



Law Reform Commission of Saskatchewan

Reform of *The Libel and Slander Act*

CONSULTATION OPEN UNTIL NOVEMBER 30, 2022.

The Law Reform Commission's *Libel and Slander Project*

- ▶ The Commission decided to study the topic of defamation upon a suggestion from a Commissioner. This report focuses primarily on potential reform of the *Libel and Slander Act*.
 - ▶ This statute has been in force in Saskatchewan for over a century with very few modifications being made to it.
- ▶ Consultation paper was published in June 2022.
- ▶ Consultation survey is posted in: <http://lawreformcommission.sk.ca/consultations/>
 - ▶ Comments can also be sent via email to director@lawreformcommission.sk.ca
- ▶ Consultation is open until November 30, 2022.
- ▶ Your comments and opinions are welcome and are an important part of the Commission's deliberations on recommendations for reform.



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The Libel and Slander Act:

Background

A BRIEF HISTORY OF LIBEL AND SLANDER

- ▶ Slander came first and was actionable *per se* for remarks related to criminal disease, a "loathsome disease", one's profession or trade, or the unchastity of women.
- ▶ Slander would eventually cover verbal defamatory remarks or other transitory communications.
- ▶ Libel followed the invention and growth of the printing press; initial claims were focused on political statements considered to be "destabilizing".
- ▶ Most provinces have abolished the distinction between libel and slander; Saskatchewan has not.



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The Libel and Slander Act: Background

THE PURPOSE OF DEFAMATION LAW & THE FREEDOM OF EXPRESSION

- To protect the reputation and dignity of individuals
 - Reputation is increasingly important in a democratic society
- However, must be balanced against freedom of expression
- Supreme Court's Three Rationales for the Freedom of Expression:
 1. Fundamental to democracy
 2. Necessary for the discovery and acceptance of truth
 3. Important for the pursuit of self-fulfillment



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Defamation in the Online Era

"Animal hospital sues former client over viral TikTok videos claiming clinic mistreated her dog" - *CBC News*, September 7, 2022

"Disgruntled bride ordered to pay \$115K after defamatory posts ruin Chinese wedding-photo business" - *CBC News*, March 1, 2018

"Health authority sues Brandon psychiatric nurse over allegedly defamatory social media posts" - *CBC News*, May 15, 2022



"3 Ontario nurses disciplined for social media posts related to pandemic launch \$1M libel suit" - *CBC News*, January 10, 2022



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The Libel and Slander Act:

An Overview

ELEMENTS FOR AN ACTION IN DEFAMATION

Three Essential Elements:

1. Defamatory Words

- ✓ The words must communicate a "degrading imputation" that will "lower the opinion" others have
- ✓ Does not need to be from a direct statement

2. Identifying the Plaintiff

- ✓ A reasonable person could understand that it was the plaintiff the words referred to
- ✓ Can be problematic when referring to a group

3. Published by a Third Party

- ✓ Remarks were communicated to a third person
- ✓ Defendant was responsible for the publication



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The Libel and Slander Act:

An Overview

DEFENCES

1. **Justification**

- ✓ Complete defence if the remarks were truthful
- ✓ Test of substantial truth

2. **Consent**

- ✓ So long as plaintiff expressly or implicitly agreed to content

3. **Absolute Privilege**

- ✓ Protects executive officers of the state, parliamentary and legislative officials and persons involved in the processing and furtherance of judicial or quasi-judicial proceedings

4. **Qualified Privilege**

- ✓ Based on circumstances of each case



The Libel and Slander Act: *An Overview*

DEFENCES CONTINUED

5. **Responsible Communication**

- ✓ New; applies to situations where matter is one of public interest and publisher attempted to verify allegation

6. **Protected Reports**

- ✓ Can arise from subject matter discussed in report and type of proceedings; high societal importance

7. **Fair Comment**

- ✓ Matters of public interest; available to media and public at large
- ✓ Defeated if malice present

8. **Innocent Dissemination**

- ✓ Those involved in publishing but are completely ignorant as to defamatory material



The Libel and Slander Act

An Overview

OTHER RELEVANT PROCEDURAL ELEMENTS IN DEFAMATION

- ▶ 1. NOTICE: In Saskatchewan certain actions require notice to be given to the defendant before the action can proceed. Section 15 of *The Libel and Slander Act* provides as follows:
 - ▶ No action shall lie for a libel contained in a newspaper unless the plaintiff has given to the defendant, in the case of a daily newspaper, five, and in the case of a weekly newspaper, fourteen, clear days' notice in writing of his intention to bring the action, such notice to distinctly specify the language complained of.
- ▶ 2. JURISDICTION: *The Libel and Slander Act* also has provisions detailing the determination of jurisdiction, the main considerations being the location of the newspaper office, the jurisdiction of the plaintiff, and the interests of justice generally. Section 13 of the Act provides:
 - ▶ An action for libel contained in a newspaper shall be tried at the judicial centre nearest to which the chief office of the newspaper is, or at the judicial centre nearest to which the plaintiff resides at the time the action is brought, but, upon the application of either party, the court or a judge may direct the action to be tried or the damages to be assessed at any other judicial centre if it appears to be in the interest of justice or that it will promote a fair trial, and may impose such terms as to the payment of witness fees and otherwise as may seem proper.



The Libel and Slander Act

An Overview

OTHER RELEVANT PROCEDURAL ELEMENTS IN DEFAMATION

- ▶ **3. CONSOLIDATION OF ACTIONS:**
Under section 6 of Saskatchewan's *Libel and Slander Act*, actions brought forth for the same or substantially the same libel can be consolidated through an order made by the courts.
- ▶ **4. PRESUMPTIONS:**
Another important factor to mention is the presumptions that exist under Canadian common law. First, at common law, there is a presumption of damages for libel.¹²⁷ In addition, once the plaintiff has proven that the impugned words were defamatory, referred to the plaintiff, and were published, it is presumed that the statements are not true or factual.¹²⁸ Finally, defamation is a strict liability tort and thus the plaintiff is not required to prove the defendant intended to cause harm.



The Libel and Slander Act:

Defamation in Saskatchewan

- Saskatchewan enacted its first libel and slander legislation in 1909
 - The Act has been substantively amended only three times in the last century
 - Since 2004, only minor amendments to definitions and administrative provisions have been made
- *The Libel and Slander Act* is not frequently cited in defamation cases in Saskatchewan due to its limited scope, relatively antiquated provisions, and for the fact that much of the law surrounding defamation is developed or expanded by the common law
- In Saskatchewan, reported cases relying on *The Libel and Slander Act* largely cite and state the legislation, while discussion and interpretation of the legislation in the case law is largely absent



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The Libel and Slander Act:

Reform Initiatives in Other Jurisdictions

The Law Reform
Commission of Ontario

The United Kingdom

Australia



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Reform Initiatives in Other Jurisdictions

LAW REFORM COMMISSION OF ONTARIO

- ▶ Final Report released in 2020 after 4 years of research and consultation
- ▶ Recommendations:
 1. Abolish the distinction between libel and slander
 2. Replace the defence of fair comment with a defence of opinion
 3. Change the definition of publisher to require an intentional act
 4. Changes to remedial options available to a complainant
 5. Overhaul the current rules around notice and adapt the system for internet intermediaries
 6. Create a single publication rule to ensure limitation periods remain function and operative
 7. Ensure the jurisdiction is the location of the most substantial harm



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Reform Initiatives in Other Jurisdictions

THE UNITED KINGDOM

- ▶ Updated its defamation legislation in 2013
- ▶ Amendments:
 - ▶ Serious harm threshold to tackle surge of trivial and frivolous claims
 - ▶ New defences codified: operators of websites, truth and honest opinion, and publication on matters of public interest
 - ▶ Single publication rule
 - ▶ Jurisdiction changes
 - ▶ Remedial court orders to make summary judgments public and to stop distribution



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Reform Initiatives in Other Jurisdictions

AUSTRALIA

- ▶ Large-scale reforms on a national level currently in place
- ▶ Changes so far:
 - ▶ Abolishing distinction between libel and slander
 - ▶ Limits on damages
 - ▶ Adding defences: truth and honest opinion, qualified privilege for public interest reporting and protection for peer-reviewed academic publications
 - ▶ Provisions for dispute resolution – offers to make amends
 - ▶ Serious harm threshold
 - ▶ Single publication rule for limitation periods
- ▶ Next Up:
 - ▶ Liability of internet intermediaries and lack of privilege leading to dissuasion of reporting to police, other bodies



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POTENTIAL REFORMS TO *THE LIBEL AND SLANDER ACT*

13 REASONS WHY

Potential Reforms to *The Libel and Slander Act:*

A. Distinction Between Libel and Slander

- ▶ The evolving nature of communication has blurred the distinction between the two torts, resulting in arbitrary and confusing technical distinction
- ▶ Most Canadian provinces have abolished the common law distinction between libel and slander, and simply refer to both as defamation
 - ▶ Saskatchewan, British Columbia, and Ontario are the only provinces yet to abolish the distinction
- ▶ Abolishing the distinction would reduce arbitrary differences that result in different liability standards
- ▶ Bringing uniformity would increase predictability and access



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Potential Reforms to

The Libel and Slander Act:

POTENTIAL SOLUTIONS FOR ABOLISHING THE DISTINCTION BETWEEN LIBEL AND SLANDER

- ▶ Abolish the distinction by adopting a provision similar to section 7 of the *Defamation Act 2005 (NSW), 2005/77*
 - ▶ (1) The distinction at general law between slander and libel is abolished.
 - ▶ (2) Accordingly, the publication of defamatory matter of any kind is actionable without proof of special damage.
- ▶ Create new defamation legislation



Consultation Question:

- ▶ Should the distinction between libel and slander in Saskatchewan's legislation be abolished?
- ▶ If the distinction between libel and slander should be abolished, should this be done by creating new defamation legislation or are amendments to *The Libel and Slander Act* sufficient?



Potential Reforms to *The Libel and Slander Act:*

B. Limitation Periods

- ▶ The general two-year limitation set out in *The Limitations Act, 2004* applies
- ▶ At common law, every publication of defamatory material commences a new cause of action.
 - ▶ Online communication is wreaking havoc
- ▶ Implementing a single publication rule could address these concerns
 - ▶ Creates a sole cause of action in defamation for the publication and all its republications by that publisher
 - ▶ Creates clarity and prevents incessant start-overs whenever communication is republished via sharing



Potential Reforms to

The Libel and Slander Act:

CREATING A SINGLE PUBLICATION RULE

The event at which the limitation period begins to run needs to be identified

Possible Options:

- Upon the first instance of publication?
- Upon discovery by the complainant?
- When the complainant ought to have discovered the defamatory publication?



CONSULTATION QUESTION:

- ▶ Would Saskatchewan benefit from the introduction of a single publication rule in the Act?
- ▶ When should the limitation period begin to run?
 - ▶ *Upon the first instance of publication?*
 - ▶ *Upon discovery by the complainant?*
 - ▶ *When the complainant ought to have discovered the defamatory publication?*



Potential Reforms to *The Libel and Slander Act:*

C. Distinctions Between Publishers

- ▶ *The Libel and Slander Act* distinguishes between types of publishers. Specifically, newspapers and its definition.
- ▶ The Commission is considering whether distinctions between types of media sources or publishers are still appropriate, or if the source of publication should be irrelevant to the proceedings.
 - ▶ The narrow definition of newspaper and the distinction between types of publishers has broader implications. Many newspapers are entirely online and are available for free.
- ▶ Updating definitions within the Act to align with current understandings could lessen arbitrary distinctions and potentially make the law more accessible, predictable, and fair.



Consultation Question:

- ▶ Does *The Libel and Slander Act* still need to distinguish between publishers or should all sources that contain alleged defamation be treated in a similar fashion?
- ▶ If distinctions should remain, should “newspapers” be treated differently, and if so, how should they be defined?
 - ▶ Should online news sources be included?
 - ▶ Should the interval between publications be part of the definition?



Potential Reforms to The Libel and Slander Act:

D. Publisher Definition

- ▶ A definition would bring the Act in line with the modern technological era.
- ▶ The LCO recommended that the definition of publisher be revised to “require an intentional act of communicating a specific expression.”
 - ▶ Publishers of defamatory statements would thus not be held responsible for republications unless the publication was their intention.



Consultation Question:

Should a definition of “publisher” be added to The Libel and Slander Act?

- ▶ If so, should the LCO’s proposed definition of publishers be used?



*Potential
Reforms to
The Libel and
Slander Act:*

E. Jurisdictional Rules and Choice of Laws

- ▶ Forum Shopping and Libel Tourism
- ▶ Only one jurisdictional provision in SK for actions in newspaper libel – has not changed since 1909
- ▶ Presumptive jurisdiction determined by whether there is a real and substantial connection between the forum and subject matter
- ▶ *Haaretz* Decision and online defamation jurisdiction



CONSULTATION QUESTION:

Is the jurisdiction provision for newspapers in s. 13 still needed?

- ▶ *If so, should the provision be expanded to include other types of publications, or is the common law framework sufficient?*

Should a choice of law provision be added into the Act?

- ▶ *If yes, should the provision provide that the law governing multi-jurisdictional defamation actions is the law of the place where the most substantial harm to the plaintiff's reputation occurred?*



Potential Reforms to The Libel and Slander Act:

F. Security For Costs

- Currently, s. 12 of the Act covers security for costs, but it only applies to newspapers. However, other types of publishers may request for security for costs pursuant to *The King's Bench Rules*.
- The LCO recommended that provisions in Ontario's defamation legislation should be repealed and instead allowing civil procedure legislation to govern.



CONSULTATION QUESTION:

Should s.12 of the Act be expanded to apply to all publishers or should s. 12 be removed so that all publishers seeking security for costs follow the applicable rules in *The King's Bench Rules*?



Potential Reforms to *The Libel and Slander Act*

G. Notice Regime

➤ Saskatchewan's notice regime only covers newspapers.

Two Important Features:

1. Notice regimes foster the discovery and proliferation of truth by allowing the publisher of the defamatory content to publish corrections.
2. Access to Justice is forwarded as notice regimes encourage early resolution, avoiding costly court proceedings.



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Potential Reforms to

The Libel and Slander Act:

Notice Regime Continued

In Australia, defamation proceedings cannot be commenced unless a "concerns notice" is provided to the defendant and the amends period has passed.

The notice period in Australia is 28 days.

- A notice must be in writing, specify the location where the defamation can be accessed, address the defamatory imputations, the serious harm it has or could cause, and in some cases, the financial loss caused.



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Potential Reforms to *The Libel and Slander Act:*

Notice Regime - Ontario

- LCO survey responses from stakeholders on what aspects of the notice regime need updating:
 - Outdated
 - Should be extended to online publications
 - Should be eliminated altogether because most plaintiffs are unaware of the notice requirement causing a significant barrier to access to justice
- The LCO's view was to simplify the notice system by implementing uniform procedures and rules to bring clarity to the law of defamation and improve accessibility.

CONSULTATION QUESTION:

- ▶ Should a single notice regime be created in Saskatchewan that includes all publishers or are distinctions between categories of publishers still needed?
 - ▶ *What distinctions are needed and how would these affect the requirements of the notice period?*
- ▶ What should the consequences be of not adhering to the notice period?
 - ▶ *Loss of a cause of action or the delay of the action?*
- ▶ What should the requirements for the content and form of a notice be?
 - ▶ *Should notices be sent electronically?*
- ▶ *If the author is unreachable or anonymous should notices be sent to internet intermediaries?*
- ▶ What requirements, if any, should those receiving a notice be under?



Potential Reforms to *The Libel and Slander Act:*

H. Offer to Make Amends Regime

- Redress to remain open for a set period of time.
- This would foster access to justice by encouraging early resolution.
- If an offer to make amends regime were added to Saskatchewan's legislation, a defence of failure to accept a reasonable offer could also be incorporated, or any attempts to remedy the situation could be mitigating factors.
- Currently in Saskatchewan, evidence of apologies can be used as mitigating factors, although no regime for offers to make amends is present.



Potential Reforms to

The Libel and Slander Act:

The Australian Model Provisions

- ▶ An offer to make amends can include any acts undertaken “to redress the harm sustained by the aggrieved person.”

Examples:

- ▶ offers to publish an apology
- ▶ removal of the content
- ▶ paying compensation

Potential Reforms to

The Libel and Slander Act:

Nova Scotia's Defamation Legislation

- ▶ Section 16(1) allows a person who has published alleged defamatory words to make an offer of amends if the words were published innocently.
 - ▶ Discontinuance/non-commencement if the offer is accepted
 - ▶ Defence established if:
 - ▶ Offer unaccepted
 - ▶ Defendant can prove the words were innocently published
 - ▶ Offer was made as soon as practicable
 - ▶ This defence does not apply to the publication of words written by someone else, unless the defendant can prove the words were written without malice.

CONSULTATION QUESTION:

- ▶ Should an offer to make amends regime be added into the Act or is the mitigation of damages currently available sufficient?
- ▶ If an offer to make amends regime is implemented, should a defence of failure to accept a reasonable offer also be added?



Potential Reforms to *The Libel and Slander Act:*

I. Remedial Options

- Currently, the *Act* only has provisions for monetary damages.
- The availability of other remedial options may serve to better address reputational harm and minimize the costs and time associated with the court process.
- Possible solutions could include:
 - Take Down Orders
 - Publication Orders



Potential Reforms to *The Libel and Slander Act:*

- ▶ The LCO's recommendations included:
- ▶ Court-ordered take-downs or restrictions of access to material
- ▶ Ordering the defendant to publish a summary of the judgement for the plaintiff
- ▶ Considering whether remedial options should be available on an interim basis

CONSULTATION QUESTION:

- ▶ Should other remedial options be added to *The Libel and Slander Act*?
 - ▶ *Should take down orders be available?*
 - ▶ *Should publication orders be available?*
- ▶ Should these be available on an interim basis?
- ▶ *What test should be applied?*



Potential Reforms to *The Libel and Slander Act:*

J. Statutory Privileges

- ▶ 1. Privilege of Fair and Accurate Reporting
 - ▶ Section 10: qualified privilege
 - ▶ Section 11(1): absolute privilege
- ▶ 2. Privilege for Peer Reviewed Reports
 - ▶ Both UK and Australia have addressed qualified privilege for peer-reviewed scientific and academic reports.



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CONSULTATION QUESTION:

- ▶ Should the privilege of fair and accurate reporting in the Act be expanded?
 - ▶ *If so, should the privilege be extended to all publishers who meet certain requirements?*
 - ▶ *Should it extend to broadcasts?*
- ▶ Should the Act be amended to create a privilege for peer reviewed material?



Potential Reforms to *The Libel and Slander Act:*

K. Serious Harm Threshold

- ▶ Both the UK and Australia have added a serious harm threshold that reverses the presumption of damages to prevent frivolous or trivial defamation claims.
 - ▶ "Serious harm" as it affects certain corporations means having caused or likely to cause serious financial loss
- ▶ The LCO recommended against reversing the presumption of damages because:
 - ▶ It's a central element of defamation
 - ▶ Ontario has anti-SLAPP provisions that discourage trivial claims
 - ▶ A serious harm threshold could impede access to justice by placing evidentiary burden on the plaintiff



CONSULTATION QUESTION:

- ▶ Are frivolous and trivial defamation claims a problem in Saskatchewan?
 - ▶ If yes, should this problem be addressed in legislation by adding a serious harm threshold or some other type of provision?



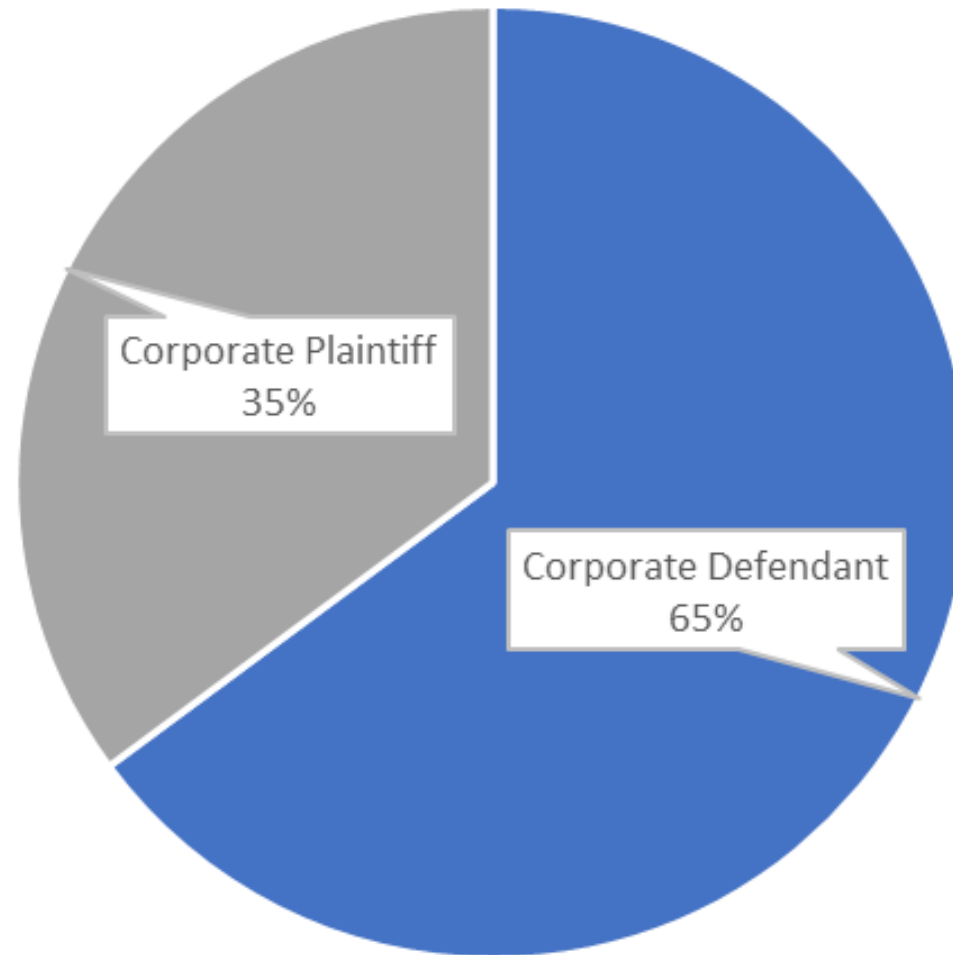
Potential
Reforms to

*The Libel and
Slander Act:*

L. Corporate Plaintiffs

- ▶ Saskatchewan's legislation currently makes no distinction between corporate and human plaintiffs in a defamation action.

Reported Cases Involving Corporations



Potential Reforms to *The Libel and Slander Act:*

- ▶ **L. Corporate Plaintiffs Continued**
- ▶ The UK and Scotland require a corporate plaintiff to establish the risk of serious financial loss as a threshold element of defamation.
- ▶ The Australian Model Defamation Provisions adopt the serious financial loss threshold test for “excluded corporations” who retain a right to bring a defamation claim. The Model Defamation Provisions prohibit a for-profit corporation from suing in defamation regardless of whether “serious financial loss” has resulted, unless the corporation is able to fit the definition of an excluded corporation.



▶ L. Corporate Plaintiffs Continued

- ▶ New Zealand
 - ▶ Threshold applies to all corporations
 - ▶ Threshold only requires pecuniary loss rather than "serious" financial harm (to prevent frivolous lawsuits)
- ▶ Ireland
 - ▶ Rejects a distinction between corporate and non-corporate plaintiffs

Potential
Reforms to

*The Libel and
Slander Act:*

Potential Reforms to

The Libel and Slander Act:

- ▶ **L. Corporate Plaintiffs Continued**
- ▶ The LCO rejected creating any distinctions between corporate and human plaintiffs as this could create access to justice concerns for small businesses and that establishing different rules based on the size of a corporation would impose "arbitrary divisions".

CONSULTATION QUESTION:

Should Saskatchewan's defamation legislation distinguish between human and corporate plaintiffs? If so, in what way(s) should they be treated differently?

- ▶ If so, should there be a distinction between various types of corporations?
 - ▶ *Should for-profit or charitable status corporations be treated differently?*
 - ▶ *Should a "serious financial harm" threshold test be required for corporate plaintiffs to bring a defamation claim?*



Potential Reforms to *The Libel and Slander Act:*

M. Anti-SLAPP Legislation

- ▶ Ontario, British Columbia and Quebec all have enacted strategic lawsuits against public participation (SLAPP) legislative provisions
- ▶ The Uniform Law Conference of Canada has adopted a *Uniform Protection of Public Participation Act* (2017) and recommended its implementation to all jurisdictions in Canada.
 - ▶ Saskatchewan has not yet enacted Anti-SLAPP legislation



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Potential Reforms to *The Libel and Slander Act:*

▶ M. Anti-SLAPP Legislation Continued

- ▶ It is worth noting that SLAPP suits are not limited to defamation suits,
- ▶ These types of provisions allow a defendant to a defamation claim to seek dismissal of the claim in a preliminary proceeding on the basis that the defendant's expression is on a matter of public interest.
- ▶ If the defendant meets this burden, the plaintiff then must establish that the claim has substantial merit and that the defendant has no valid defence. The plaintiff also must establish that the harm likely to be suffered from the defendant's expression is "sufficiently serious" and outweighs the public interest in defending the defendant's freedom of expression.

CONSULTATION QUESTION:

Is perceived – or actual – abuse of defamation claims with respect to matters of public interest a concern in Saskatchewan? If so, how should this concern be addressed?

- ▶ Is this an issue that requires further consideration?



Future Potential Reforms to

The Libel and Slander Act:

- ▶ The LCO has considered additional issues beyond the scope of this project, including:
 - ▶ Meaningful court remedies for online defamation, including limitation of damages awards, final takedown orders, retractions, apologies, corrections and rights of reply;
 - ▶ A new notice regime and limitation of claims, including dedicated notice rules for intermediary platforms;
 - ▶ New legal responsibilities for intermediary platforms;
 - ▶ A proposal for a notice and takedown process for online defamation disputes; and
 - ▶ The potential use of online dispute resolution in online defamation disputes.



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CONSULTATION QUESTION:

- ▶ Should the Commission consider any of these additional issues discussed by the LCO in a future project?
- ▶ Is there a need to consider any of these issues in the near future as a matter of priority?



CONSULTATION QUESTION:

- ▶ Are there any other reforms that should be made to *The Libel and Slander Act*?



CONSULTATION QUESTION:

- ▶ How important is it that Saskatchewan's defamation legislation be similar to other provinces' legislation?





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Thank you!
Any Comments or Questions?

CONSULTATION OPEN UNTIL
NOVEMBER 30, 2022