The Advocates' Society

Handout to Accompany Oral Submissions to the Standing Committee on Justice Policy
RE: Bill 52, *Protection of Public Participation Act, 2014*
September 24, 2015

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's submissions reflect the diverse and considered views of the litigation bar.

While the Society is supportive of the laudable goal of Bill 52 to ensure that public disclosure on a matter of importance is not silenced by the looming threat of litigation, the following "unintended consequences" of certain provisions of Bill 52 pose concerns to the Society:

1. **The imposition of an unduly high burden on the plaintiff to bring an indefensible claim**

   - It is appropriate to require that the plaintiff establish that its suit has "substantial merit" (Section 137.1(4)(a)(i)).
   - However, requiring at the same time that the plaintiff show the defendant has "*no* valid defence" (Section 137.1(4)(a)(ii)) would impose too high a burden on the plaintiff.
   - In contrast to proposed Section 137.1(4)(a)(ii), 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.

2. **The failure to consider the plaintiff's access to justice rights in the balancing of interests at stake**

   - The public interest in protecting the defendant's expression should be balanced against the plaintiff's access to justice rights, and in particular *the public value associated with access to justice where serious reputational interests are at stake* – not the public interest in permitting the proceeding to continue as proposed in Section 137.1(4)(b).
   - The fundamental value of access to justice is compromised when a lawsuit is peremptorily dismissed for the sake of protecting freedom of expression, and this compromise should be reflected in Bill 52.

3. **Changes to the substantive law of defamation that are contrary to the common law**

   - The proposed amendment to the defence of qualified privilege is contrary to Supreme Court of Canada jurisprudence. The Supreme Court has made it clear that, in a defamation claim, 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.
   - Requiring the plaintiff to demonstrate the seriousness of harm suffered or likely to be suffered as a result of the expression of the defendant is contrary to the common law, which *presumes* harm from a defamatory statement. 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.