



## UNIFORM LAW CONFERENCE OF CANADA

### ONLINE DEFAMATION PROJECT - PROGRESS REPORT

Presented by  
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August, 2021

This document is a publication of  
the Uniform Law Conference of Canada.  
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## ONLINE DEFAMATION PROJECT - PROGRESS REPORT (August 2021)

[1] At the 2020 meeting of the Uniform Law Conference of Canada (the “Conference”), the Civil Section confirmed the recommendation of the Advisory Committee on Program Development and Management that work commence on the topic of online defamation.

[2] This followed on the excellent work of the Ontario Law Commission’s comprehensive report on the topic. ( <https://www.lco-cdo.org/wp-content/uploads/2020/03/Defamation-Final-Report-Eng-FINAL-1.pdf>). (the “Commission”)

[3] The Commission was willing to share its work with the Conference in the hope of moving toward a draft act.

[4] The Conference has a *Uniform Defamation Act* (1994) which is of some vintage. One of the observations of the Commission was that the Act was rooted in the older context of defamation by publication in print media. It was observed that it might be prudent to start from scratch rather than attempt to update the existing uniform act.

[5] One of the major challenges in undertaking work in this area is how to define the scope of the project. At first, the thought was to identify the low hanging fruit and deal with those issues first. The problem in doing so, is that a significant amount of work could be done, and there is the risk of it being wasted if the project founders on one or more of the larger issues.

[6] The Conference has had the benefit of a Summary Issues Paper prepared by Susan Gratton of the Commission. Susan was also a member of the working group on Nondisclosure of Intimate Images. This Summary was intended to allow the working group to decide on the priorities and adopt an approach to the topic. (See: attached).

[7] The change to the landscape of social media has led to several possible approaches.

[8] Three primary issues are central to any reform in this area:

- a. the definition of publication;
- b. the role of Internet intermediaries; and
- c. the crafting of new remedies, especially a takedown option.

[9] Since these issues are so central, it might be advisable to tackle one or more of them at the start.

[10] A second approach is to move away from existing legal constructs and to think of novel and creative ways of dealing with “online harm”. This would abandon the use of defamation or privacy or traditional torts, and assert that the phenomenon of “online harm” is so pervasive that a whole new construct is needed. This would inevitably drift into the regulation of online media.

[11] This kind of activity, going where no one has gone before, is not an exercise that the Conference has experience or skill in. It is my view, at least, that this kind of thinking and analysis is best left to others before the Conference becomes involved. Even if that restriction is accepted, there is a large amount of work to be done, and the Commission document and analysis could be the guiding document.

[12] The second major challenge for this working group is finding leadership in project management and subject matter expertise. This challenge is further complicated by the fact that there is a clear dichotomy between media representatives and user representatives. The project cannot be seen or characterized as being dominated by one group or the other. The working group must have the benefit of input from both groups and be seen as the honest broker and analyst of the input.

[13] I am currently in negotiations with individuals who could provide the subject matter expertise and be seen as neutral as between Media and users. Their involvement will depend partially on the scope of the project and the administrative support the Conference can provide. Until I am able to confirm this leadership component, I have not engaged the small number of volunteers whom jurisdictional representatives put forward, other than to provide the Summary Issues Paper.

[14] The first task of the working group will be to answer questions such as:

- Whether to attempt to update the existing uniform act or to start from scratch;
- Whether to take on initially one of the three big issues – no traction on these issues means dim prospects for the overall project;
- How to define the scope of the project so as to provide meaningful legislation without crossing the frontier of online harm and spending significant time in a galaxy with which the Uniform Law Conference of Canada is not familiar;
- Identify areas of the Commission paper where further research or consultation may be necessary.

[15] The members of the working Group who have been identified so far are:

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## SUMMARY ISSUES PAPER



LAW COMMISSION OF ONTARIO  
COMMISSION DU DROIT DE L'ONTARIO

To: Peter Lown, ULCC  
From: Sue Gratton and Nye Thomas, LCO  
Date: March 29, 2021  
Re: Preliminary Ideas for ULCC Defamation Law Project

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Thank you for involving the LCO in the ULCC's new project on uniform defamation law reform. We are happy to think that our 2020 Final Report [\*Defamation Law in the Internet Age\*](#) provided some inspiration for the project.

Unfortunately, we do not have the financial or administrative resources to lead the project or organize meetings. However, we are delighted to take part in working group meetings and provide informal advice.

As requested, here are some preliminary ideas about issues to be explored in the project. We also list some individuals/organizations who may wish to be involved.

### Three Thoughts as to Overall Approach

- We recommend a holistic approach to defamation law reform. It may be tempting to think of internet-specific issues as an “add-on” to more familiar and longstanding doctrinal issues. However, the internet is now the backdrop for most defamation and the project should reflect this. Specifically, we do not believe it useful to orient a defamation law project around the existing *Uniform Defamation Act (1994)*. The Act is obsolete and incremental reform is not advisable. A new model statute should be developed from scratch.
- Defamation law has traditionally hinged on a distinction between media and non-media publications. With the advent of the internet, this distinction is blurred. A foundational question for a ULCC reform project is whether a two-track approach to the law continues to be appropriate or whether a uniform set of legal principles is to be preferred. The approach to this issue will drive many of the other issues in the project.
- The problem of access to justice for defamation complainants and publishers pervades defamation law. Particularly in the online context, traditional court proceedings are too slow and costly to meet the needs of either party. The borderless nature of the internet and possibility of anonymity mean that some defendants will be beyond the reach of Canadian courts. We recommend that the project explore other options for improving access to justice.

## Overview

Defamation law in Canada encompasses both substantive legal principles and the procedural elements of defamation proceedings. For the most part, the substantive legal principles are governed by common law. Provincial defamation legislation and the ULCC's 1994 *Uniform Defamation Act* primarily cover procedural matters with some legislative "tweaks" to substantive principles.

In our view, the procedural aspects of defamation proceedings are most clearly in need of law reform. Current legislation pre-dates the internet and contemporary civil procedure rules. There is much that could be done to modernize defamation proceedings and improve access to justice for both complainants and respondents.

The substantive legal principles of defamation law are relatively more stable. Gradual common law reform has occurred and there is less need for reform here. However, the common law doctrine of publication is a key exception and is addressed below.

In the next section, we recommend six procedural issues for inclusion in the ULCC's project. In the following section, we suggest two further issues that should be considered for inclusion in the project although they are more controversial in nature. The substantive doctrine of publication is one of these. Please note that this is not a comprehensive list of possible law reform issues. Several others are canvassed in the LCO's Final Report. And there are still others beyond the scope of the LCO's project (i.e., special pleadings rules, defamation of deceased persons, etc.).

## Recommended Issues for a Uniform Defamation Law Project

The following areas of defamation law are strong contenders for reform. Each would be appropriately addressed in a new *Uniform Defamation Act*. For more context on each issue, see the page references to the LCO's Final Report.

### **1. Distinction Between Libel and Slander –** (LCO Final Report, 20)

Most provinces and territories in Canada have legislatively abolished this distinction and ULCC's *Uniform Defamation Act* follows suit. Only Ontario, British Columbia and Saskatchewan have maintained the distinction in their legislation. The LCO recommended that the distinction be abolished in Ontario.

### **2. Notice Regime –** (LCO Final Report, 37-47)

Notice requirements for defamation actions against media publishers vary significantly across Canada.<sup>1</sup> During the LCO's project, Ontario practitioners uniformly agreed that the Ontario notice period was outdated and its application to online publications unclear.

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<sup>1</sup> See the chart outlining the different notice periods in defamation legislation across Canada in the LCO's [Consultation Paper](#) (November 2017), 74.

There is much debate over the best approach to this issue. Since notice periods are designed to protect media publishers, opinions tend to align along media and non-media interests. Issues include:

- whether a notice period should be required at all;
- types of publications subject to notice;
- whether and how notice should apply to online publications; and
- consequences for failure to meet the notice period.

The LCO recommended an entirely new notice regime for Ontario applicable to all publications.

### **3. Limitations and Single Publication Rule –**

(LCO Final Report, 48-49)

The limitation periods applicable to defamation actions also vary across Canada.<sup>2</sup> Most provinces and territories have two limitation periods: a short period applicable to claims involving media publications and a longer period for other claims. A key issue here is whether it remains appropriate to distinguish between different types of defamation in this way. The LCO recommended a single two-year limitation period for all Ontario defamation claims.

A related issue is the common law rule that a new limitation period begins every time a defamatory statement is republished. This is problematic in the online context where posts are shared and reposted, fluidly and indefinitely. Certain jurisdictions (United States, England and Wales) have modified the common law to provide that only a single limitation period applies in respect of the first publication and all republications of an alleged defamatory statement. There has been much debate whether this single publication rule should also be adopted in Canadian jurisdictions. The LCO recommended a single publication rule for Ontario.

### **4. Court Procedures and Evidentiary Rules**

(LCO Final Report, 61, 70)

The LCO made recommendations to reform various procedural and evidentiary rules in the Ontario *Libel and Slander Act*. The ULCC project might similarly consider whether updated rules should be included in a uniform defamation act.

### **5. Court Remedies –**

(LCO Final Report, 33-36)

The traditional legal remedy for defamation is an award of damages. Other remedies, particularly injunctions, are less available due to the concern for restricting a publisher's freedom of expression. This *status quo* is significantly out-of-step with the nature of online defamation and the kind of reputational harm suffered by many complainants. In many cases, the primary goal of complainants in bringing action is to have the damaging posts removed from the internet as quickly and effectively as possible. A reform project should reconsider what court remedies should be available for online defamation.

There is a particularly strong argument that certain remedies, such as a final takedown order and an order to publish a summary of the court's judgment, are necessary to make court judgments

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<sup>2</sup> The various limitation periods across Canada are also detailed in the LCO's Consultation Paper, 74.

meaningful in the internet age. The LCO recommended both these remedies be available in Ontario.

## **6. Informal Procedures and Remedies –**

(LCO Final Report, chapters 8 & 9)

Practically speaking, a court judgment is out of reach for most complainants experiencing online defamation. Defamation actions are highly technical and expensive. Final judgment can take years. These barriers to access to justice are exacerbated where the publisher is anonymous or outside the jurisdiction. Alternatives to the formal court process are sorely needed. Possibilities include a regulatory take-down mechanism and/or online dispute resolution, both as recommended by the LCO in its Final Report.

## **Other Potential Issues to be Explored**

We suggest that the ULCC consider two additional issues for inclusion in the project. However, we note that LCO stakeholders were divided as to the need for reform here.

### **1. Interlocutory Takedown Orders**

(LCO Final Report, 54-59)

In defamation cases, interlocutory injunctions are restricted to the “rarest and clearest of cases” since they amount to a prior restraint of speech. The LCO concluded that this test is too stringent in the case of online personal attacks. We recommended a new statutory test for interlocutory takedown orders that balances egregious reputational harm online against free expression considerations. However, some stakeholders opposed amending such an established common law rule.

### **2. Publication Doctrine**

(LCO Final Report, 71-80)

As mentioned above, one of the most contentious issues in the LCO’s Defamation Law project was whether internet intermediaries, such as Facebook and Google, should be considered publishers of user-generated content appearing on their platform. In common law, intermediaries involved, even unknowingly, in the communication of defamation might be liable as publishers of the defamation. The LCO concluded that this doctrine was overinclusive and inappropriate for the internet era. Instead of subjecting internet platforms to liability in defamation law, we recommended they administer a notice and takedown regime allowing for quick removal of online defamation.

Some LCO stakeholders expressed the view that internet platforms hold a moral responsibility to control the content they host. They vehemently disagreed with our recommendation to limit intermediary liability in defamation law. The LCO’s conclusion was that the matter of moral responsibility for internet content is a broader issue best addressed by regulatory initiatives tackling hate speech, content moderation and privacy, etc.<sup>3</sup>

For the purpose of the ULCC’s defamation project, it is important to note that a debate around the publication doctrine in defamation law can quickly devolve into a much wider and potentially

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<sup>3</sup> See, for example, the recent Canadian Commission on Democratic Expression report, [Harms Reduction: A Six-Step Program to Protect Democratic Expression Online](#), January 2021.



unwieldy debate about internet regulation generally. However, in our view, meaningful law reform requires that this issue be tackled.

### **Possible Working Group Members**

The LCO Final Report was made possible through the support of a dedicated group of experts who participated in our Advisory Group and/or Working Group, contributed a paper, spoke at our international conference and/or RightsCon panel and otherwise consulted on the project.

All the individuals listed in Appendix D of our Report provided valuable input and would be well-placed to assist the ULCC with its defamation project. We simply note a few individuals who may be particularly interested in being involved:

Hilary Young

Emily Laidlaw

Brian Rogers

John Gregory

Dan Burnett

Roger McConchie

We hope this is of assistance in getting this project off the ground and look forward to next steps.