Canadian Association of University Teachers
Association canadienne des professeures et professeurs d'université

Ontario Confederation of University Faculty Associations
Union des Associations des Professeurs des Universités de l'Ontario

SUBMISSION OF
THE ONTARIO CONFEDERATION OF UNIVERSITY FACULTY ASSOCIATIONS AND THE CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS BEFORE THE STANDING COMMITTEE ON JUSTICE POLICY

Bill 52: An Act to Amend the Courts of Justice Act, the Libel and Slander Act and the Statutory Powers Procedure Act in Order to Protect Expression on Matters of Public Interest (The Protection of Public Participation Act, 2015)

Queen's Park, October 1, 2015

The following submission is made on behalf of the Ontario Confederation of University Faculty Associations (OCUFA) and the Canadian Association of University Teachers (CAUT).

Collectively, OCUFA and CAUT represent academic staff associations across Canada, comprising approximately 68,000 members, including faculty and academic librarians. Seventeen thousand of those academic staff and librarians are in Ontario. Academic staff teach students in our universities and they engage in research to advance our collective knowledge. As part of their roles as academics, CAUT and OCUFA members are called upon to speak out about issues of concern to residents of Ontario and Canada. And their responsibilities do not end at the door of the institutions in which they work - academic staff engage with many other organizations, including community groups and non governmental organizations, where their communication about matters of public interest and participation in policy debates are essential to a full and fair discussion of the issues. Our democracy depends upon protecting the rights of academic staff to participate in communication about matters of public interest. Those rights, now more than ever, must be protected.

OCUFA and CAUT have long supported policies which provide robust protection to those who participate in public discourse. In September 2013, CAUT was one of 140 groups (including CJFE, Greenpeace, the Centre for Law and Democracy, and PEN Canada) which formally urged the Ontario government to pass anti-SLAPP protection in order to protect public debate in Ontario. CAUT and OCUFA are here today to commend the government in moving forward to pass Bill 52, known as the Protection of Public Participation Act. We are also here to propose some changes to the bill which we believe would enable the bill to more effectively achieve its objectives.

Academic Staff and Rights of Public Participation

As noted above, academic staff members at Ontario's universities are uniquely placed to contribute meaningfully to public dialogue about important policy issues. Academic staff have a long history of such participation, which is encouraged and protected by academic freedom, a right unique to academic staff. Many high courts, including senior courts in Ontario and the Supreme Court of Canada (Mckinney v. University of Guelph, [1990] 3 SCR 229, 1990 CanLII 60) have recognized the importance of academic freedom to a robust democracy, thus protecting the important role of academic staff participation in public debate.

Ontario universities, through collective agreement language and university policies, have recognized the importance of protecting the academic freedom of their academic staff.

While academic freedom is unique to academic staff members, their voices during public debate may also be protected by other important rights of more general application, including rights guaranteed by the Canadian Charter of Rights and Freedoms to freedom of speech and expression (section 2(b)) and to the right to peaceful assembly (section 2(c)) and the right to associate (section 2(d)). International instruments also recognize the right of citizens to participate in public affairs and to hold opinions and to express them without interference. (Articles 19 and 25 of the International Covenant on Civil and Political Rights, ratified by Canada). The importance of protecting academic staff members' rights to

participate and speak is also recognized in the UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel (1997) (Article 26).

All of these rights as articulated by courts, universities and international bodies must be given full effect by legislation. It is not enough for Bill 52 to pay lip service to them.

When a person who speaks out is the target of a legal proceeding or a threat of a legal proceeding, that person must be protected by the law. Otherwise, when the speaker is named as a defendant in a legal proceeding, discussion is silenced, and debate is stifled.

Bill 52 enables a defendant to seek prompt dismissal of a proceeding against him or her. Without it, the threat of litigation or the commencement of a proceeding may silence opposition, even when the proceeding or threatened proceeding is not credible. Aggressive plaintiffs may achieve their goal of silencing opposition by initiating or threatening legal proceedings without merit. At the same time, their actions may cause like-minded organizations to self-censor even before discussion begins or to limit their own communication about an issue of public interest. It is impossible to quantify the chilling effects of such self-censorship, but research indicates that of the cases that are actually launched and which actually proceed to trial, the plaintiffs fail to win their cases 77 – 82% of the time (Ecojustice page 7). All of this suggests the need for legislation like Bill 52 is real, and is urgent.

Academics in Canada and in Ontario have been the target of litigation where they engage in public participation. Probably the most prominent example involves the publication of Noir Canada, subtitled Pillage Corruption et Criminalite en Afrique by three Quebec based academics, which criticized Canadian corporations operating in Africa. The book was published in Quebec, and legal proceedings were commenced there, but they were also initiated in Ontario which had the advantage of no law to protect public participation. Ultimately, the case was settled, but only after a Quebec Superior Court characterized the lawsuit as “seemingly abusive”. There are many less prominent examples, including that of Professor Ana Isla at Brock University, who was targeted by individuals associated with the Catholic Church. They filed complaints against Dr Isla under the university’s harassment process and also under the Ontario’s Human Rights Code after she spoke out about Brock’s association with Church-related organizations working overseas. Although all of the proceedings against Dr Isla were eventually dismissed or discontinued, Dr Isla testified before an arbitrator that she was effectively silenced by the complaints during the long process to end them.

Background to Bill 52

Ontario’s Attorney General created an advisory panel on anti-SLAPP legislation to advise the government on how the government should approach the issue. The panel was chaired by Dean Mayo Moran of the University of Toronto, and also included two prominent practitioners, Peter Downard and Brian MacLeod Rogers.

The panel heard submissions from stakeholders and considered similar legislation in other jurisdictions, including Quebec and British Columbia. The panel issued a report dated October 28, 2010, which contains a number of important observations about the key elements of legislation which is necessary to

give effect to the purposes sought to be achieved. Among other things, the panel reported that the law should:

- protect expression on matters of public interest and promote the freedom of the public to participate in matters of public interest through expression
- define a sphere of activity covered by special procedure which would include all public interest communications and would not restrict protection to submissions made to a public body
- provide an expeditious way of dismissing proceedings which seek to limit public interest communications while providing special relief and/or recovery of costs for the defendant
- require the court to consider the effect and not the purpose of the proceeding which the defendant moves to have dismissed

OCUFA and CAUT endorse and support the inclusion in the Bill of these important elements which were discussed at length by the panel in its report. As noted above, we support and endorse the bill. However, with some modifications, we think it can be even better. The changes identified and discussed below will, we believe, enable the law to more effectively achieve its purpose and provide better protection to defendants who have engaged in public participation.

<u>Proposed Modifications to Enable Bill 52 to Achieve its Objectives</u>

1. A key purpose of the bill is to address the financial inequality between parties who threaten or initiate proceedings which defeat or discourage communication in the public interest (often corporations), and those who engage in communications (often community-based organizations or NGOs funded by donations). To that end, the bill authorizes a court to impose significant cost awards and damages against the plaintiffs if their proceeding is dismissed at the request of the defendants. We believe the bill can and should do more to redress the financial inequality between the plaintiffs and the defendants.

   Awards of costs or damages are not made until the court has heard and decided the defendant's motion for dismissal of a proceeding. Practically speaking, this means that a defendant will not know with certainty whether it will recover its costs until after the court has decided the motion. Even with the expedited process contemplated by the bill, this uncertainty may discourage some defendants from bringing a motion to court to end the proceedings against them. To avoid the cost of litigation, impecunious or cautious defendants may simply discontinue their public campaign. If this result occurs, the plantiffs' objective has been achieved.

   The Moran panel considered this issue (para 40) and expressly acknowledged the importance of the "intimidation effect" of a lawsuit for a large amount and the costs of fighting it. The panel considered an "up front" funding mechanism, but rejected the creation of a public fund and concluded that a speedy procedure is the best way to protect the defendants interests. With respect, the panel's conclusion that "public money is scarce" (para 50) is not an adequate reason to reject the idea of providing funding for defendants before they bring their motion for

dismissal of the proceedings against them. Where the right of the public to participate in the democratic process is at stake, access to funding should not be determinative of their rights. For these reasons, we urge the government to ensure that funding is available to litigants.

Some of the models are described in the report (para 50) and we do not intend to repeat them here, other than to note that there are a variety of options available. It is also clear that measures can be implemented to either cap the amount available to defendants, to impose a means test on recipients, or to require repayment of some or all of the funds.

In Quebec, a similar panel was struck to consider and recommend legislative approaches to the issue before Quebec passed its public participation law. That panel recommended (as one proposed model for the law) the establishment of a fund to support defendants. (From the Streets to the Courtroom: The Legacies of Quebec's anti-SLAPP Movement, Norman Landry, page 63)

2. We applaud the language in the "purpose" section of the bill, save for one important concern. Section 137.1 (2) of the bill defines "expression" to include both verbal and non verbal communication. It appears that the language is intended to cover actions as well as words, which is consistent with a purposive approach to protecting public discourse. However, we believe that the intention of the bill should be made clear and explicit. "Expression" should be expressly defined to include "… any communication *and conduct* …" (verbal or non verbal). Express language reduces uncertainty, which is particularly important where legislation protects fundamental democratic rights. Clarity provides better protection.

   British Columbia was the first jurisdiction in Canada to pass a law protecting public participation in 2001. Although it was repealed shortly after its passage by a newly elected government, BC's Protection of Public Participation Act SBC 2001, c. 19 (repealed) contained a definition of "public participation" that included both communication and conduct.

3. We are pleased that Bill 52 protects expression in public interest without limitation and without requiring that in order to be protected, the expression must occur in course of submissions to a government body. The panel considered and properly rejected the idea that the statute should exclude from the scope of protected expression to exclude expression that occurs in connection with a technical trespass. The purpose clause makes it clear that (subject to our concern above) a broad range of communication in the public interest is and should be protected.

   The bill does not define an express statutory right to public participation. The broad scope of the purpose clause seems to achieve this result by implication, but to more clearly achieve its objectives, the bill should contain an express definition of the right. By including a right to public participation, the law acknowledges its value and importance in clear and unambiguous terms. The inclusion of an express right to public participation is endorsed by a number of writers and academics who argue that establishing a statutory right is tangible evidence of the value that

the legislature places on democratic activity (Strategic Lawsuits Against Public Participation: The British Columbia Experience, by Michaelin Scott and Chris Tollefson (page 53). Also see The Failure of Defamation Law to Safeguard Against SLAPPs in Ontario, by Ramani Nadarajah and Renee Griffin (page 81)).

4. Quebec's legislation confers discretion on the courts to impose damages awards personally upon the directors and officers of an organization that uses the courts to defeat the freedom of another to engage in public participation. When this was challenged by the business community, the Quebec government defended this provision as being consistent with the objective of the bill to establish disincentives to abusive actions. (Landry, ibid, page 67)

   The imposition of liability and responsibility on senior officers and directors to encourage organizational responsibility and accountability and hopefully to change corporate conduct, has a precedent in Canadian legislation. The Westray Bill to amend the Criminal Code passed with all-party support in the House of Commons. The amendments included, among other things, the assignment of liability for corporate misconduct on senior directors or officers of a corporation. We believe that the addition of a clause that expressly contemplates personal damages awards against senior officers in Bill 52 would have the effect of ensuring more careful review of decisions to commence litigation and would deter proceedings that interfere with important public policy debates.

Conclusion

In conclusion, and as indicated above, OCUFA and CAUT support Bill 52. We believe that it enhances democracy and ensures protection for voices of dissent. Our proposed changes are intended to further these legislative objectives.

We thank this Committee for giving us the opportunity to present these submissions and for considering our views on Bill 52, which advance the interests of all Ontarians.