Ontario
Civil Liberties
Association

January 13, 2016 By Mail and Fax

The Honourable Mr. Justice Butler
Supreme Court of British Columbia

Your Honour:

Re: Unconstitutionality of s. 319(2) of the *Criminal Code* (*R. v. Topham*, Court File No. 25166, Quesnel Registry)

The Ontario Civil Liberties Association (OCLA) wishes to make this intervention, in letter form, to assist the Court in its hearing of the defendant's constitutional challenge of s. 319(2) of the *Criminal Code* ("*Code*"), to be heard in the Supreme Court of British Columbia.

The defendant submits that s. 319(2) of the *Code* infringes on the s. 2(b) guarantee of freedom of expression contained in the *Canadian Charter of Rights and Freedom*, and is not saved by s. 1 of the *Charter*.[1]

The Supreme Court of Canada has determined and reaffirmed that the *Charter* must provide at least as much protection for basic freedoms as is found in the international human rights documents adopted by Canada:[2]

> And this Court reaffirmed in *Divito v. Canada (Public Safety and Emergency Preparedness)*, [2013] 3 S.C.R. 157, at para. 23, "the Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified". [Emphasis added.]

Canada has ratified the *International Covenant on Civil and Political Rights* ("*Covenant*"). Article 19, para. 2 of the *Covenant* protects freedom of expression:[3]

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

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[1] Defendant's "Memorandum of Argument Regarding Charter Issues", *R. v. Topham*, Court File No. 25166, Quesnel Registry.
[2] *Saskatchewan Federation of Labour v. Saskatchewan* [2015 SCC 4], at para. 64.
[3] *International Covenant on Civil and Political Rights*, Article 19, at para. 2.

Further, the U.N. Human Rights Committee, in its General Comment dated 12 September 2011, has specified that any restrictions[4] to the protection of freedom of expression "must conform to the strict tests of necessity and proportionality":[5]

> 35. When a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. [Emphasis added.][6]

The impugned provision in the *Code* does not require the Crown to prove any actual harm, and no evidence of actual harm to any individual or group was presented in the trial of *R. v. Topham*. There is no "direct and immediate connection" between Mr. Topham's expression on his blog and any threat that would permit restriction of his expression.

The OCLA submits that the current jurisprudence of the *Covenant*, including the 2011 General Comment No. 34, represents both Canada's obligation and the current status of reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society, in relation to state-enforced limits on expression. The process and the jury-conviction to date in the instant case establish that s. 319(2) of the *Code* exceeds these limits, and is therefore not constitutional.

Furthermore, s. 319(2) of the *Code* allows a maximum punishment of "imprisonment for a term not exceeding two years". The *Code* punishment of imprisonment exceeds the "strict tests of necessity and proportionality" prescribed by the *Covenant*.

In addition, in paragraph 47 of General Comment No. 34, it is specified that: "States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty." [Emphasis added.] In the penal defamation envisaged in the *Covenant*, unlike in s. 319(2) in the *Code*, the state has an onus to prove actual harm.

And in relation to state concerns or prohibitions about so-called "Holocaust denial", paragraph 49 of the said General Comment has:

> Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression.

Finally, the OCLA submits that the feature of s. 319(2) that gives the Attorney General direct say regarding proceeding to prosecution (the requirement for the Attorney General's "consent")[7] is unconstitutional because it is contrary to the fundamental principle of the rule of law, wherein

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[4] *Ibid.*, Article 19, at para. 3, and Article 20.
[5] General Comment No. 34, UN Human Rights Committee [CCPR/C/GC/34], at para. 22.
[6] *Ibid.,* at para. 35.
[7] *Criminal Code* (R.S.C., 1985, c. C-46), s. 319(6).

provisions in a statute cannot be subject to arbitrary application or be politically motivated or appear as such. The fundamental principle of the rule of law underlies the constitution.[8]

For these reasons, the OCLA is of the opinion that s. 319(2) of Canada's *Criminal Code* is unconstitutional and incompatible with the values of a free and democratic society.

If the Court requests it, the OCLA will be pleased to make itself available to provide any further assistance in relation to the instant submission.

Yours sincerely,

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[8] For a recent example where unconstitutionality arising from the rule of law was the main issue before the court, see: *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII); and see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, 1991 CanLII 119 (SCC), p. 210 (i).

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