary Proposals, note 442, 1. Jack Balkin has conveyed the breadth of internet intermediaries in the following description: "The hallmark of the digital age is a revolution in the infrastructure of free expression. That infrastructure includes the domain name system (DNS), Internet protocols, technological standards for storage and transmission of information, the Internet backbone, broadband networks and broadband companies, web-hosting companies, and cloud services for storing, creating, displaying, and transmitting documents. It includes a wide variety of platforms and social media for creating, publishing, transmitting, and sharing content. It includes hardware platforms: computers, tablets, and especially smartphones, which have become all-purpose information and communication devices. It includes software applications of all types, including both systems that are open (like Linux and its variants including Apache and Android) and closed (like Apple's iOS system for phones and tablets). It includes distributed and networked systems of cameras, face-recognition systems, sensory-input devices, and information-collection devices. Finally, it includes a range of auxiliary services that support digital communication: (1) search engines, without which most information would be lost; (2) payment companies like PayPal, MasterCard, and Visa, who facilitate transactions with digital speakers; and (3) advertisers, who support and subsidize much of the Internet's free platforms, content production, and applications.": Jack M Balkin, "Old School/New School Speech Regulation" (2014) 127 Harv L Rev 2296 [Old School], 2303-2304.

467 Laidlaw & Young, Intermediary Proposals, note 442, 1. This argument has also been made by Eric Descheemaeker before the Scottish Law Commission, *Report on Defamation*, Scot Law Com No 248 (December 2017), online: **https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/,** paras 4.12, 4.13. Others have argued that the common law concept of publisher continues to provide a

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suitable framework for assessing the legal liability of internet platforms with some modifications: Gary Chan Kok Yew, "Search Engines and Internet Defamation: Of Publication and Legal Responsibility," (2019) 20 Computer Law & Security Review: The International Journal of Technology Law and Practice, online: **https://doi.org/10.1016/j.clsr.2019.01.002.**

468 *Crookes v Newton*, note 444; *Niemela v Malamas*, 2015 BCSC 1024.

469 *SOCAN v CAIP*, 2004 SCC 45; *Bunt*, note 463; *Tamiz v Google Inc*, [2013] EWCA Civ 68.

470 Laidlaw & Young, note 442, 35; *Weaver v Corcoran*, 2015 BCSC 165, para 284, appeal allowed on other grounds 2017 BCCA 160 [*Weaver*]; *Roy v Ottawa Capital Area Crime Stoppers*, 2018 ONSC 4207, paras 40-41.

471 Andrew Scott, "An Unwholesome Layer Cake: Intermediary Liability in English Defamation and Data Protection Law" in David Mangan & Lorna E Gillies, eds, *The Legal Challenges of Social Media* (Cheltenham, UK: Edward Elgar, 2017), [Layer Cake], 223.

472 Laidlaw & Young "Intermediary OHLJ", note 442, 118.

473 Laidlaw & Young, Intermediary Proposals, note 442, 85.

474 Laidlaw & Young, Intermediary Proposals, note 442, 87.

475 Oster, note 446, page 356.

476 *Crookes v Newton*, note 444

477 *Crookes v Newton*, note 444, para 36.

478 Scott, "Layer Cake", note 471, 228, quoting Balkin, "Old School", note 466, 2309.

479 Laidlaw & Young "Intermediary OHLJ", note 442, 142, quoting from Martin Husovec, "Accountable, Not Liable: Injunctions Against Intermediaries" (2016), [unpublished, archived at Tilburg Law and Economic Center], 9.

480 Laidlaw & Young "Intermediary OHLJ", note 442, 142.

481 Lavi, note 451, 162: "The internet is fundamentally different from traditional media, both in its architecture and in its applications. Consequently, policymakers must address the normative standard of liability for intermediaries who disseminate users' content in comparison to traditional categories of liability."

482 The famous US decision, *New York Times v Sullivan*, 376 US 254, is an example. In Canada, see *Teskey v Canadian Newspapers Co* (1989), 33 OAC 383 (CA) where a community newspaper was held to be the publisher of a defamatory ad drafted and paid for by a local activist even though the staff didn't read the content.

483 Partly this argument for equating publishers and platforms is an argument of moral responsibility. Partly it is a plea for better control of the phenomenon of harmful content proliferating online. In both respects, it echoes the current global debate about platform accountability for hate speech and fake news more broadly. However, it is important to keep in mind the contextual differences between harmful online content generally and the narrower, relatively nuanced legal concept of defamatory speech.

484 For newspapers, the opportunity to publish is a limited resource. Since not everything can be published, it is necessary for newspapers to vet content proactively. Platforms are not subject to any such limitations.

485 Jeff Jarvis, "Platforms Are Not Publishers" The Atlantic (10 August 2018), online: **https://www.theatlantic.com/ideas/archive/2018/08/the-messy-democratizing-beauty-of-the-internet/567194/.**

486 Clay Shirky, *Here Comes Everybody: The Power of Organizing Without Organization* (2008) 81, 98, as quoted by Brent Skorup and Jennifer Huddleston, "The Erosion of Publish Liability in American Law, Section 230, and The Future of Online Curation" (2020) Oklahoma Law Rev (forthcoming).

487 Visual Capitalist, Infographic: What Happens in an Internet Minute in 2019?, online: **www.visualcapitalist. com; https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute/;** Zephoria Digital Marketing, The Top 20 Valuable Facebook Statistics – Updated January 2020, online: **https://zephoria.com/top-15-valuable-facebook-statistics/.**

488 Scott, "Layer Cake", note 471, 235.

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489 Ivar A Hartmann, "A New Framework for Online Content Moderation" (2019) Computer Law & Security Review, **https://doi.org/10.1016/j.clsr.2019.105376.**

490 Balkin, "Old School", note 466, 2310.

491 See, for example, *Kaschke v Gray*, [2010] EWHC 690 (QB) [*Kaschke*] and *Davison v Habeeb*, [2011] EWHC 3031 (QB).

492 England and Wales Defamation Act 2013, note 443, ss 5 and 10.

493 UK House of Lords and House of Commons, *Joint Committee on the Draft Defamation Bill*, Draft Defamation Bill, Session 2010-12 (London, 12 October 2011), 54, online: **https://publications.parliament.uk/pa/jt201012/jtselect/jtdefam/203/203.pdf.**

494 For example, outrageous posts that seem defamatory may be perfectly legal. Consider a rant in which a talk show host compares a social activist to Hitler and the Ku Klux Klan. Although defamatory, these comments were ultimately held to be legal as fair comment: *WIC Radio v Simpson,* 2008 SCC40. On the other end of the spectrum, posts that sound credible may be defamatory. In an English case, a politician sued a platform over a detailed and well-written blog alleging that she was part of a renowned terrorist group. Although the platform had received a complaint about the blog, the court pointed out that there was no way for the platform to know whether the complaint was valid, that is, whether the blog was false: *Kaschke*, note 491.

495 In fact, publishers and intermediaries as defined in this Final Report are mutually exclusive concepts. Where an internet provider publishes (in the recommended sense of intentionally conveying specific content), it is no longer an intermediary: Laidlaw & Young, Intermediary Proposals, note 442, 98.

496 Laidlaw & Young, Intermediary Proposals, note 442, 87-88.

497 Laidlaw & Young "Intermediary OHLJ", note 442, 148.

498 LCO Focus Group (25 January 2018).

499 Laidlaw & Young, Intermediary Proposals, note 442, 89-92.

500 See, for example, *Monir v. Wood,* [2018] EWHC 3525, para 84: "The important question is whether the publisher knew or can properly be expected to have known the content of the article being published. Eady J stated that knowledge of 'the relevant words' contained in the article complained of must be shown. That should be taken to mean that the publisher must know or be taken to know the content—not necessarily every single word posted—but the gist or substantive content of what is being published, to qualify as a first or main publisher. Such knowledge may exist in relation to the content of a particular posting or a particular discussion thread or group of discussion threads, it being irrelevant whether the provider realised that such content was in law defamatory….".

501 Laidlaw & Young, Intermediary Proposals, note 442, 90-91.

502 Laidlaw & Young, Intermediary Proposals, note 442, 92. This is consistent with Deschamps J's minority opinion in *Crookes v Newton*, note 444, suggesting that only *deliberate acts* should lead to liability in defamation.

503 See Peter A Downard, *The Law of Libel in Canada,* 4th ed (Lexis Nexis, 2018) [Libel], para 3.51.

504 City of Toronto's Insurance Risk Management section and the City Clerk, Submission to the LCO (14 June 2019).

505 *Voller v Nationwide New Pty Ltd*, [2019] NSWSC 766. Contrast *Weaver*, note 470.

506 Laidlaw & Young, Intermediary Proposals, note 442, 92; Yew, note 467, 12.

507 An example is platforms who selectively disseminate or adopt third party content: Lavi, note 451, 182: "Full dissemination and regular links are only functional and enhance the flow of information. They should not be considered the intermediary's speech. However, when the intermediary selectively disseminates defamation, the content should be considered the intermediary's speech. The same goes for adoption of defamation."

508 Barry Sookman, *Computer, Internet and Electronic Commerce Law*, loose leaf (Carswell: Toronto, Ont, 1989), para 10.5, quoted in *Century 21 Canada v Rogers Communication Inc*, 2011 BCSC 1196, para 129.

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509 Lewis et al, "Libel by Algorithm? Automated Journalism and the Threat of Legal Liability" (2019) 91 Journalism & Mass Communication Quarterly 71. Also see Madeline Lamo and Ryan Calo, "Regulating Bot Speech" (2019) 66 UCLA L Rev 988.

510 Laidlaw & Young, Intermediary Proposals, note 442, 32; Matthew Collins, *Collins on Defamation* (2014: Oxford University Press) [Collins on Defamation], 36-42.

511 *Crookes v Newton*, note 444, paras 40-42.

512 *Breeden v Black*, 2012 SCC 19, para 20; Downard, *Libel*, note 503, 105-107.

513 *Pritchard v Van Nes*, 2016 BCSC 686.

514 Emily Laidlaw, "Pritchard v Van Nes: Imposing Liability on Perpetrator Zero of Defamatory Facebook Posts Gone Viral" (18 May 2016) University of Calgary Faculty of Law, online: **https://ablawg.ca/2016/05/18/pritchard-v-van-nes-imposing-liability-on-perpetrator-zero-of-defamatory-facebook-posts-gone-viral/.**

515 Charles Campbell, Submission to the LCO (19 October 2018); LCO Stakeholder Interview (18 April 2018).

516 *Crookes v Newton*, note 444.

517 Laidlaw & Young, Intermediary Proposals, note 442, 32.

518 Brown, *The Law of Defamation in Canada*, loose-leaf (Toronto: Carswell, 1999) vol 1, 7-33.

519 *Crookes v Newton*, note 444.

Chapter VIII

520 J C Gibson, DCJ "Adapting Defamation Law Reform to Online Publication" Defamation and Media Law, University of New South Wales (21 March 2018), 8, online: **http://glj.com.au/wp-content/uploads/2018/04/Gibson-DCJ-defamation-law-reform.pdf.**

521 The LCO thanks the following individuals for their participation in these panels: Emily Laidlaw, Hilary Young, Bram Abramson, Christina Angelopoulos, Guiseppina D'Agostino, Joris Van Hoboken, Daphne Keller, Sunita Bose, Bertrand de la Chapelle, Michael Geist, Paul Schabas.

522 Emily Laidlaw and Hilary Young, "Internet Intermediary Liability in Defamation: Proposals for Statutory Reform", LCO Issue Paper (July 2017), 2, online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw-and-Young.pdf** [Intermediary Proposals].

523 These are described in the LCO's Consultation Paper: Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [LCO Consultation Paper] and Laidlaw & Young, Intermediary Proposals, note 522, 47-76.

524 Joris van Hoboken & Daphne Keller, "Design Principles for Intermediary Liability Laws", Transatlantic Working Group (8 October 2019).

525 *Communications Decency Act*, 47 USC [CDA], s 230.

526 Laidlaw & Young, Intermediary Proposals, note 522, 97.

527 Jack M Balkin, "Free Speech is a Triangle" (2018) 118 Columbia L Rev 2011 [Triangle], 2043.

528 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [E-Commerce Directive].

529 Laidlaw & Young, Intermediary Proposals, note 522, 77-79.

530 Laidlaw & Young, Intermediary Proposals, note 522, 81.

531 *Defamation Act, 2013* (UK) c 26 [*Defamation Act 2013*].

532 The legislation defines intermediary as a "person who was not the author, editor or publisher of the statement complained of". Publishers in the legislation means commercial publishers.

533 The Defamation (Operators of Websites) Regulations 2013, SI 2013/3028 [Defamation Regulations].

534 Ronen Perry & Tal Z Zarsky, "Who Should Be Liable for Online Anonymous Defamation" (2015-2016) 82 U of Chicago L Rev Dialogue 162.

535 Alastair Mullis and Andrew Scott, "Tilting at Windmills: the Defamation Act 2013" (2014) 77 Modern Law Rev 87, 100: "Where posters are not identifiable, the effect of the Act is to

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encourage website operators voluntarily to disclose their identity and contact details".

536 *R v Spencer*, 2014 SCC 43; Anonymous speech is also arguably protected by freedom of expression: *Warman v Wilkins-Fournier,* 2010 ONSC 2126 (Div Ct), para 17.

537 Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, United Nations General Assembly, A/HRC/38/35 (6 April 2018), paras 30, 60.

538 Emily B Laidlaw and Hilary Young, "Internet Intermediary Liability in Defamation," (2019) 56 OHLJ 112, 141 [Intermediary OHLJ].

539 See, for example, Scottish Government, *Defamation in Scots Law: A Consultation* (January 2019), para 101, online: **https://www.gov.scot/publications/defamation-scots-law-consultation/pages/3/;** Brett Wilson LLP, "Defamation Act 2013: A Summary and Overview Six Years On, Part 2", Inforrm's Blog (30 January 2020), online: **https://inforrm.org/2020/01/30/defamation-act-2013-a-summary-and-overview-six-years-on-part-2-sections-4-to-14-brett-wilson-llp/.**

540 Laidlaw & Young call their regulatory proposal "notice-and-notice plus (NN+)" to distinguish it from: (1) traditional notice and takedown regimes that rely on intermediaries to assess the legality of third party content and (2) the notice-and-notice regime in Canadian copyright law. Although the LCO has adopted their proposal, we prefer to label it a notice and takedown regime. As one stakeholder pointed out, the model does provide for takedown of content in certain circumstances so it is a notice and takedown regime (albeit an improved regime relative to established models).

541 The subclass of intermediaries the LCO recommends should be subject to the notice and takedown regime is discussed in the next section below. We refer to individuals posting content online as "publishers", that is, the individuals who have intentionally conveyed the specific words in issue. In their paper, Laidlaw and Young refer to publishers as "third parties". The LCO has not adopted this terminology since it tends to understate the role of publishers in relation to the allegedly defamatory content. Although the LCO recommends that intermediary platforms have a statutory obligation to take down content in certain circumstances, in our opinion, the publisher remains ultimately responsible for the content and subject to a potential defamation proceeding.

542 Laidlaw & Young, Intermediary Proposals, note 522, 98.

543 Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford: Oxford University Press, 2016), 40-43.

544 "[A] host provider is better placed than an access provider to take measures to seek and remove illegal information": *Eva Glawischnig-Piesczek v Facebook Ireland Limited*, Case C-18/18 (4 June 2019) Adv Gen, para 48. Also see the CJEU decision (3 October 2019) [*Facebook Ireland*].

545 Laidlaw & Young, Intermediary Proposals, note 522, 98-99.

546 Report of the Standing Committee on Industry, Science and Technology, *Statutory Review of the Copyright Act,* 42nd Parliament, 1st Session (June 2019), online: **https://www.ourcommons.ca/Content/Committee/421/INDU/Reports/RP10537003/indurp16/indurp16-e.pdf.**

547 The takedown rules are specifically rules (f) through (s): Laidlaw & Young, Intermediary Proposals, note 522, 103-107.

548 Publishers concerned about over-removal could seek putback from the intermediary platform, failing which a court application might be brought against the intermediary platform.

549 Laidlaw & Young, "Intermediary OHLJ", note 538, 159.

550 An analogous "bare bones" model of response is the US *Digital Millennium Copyright Act* (DCMA) provision for the contents of a counter notification. This requires "[a] statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled": 17 USC, s 512 (g)(3).

551 See, for example, presentation by Alex Feerst, Medium, *Content Moderation & Removal at Scale*, Santa Clara University School of Law (2 February 2018), online: **https://santaclarauniversity.hosted.panopto.com/Panopto/Pages/Viewer.aspx?id=6e2bf22d-52cd-4e3f-9324-a8810187bad7.**

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552 Laidlaw & Young, Intermediary Proposals, note 522, 57, 69.

553 Scottish Law Commission, *Report on Defamation*, Scot Law Com No 248 (December 2017), online: **https://www.scotlawcom.gov.uk/index.php/download_file/view/2001/821/,** para 4.14.

554 Jennifer M Urban, Joe Karaganis, Brianna L Schofield, *Notice and Takedown in Everyday Practice* (American Assembly, 2016), 126-139.

555 Urban et al, note 554, 128-129.

556 Urban et al, note 554, 138-139.

557 Internet Service Providers (ISPs) subject to the Canadian copyright notice and notice regime have, in some cases, voluntarily made available information to their users about notice and notice. However, this information varies in its accuracy and usefulness: see Michael Geist, "Canadian ISPs Responding to Copyright Notices By Adding Information on Notice System, Privacy Concerns" (9 January 2015), online: **http://www.michaelgeist.ca/2015/01/canadian-isps-responding-copyright-notices-adding-information-notice-system-privacy-concerns/.**

558 See *ME2 Productions v Doe*, 2019 FC 214 [*ME2 Productions*].

559 *ME2 Productions*, note 558.

560 *ME2 Productions*, note 558, para 140. The notice and notice regime was considered in detail by the SCC in *Rogers Communications Inc v Voltage Pictures*, 2018 SCC 38.

561 *AT v Globe24h.com*, 2017 FC 114; *SOCAN v CAIP*, 2004 SCC 45. Also see *Ontario Securities Commission v DaSilva*, 2017 ONSC 4576, applying this principle to provincial legislation.

562 *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, para 54. The court's jurisdiction over Google was not in issue on appeal to the Supreme Court of Canada: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, para 37.

563 *Douez v Facebook Inc*, 2017 SCC 33. The court had jurisdiction over Facebook despite a forum selection clause specifying California as the governing jurisdiction.

564 Subsequent to the Supreme Court of Canada's decision in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, Google obtained an order from the United States District Court in California that the injunction issued by the BC court was unlawful and unenforceable in the United States. It then brought a motion in BC to set aside or vary the injunction, but this was denied: *Equustek Solutions Inc v Jack*, 2018 BCSC 610.

565 Barry Sookman, "The Unintended Equustek Effect: a Reply to Michael Geist" (2 April 2019), online: **http://www.barrysookman.com/2019/04/02/the-unintended-equustek-effect-a-reply-to-michael-geist/.** At the same time, courts must consider the potential for reciprocal extra-territorial orders by courts in countries that hold norms inconsistent with our own: Michael Douglas, "Extraterritorial Injunctions Affecting the Internet" (2018) 12 Journal of Equity 34.

566 LCO Stakeholder Interview (9 January 2018).

567 Bobby Chesney and Danielle Citron, "Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security" (2018) 107 California L Rev 1753, 1774. More generally, see Neville L Johnson et al, "Defamation and Invasion of Privacy in the Internet Age" (2019) 25 SW J Intl L 9.

568 Chesney & Citron, note 567, 1765-1768.

569 Chesney & Citron, note 567, 1792.

570 A fair balance, defined as an equilibrium of interests rather than a tipping point, was recommended by Christina Angelopoulos in her presentation at the LCO International Conference: Defamation Law and the Internet: Where Do We Go From Here? (3 May 2018), online: **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/** [LCO 2018 Conference].

571 See, for example, the Manila Principles (2015), online: **https://www.manilaprinciples.org/.**

572 LawRight, Submission to Australia Review (30 April 2019), online: **https://www.justice.nsw.gov.au/justicepolicy/Documents/review-model-defamation-provisions/defamation-submission-lawright.pdf**.

573 Annemarie Bridy and Daphne Keller note a similar drawback to the counter-notice process for alleged copyright infringement in the US *Digital Millenium Copyright Act* (DCMA) in "US Copyright Office Section 512 Study: Comments in Response to Second Notice of Inquiry" (21 February 2017), 29-30, online: **https://ssrn.com/abstract=2920871.** Also see Urban et al, note 554.

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574 LCO, Reforming Intermediary Responsibility: Testing a Human Rights Centred Framework Beyond the Liability and Immunity Divide, RightsCon 2018, online: **https://rightscon2018.sched.com/event/EHnu/reforming-intermediary-responsibility-testing-a-human-rights-centred-framework-beyond-the-liability-and-immunity-divide.**

575 *Equustek Solutions Inc v Google Inc*, 2015 BCCA 265, para 25; Maanit Zemel, Presentation on "Anonymity – A Front Line Issue", LCO 2018 Conference, note 570.

576 Defamation Regulations, note 533, s 9.

577 See, for example, *Facebook Ireland*, note 544.

578 LCO Focus Group (15 February 2018).

579 Bridy & Keller, note 573, 31.

580 Urban et al, note 554.

581 LCO Stakeholder Interview (20 July 2016).

582 Again, there is an analogy to the copyright context. According to Urban et al, note 554, the migration to automated bulk copyright notices sent by rightsholder organizations has not diminished the overall utility of the US notice and takedown process.

583 Daphne Keller, "Build Your Own Intermediary Liability Law: A Kit for Policy Wonks of All Ages", Balkinization (11 June 2019), online: **https://balkin.blogspot.com/2019/06/build-your-own-intermediary-liability.html.** Also see van Hoboken & Keller, note 524.

584 In fact, the term "intermediary" itself may be said to reflect outdated notions of internet platforms as "mere conduits" for the transmission of content.

585 Laidlaw & Young, Intermediary Proposals, 48-49, 51.

58 It may be that an international consensus is building around the need for internet regulation that is more robust than this earlier stance.

587 Balkin, "Triangle", note 527; Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (New Haven: Yale University Press, 2018); Mark Bunting, "From Editorial Obligation to Procedural Accountability: Policy Approaches to Online Content in the Era of Information Intermediaries" (2018) 3 Journal of Cyber Policy 165.

588 Balkin, "Triangle", note 527, 2041.

589 See, for example, Canada House of Commons Standing Committee on Access to Information, Privacy and Ethics, *Democracy Under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly* (December 2018), online: **http://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-17** [Democracy Under Threat]; UK House of Lords Select Committee on Communication, *Regulating in a Digital World,* 2nd Report of Session 2017-19 (9 March 2019) - HL Paper 299, online: **https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/29902.htm;** UK, *White Paper on Online Harms*, presented to Parliament by the Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for the Home Department by Command of Her Majesty (8 April 2019), online: **https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf** [UK White Paper]. For an analogous proposal in relation to s 230 of the *Communications Decency Act* in the United States, see Chesney & Citron, note 567.

590 The statutory duty of care model was developed by Professor Lorna Woods and William Perrin and was adopted as a recommendation in three recent regulatory proposals in Canada and the UK. Also see India's Proposed Amendments to Intermediary Guidelines which would impose a similar duty of "due diligence" on intermediaries in respect of online content: The Information Technology Intermediaries Guidelines (Amendment) Rules 2018 (24 December 2018): **https://meity.gov.in/content/comments-suggestions-invited-draft-%E2%80%9C-information-technology-intermediary-guidelines**. These proposed guidelines were still being debated as of February 4, 2020: Surabhi Agarwal, "Revised IT Intermediary Rules in 2 Weeks After Lawmin Nod", The Economic Times (4 February 2020), online: **https://www.pressreader.com/india/the-economic-times/20200204/281775631145785.**

591 Canada, Democracy Under Threat, note 589.

592 UK White Paper, note 589.

593 UK White Paper, note 589, para 3.6.

594 Canada, Democracy Under Threat, note 589, recommendation 8.

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595 Canada Democracy Under Threat, note 589, recommendation 10, 41.

596 One compelling critique is offered by Graham Smith, "The Rule of Law and the Online Harms White Paper", Inforrm's Blog (12 May 2019), online: **https://inforrm.org/2019/05/12/the-rule-of-law-and-the-online-harms-white-paper-graham-smith/#more-42245.**

Chapter IX

597 Law Commission of Ontario, Defamation Law in the Internet Age Consultation Paper (November 2017) 116, online: **http://www.lco-cdo.org/wp-content/uploads/2017/12/Defamation-Consultation-Paper-Eng.pdf** [LCO Consultation Paper].

598 In a comprehensive LCO Issue Paper, Emily Laidlaw canvases several models of alternative dispute resolution that might be adapted to defamation disputes, including company-led and government-pushed models. She concludes by recommending a public government-created model similar to BC's Civil Resolution Tribunal: Emily 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: Proposals for Reform", LCO Issue Paper (September 2017), 102, online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-Laidlaw.pdf** [ADR]. This was also the model primarily discussed by Panel 4 at the LCO International Conference: Defamation Law and the Internet: Where Do We Go From Here? (3 May 2018), online: **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/** [LCO 2018 Conference].

599 Kate Klonick, "The New Governors: The People, Rules, and Processes Governing Online Speech" (2017) 131 Harv L Rev 1598.

600 David Kaye, *Speech Police* (Columbia University Press, 2019).

601 The expression "platform law" was adopted by UN Special Rapporteur David Kaye in his 2018 Report: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, United Nations General Assembly, A/HRC/38/35 (6 April 2018).

602 Laidlaw, ADR, note 598, 33.

603 Laidlaw, ADR, note 598, 33.

604 Richard Susskind, *Online Courts and the Future of Justice* (OUP, 2019).

605 BC, Civil Resolution Tribunal, online: **https://civilresolutionbc.ca/.**

606 Emily B Laidlaw, "Re-Imagining Resolution of Online Defamation Disputes" (2019) 56 OHLJ 162 [Re-Imagining], 167-168, 178.

607 Jane Bailey and Valerie Steeves, "Defamation Law in the Age of the Internet: Young People's Perspectives," LCO Issue Paper (June 2017), online: **http://www.lco-cdo.org/wp-content/uploads/2017/07/DIA-Commissioned-Paper-eQuality.pdf**.

608 Lessons might be learned from the cyber-bullying legislation and agency introduced in Nova Scotia: Nova Scotia, CyberScan, online: **https://novascotia.ca/cyberscan/.** Also see the discussion in the LCO Consultation Paper, note 597, 121-122.

609 Laidlaw, ADR, note 598, 73.

610 Laidlaw, ADR, note 598, 59.

611 In note 622 below, we discuss eBay's ODR model, NetNeutrals.

612 Laidlaw, ADR, note 598, 78; Emily B Laidlaw, *Regulating Speech in Cyberspace: Gatekeepers, Human Rights and Corporate Responsibility* (Cambridge, 2015), chapters 3, 6.

613 *Civil Resolution Tribunal Act*, SBC 2012, c 25, as amended [CRTA].

614 Honourable Justice David M Brown, "Red Block, Yellow Block, Orange Block, Blue: With So Much Competition, What Do We Do?" (2019) 38 Advocates' Journal 14. The CRT is currently being used as a model for ODR initiatives in other jurisdictions, including the creation of online courts (rather than tribunals) in the United Kingdom. The UK initiative was recently described in an audit report by the House of Commons Justice Committee: *Court and Tribunal Reforms, Second Report of Session 2019* (31 October 2019).

615 CRTA, note 613.

616 BC, Civil Resolution Tribunal, online: **https://civilresolutionbc.ca/participant-satisfaction-survey-october-2019/.**

Electronic copy available at: https://ssrn.com/abstract=3565327

617 Laidlaw, ADR, note 598.

618 LCO 2018 Conference, note 598.

619 Laidlaw, ADR, note 598, 96.

620 Laidlaw, ADR, note 598, 106.

621 Laidlaw, ADR, note 598, 63-66.

622 For example, eBay uses an ODR platform called Net Neutrals to resolve disputes about user reviews posted on eBay. Net Neutrals offers what it calls an Independent Feedback Review. For a fee of $130, a buyer or seller unhappy with an online review may initiate an online case against the reviewer. An independent dispute resolution professional is assigned to consider information submitted by both parties and decide whether the review should be removed from the website. The "Neutral", as the decisionmaker is called, makes its decision based on eBay's Guidelines for Feedback Withdrawal. According to the Net Neutral website, the Neutral will remove a review where the claimant establishes "clearly and convincingly" that "the transaction-related information contained in the feedback comment is factually inaccurate": **https://netneutrals.com/FAQs.aspx.**

623 Not all content moderation is initiated by a user complaint. Most social media hosts use a combination of user-based policies, in-house moderation and algorithmic mechanisms to moderate content. In some cases, users are relied on to flag problematic content at first instance. Others, such as Reddit, primarily moderate content through an algorithm. However, for the purpose of this discussion of ODR, the LCO focuses on complaint-driven processes.

624 Laidlaw, "Re-Imagining", note 606, 193.

625 Evelyn Douek, "Facebook's 'Oversight Board': Move Fast With Stable Infrastructure and Humility" (2019) 21 NCJL & Tech 1, 11.

626 "Platforms create rules and systems to curate speech out of a sense of corporate social responsibility, but also, more importantly, because their economic viability depends on meeting users' speech and community norms": Klonick, note 599, 1625.

627 Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (New Haven: Yale University Press, 2018), 121-122.

628 Danielle Keats Citron, "Technological Due Process" (2008) 85 Wash U L Rev. 1249, 1252.

629 Laidlaw, ADR, note 598, 79.

630 Citron, note 628. Also see Thomas Kadri and Kate Klonick, "Facebook v Sullivan: Public Figures and Newsworthiness in Online Speech (2019) 93 So Cal L Rev 37.

631 Gillespie, note 627, ch 3.

632 Ari Ezra Waldman identifies an analogous problem in relation to privacy law principles: Waldman, "Privacy Law's False Promise" (2019) 97 Wash U L Rev 48.

633 UK House of Lords Select Committee on Communication, *Regulating in a Digital World,* 2nd Report of Session 2017-19 (9 March 2019) - HL Paper 299, para 222, online: **https://publications.parliament.uk/pa/ld201719/ldselect/ldcomuni/299/29902.htm.**

634 Michel José Reymond, "The Future of the European Union 'Right to be Forgotten'" (2019) 2 Latin American Law Review 81, 87.

635 Reymond, note 634, 87.

636 Laidlaw, ADR, note 598, 77-81.

637 Article 29 Data Protection Working Party, Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González" C-131/12 (26 November 2014), online: **https://ec.europa.eu/newsroom/article29/document.cfm?action=display&doc_id=64437.** In the EU Google Spain decision, the CJEU held that the search engine Google should be required to remove personal data located online where it is "inadequate, irrelevant or no longer relevant, or excessive in relation to" the "purposes for which [it was] collected or processed." The Article 29 Data Protection Working Party has since been replaced by the European Data Protection Board (EDPB). The EDPB has recently adopted draft guidelines under the GDPR that will update the 2014 Guidelines, online: **https://edpb.europa.eu/our-work-tools/public-consultations-art-704/2019/guidelines-52019-criteria-right-be-forgotten-search_en.**

638 Facebook released its Charter for the Oversight Board on September 17, 2019: Facebook, Establishing Structure and Governance for an Independent Oversight Board, online:

Electronic copy available at: https://ssrn.com/abstract=3565327

https://about.fb.com/news/2019/09/oversight-board-structure/; Kate Klonick, "Does Facebook's Oversight Board Finally Solve the Problem of Online Speech", *Models for Platform Governance* (CIGI, 2019) 51 [Facebook].

639 Facebook, Oversight Board Charter (September 2019), 2, online: https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf.

640 Facebook, note 639, 6.

641 See Douek, note 625, 47-53. Kate Klonick has observed that the legitimacy of the Oversight Board will be determined by its commitment to principles of procedural fairness and will require that "users see Facebook make decisions recommended or mandated by the board that are in users' interests but against the company's immediate best interests": Klonick, "Facebook", note 638, 53.

642 Neither would the Oversight Board be able to hear a sufficient proportion of Facebook's 1,000,000 daily content disputes: Douek, note 625, 5-6.

643 Article 19, *The Social Media Councils: Consultation Paper* (June 2019) 7, online: https://www.article19.org/wp-content/uploads/2019/06/A19-SMC-Consultation-paper-2019-v05.pdf. For a similar proposal, see the Global Partners Digital, *A Rights-Respecting Model of Online Content Regulation by Platforms* (May 2018), online: https://www.gp-digital.org/wp-content/uploads/2018/05/A-rights-respecting-model-of-online-content-regulation-by-platforms.pdf.

644 Article 19, note 643, 15.

645 Article 19, note 643, 8. Also see Pierre Francois Docquir, "The Social Media Council: Bringing Human Rights Standards to Content Moderation on Social Media", *Models for Platform Governance* (CIGI, 2019) 9, and Heidi Tworek, "Social Media Councils", *Models for Platform Governance* (CIGI, 2019) 97.

646 Giovanni De Gregorio, "Democratising Online Content Moderation: A Constitutional Framework" (2019) Computer Law & Security Review, https://doi.org/10.1016/j.clsr.2019.105374.

647 EU *Directive on Copyright in the Digital Single Market* (17 April 2019), Directive (EU) 2019/790 [EU Copyright Directive].

648 EU Copyright Directive, note 647, article 17 (9); De Gregario, note 646.

649 Martin Husovec refers to this as an ADR mechanism: "Why There Is No Due Process Online?", in Tiffany Li, ed, *New Controversies in Intermediary Liability Law, Essay Collection* (Yale Information Society Project), 17.

650 Evelyn Douek distinguishes between ODR systems resolving disputes between two private parties on a platform and "the more 'public law' style of disputes that are involved in contesting the ruling of the platform 'government'": Evelyn Douek, "Verified Accountability: Self-Regulation of Content Moderation as an Answer to the Special Problems of Speech Regulation", A Hoover Institution Essay, Aegis Series Paper No 1903, 6, online: https://www.hoover.org/sites/default/files/research/docs/douek_verified_accountability_aegisnstl1903_webreadypdf.pdf.

651 Ivar A Hartmann, "A New Framework for Online Content Moderation" (2019) Computer Law & Security Review, https://doi.org/10.1016/j.clsr.2019.105376.

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