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FOLA Submissions

Regarding the Law Commission of Ontario (LCO) final report entitled *Defamation Law in the Internet Age*

Submitted to: Director of Policy and Legal Affairs
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Submitted on: 28 July 2020

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INTRODUCTION

The Federation of Ontario Law Associations (FOLA) appreciates the opportunity to provide submissions regarding the Law Commission of Ontario (LCO) Final Report entitled *Defamation Law in the Internet Age* (“the Report”).

FOLA is an organization that represents all 46 local law associations across Ontario. Together with our associate member, The Toronto Lawyers Association, FOLA represents approximately 12,000 lawyers, most of whom are in private practice in firms across the province.

In response to your invitation to comment on the Report, FOLA sought input from its member associations to provide feedback and submissions relative to this important subject.

PARAMETERS OF THE RESPONSE

You have invited us to comment on the 39 recommendations made in the Report by advising you of those that (1) we do not agree with or (2) that we would have proposed but were not made in the Report. You have also invited us to make submission regarding defamation law, in general.

(1) Recommendations

1-18 Agree

19 With regards to this recommendation, the following issues have been identified:

19(i) Retention of records in this subsection provides for a duty of an intermediary platform to “**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 information”. At recommendation 23 the Report sets out, that in the context of a motion for a Norwich order, an intermediary platform retain “**any records of information** identifying and anonymous publisher **for a period of one year** to allow the plaintiff to obtain a court order requiring the release of the information”.



It is respectfully submitted that there should be one set of time limits for retention of information and that the wording be harmonized to provide greater certainty and consistency in their application. It is also suggested that the wording suggestive of a higher level of disclosure envisioned in recommendation 23 i.e. “**any information**” be employed.

19(j) The recommendation that the notice regime apply only to intermediary platforms was found to be problematic. While the statement that the notice provisions would apply with respect to content made available to Ontario users, it is submitted that internet service providers, search engines and other intermediaries not directly hosting user content should also be included in the notice regime. Further, it is submitted that the requirement for prominently posting contact information for purposes of receiving notice of complaint be applicable to not only the intermediary platform but also for the said internet service providers, search engines and other intermediaries not directly hosting user content.

19(k-m) The suggestions in the Report providing for a wide range of **potential** remedial actions to resolve complaints, would be welcomed, however, it is submitted that firm time frames for such action to be taken/or not should be incorporated. Accordingly, the suggestion at **19(m)** that the “publisher should **not be under a specific deadline to take remedial action**” should be rejected.

20-22 Agree

23 See comments under 19(i) above

24-34 Agree

35-37 At page 10 of the Report the LCO correctly states that “the law should be simplified. The current law relies too much on obsolete technical categories.” To this end, new legislation must address the fact that the internet age has added greater, not less complexity to communications/publications/republication/ dissemination of information and disinformation.

The Report offers distinctions between platforms and providers and their respective roles and obligations. A submission received by FOLA provided the following comments which are worthy of consideration in that they suggest that in drafting new legislation that all platforms (intermediary or otherwise) be held accountable in defamation :

“ Defamation law as it currently exists in Ontario contains an important tool which should be preserved in respect of these leviathans of the internet because the



definition of publication in our law has been broadly enough interpreted so as to potentially include all media platforms”.

“We do not really know what is going on behind the scenes even now in terms of what these platforms are doing...they should be held accountable for their choices”

“...in the years and decades to come with the rapid development of technology and changing moral viewpoints it is not difficult at all to envision an internet where the major platforms exercise far more control over content than we think they do now...This is all the more reason to preserve the ability of the law to find them legally liable for defamatory content where it would be appropriate to do so.”

38 Agree, apart from **38(i)** regarding the takedown process being applicable only to intermediary platforms, the member submission noted above speaks to this. The process should be applicable to all players and not only to the intermediary platforms.

39 Agree

(2) Proposals Not Made

None

(3) General Comments

We commend the authors and contributors to the Report in addressing this important area of law, which to date, has not caught up with our electronic and online reality. If accepted, the “take-down” protocols would be a powerful self help tool for parties and offer to them a meaningful and rapid access to justice, in the first instance in what were referred to in the Report as “high volume , low value defamation complaints” and in so doing diverting them from the formal court system, encouraging informal, practical resolutions of these claims.

The Report correctly identifies that “there is currently no practical legal remedy available” for Ontarians with regards to online defamation and that within the current framework of the law they have no meaningful or costs effective way to seek or access justice.

We urge the Minister to consider the changes suggested in this report and submissions relative to same and to take the opportunity to modernize the law on defamation for the benefit of Ontarians.



CONCLUSION

The Federation of Ontario Law Associations appreciates the opportunity to make these submissions regarding the Law Commission of Ontario Final Report *Defamation Law in the Internet Age*.

John Krawchenko
1st Vice Chair