OCLA position paper on Bill 83

The tort of defamation must be abolished in Ontario [1]

Bill 83, *Protection of Public Participation Act, 2013*, is Ontario's proposed legislation to address strategic lawsuits against public participation (SLAPPs). The stated purpose of this bill is to foster free expression by discouraging the use of litigation as a means of silencing expression. Bill 83 is currently before the Ontario Legislature.

OCLA is an organization that vigorously advocates for authentic and unqualified freedom of expression in Ontario, in accordance with the right to free expression enshrined in the *Canadian Charter of Rights and Freedoms*. OCLA's position, as expressed in our letter to Attorney General John Gerretsen of December 5, 2013, is that Bill 83 is based on faulty common law principles underlying defamation law—principles which, if left intact in the form of the present defamation cause of action, threaten freedom of expression at the most fundamental level.

In the following, we elaborate on the two main problems with Bill 83: it maintains defamation law and it will not protect free expression.

1: Bill 83 does not abolish defamation as a cause of action in Ontario

The common law of defamation has survived from criminal statutes of a past era that were designed to protect nobility from criticism. It is the only common law tort (or cause of action) where damages—actual damage to reputation—and malice (malice of defamation) are *assumed*, and need not be proven in court. The result is a presumption of guilt—regarding falsity of the expression, malice of the defendant, and damages to the plaintiff—that can only be overturned if the defendant can prove one of the available defences, which are strictly limited and codified.

As such, and given the further explanations below, the tort of defamation (libel and slander) is incompatible with the right to free expression enshrined in the *Canadian Charter of Rights and Freedoms* and should not have standing in Canada in modern times. Here, OCLA stands with legal scholars who have argued that the presumptions of falsity, malice, and damages should be abolished [2].

Defamation law is structured such that if a complained of criticism, comment, or opinion is ruled by the court to have the tendency to reduce the social reputation of the plaintiff, in the mind of a fictitious "reasonable person", then damage to reputation is assumed and a financial award for damages is due, even in a total absence of evidence of actual damage to reputation (such as: lost fans of an artist, lost clients of a service provider, lost social connections, loss of employment, fewer invitations to social or business functions, etc.). The criticism complained of is all that is needed to obtain damages. Guilt is automatic, and the only possible defences are strictly limited and codified, carrying the names of "truth", "privilege", "fair comment", and "responsible reporting". The presumed-guilty party has the onus to prove an allowed defence.

Likewise, with the tort of defamation, a complete absence of actual malice (communication made for an improper purpose other than freedom of expression) on the part of the defendant is irrelevant. The cause of action of defamation holds in the absence of actual malice, which need not be proven by the plaintiff for damages to be due. Again, the only requirement is that the court finds that the comment complained of has the tendency to reduce the social reputation of the plaintiff, in the mind of a fictitious "reasonable person", in the absence of any evidence other than the words complained of.

These presumptions particular to defamation law have repugnant consequences for freedom of expression. For example, they support the intrinsically fallacious and hypocritical legal exercise that, on the one hand, insults are not by themselves defamation, form is irrelevant before content, and honest vehement opinions are as protected as moderate ones, while on the other hand, language (form) can be evidence for actual malice, which, if proven, defeats all the allowed defences against the tort of defamation.

All of this is exacerbated by the fact that there is no practical need for the tort of defamation because there are other common law torts that sufficiently protect against unjustified attacks to personal reputation, and which correctly require proof of harm and of malice. These include the torts of: malicious falsehood, intentional infliction of mental suffering, conspiracy to harm, and so on.

Furthermore, defamation law is critically flawed by being heavily and structurally biased in favour of those with money and power, both individuals and corporations, including individuals supported by powerful institutions. The most obvious source of bias is that rich individuals are most able to afford litigation, using the most successful lawyers. (A defamation lawsuit can cost $1 million to litigate.) In addition, damages are awarded in proportion to the "value" of the plaintiff's reputation, as perceived by the judge; rich and powerful individuals are judicially determined to have reputations of high monetary values needing large reparations when found to be damaged.

While Bill 83 superficially acknowledges the structural bias toward powerful parties in that the proposed legislation implicitly acknowledges that SLAPP suits are a problem in Ontario, it does not address the underlying systemic problems with defamation law, and does not take us in the necessary direction toward the removal of the tort of defamation as a cause of action.

There should be no room whatsoever for the tort of defamation in a free and democratic modern society. With such a malleable tool in the hands of human judges and juries, most trials turn out to be exercises in punishing the insolent, protecting the powerful, cooling the mark out, removing the politically incorrect, reinforcing society's taboos, and gauging establishment postures on the controversies of the day. And those are just the cases that go to trial, and/or are selected for appeals, not the great majority of cases in which the defendants are pressured and intimidated into settlements.

If personal freedom is to have meaning, then communication cannot be suppressed by allowing a legal apparatus—available to anyone with significant financial means—that presumes guilt and punishment of the communicator. This is especially true with the advent of the internet, which democratizes information and discourse, and greatly facilitates responding to any criticism with rational arguments and evidence.

2: Bill 83 does not protect the societal critics most in need of protection

In addition to condoning the tort of defamation, Bill 83 will not protect the societal critics most in need of protection. The Bill is largely window dressing, showing admirable intentions but without protecting the speech most likely to disturb the status quo.

This can be seen, in the version for second reading, in the two core sections of the proposed legislation, which are the "Order to dismiss" and the "No dismissal" sections (emphasis added):

> **Order to dismiss**
>
> (3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.
>
> **No dismissal**
>
> (4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,
>
> (a) there are grounds to believe that,
>
> (i) the proceeding has substantial merit, and
> (ii) the moving party has no valid defence in the proceeding; and
>
> (b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

We see that the statute prevents a defamation lawsuit for expressing an opinion solely if the opinion is deemed by the judge (as a question of law) to "[relate] to a matter of public interest". The judge has discretion to decide the line between "public interest" and "personal interest" deemed to affect solely the parties.

Thus one remains at the mercy of an unframed judicial discretion, where no general and objective test for "public interest" has been devised [3]. For example, it is not considered a matter of public interest *a priori* that an individual can be sued for his/her honest

opinion, that, when sued, he/she is assumed guilty of causing damage to reputation on the sole basis of the expressed opinion, and that he/she has no recourse to any defence if the opinion is not deemed to "relate to a matter of public interest".

The said judicial discretion to allow defamation lawsuits against honest opinions on matters judged to not be of public interest is fundamentally problematic in a free and democratic society that alleges to uphold a supreme law (*Canadian Charter of Rights and Freedoms*) expressly containing the guaranteed personal freedoms of thought, belief, opinion and expression, as:

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

Continuing, the Bill does appear to propose to dismiss all defamation actions for expressions that relate to matters of public interest, such as criticisms of the banking system, or a CEO's decisions affecting people, or McDonald's greasy food, and so on.

However, the plaintiff can challenge the dismissal by satisfying the conditions outlined in the "No dismissal" section of the Bill. The three conditions in the "No dismissal" section that must be satisfied, in the judge's mind, are:

Condition 1: "The proceeding has substantial merit". For this to be satisfied, the judge need only see a large damage to an important person's reputation—precisely the kind of damage resulting from an effective criticism of an individual with high social status in society. The more the criticism stings and has real impact, the more the "proceeding has substantial merit". How else does one measure merit of a defamation claim?

Indeed, the first condition is best satisfied for exactly those public interest criticisms that most need protection, in terms of their public contribution to challenge the status quo.

Condition 2: "The moving party has no valid defence in the proceeding". Now wait a minute. Normally, the whole idea of anti-SLAPP legislation is supposed to be that you don't need to rely on the codified common law defences of "truth", "privilege", "fair comment", and "responsible journalism", because it is recognized that asymmetry of resources in lawsuits against public expression is simply unacceptable. But Bill 83 expressly does not recognize this principle, by virtue of its section "(4)(a)(ii)" (Condition 2).

Only the onus to establish an allowed defence has been shifted. In the common law of defamation the defendant must make his defence, whereas, under Bill 83, the plaintiff must prove that the defendant has no defence. But, in the mind of a judge, either the defence is legally valid or it is not, so the distinction regarding onus is somewhat academic.

Furthermore, in many (most) cases of compelling and ardent criticism, even the onus to secure an allowed limited defence has not in practice been shifted in Bill 83 compared to the common law. This is because one general way to invalidate any defamation defence is to prove actual malice, but, in attempting to establish such a proof of actual malice in the common law, it is always the plaintiff that has the onus to prove actual malice sufficient to dismiss an allowed defence against defamation [4].

Therefore, in practice, the second condition amounts to having the full defamation trial, virtually under the same common law tests as usual, except for the moderate advantage that the moving party (defendant) chooses when to bring the motion to dismiss, which can provide a tactical advantage, such as regarding available evidence at the time of the motion, and so on.

Overall, however, in the motion to dismiss contemplated in Bill 83, the judge will use the same judgement as he would under the common law regime. Those criticisms most in need of protection, which have the greatest impact in challenging the authority of the status quo—of the dominant establishment views—will be most likely to be found to have "no valid defence". Malice is most easily perceived by a judge's mind when it comes to challenging the established order of ideas, attitudes, and power. There is no lack of sociological studies establishing the role of the courts in conservatively protecting the status quo. In one of the most deplorable and self-serving features of the common law of defamation, the defamatory criticism itself can be used as evidence for express malice, a malice which negates all defences.

Condition 3: "The harm ... suffered ... is sufficiently serious that ... outweighs the public interest in protecting that expression." This, unfortunately, is exactly the kind of legal gymnastics that already opposes (i.e., "balances") the expressly guaranteed *Charter* freedom of expression, and the "right", in the common law of defamation, to protect one's reputation without having to prove damage to reputation. Unfortunately, the battle ("balance") between the fundamental freedom of expression and the protection of the individual's reputation is being lost in Canada; for example, with a Supreme Court decision that aspects of the common law of defamation already strike the correct balance, despite the advent of the *Charter of Rights and Freedoms* [5]. Thus, the incompatible inconsistency between the common law of defamation and the guaranteed *Charter* freedom of expression would best be redressed by corrective statute that goes to the heart of the issue, unlike Bill 83, which preserves and relies on the deleterious characteristics of the common law of defamation.

Any new statute, such as Bill 83, should move towards adopting the *Charter* guarantee of freedom of expression as an actual guaranteed freedom, rather than acquiescing to

Supreme Court decisions that preserve the common law of defamation in the post-*Charter* era. We already know how Canadian judges too often deal with the said "balance": the greater the perceived harm to the important person's (corporation's) reputation, the more that perceived harm "outweighs the public interest in protecting that expression". Thus, exactly the speech that most needs protection in a democratic society is the speech that is suppressed and punished.

Bill 83, judging from this draft for second reading, will not protect the speech most in need of protection, but it will offer up a bonanza for defamation lawyers, who will have an entire new and expensive legal process before settlement or trial. There could well be increased costs in judicial resources, not savings, and as many high-profile defamation cases that go to trial as ever.

Conclusion

Bill 83 is a statutory re-mix of the common law of defamation that fails to eliminate legal mechanisms that unjustly suppress free expression. It does not introduce a test for SLAPPs. It does not protect the most effective communicators from the common law of defamation. It does not address asymmetry of arms in defamation litigation. It does not bring transparency and accountability to non-party funding of defamation lawsuits. It does not provide a stronger recognition of the express guaranteed freedom of opinion and expression contained in the *Canadian Charter of Rights and Freedoms*.

The recent "Noir Canada" saga is a well-documented example of what will happen, in cases most in need of protection. The case spurred the rapid development of actual anti-SLAPP legislation in Quebec. The defendants then won a SLAPP determination, but the stress of litigation caused them to collapse nonetheless—the book was retracted and cannot be published.

OCLA urges Ontario legislators not to further enshrine the common law of defamation—which is antithetical to a free and democratic society of equal citizens—but to instead take the opportunity of the widespread interest in Bill 83 to conduct a thorough public examination of defamation law, its pernicious impact on freedom of expression, and its deleterious impact on our society.

Endnotes

[1] Requested by OCLA, based on research and a first draft report prepared by Dr. Denis G. Rancourt for OCLA. January 2014.

[2] Bayer proposes that the plaintiff should be required to prove that the words complained of are false, did indeed cause damage to reputation, and that the defendant acted with actual malice or negligence: Carolin Anne Bayer, *Re-thinking the common law of defamation: Striking a new balance between freedom of expression and the*

protection of the individual's reputation, thesis, Master of Laws, University of British Columbia, 2001. See also: Hilary Young, "But names don't necessarily hurt me: Considering the effect of disparaging statements on reputation", *Queen's Law Journal*, 37:1, 2011.

[3] *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 SCR 640, at para. 103

[4] Note: Defamatory malice is assumed, actual malice to defeat a limited defence must be proven; such is one of many illogical contortions in the common law of defamation, which by original design assumes guilt of inflicting damage to reputation.

[5] *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 SCR 1130, at para. 208.