



Ontario
Civil Liberties
Association

“The OCLA takes a vigorous and highly principled approach to defending free speech rights, which is an approach that is sorely needed in Canada today.”

— John Carpay,
President,
Justice Centre for
Constitutional Freedoms

“I am very pleased to learn of the Ontario Civil Liberties Association, and wish it the greatest success in its work, which could not be more timely and urgent as elementary civil rights, including freedom of speech, are under attack in much of the world, not excluding the more free and democratic societies.”

— Noam Chomsky,
Institute Professor, MIT

“Freedom of expression is our most fundamental and most precious freedom. It has been under attack in Canada for years. The Ontario Civil Liberties Association has taken a position on freedom of expression that is both courageous and principled. The OCLA now stands alone and its position should be supported by all Canadians who cherish democracy and freedom.”

— Robert Martin,
Professor of Law,
Emeritus,
Western University

ocla.ca



May 19, 2015

By Fax

The Honourable Madeleine Meilleur
Ministry of the Attorney General
Constitutional Law Branch
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Hon. Madeleine Meilleur:

Re: Notice of Constitutional Question, Court of Appeal for Ontario File No. C59074 *St. Lewis v. Rancourt*

The Ontario Civil Liberties Association (OCLA) is a proponent of freedom of expression for all Ontarians, on all issues. OCLA is concerned that freedom of expression is in decline in Ontario.

You have been served with a Notice of Constitutional Question (“Notice”), in the above-cited appeal that is listed to be heard in Toronto on Friday, June 26, 2015. A copy of the Notice is attached.

The questions raised in the Notice are vital constitutional questions about the *Canadian Charter of Rights and Freedoms* guarantee of freedom of opinion and expression for all citizens of Ontario.

Defamation law is the main legal instrument used to infringe or deny the *Charter* right of freedom of opinion and expression, and it is the dominant government-sponsored source of chill against free expression in our society.

OCLA asks that you intervene in this appeal in order to protect the *Charter* right of expression for all citizens of Ontario. This is particularly important because the defendant/appellant in this case is self-represented, while being opposed by a major law firm being financed without limit using public money.¹

¹ OCLA Campaign: Public Money is Not for Silencing Critics — University of Ottawa must end its financing of a private defamation lawsuit. <http://ocla.ca/our-work/public-campaigns/public-money-is-not-for-silencing-critics/>.

The common law tort of defamation is in direct opposition to the *Charter* right of expression, and it is the only tort in which both malice (of defamation) and damages are *presumed*, rather than needing to be proved by the plaintiff. In this tort, the defendant has a reverse onus to show that the particular defamation is protected by law by virtue of a pleaded common law or statutory defence.²

Under such legal circumstances, it was an egregious violation of the appellant's *Charter* right of expression for the trial judge to refuse to put the defendant's defences to the jury, which were pleaded defences that were never struck out, and for which there was ample supporting evidence on the trial record.

The OCLA asks that you make a representation in this appeal that barring pleaded and standing defences in a defamation trial is incompatible with the *Charter* right to freedom of opinion and expression.

The second of three constitutional issues in the Notice is that the recent common law of permanent injunctions (permanent gag orders), against a defendant following a finding of defamation, includes permanent prohibitions of unknown expression, and is thus unconstitutional.

The said common law has never been challenged previously in an appellate court in Canada.

This unfortunate recent development in Canadian common law is at odds with Canadian values of freedom of expression, and the said common law expressly discriminates on the basis of financial means.

The OCLA asks that you make a representation in this appeal that the said recent common law of permanent injunction in defamation cases is incompatible with both *Charter* and Ontario values.

Finally, the Notice challenges the constitutionality of massive costs of trial against an individual defendant, opposed by unlimited public money, in a defamation case.

The excessive chill on expression from extravagant defamation-trial costs ordered against a defendant, while not actually paid by a private plaintiff, is evident. In this case, the trial court permanently barred a blogger from future unknown expression because he has no money, and then turned around and ordered him to pay the huge legal costs of trial, even though the costs had already been paid in full using public money.

Furthermore, such a costs order, in the circumstances of this case, is in violation of Canada's (and Ontario's) obligations under the *International Covenant on Civil and Political Rights*.³

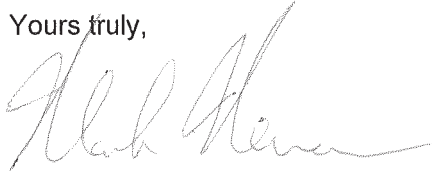
² See: OCLA position paper on Bill 83 — The tort of defamation must be abolished in Ontario. <http://ocla.ca/our-work/reports/report-bill-83/>.

³ **General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, at paragraph 47, regarding defamation law:** "Where relevant, States parties should place reasonable limits on the requirement for a defendant to reimburse the expenses of the successful party."

The OCLA asks that you make a representation in this appeal to argue that costs such as those ordered in the circumstances of this case are an unreasonable suppression of the *Charter* right of freedom of opinion and expression.

Your contributions in this appeal are essential to ensure that the law constraining the *Charter* right of freedom of opinion and expression is consistent with the values of Ontario's free and democratic society, and with international obligations.

Yours truly,

A handwritten signature in cursive script, appearing to read "Mark Mercer".

Mark Mercer, PhD
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