July 30, 2020

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Justice Sector Consultation on Defamation Law

Thank you for inviting The Advocates' Society to provide its input on the Law Commission of Ontario's final report *Defamation Law in the Internet Age*, published in March 2020 (the "Report").

As you know, The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The mandate of the Society includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. The membership of the Society includes advocates with substantial expertise in the practice of defamation law.

The Society struck a Task Force composed of advocates who practise defamation law, representing both plaintiffs and defendants, as well as advocates with other specialties. The Task Force reviewed the LCO's Report in detail, discussed its recommendations, and consulted with other members of the Society. The Society's feedback on the Report's recommendations is set out below. In accordance with its mandate, the Society's comments are confined to certain recommendations found in Chapters IV, V, VI, VIII, and IX of the Report.

Chapter IV: A New Notice Regime and Limitation of Claims

Recommendation 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 Sections 5 to 8, 9 and 20 of the LSA[1] should be repealed. The notice regime should include the following provisions[.]

The Society supports modernizing the statutory notice regime, thereby improving certainty for potential complainants as well as potential defendants, and minimizing the risk of claims being lost inadvertently. The creation of a single statutory notice requirement for all online and offline publications would simplify and clarify what has become an increasingly fraught area of the law in light of new technologies and existing medium-specific categories in the *LSA*.

[1] *Libel and Slander Act*, R.S.O. 1990, c. L.12 [*LSA*].

Recommendation 19(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.

The Society supports legislative clarity on when the statutory notice requirement applies, as well as implementing a prescribed form of notice. The existing judge-made law on both the requirement for notice and the content of a notice, developed over many decades, is voluminous and often opaque. While recognizing the historical rationale for limiting the requirement for notice to the news media, including to allow corrections in mitigation of damages, the evolution and breadth of online speech have made the current distinctions in the *LSA* difficult to interpret and apply in a principled way. For example, applying the notice requirement to all forms of technology or media used to publish an alleged defamation would obviate the need for litigation about intricacies such as whether the Internet qualifies as a "form of wireless radioelectric communication utilizing Hertzian waves".[2] Eliminating litigation over such issues clearly benefits access to justice and encourages more efficient resolution of the merits of a case.

Providing a prescribed form of notice would assist potential litigants (particularly those who are self-represented) in maintaining their claim by mitigating the risk of insufficient notice (and losing their claim as a result), and reducing cost and complexity in preparing a notice. In developing a prescribed form for the notice, the Society recommends that the focus be placed on substantive requirements for notice rather than technical requirements for notice.

In addition, the Report's recommendation that notice be given to a publisher "where it is reasonably possible to do so" is unclear and should not be adopted in new legislation. Such language would invite litigation over the circumstances in which it is "reasonably possible" to give notice. Instead, clear and certain statutory language should be used. The desired clarity can be achieved in various ways, such as requiring notice in all circumstances without exception or requiring notice in all cases unless the plaintiff satisfies a court that it is appropriate to waive the requirement (on the basis of a clear statutory test), either before or after the fact. The Society notes that the latter option may invite some additional litigation steps, but reflects a balance of flexibility and clarity.

In addition, the current *LSA* includes a provision requiring a publisher to make its contact information public in order to have the benefit of the notice requirement.[3] Such a requirement may remain advisable. Providing notice through an intermediary platform may be another permissible statutory mechanism where direct public posting of contact information is unlikely or impractical.

Recommendation 19(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.

The Society supports the LCO's recommendation to permit service of a notice electronically. If notice is required in every case, it ought to be easier to serve that notice, especially in respect of online

[2] See the definition of "broadcast" in s. 1 of the current *LSA*, as well as *Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405.

[3] See s. 8(1) of the current *LSA*; note that the current language references only print publications and therefore requires modernization.

publications. However, it is important that the statutory requirements be balanced between complainants and publishers.

Regarding the need for evidence that the intended recipient of an electronic notice "operates a private electronic account, accesses it regularly and has accessed it recently", this should be approached practically so as not to defeat the goal of improving access to justice. It may place too great an onus on potential plaintiffs to require them to confirm and have evidence that an electronic account was recently accessed. While return confirmation and "read receipts" are sometimes available, these measures are also easy to avoid if desired, particularly for non-public electronic modes of communication, such as text messages. Other options to consider may include:

- a statutory presumption of receipt upon proof of delivery, imposing an obligation on publishers to have an account that is deemed to be monitored (which may be impractical for non-commercial or non-professional publishers), or
- tying electronic notice to the provision of public contact information by a publisher, discussed under Recommendation 19(a) above.

If electronic notice is also permitted for offline publications, it may be unfair to presume that the notice came to the publisher's attention. The Society urges the government to carefully consider these concerns when drafting legislation to allow electronic notice.

Recommendation 19(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.

The proposed timeframe for the new notice requirement (four weeks before commencement of a claim) raises some concern for the Society, particularly when combined with the LCO's proposed two-year limitation period for all defamation actions. Both are significant changes from the existing regime for media publishers, in which a notice must be served within six weeks of the publication coming to the knowledge of the complainant, and a claim commenced within three months.

If the LCO's recommendation were adopted, a complainant could wait 23 months from when a publication comes to their attention to serve a notice.[4] This raises several issues:

- Damages could theoretically mount over a 23-month period before a publisher even knows that the potential plaintiff is raising a legal issue with the publication.
- This would severely limit the utility of the notice period as a negotiation period between complainants and defendants, as well as defendants' ability to mitigate damages by changing, correcting, or removing an alleged defamatory publication. A shorter notice period would improve the likelihood of notice serving as an early resolution tool. Resolution is less likely if a publication has been up for a significant period of time with seemingly no issue.
- There are also concerns about free expression, libel chill, and access to justice if a potential claim can exist without notice for such a lengthy period of time. Given the nature of the defamation tort, the reverse onus on defendants, and the rise of online publications and damages (which was a key basis for reconsidering the statutory regime for defamation), it would be incongruous to allow "stealth" claims to appear after nearly two years.

[4] The complainant has two years to commence a claim; and they must serve notice at least four weeks before the claim.

While damage from defamatory content on the Internet may arise in a delayed fashion, it is the Society's experience that any substantial harm typically occurs early on. Further, if the form and service of notice is prescribed and simplified, making it more accessible to complainants, notice can more easily be provided even if a claim is not subsequently commenced.

For these reasons, the Society suggests that complainants be required to give defendants notice of a defamation complaint substantially earlier than currently envisioned by the LCO's recommendation, particularly if there is a move to a longer limitation period (discussed further below with respect to Recommendation 21). In deciding the length of an appropriate notice period, the government should have regard to providing the shortest delay possible to a defendant, while providing a complainant with sufficient time to reasonably ensure that they will not be deprived of their claim on technical grounds.

Finally, the Society disagrees with the LCO's statement that "[i]f the limitation period for the action is due to expire before the end of the negotiation period, the limitation period should be extended accordingly."[5] This is out of line with other rules on limitation periods. (Indeed, it means a complainant could in theory wait two years less a day after becoming aware of the publication to serve a notice, exacerbating the concerns identified above.) Instead, there should be a requirement to give notice early enough that the negotiation period does not continue past the expiry of the limitation period.

Recommendation 19(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.

The Society appreciates that intermediary platforms will incur administrative costs processing notices from complainants and passing them on to publishers. Permitting intermediaries to charge an administrative fee allows them to offset those costs and, as a result, makes it more likely that intermediaries will comply with their statutory obligations under the notice regime. Because intermediaries play a central role in that regime, their participation is essential to its effective operation. For these reasons, the Society supports including in the new legislation a mechanism through which intermediaries may charge an administrative fee to complainants for passing on notices.

However, such fees should not present a barrier to complainants using the notice regime. The LCO's Report expresses the view that intermediaries should not forward notices where they "do not meet the procedural requirements or where the complainant does not pay the required administrative fee."[6] If that is the case, the administrative fee must not pose a financial hardship to anyone who wants to give a defamation notice. Allowing intermediaries to determine what fee to charge is likely to lead to higher fees and have an adverse effect on access to justice. Accordingly, the Society supports the recommendation that the administrative fee be set by regulation. The administrative fee should be set at a modest level to ensure it is not a barrier to access to justice.

Recommendation 20: Single Publication Rule – 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.**

[5] Report, p. 43.
[6] Report, p. 45.

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.

There has been considerable uncertainty in Ontario regarding the "single publication rule" and the extent to which publishing the same expression in different media can trigger new causes of action. The lack of clarity regarding the single publication rule increases the prospect of litigation on issues peripheral to the merits of a defamation claim, increasing the cost to litigants and the burden on the civil justice system in Ontario. Further, as noted by the LCO in its Report, deeming a new cause of action to arise every time the same expression is republished online "render[s] limitation periods meaningless"[7] given how easily and quickly communications can be spread online, and the theoretical "republication" that occurs each time the same website is viewed.[8] Triggering a new cause of action each time the same expression is republished online encourages complainants to sit on their rights rather than act promptly when they become aware of a potentially defamatory publication online, causing unfairness to publishers. For these reasons, the Society supports the LCO's recommendation that the "single publication rule" be codified in the new *Defamation Act*.

However, the benefits of certainty that would result from enacting the "single publication rule" in legislation may be undermined if the standard for a new cause of action is defined as republication in a "materially different" manner. The phrase "materially different" does not provide sufficient guidance to litigants and courts to substantially reduce the amount of litigation over whether a new cause of action has arisen in respect of the same expression. While the necessary guidance could be provided by the courts over time, to further enhance certainty, the Society suggests including additional direction in the new *Defamation Act* as to what "materially different" means, such as requiring that the mode of publication result in the expression reaching a new or substantially expanded audience.

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

While there are reasons to support a single limitation period for all defamation claims, including simplifying this area of law in much the same way as a single notice period would, the Society has some reservations about a two-year limitation period. The Society recognizes that limitation periods reflect a balance among many different competing interests; setting a limitation period is inherently a line-drawing exercise and some arbitrariness is inevitable. Accordingly, the Society does not propose a specific limitation period in place of the two-year limitation period. However, given the unique nature of the defamation cause of action—particularly its implications for free expression and the transitory nature of communication—the Society suggests that a shorter limitation period is appropriate than that which applies for other torts.

Whatever limitation period is established in the new *Defamation Act*, there must be clear transitional provisions so that publishers who published material before the new legislation comes into effect are not unfairly caught by a materially longer limitation period. One option is for the applicable limitation period to be the one in effect on the date that the publication came or ought to have come to the plaintiff's

[7] Report, p. 48.

[8] This was also recently rejected by the Court of Appeal for Ontario in *John v. Ballingall*, 2017 ONCA 579, at paras. 34-35.

attention. This would be consistent with the discoverability principle, but the Society recognizes it may be unfair to news media who unexpectedly face a significantly longer limitation period in respect of a story published under the current three-month limitation period but not discovered by the plaintiff until after the new general limitation period is enacted. Alternatively, the applicable limitation period could be the one that was in effect on the date of publication, but that could result in the limitation period expiring before the plaintiff discovers their cause of action.

Chapter V: Preliminary Court Motions

Recommendation 22: Interlocutory Takedown Motions

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.

The Society recognizes the controversial nature of this recommendation. While not advocating for or against this recommendation, the Society has concerns related to this recommendation and, in particular, the LCO's justification for departing from longstanding and well-established jurisprudence regarding the availability of interlocutory injunctions for alleged defamation.

The LCO's Report seeks to justify the recommendation on the basis of examples that would likely meet the existing test for an interlocutory injunction. Where the circumstances are not as obvious, there is a clear risk of libel chill and a potential impact on the publisher's freedom of expression to weigh. The LCO's Report also seeks to justify its recommended departure from well-established jurisprudence on the basis of the inherent potential for reputational harm arising from online defamation, which is perhaps at odds with the LCO's intention that its recommendations be "medium neutral". Moreover, the practical reality is that damage arising from online defamation has usually already occurred by the time an interlocutory injunction can be brought, heard, and decided. The Society is also concerned that implementing this recommendation will increase the frequency of costly interlocutory proceedings.

To the extent that this recommendation is adopted, the Society suggests that, consistent with injunction practice, any proposed legislation should provide for the ability of the court to require the moving party to provide an undertaking as to damages.

Recommendation 23: Retention of Information – 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.

This recommendation makes service of notice of a motion for a Norwich order a "trigger" for the retention of information identifying an anonymous publisher. The Society suggests that the "trigger" for this obligation might be expanded in light of the fact that there are other (and earlier) ways that an intermediary platform might have notice of an issue—for example through receipt of a notice of complaint to forward to a publisher, or a notice under the proposed notice and takedown regime. In this regard, the Society suggests that Recommendation 23 be reconciled with the recommendation regarding the retention of records in Recommendation 19(i) and the takedown process in Recommendation 38, if all of these recommendations are adopted.

Chapter VI: Jurisdiction, Corporations and the Court Process

The LCO's Report observes in Chapter VI that while access to justice will be enhanced by diverting "high volume, low value" defamation claims away from the court system, "the court process remains crucial to protect the important legal rights at stake in many defamation law claims."[9] For that reason, the Report addresses the related issues of jurisdiction and choice of law in defamation actions, which can be particularly pertinent given the multi-jurisdictional reach of online defamation, in which a defamatory statement can be downloaded anywhere in the world by anyone with access to the Internet. The Report highlights two concerns that arise in this context.

First, the Report is concerned that without appropriately defined boundaries to the assumption of jurisdiction by Ontario courts, a risk of "libel tourism" arises, in which plaintiffs with no significant connection to Ontario may choose to pursue claims in Ontario because of perceived legal advantages, based simply on the fact that the defamatory statement was downloaded in Ontario, however small the number of people who may have downloaded it.

Second, the Report identifies a need for a new legal test applicable to the choice-of-law portion of the *forum non conveniens* test to replace the traditional test of *lex loci delicti*. The latter test provides that the governing law for the claim should be that of the jurisdiction in which the tort arises. In the case of online defamation, where the tort arguably arose wherever anyone downloaded the defamatory statement, this raises the possibility that the claim is subject to the laws of multiple jurisdictions.

In considering these two concerns, the Report takes note of the Supreme Court of Canada's decision in *Haaretz.com v. Goldhar*,[10] and frames its recommendations on jurisdiction as a response to the Supreme Court's "implicit invitation"[11] to make proposals for reform in this area.

The Report makes several other recommendations in Chapter VI in addition to its recommendations with respect to jurisdiction, which the Society comments on below.

[9] Report, p. 62.
[10] 2018 SCC 28.
[11] Report, p. 64.

Recommendation 24: Jurisdiction – 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.

The Report's first recommendation in this area is that a new discretionary factor should be added to the jurisdiction test at the rebuttal stage, pursuant to which the court would consider whether the publication in issue was targeted at an Ontario audience. If the court found that it was not, the presumption that the court should take jurisdiction could be rebutted on that basis. This recommendation is framed as a guideline for the courts rather than as a recommendation for statutory reform.

In the Society's view, the law of jurisdiction raises complex issues, some of them constitutional, that extend beyond the specific scope of defamation in general and multi-jurisdictional online defamation in particular. For that reason, the Society agrees with the LCO that further reform of the law in this area should be left to the courts, which have the flexibility to consider any proposed changes to the law in the context of the facts before the court in individual cases.

Recommendation 25: Choice of Law – 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.

The Report's second recommendation in the area of jurisdiction does call for statutory reform. The Report does not explain why Recommendation 25 calls for statutory codification, whereas Recommendation 24 is left to the courts.

While the Society agrees with the Report that further clarification of the law of jurisdiction is called for, the Society does not believe that Recommendation 25 should be codified in a statute dedicated to defamation law. As noted above, jurisdiction is not an issue specific to the law of defamation. It has implications for many other areas of the law. The Society believes Recommendation 25 should also be left to the courts to consider as they develop the law of jurisdiction. If jurisdiction is to be the subject of legislative reform, any such reform should be evaluated on a basis much broader than the law of defamation alone.[12]

Recommendation 26: Corporations – Corporations should retain standing to sue for defamation.

The Society agrees with this recommendation.

Recommendation 27: Jury Trials – Jury trials should continue to be available in Ontario defamation actions.

As you are aware, the Ministry of the Attorney General recently conducted a consultation as to whether civil juries should be eliminated in Ontario, and if so, whether certain types of actions should be exempt. The Society's position on this issue, outlined in a letter dated June 15, 2020 (appended hereto), was that this important decision should be made on the basis of data and extended consultation with justice system stakeholders. The Society suggests that the LCO's recommendation that jury trials continue to be available

[12] We note, in this regard, that other provinces have codified the law in the area of jurisdiction. See e.g. *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28; *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2; *Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-41.1.

for defamation actions in Ontario be considered not as a standalone issue, but within the context of the broader discussion about civil juries in Ontario.

Regarding **Recommendation 29 (Evidence)**, and **Recommendations 30 through 34 (Provisions to be Repealed)**, the Society agrees with these recommendations in the event the government adopts the LCO's recommendation for a new *Defamation Act*.

Chapter VIII: Notice and Takedown

In Chapter VIII, the LCO responds to concerns, quoted at the outset of the Chapter, that complainants of online defamation have not had effective remedies, and that "comprehensive legislation for easier take-down procedures"[13] is warranted. The LCO's proposed takedown regime would operate as follows:

- A complainant, on payment of a fee, submits a notice to the internet platform complaining of alleged defamation that a third party has posted;
- The platform has a duty to pass the notice to the third party poster;
- If the platform cannot pass the notice to the third party poster, or receives no response from the third party poster, the platform must take down the content complained of;
- If the third party poster notifies the platform that the third party does not want the material complained of removed, removal of the content is not required;
- In this respect, all the third party has to say or do is object to the removal. The third party does not need to provide any reason or explanation for the objection;
- Where a platform has taken down the material, the third party can request the platform to restore the material to the platform, which the platform may then do without consequence;
- Where the material complained of has been posted anonymously, the complainant is not entitled to be informed by the platform of the identity of the third party poster;
- If the platform does not comply with the takedown procedure, the complainant may claim statutory damages from the platform in court. These damages are to be in the nature of a penalty, and not a remedy for any damage to the reputation of the complainant that may have been caused by the material complained of.

The LCO's recommended takedown procedure is closely linked to its recommendations largely protecting internet platforms from civil liability for third party content posted on the platforms. Those recommendations raise questions of substantive law and policy which are beyond the Society's mandate. It should also be observed that given the multi-jurisdictional character of the Internet, the procedure raises significant questions as to the likely efficacy of a single province's legislation.

The takedown procedure only provides a remedy to complainants of online defamation in very limited circumstances. A complainant will only obtain relief if the platform cannot notify the third party poster (a situation that seems unlikely, and in any event within the control of the platform), or if the third party poster demonstrates indifference to the published content by not responding to the notice received from the platform. All the third party needs to do to prevent the complainant from obtaining a remedy is object to the material being taken down. The third party is free to object on arbitrary or even malicious grounds, or to object without providing grounds. Once that occurs, the complainant's only recourse is through the traditional legal system. These limitations highlight the importance of pursuing the development of

[13] Report, p. 81.

separate online dispute resolution procedures, discussed in Chapter IX of the LCO's report, upon which we comment below.

A question arises whether the proposed takedown procedure should place a more substantial burden upon a third party who wishes to object to the removal of content complained of as being defamatory. For example, the third party could be required to provide the platform with a reason for objecting to the removal. In addition, the platform could be required to remove the material where reasons are given and it is clear on their face that the reasons are irrational or malicious. Set against these suggestions is the view that an obligation to provide reasons may infringe on the freedom of expression of the third party, and the view that platforms should in no circumstances be required to assess the merit of a third party's expression or their justification thereof. The appropriate legislative choice on this subject will turn upon fundamental policy choices as to the reasonable scope of protected freedom of expression and of platforms' responsibility for third party content.

The LCO's approach to anonymous speech in the proposed takedown procedure also raises issues for consideration. The freedom to speak anonymously is an element of freedom of expression more broadly. The takedown procedure, however, treats anonymity as worthy of absolute protection in all circumstances. Given the harm that may be caused by anonymous speech, and the barrier which a publisher's anonymity may create for a complainant's access to justice, questions arise whether the protection of anonymity should be subject to limits in some circumstances.

Finally, the recommended statutory damages remedy raises issues for consideration. As stated above, statutory damages are expressly intended to be in the nature of a penalty, not compensation for loss of reputation. Although the amount of the damages is to be in the discretion of the court, it is apparent that the amount is intended to be relatively modest. The remedy is based on the statutory damages regime under the *Copyright Act*, in which damages are limited to $10,000.[14] Questions arise whether an award in that amount will be meaningful from the complainant's perspective, and whether the fact that the complainant must incur the expense and inconvenience of going to court to obtain statutory damages may reduce the likelihood that they will pursue the remedy. The utility of the remedy may also be reduced by potential difficulties in enforcing the award where it is obtained against a platform situated in another jurisdiction, a concern we have referred to above.

Chapter IX: Online Dispute Resolution

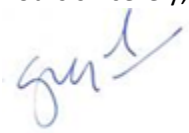
The Society recognizes that Chapter IX of the Report contains a more aspirational discussion about online dispute resolution (ODR) than practical recommendations for its implementation. However, the Society would like to emphasize that ODR should be the target of present-day reform and innovation. In a rapidly-evolving online media environment where defamatory statements may be broadcast and shared quickly, a timely and cost-effective system would provide potential litigants with access to justice. In summary, an effective and proven system would be desirable in the immediate future and is arguably overdue.

The Report cites British Columbia's Civil Resolution Tribunal as an example of an effective system. The Society recommends that the Civil Resolution Tribunal's system be evaluated for implementation in Ontario, or that the design and development of a similar system be considered as part of the coming updates to defamation legislation (or more broadly). The Society acknowledges that implementing this recommendation might have substantial budgetary implications.

[14] R.S.C. 1985, c. C-42, s. 41.26(3).

Thank you for the opportunity to make these submissions on the important issue of the reform of defamation law in Ontario. If you have any questions, I would be pleased to discuss the Society's submissions with you at your convenience.

Yours sincerely,



Guy J. Pratte
President

Attachment:

1. The Advocates' Society Letter to The Hon. Doug Downey, dated June 15, 2020

CC: Amanda Iarusso, Director of Policy and Legal Affairs to the Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

Members of The Advocates' Society's Task Force:

Andrea L. Burke, *Davies Ward Phillips & Vineberg LLP*
Monty Dhaliwal, *Pallett Valo LLP*
Peter Downard, *Fasken*
Iris Fischer, *Blake, Cassels & Graydon LLP*
Andrea Gonsalves, *Stockwoods LLP* (chair)
Tycho M.J. Manson, *Chernos Flaherty Svonkin LLP*
Ken McEwan, Q.C., *McEwan Partners LLP*

June 15, 2020

VIA EMAIL: attorneygeneral@ontario.ca

The Honourable Doug Downey, M.P.P.
Attorney General of Ontario
Ministry of the Attorney General
720 Bay St., 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General:

RE: Elimination of Civil Jury Trials in Ontario

The Advocates' Society, established in 1963, is a not-for-profit association of more than 6,000 members throughout Canada, including approximately 5,000 in Ontario. The Society's mandate includes, among other things, making submissions to governments and others on matters that affect access to justice, the administration of justice, and the practice of law by advocates. The Society's membership includes advocates who regularly represent clients in cases tried by civil jury, and advocates whose trial practice focuses on judge-alone trials.

We are in receipt of your letter dated June 5, 2020, which sought the Society's input by June 15, 2020, as to whether civil juries should be eliminated in Ontario, and if so, whether certain types of actions should be exempt. The Society struck a Task Force to consider these important questions.

First, the Society must strenuously object to the extremely short timeframe in which the government has asked for input on this vital issue. The Society shares the government's desire to build a justice system that is more accessible and responsive to Ontarians. However, we believe that decisions regarding permanent changes to longstanding elements of our justice system ought to be the product of careful research, analysis, consultation, and deliberation. As you are aware, jury trials are currently suspended in Ontario due to the COVID-19 pandemic and the Superior Court of Justice has indicated that it "[w]ill not recommence criminal or civil jury selection or jury trials until September, 2020, at the earliest."[1] We suggest that there is therefore time to engage in careful consideration of whether to maintain or eliminate civil jury trials in Ontario, or whether there are other paths, such as reforming aspects of the civil jury system, that should be explored.

Specifically, the Society believes that more time is required to permit (1) robust stakeholder consultation on the advantages and disadvantages of civil jury trials and (2) the collection and publication of data about civil jury trials in Ontario.

[1] Ontario Superior Court of Justice, *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media Re: Expanded Operations of Ontario Superior Court of Justice, effective May 19, 2020*, online: Superior Court of Justice < https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/ > .

The question of whether to eliminate a long-held, substantive right held by parties to civil litigation merits broad consultation with justice system stakeholders. In particular, comprehensive consultation with the bar is necessary because there is no apparent consensus among members of the bar regarding whether civil juries ought to be maintained, reformed, or eliminated (with or without exceptions).

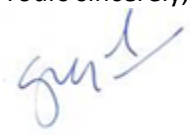
In response to a 2016 consultation by the Civil Rules Committee about whether jury trials should be eliminated under the Simplified Procedure, the Society observed that juries have historically been considered a hallmark of a free and democratic society where ordinary citizens consider it their right to participate in the legal system. That said, there are some who believe that the time for civil juries has passed and that there are other means, such as trial by judge alone, which better achieve access to justice. Before such an important substantive right is taken away, however, there needs to be appropriate consultation, fact gathering, and analysis. Consideration should also be given to potential reform of the current jury system short of complete elimination of a civil jury trial. Such a robust process would also permit consideration whether certain types of actions should be exempt if civil juries are to be eliminated. The Society's December 8, 2016 letter to the Civil Rules Committee is attached for your reference.

The members of the Society's Task Force were unanimous that any decision about whether to eliminate civil juries in Ontario ought to be made in part on the basis of data regarding the frequency of civil jury trials and their cost and resource implications for our justice system. The government's response to COVID-19 has been informed by evidence; a fundamental change to our legal system should similarly be based on relevant, reliable data. In our 2016 letter to the Civil Rules Committee, the Society outlined the types of statistics that could assist in deciding whether to change the regime prevailing at that time. As we noted in our 2016 letter, "Without these statistics, the Society is left with only anecdotal evidence and is not in a position to evaluate the true impact that the elimination of jury trials under the Simplified Procedure would have on the efficient use of court resources." We believe this statement remains applicable to deciding the way forward in regular actions now.

The Society reiterates its grave concern with the government altering the administration of justice in Ontario without the benefit of relevant data and fulsome stakeholder input. The Society strongly urges the government to gather and publish data about civil juries in Ontario, and to engage in a significantly more extended consultation with the bar and other justice system stakeholders. Given more time, the Society would be pleased to review data provided by the government regarding civil juries, canvass the diverse views of its membership more comprehensively, and develop helpful input for the government's consideration.

Thank you for considering these submissions. We would be pleased to answer any questions you may have.

Yours sincerely,



Guy Pratte
President

Attachments:

1. The Advocates' Society Letter to Derek McKay, Member of the Civil Rules Committee Secretariat, dated December 8, 2016

CC: Amanda Iarusso, Director of Policy and Legal Affairs to the Attorney General of Ontario
Vicki White, Chief Executive Officer, The Advocates' Society

Members of The Advocates' Society's Task Force:

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December 8, 2016

VIA EMAIL: dm@royoconnor.ca

Derek McKay
Member of the Civil Rules Committee Secretariat
c/o Roy O'Connor LLP
23rd Floor, 200 Front Street West
P.O. Box 45
Toronto, ON
M5V 3K2

Dear Mr. McKay:

RE: Consultation on Simplified Procedure and Jury Trials

The Advocates' Society (the "Society"), founded in 1963, is a not-for-profit association of over 5,500 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates. As courtroom advocates, the Society's members have a keen interest in the effective resolution of legal disputes.

The Society has reviewed with interest the consultation document circulated by the Civil Rules Committee on whether to recommend legislative changes to limit the availability of jury trials in actions under the Simplified Procedure of Rule 76 of the *Rules of Civil Procedure* (the "Consultation Document"). The Society assembled a Task Force whose members have closely considered the issue and consulted with other members of the Society in order to draft these submissions.

The members of the Task Force held strongly opposed viewpoints, which we believe would be reflected within the Society's membership as a whole, and ultimately were unable to reach a consensus position on the question of whether jury trials should be eliminated under the Simplified Procedure.

Juries are considered a hallmark of a free and democratic society where ordinary citizens consider it their right to participate in the legal system. In an article entitled "Jury Systems Around the World",[1] Valerie P. Hans states: "Two-thirds of the opinion leaders, including judges, prosecutors, lawyers, religious leaders, business executives, and members of the national assembly, agreed that the judicial system would become more democratic and transparent if

[1] (2008) *Cornell Law Library Publications*, Paper 305, Scholarship@Cornell Law: A Digital Repository, online: http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1378&context=facpub ("Hans").

laypersons were included as legal decision makers."[2] In fostering participation by members of the public in the justice system, jury trials enhance public understanding of the role of judges, lawyers and the justice system generally. It is a substantive right of a party to have the facts of his or her case determined by his or her peers and juries can make basic determinations of credibility and fact as effectively as judges can.

Jury trials also encourage settlement more than non-jury trials. As noted in the Civil Justice Reform Project report by The Hon. Coulter A. Osborne, Q.C.,[3] both insurers (in tissue cases) and plaintiffs (in catastrophic and fatality cases) have endorsed the use of jury notices as an effective means of encouraging settlements. If the threat of a jury trial encourages settlement then the elimination of the availability of jury trials under the Simplified Procedure could have the adverse effect of increasing the number of Simplified Procedure matters that actually proceed to trial, which in turn will require additional court and judicial resources.

To some, the elimination of jury trials may seem counterintuitive to upholding these important principles. Some are also concerned that the elimination of jury trials under the Simplified Procedure could begin a slippery slope to the eventual elimination of jury trials for all civil actions in all jurisdictions.

That said, some remain concerned that the costs and court resources that are channeled into jury trials under the Simplified Procedure may be best diverted to other avenues within the justice system to ensure better access to justice. As the Consultation Document notes, some Canadian jurisdictions have restricted the use of civil jury trials in different situations (e.g. Quebec, Alberta and British Columbia). In Ontario, jury trials are already not permitted for certain types of proceedings (family law matters, either in the Superior Court of Justice or Ontario Court of Justice, including for very serious child protection cases; claims for injunctive relief, the partition of real property, foreclosure of a mortgage, specific performance, and declaratory judgment; and claims against municipalities or other government bodies, including personal injury claims).

The policy behind the Simplified Procedure is to attempt to reduce the cost of litigating claims of modest amounts by reducing the amount of procedure available, consistent with the principle of proportionality articulated by the Supreme Court of Canada in *Hryniak v. Mauldin*[4] and *Canada (Attorney General) v. Confédération des syndicats nationaux*.[5] The court resources, including physical space, court staff, juror selection processes, and time,[6] and the additional cost to litigants, including extra disbursements associated with copies of exhibits, demonstrative aids, audio-visual equipment and oral expert testimony, should be proportional to the amount at stake in the proceeding and the nature of the issue.

These observations are made, however, without the benefit of robust statistical information. The Consultation Document states that:

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[2] Hans at p. 283.
[3] November 2007, Ontario Ministry of the Attorney General, online: https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/ ("Osborne Report").
[4] [2014] 1 SCR 87, 2014 SCC 7.
[5] [2014] 2 SCR 477, 2014 SCC 49.
[6] Both the Osborne Report and the report of Prof. John McCamus on civil justice reform from 1996 support a finding that civil jury trials are slower than bench trials.

In Ontario, over the last five years, an average of 943 jury notices have been filed each year under Rule 76, of which an average of only 30 cases per year actually proceeded to a jury trial. More than 75% of these cases involved either motor vehicle accident claims or other, non-vehicle related personal injury claims.

While these statistics tell part of the story, the Society believes that they are insufficient to inform any decision with regard to the potential curtailment, or elimination, of the right to a jury trial under the Simplified Procedure. More robust statistics on jury trials under the Simplified Procedure and under the regular stream must be analyzed. In particular, the Society believes that the following statistics would be essential to making any decision regarding a change to the current regime:

- In Ontario, over the past five years, how many jury notices have been filed each year in the regular stream, and how many of those cases actually proceeded to a jury trial?
- What is the average number of days taken by judge-only trials vs. jury trials over the past five years?
- What is the allocation of other court resources to jury trials under the Simplified Procedure?
- What is the average quantum of costs awards in jury trials under the Simplified Procedure?
- What is the breakdown of the monetary thresholds of the jury trials that have taken place before the Superior Court of Justice (e.g. $25,000-$50,000; $50,000-$75,000; $75,000-$100,000) over the past five years?

While there are certainly concerns regarding the timely hearing of proceedings before the Superior Court of Justice in various parts of the Province and on backlogs of cases in the system, there are several factors that contribute to these delays. The statistics referred to above could assist with assessing the financial and resource impacts at various stages of the jury trial process, including the pre-trial stage. Without these statistics, the Society is left with only anecdotal evidence and is not in a position to evaluate the true impact that the elimination of jury trials under the Simplified Procedure would have on the efficient use of court resources.

The Society stresses that any changes to the *Rules of Civil Procedure* must be made with a careful focus on statistical evidence in addition to qualitative factors. Having said that, the Society remains very concerned about the delays in the civil justice system and in particular with respect to securing trial dates. The Civil Rules Committee's search for a solution to this urgent problem is welcome.

Thank you for providing the Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours very truly,

Bradley E. Berg
President

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