File number: 35676

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

Denis Rancourt

Applicant
(Defendant)

and

Joanne St. Lewis

Respondent
(Plaintiff)

and

University of Ottawa

Respondent
(Intervening Party)

RESPONSE OF THE RESPONDENT/APPELLANT DENIS RANCOURT (Motion for Leave to Intervene of the Ontario Civil Liberties Association)

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TABLE OF CONTENTS

Memorandum of Argument of the Respondent/Appellant Denis Rancourt

The final judgment appealed from was about maintenance and champerty

1. The Ontario Civil Liberties Association ("OCLA") seeks to intervene in appellant Denis Rancourt's application for leave to appeal from a final judgement of the Court of Appeal for Ontario, dismissing an appeal of a motion to stay or dismiss a defamation action because of maintenance and champerty, or, alternatively, to end both (a) the maintenance of the plaintiff by the non-party University of Ottawa and (b) the champertous arrangement to share proceeds of the action between the non-party and the plaintiff: [1]

> In the alternative, granting the defendant's champerty motion to terminate and repeal the University's funding of the plaintiff's litigation and bar sharing in the proceeds of the action [Emphasis added]

Maintenance is an issue in the application for leave to appeal to the Court

2. Non-party funding of the costs of a plaintiff in a defamation lawsuit, using public money, is relevant to a judicial determination of maintenance and/or champerty. Maintenance is an issue in the appellant's application for leave to appeal to the Court.[2] Indeed, it is argued in the application for leave to appeal that a determination of apparent bias of Beaudoin J. would invalidate Beaudoin J.'s decisions to deny material evidence in support of a finding of maintenance.[3] The said denied material evidence is relevant to the motives of the non-party funder, and to the

[1] Appellant's Factum to the Court of Appeal, **Applicant Rancourt's application book, Tab E-8, page 284, para. 78(3).**
[2] Appellant's Memorandum of Argument, **Applicant Rancourt's application book, Tab D, paras. 13-15, 20, and 51.**
[3] Appellant's Memorandum of Argument, **Applicant Rancourt's application book, Tab D, paras. 20, and 50-51.**

credibility of its affiant witnesses. Motive is determinative in establishing maintenance or champerty.[4]

Maintenance is an issue for the purpose of determining national importance

3. The issue of maintenance, and thus of non-party funding of the defamation action using public money, and any such central issue that was before the appellate court and that was raised in the application for leave to appeal, is an active and relevant issue for the purpose of the Court's determination of the question of national importance because the Court has determined that reasonable apprehension of bias is remedied by remediation of the entire process thus tainted: [5]

> 99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. See *Curragh, supra*, at para. 5; *Gushman, supra*, at para. 28. This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh, supra*, at para. 5.
>
> 100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See Newfoundland Telephone, supra, at p. 645; see also Curragh, supra, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances": Blanchette v. C.I.S. Ltd., 1973 CanLII 3 (SCC), [1973] S.C.R. 833, at p. 843. However, if the words or conduct of the

[4] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA), at para. 27: "a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty."

[5] *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, paras. 99-101.

> judge, viewed in context, do not give rise to a reasonable apprehension of bias, the findings of the judge will not be tainted, no matter how troubling the impugned words or actions may be.
>
> 101 Therefore, while the appellant is correct that appellate courts have wisely adopted a deferential standard of review in examining factual determinations made by lower courts, including findings of credibility, it is somewhat misleading to characterize the issue in this appeal as one of credibility alone. If Judge Sparks' findings of credibility were tainted by bias, real or apprehended, they would be made without jurisdiction, and would not warrant appellate deference. On the other hand, if her findings were not tainted by bias, then the case turned entirely on her findings of credibility and an appellate court should not interfere with those findings, unless they were clearly unreasonable or not supported by the evidence. See for example, R. v. W. (R.), 1992 CanLII 56 (SCC), [1992] 2 S.C.R. 122, at pp. 131-32. [Emphasis added.]

The Ontario Civil Liberties Association would provide a needed and unique perspective

4. Mr. Hickey (Executive Director of OCLA) provided an affidavit in the appellant's application for leave to appeal, for the sole purpose of giving evidence of the egregious nature of Beaudoin J.'s words and actions in court on July 24, 2012, in support of the national importance of judicially addressing the appellant's complaint of reasonable apprehension of bias, as a systemic problem.[6]

5. Mr. Hickey's affidavit in the application for leave to appeal, as an independent witness who was in court on July 24, 2012, is distinct from OCLA's motion to intervene, which is based on OCLA's unique expertise and perspective on the question of the national importance of non-party funding of costs in defamation lawsuits.

[6] Appellant's Memorandum of Argument, **Applicant Rancourt's application book, Tab D, para. 12.**

6. The respondent/appellant Denis Rancourt submits that OCLA's intervention should be allowed because OCLA has a real interest and provides important submissions, evidence, and a unique perspective, relevant to the national importance of non-party funding of defamation lawsuits, that cannot be provided by the other parties:

(a) OCLA is in communication with members of parliament of the Ontario legislature regarding active development of new legislation for the protection of expression in Ontario (Bill 83);

(b) OCLA successfully brought the question of non-party funding of defamation lawsuits to the attention of the legislative debate around Bill 83; [7]

(c) OCLA is in contact and collaboration with a multitude of stakeholders across Canadian civil society, regarding protection of expression legislation; [8]

(d) OCLA draws on the expertize of its nine-member Advisory Board, including that of freedom of expression expert Professor Dr. Mark Mercer, and several other experts; [8] and

(e) OCLA, through its contacts and research, provides the voice of relevant legal research scholarship on the balance between the guaranteed freedom of expression of the *Charter* (s. 2), and protection of reputation.

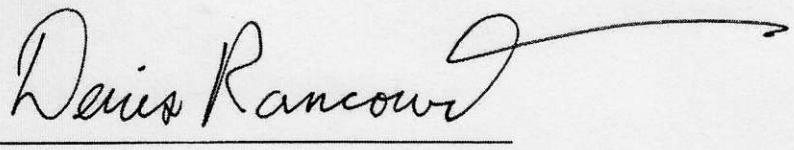
7. The OCLA submissions in intervention would add a different and useful additional perspective on the national or public importance of the questions in the leave to appeal because circumventing a judicial determination of apparent bias that taints decisions to exclude evidence relevant to establishing maintenance in a defamation action has additional national importance by virtue of engaging the *Charter* (s. 2) guarantee of freedom of expression. Maintenance in a

[7] Letter from John O'Toole MPP, **Affidavit of Joseph Hickey, OCLA's motion book, Exhibit "K", Tab 2-K, page 46.**
[8] **Affidavit of Joseph Hickey, OCLA's motion book, Tab 2.**

defamation action, using public funds, is the central issue in the impugned judgement. Unaddressed bias is the ground in seeking leave to appeal. Both are of national importance.

ALL OF WHICH is respectfully submitted this 20th day of February 2014.

SIGNED BY:



Dr. Denis Rancourt (Respondent to the motion to intervene of OCLA)

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Table of Authorities

Statutes, Regulations, and Rules

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.