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The Advocates' Society

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October 1, 2015

Shafiq Qaadri
MPP (Etobicoke North) and Chair, Standing Committee on Justice Policy
Room 1405, Whitney Block
Queen's Park
Toronto, ON
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Dear Mr. Qaadri:

RE: Bill 52: *Protection of Public Participation Act, 2015*

As President of The Advocates' Society (the "Society"), I write to offer the Society's comments on Bill 52, the *Protection of Public Participation Act, 2015* (the "Bill").

The Advocates' Society is an association of over 5,000 litigators across Canada, most of whom practise in Ontario. Our members represent a wide variety of parties in litigation, from individuals to multi-national corporations, in a range of industries and areas of law. The Society reflects the diverse and considered views of the litigation bar.

The Society has followed the evolution of Bill 52 with great interest. In November of 2010, the Society made a number of recommendations to Dean Mayo Moran, in her capacity as Chair of the Advisory Panel to the Ministry of the Attorney General, regarding the proposed model legislation. In February of 2011, following the release of the Report of the Advisory Panel, the Society made further submissions to the Attorney General at the time, the Honourable Chris Bentley. In September 2013, the Society wrote to the Honourable John Gerretsen (Mr. Bentley's successor) with regard to concerns with Bill 83, the *Protection of Public Participation Act, 2013*.

The Society has now had an opportunity to carefully consider Bill 52 and its proposed amendments to the *Courts of Justice Act*, the *Libel and Slander Act*, and the *Statutory Powers Procedure Act*. As you know, Brian Gover, a Member of our Board of Directors and Chair of the Society's Bill 52 Task Force, and Dave Mollica, Director of Policy and Practice, appeared before the Standing Committee on Justice Policy on September 24, 2015. These written submissions are intended to expand upon the oral submissions made by Mr. Gover to the Standing Committee and to address the questions and discussion points raised by the Standing Committee members.

I must start by stressing, as did Mr. Gover in his presentation to the Standing Committee, that the Society is supportive of the laudable goal of Bill 52 to ensure that public discourse on a matter of importance is not silenced by the looming threat of litigation. That said, I ask this Standing Committee to consider what may be the "unintended consequences" of certain provisions in Bill 52. The proposed amendments raise a number of concerns for the Society related to procedural fairness and the proper administration of justice, as well as other

related matters. The Society's views on certain specific components of the proposed legislation are set out below.

***Courts of Justice Act*, s. 137.1(4)(a) – Burden Shifting on Merits**

Under the proposed s. 137.1(4)(a) of the *Courts of Justice Act*, once it is shown that a suit arises from an expression related to a matter of public interest, the suit will be dismissed unless the plaintiff demonstrates that the suit has “substantial merit” (s. 137.1(4)(a)(i)) and that the defendant has “no valid defence” (s. 137.1(4)(a)(ii)). The Society is concerned that imposing *both* of these requirements will place an unnecessary and improperly onerous burden on any legitimate plaintiff who may well have a compelling interest in protecting its reputational interests.

We believe it is appropriate to require that the plaintiff establish that its suit has “substantial merit”, as provided in s. 137.1(4)(a)(i). Such a requirement is common in legal tests requiring a balancing of interests analysis, as in the case of Bill 52. Proof of some merit is one of the requirements to obtain an interlocutory injunction, for example, and is also required to seek leave to proceed with so-called “secondary market claims” under recent amendments to the *Securities Act*, R.S.O. 1990, c. S.5 (as amended).

It is not appropriate, however, to require at the same time that the plaintiff show the defendant has “no valid defence”. This would impose a burden on the plaintiff to demonstrate in a summary proceeding that its suit is certain to succeed, failing which its case would be dismissed without trial. This raises a serious issue of access to justice. Canadian courts and legislatures have traditionally refused to permit civil plaintiffs to be kept out of court or “driven from the judgment seat” except in cases where it is clearly shown by a defendant that the plaintiff *cannot* succeed.¹ The requirement that the plaintiff show there is no valid defence, as in the proposed s. 137.1(4)(a)(ii), would turn this important concept completely on its head.

There is a considerable breadth of activity that is captured by the concept of “public interest”. Care must be taken not to go beyond what is necessary to achieve a proper balancing of interests, so that the fundamental civil right of residents of the Province to obtain access to justice is not unduly restricted. The addition of s. 137.1(4)(a)(ii) heightens the risk that defendants will abuse Bill 52 as a tactical mechanism for creating barriers to meritorious litigation.

In our view, the requirement that the plaintiff show its suit has “substantial merit” is adequate to achieve the balancing of interests that is the goal of Bill 52. The requirement to show “no valid defence” is unnecessary and unwarranted. We therefore recommend that Bill 52 be amended to delete the proposed s. 137.1(4)(a)(ii).

***Courts of Justice Act*, s. 137.1(4)(b) – No Presumption of Harm**

The proposed s. 137.1(4)(b) of the *Courts of Justice Act* places a further burden upon the plaintiff, by requiring that the plaintiff demonstrate the seriousness of the harm suffered or likely to be suffered by the plaintiff as a result of the expression of the defendant. It is a fundamental principle of defamation law that harm from a defamatory statement is presumed. That a plaintiff need not prove any actual harm in an action to defend his or her reputation in the community and seek meaningful relief has been well established by

¹ *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

centuries of jurisprudence, both in Canada, England and other common law jurisdictions. This is so because our courts have recognized for many years that in cases of libel it is frequently impossible to ascertain who has heard or become aware of the defamatory statement in question, or thinks less of the plaintiff as a result. By effectively providing for the dismissal of cases without trial absent immediate proof of harm, s. 137.1(4)(b) would improperly restrict Ontarians' access to justice in otherwise viable defamation cases.

The Society believes that the Bill should not restrict access to justice by requiring proof of harm and that any reference to the harm suffered or likely to be suffered by the plaintiff should therefore be removed from it. In the Society's view, the balancing of interests to which Bill 52 is directed can be better achieved by an amended s. 137.1(4)(b), as discussed below.

Courts of Justice Act, s. 137.1(4)(b) – Balancing of Interests

As presently drafted, the proposed s. 137.1(4)(b) attempts to balance "*the public interest in permitting the proceeding to continue*" against the public interest in protecting the defendant's expression. The Society believes that the focus on the *public interest in the continuation of the proceeding* is misplaced. Whether a plaintiff should be entitled to proceed should not depend on any public interest in the continuation of the proceeding, but rather upon the interests of justice. It is the interests of justice (and in particular the public value associated with access to justice where serious reputational interests are at stake) that should be weighed against the public interest in free expression. It is the fundamental value of access to justice that is compromised when a lawsuit is peremptorily dismissed for the sake of protecting freedom of expression. The legislation should reflect this compromise, and make it clear to the parties and to the presiding judge precisely what competing values are at stake.

Accordingly, the Society recommends that the proposed s. 137.1(4)(b) be deleted and the following substituted: *the importance of the plaintiff's access to justice in continuing the proceeding outweighs the public interest in protecting the moving party's expression.*

Courts of Justice Act, ss. 137.1(7) and 137.1(8) – Costs

Bill 52 would create cost presumptions in favour of a moving party while minimizing judicial discretion. While an asymmetrical costs regime may be consistent with the spirit and purpose of the proposed legislation, the Society's view is that the legislation should not unduly fetter judicial discretion in matters of costs.

As noted above, the sphere of activity that may be captured by the proposed legislation is broad, and the proposed costs regime could be engaged in a wide variety of circumstances as a result. Moreover, the proposed regime provides for the dismissal even of complaints with considerable merit, provided that the moving party succeeds on the balancing of interests analysis. It would be unfair to treat a plaintiff whose claim is frivolous in the same manner as one whose claim is meritorious but was dismissed on a balancing of interests.

The Society believes that Bill 52 should not fetter the discretion of the judiciary to make appropriate costs awards having regard to the variegated circumstances in which it might be triggered. Accordingly, the Society recommends that s. 137.1(7) and 137.1(8) be replaced with the following:

137.1(7) If a judge dismisses a proceeding under this section, the judge, in exercising her discretion to award costs, may award the moving party costs on the motion and in the proceeding on a full indemnity basis.

137.1(8) If a judge does not dismiss a proceeding under this section, the judge, in exercising her discretion to award costs, may award the responding party no costs on the motion in appropriate circumstances.

Courts of Justice Act, s. 137.1(9) – Damages

The proposed s. 137.1(9) of the *Courts of Justice Act* would endow the presiding court with a broad discretion to award damages upon finding that a SLAPP suit had been brought in bad faith or for an improper purpose. The Society is concerned that the issues and interests in a damages claim are altogether different from those at issue in the balancing that occurs under s. 137.1(4)(b). The procedure created by Bill 52 lacks the proper procedural safeguards appropriate for the fair and just determination of a claim for damages asserted in the Ontario Superior Court.

While the policy objectives of the proposed legislation would be well served by the creation of a damages remedy to discourage frivolous lawsuits, we recommend that s. 137.1(9) be amended to create a separate right of civil action for damages. The right of action would arise where the presiding judge has made a finding of bad faith or improper purpose and has made a specific declaration to that effect. This right of action would discourage bad faith and improper conduct, but would at the same time ensure that any claim for damages based upon such conduct will be subject to the procedural safeguards established by the Ontario *Rules of Civil Procedure*. The damage claimant could also avail itself of the summary judgment procedure provided for in Rule 20, if appropriate to the case.

Since a different judge may well preside over the separate damage proceeding, it is important to provide for a specific declaration by the judge hearing the SLAPP motion. That will ensure there is no doubt as to whether the relevant findings have been made by the SLAPP motion judge.

Accordingly, we recommend that s. 137.1(9) be replaced with the following sections:

137.1(9) In dismissing a proceeding under this section, a judge who finds that the responding party brought the proceeding in bad faith or for an improper purpose may issue a declaration to that effect, and, provided that such a declaration is issued, the moving party may assert claims against the responding party for damages based upon that declaration.

137.1(10) In a claim for damages brought pursuant to section 137.1(9), the court shall award the plaintiff in that action such damages as the court considers appropriate.

Courts of Justice Act, s. 137.4 – Automatic Stay

The proposed amendment at s. 137.4 of the *Courts of Justice Act* provides that, where a responding party has begun a proceeding before a tribunal (within the meaning of the *Statutory Powers Procedure Act*) that the moving party views as related to the subject proceeding, the moving party may have the administrative proceeding stayed automatically. The Society notes that this amendment would necessarily be unevenly applied, because of the doctrine of federal legislative paramountcy. The application of the paramountcy doctrine

safeguards the control of the federal Parliament over the administrative tribunals it creates.² Any provision for a stay of a proceeding before a federal tribunal is therefore *ultra vires* the Ontario legislature.

***Libel and Slander Act*, s. 25 – Qualified Privilege**

The Bill would amend the *Libel and Slander Act* to extend the defence of qualified privilege to persons with a direct interest in a matter of public interest communicating to others with a direct interest, even if media are present and report on it.

This privilege has the practical effect of codifying the “actual malice” rule articulated by the U.S. Supreme Court in *New York Times Co. v. Sullivan*.³ The Supreme Court of Canada has expressly rejected this rule. In *Hill v. Church of Scientology of Toronto*,⁴ the Supreme Court carefully considered and rejected the *Sullivan* Principle on the basis that the law of defamation as carefully crafted by our Courts and the Courts of other Commonwealth countries over many years strikes the appropriate balance between prohibition of the publication of injurious false statements and freedom of expression. The Court’s conclusion in *Hill* was more recently confirmed in *Grant v. Torstar Corp.*,⁵ in which the Supreme Court specifically rejected a free standing qualified privilege for statements made in the public interest. The Supreme Court made it clear that the defence of responsible journalism was predicated both on the media’s special role in democratic discourse *and* upon the requirement that the media do its job *responsibly*, in accordance with journalistic standards of investigation.

In the circumstances, the Society is of the view that Bill 52 is not the place to modify the substantive law of defamation as proposed. In our view, this issue is best left to the Courts or, at least, to a separate legislative initiative which focuses on this issue and includes more in depth study and public consultation.

***Statutory Powers Procedure Act*, s. 17.1(7) – Tribunal Procedures on Costs**

Bill 52 would amend the *Statutory Powers Procedure Act* to provide that submissions on costs must be in writing unless doing so would cause significant prejudice. The Society notes that the proposed s. 17.1(7) would override tribunal procedures that are inconsistent with that section. Such a provision is *intra vires* the Legislature, except with respect to federal tribunals. It is nevertheless inconsistent with the general trend, evident in both legislation and judicial decisions, toward considering administrative tribunals to be “masters in their own house” when it comes to matters of procedure.⁶ For good reason, the *Statutory Powers Procedures Act* endows specialized administrative bodies with the power to determine their own procedures. In the Society’s view, where a tribunal has availed itself of its power to make its own rules as to costs, those rules should be respected.

² *Law Society (British Columbia) v. Mangat*, [2001] 3 S.C.R. 113.

³ 376 U.S. 254 (1964).

⁴ [1995] 2 S.C.R. 1130.

⁵ [2009] 3 S.C.R. 640.

⁶ See, for example, *Prasad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560, at para. 46; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 27; *Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America*, [1990] 1 S.C.R. 282, at para. 97.

We hope that the foregoing will be of assistance as you further consider this legislation and the implications accompanying it. The Society would be pleased to answer any questions you may have arising out of this letter.

Yours very truly,



Martha McCarthy
President

C: Tamara Pomanski, Clerk, Standing Committee on Justice Policy