

# Canadian defamation law is noncompliant with international law

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**SUMMARY:** Defamation law in Canada is contrary to international law, in both design and practice. Under international law, the right to hold an opinion is absolute, and the right of freedom of expression can be restricted “for respect of the rights or reputations of others” solely using written laws that must conform to the “strict tests of necessity and proportionality”. With Canadian civil defamation law, the state has unfettered discretion from an unwritten common law that provides presumed falsity, presumed malice, unlimited presumed damages, and broad gag orders enforceable by jail, using a subjective judicial test for “defamation” without requiring any evidence of actual damage to reputation. Also, Canada’s practice of its defamation law materially aggravates the noncompliance with the *International Covenant on Civil and Political Rights* (eleven impugned rules and practices are described). A final section broadly examines the underlying social and historic reasons for having developed an oppressive defamation law, followed by recommendations.

1. The most important legal instrument to suppress expression in Canada is the common law of defamation, which acts both directly and by creating chill. Using this instrument, any corporation or individual with sufficient financial means to pursue a defamation lawsuit can intimidate and silence any publisher, writer, media outlet, social-media commentator, blogger, vlogger, or public speaker.<sup>1</sup>

2. This article is divided in four parts. First, I prove that the Canadian common law of defamation is in violation of international law, and is therefore unconstitutional. Second, I show that the practice in the application of this defamation law aggravates the noncompliance. Third, I explore how and why this situation occurred, from a social and historic perspective. Finally, I make recommendations for a statute for civil defamation, which would be compliant with the *International Covenant on Civil and Political Rights*.

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<sup>1</sup> See OCLA’s January 2014 position statement “OCLA position paper on Bill 83: The tort of defamation must be abolished in Ontario” <<http://ocla.ca/our-work/reports/report-bill-83/>>

## Part 1: Demonstration that Canadian defamation law is noncompliant with international law

3. In 1995, the Supreme Court of Canada judged that the common law of defamation is consistent with the Canadian constitution (with the *Canadian Charter of Rights and Freedoms*).<sup>2</sup> This judgement has been criticized by legal scholars.<sup>3</sup>

4. Therefore, in post-*Charter* Canada, when a defendant is sued for defamation: damages, falsity, and malice of defamation (intent) are *presumed*. The plaintiff need not prove actual damage to reputation, or the defendant's intent to damage reputation, or that the words complained of are false.

5. The test for liability is not based on evidence but merely on subjective judicial discretion:<sup>4</sup>

A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right-thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike, or disesteem.

6. Once defamation is thus determined, the defendant then has the onus to establish one of the common-law-prescribed defences, such as the so-called “fair comment” defence for the case of an expressed opinion.<sup>5</sup> The threshold for the defendant to establish the “fair comment” defence for an expressed opinion is onerous.<sup>6</sup>

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<sup>2</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC), <<http://canlii.ca/t/1frgn>>: para. 141, and see paras. 83 to 140; para. 208, and see paras. 205 to 207.

<sup>3</sup> Bayer proposes that the plaintiff should, contrary to the common law of defamation, be required to prove that the words complained of are false, did indeed cause damage to reputation, and that the defendant acted with actual malice or negligence: Carolin Anne Bayer, *Re-thinking the common law of defamation: Striking a new balance between freedom of expression and the protection of the individual's reputation*, thesis, Master of Laws, University of British Columbia, 2001, <<https://open.library.ubc.ca/cIRcle/collections/ubctheses/831/items/1.0077572>>. See also: Hilary Young, “But names don’t necessarily hurt me: Considering the effect of disparaging statements on reputation”, *Queen's Law Journal*, 37:1, 2011, <<http://www.queensu.ca/lawjournal/sites/webpublish.queensu.ca/qljwww/files/files/issues/pastissues/Volume37a/1-Young.pdf>>.

<sup>4</sup> *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII), <<http://canlii.ca/t/1z46d>>, para. 67, and see paras. 68 to 80 (dissenting analysis).

<sup>5</sup> *Ibid.*, para. 1

<sup>6</sup> *Ibid.*, para. 1

7. Furthermore, the Supreme Court of Canada has judged that there should not be a cap placed on damages for defamation,<sup>7</sup> which holds for the four types of defamation damages that are allowed in the common law:

- (a) general damages (presumed),
- (b) aggravated damages (based on evidence of the defendant's behaviour beyond the expression complained of),
- (c) actual damages (based on evidence of actual harm to reputation),<sup>8</sup> and
- (d) punitive damage (based on evidence of egregious malice).

8. In addition, the Canadian common law of defamation allows a practice wherein, following a defamation judgement, a judge can make a broad permanent gag order (permanent injunction), beyond the expression complained of, on the sufficient basis of a defendant's inability to pay ordered costs and damages,<sup>9</sup> enforceable by imprisonment.<sup>10</sup>

9. Therefore, Canada enforces an unwritten (common law) defamation law that is contrary to the internationally recognized principle of "necessity and proportionality" regarding state suppression of expression (see below). Canada enforces a defamation law that — by its very design, non-transparent nature (unwritten, non-statutory), and application — is non-compliant with Article 19 of the *International Covenant on Civil and Political Rights* ("Covenant"):

Article 19

- 1. Everyone shall have the right to hold opinions without interference.
- 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.
- 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals. [Emphasis added]

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<sup>7</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC), <<http://canlii.ca/t/1frgn>>: para. 168, and see paras. 167 to 203.

<sup>8</sup> Evidence of actual damage to reputation includes: loss of employment, not being promoted, loss of career development, loss of work assignments, loss of clients or contracts, loss of income, loss of memberships to clubs and groups, loss of friends, being barred from social circles, loss of social, public and business opportunities, loss of relationships, loss of access to public participation, and so on.

<sup>9</sup> *St. Lewis v. Rancourt*, 2015 ONCA 513 (CanLII), <<http://canlii.ca/t/gjxxd>>, see paras. 13 and 14

<sup>10</sup> *Gee Nam John et al. v. Byung Kyu Lee et al.*, 2009 BCSC 1157 (CanLII), <<http://canlii.ca/t/259r4>>, see paras. 23 to 25

10. “General comments” are provisions that are added to international law, following landmark decisions, which direct and bind the interpretation of the *Covenant*. The directives in General comment No. 34 are clear in regard to the meaning of Article 19:<sup>11</sup>

22. Paragraph 3 lays down specific conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be “provided by law”; they may only be imposed for one of the grounds set out in subparagraphs (a) and (b) of paragraph 3; and they must conform to the strict tests of necessity and proportionality. Restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions to other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated. [Emphasis added]

11. Here, “provided by law” means:<sup>12</sup>

25. For the purposes of paragraph 3, a norm, to be characterized as a “law”, must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution. Laws must provide sufficient guidance to those charged with their execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not. [Footnotes removed]

12. The complexity and subtleties of the common law of defamation are antithetical to Canada’s obligation to provide a defamation statute that is in conformity with the Covenant requirement of clarity, not to mention the “unfettered discretion” that is associated with unlimited presumed damages, presumed falsity, a subjective test for “defamation”, and broad gag orders enforceable by jail.

13. “Necessity”, here, means that it must be demonstrably necessary to apply the state-enforced penalty (published correction, apology, damages, costs, gag order, imprisonment) in order to achieve the goal of “respect of the ... reputations of others”. The strict requirement of necessity is meaningless unless the state imposes an onus on the defamation plaintiff to establish both: evidence-based actual damage to reputation, and necessity of the nature and degree of the desired penalty.

14. “Proportionality”, here, means that the penalties cannot be in excess (in nature and degree) of what is needed to achieve reparation and prevention of any demonstrated actual damage to reputation; otherwise the principle is made meaningless by a subjective judicial determination of both “defamation” and “reputation”.

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<sup>11</sup> General comment No. 34, International Covenant on Civil and Political Rights, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, para. 22

<sup>12</sup> *Ibid.*, para. 25

15. In Canada, a person who is permanently paralyzed from the neck down or who suffers any such massive debilitating effects due to flagrant medical negligence has his/her “non-pecuniary losses” damages for “pain and suffering” or “loss of enjoyment of life” capped at \$100,000.00, adjusted for inflation since 1978 (the “*Andrews* cap”).<sup>13,14,15</sup> The same cap holds for non-pecuniary losses in all bodily or physical personal injury cases, such as involving loss of limbs, brain damage, etc.<sup>16</sup> Recently, relying on its 1995 ruling for absence of a cap in defamation damages, the Supreme Court clarified (so to speak) that the *Andrews* cap does not apply to non-pecuniary damages stemming from “material” injury, such as theft of copyright.<sup>17</sup>

16. The *Andrews* cap also applies to egregious cases of wrongful criminal convictions, although the Supreme Court has recently opened the door to a re-examination of non-pecuniary damages in such cases:<sup>18</sup>

... But when it rendered its decision, the Court of Appeal did not have the benefit of this Court’s judgment in *Cinar*, which confirmed that the limit is inapplicable to damages for non-pecuniary loss that do not stem from bodily injury ...

17. In contrast, in a defamation case there is no cap on the amount of awards for unproven damage to “reputation” at large, even when there is no evidence for actual damage to reputation. Following orders for large costs and damages, the court can then permanently and broadly gag the defendant, on the sufficient basis of inability to pay the costs and damages, and enforce the gag with imprisonment.

18. There was a missed opportunity for the Supreme Court to inject rationality into the question of damages in defamation when it expressed a strong dissenting view in 1988:<sup>19</sup>

In sum, in view of the arbitrary nature of the compensation awarded for non-pecuniary loss, the risk that it may have a punitive aspect, the temporary nature of the loss suffered, the compensatory effect of the judgment obtained and the moderation displayed by Quebec courts, I think that aside from truly exceptional cases it will not be necessary to award an amount greater than

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<sup>13</sup> “Non-pecuniary damages” are damages from emotional reactions and stress, which are not quantified or are not quantifiable, and which do not correspond to an objectively determined loss of income or anything having marketable monetary value.

<sup>14</sup> *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229, 1978 CanLII 1 (SCC), <<http://canlii.ca/t/1mkb5>>

<sup>15</sup> *Ter Neuzen v. Korn*, [1995] 3 SCR 674, 1995 CanLII 72 (SCC), <http://canlii.ca/t/1frhk>, para. 104, and see dissenting view.

<sup>16</sup> *Cinar Corporation v. Robinson*, [2013] 3 SCR 1168, 2013 SCC 73 (CanLII), <<http://canlii.ca/t/g2fgx>>, paras. 95 to 103

<sup>17</sup> *Ibid.*

<sup>18</sup> *Hinse v. Canada (Attorney General)*, [2015] 2 SCR 621, 2015 SCC 35 (CanLII), <<http://canlii.ca/t/gjl6n>>, at para. 146

<sup>19</sup> *Snyder v. Montreal Gazette Ltd.*, [1988] 1 SCR 494, 1988 CanLII 66 (SCC), <<http://canlii.ca/t/1ftfp>>, at para. 39

\$50,000 (now \$100,000) to compensate in full for the non-pecuniary loss resulting from an attack on reputation. [...]

19. The Supreme Court has never revisited that dissenting opinion. On the contrary, the Supreme Court has insisted on turning logic on its head by implementing the *Andrews* cap in all cases involving physical or bodily injury (not admitting — unless proven at the time of the trial — that additional actual harm can result directly from the original said physical or bodily injury, such as medical depression and complex aggravating medical conditions), and by applying the *Andrews* cap to cases of wrongful criminal convictions (again, not admitting that prolonged imprisonment can cause severe medical conditions and general loss of health long after the trial for wrongful conviction has ended), while prescribing that general damages in defamation should have no cap, where damages are presumed, where the test for “defamation” is subjective, and where actual damage to “reputation” need not be established with evidence.

20. These features of the Canadian jurisprudence of damages make it clear that the Canadian common law of defamation is at least incompatible with, if not contrary to, the *Covenant* principles of necessity and proportionality. This is in stark contrast to Canada’s *Covenant* obligation to enact laws that implement necessity and proportionality in protecting freedom of expression (regarding all aspects, not solely damages). The said obligation is long overdue.

21. Canada’s problem of noncompliance with Article 19 of the *Covenant* is not solely in civil defamation law. Canada’s [Criminal Code](#) contains provisions against “blasphemous libel” (s. 296) and “defamatory libel” (ss. 297 to 317), which are squarely contrary to international law,<sup>20</sup> and opposite to all the relevant joint statements of international rapporteurs on human rights.<sup>21,22,23</sup> In particular, the said provisions prescribe imprisonment, whereas international law expressly disallows imprisonment as a penalty for any type of defamation, whether characterized as “criminal” or not.<sup>24</sup>

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<sup>20</sup> General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, paras. 47 to 49

<sup>21</sup> JOINT DECLARATION: Current Challenges to Media Freedom, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 30 November 2000, <<http://www.osce.org/fom/40190>>

<sup>22</sup> JOINT DECLARATION, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, 10 December 2002, <<http://www.osce.org/fom/39838>>

<sup>23</sup> JOINT DECLARATION ON DEFAMATION OF RELIGIONS, AND ANTI-TERRORISM AND ANTI-EXTREMISM LEGISLATION, by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR (African Commission on Human and Peoples’ Rights) Special Rapporteur on Freedom of Expression and Access to Information, 10 December 2008, <<http://www.osce.org/fom/35639>>

<sup>24</sup> General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>, paras. 47

22. Canada has an obligation to remove all such laws from its criminal code,<sup>25</sup> an obligation that it appears to be disregarding.

23. Even the “hate propaganda” (s. 318) provision of the *Criminal Code*, which should be designed to prevent war and genocide, without violating the right of freedom of expression, does not mention the ultimate crime of war of aggression, and is further noncompliant with the *Covenant* because it does not impose a necessity onus on the state to establish a “direct and immediate connection” to actual “discrimination, hostility, or violence”.<sup>26</sup> As such, the said provision describes a “crime of expression”, which is subjectively judged by the state, without any objectively defined and justified threshold, while failing to comply with the *Covenant* requirement imposed by Article 20(1) regarding outlawing war propaganda.

24. Further, the “public incitement of hatred” (s. 319) provision of the *Criminal Code* is at least as problematic, and clearly in noncompliance with the *Covenant*.<sup>27</sup> In this author’s opinion, to be compliant a statutory scheme for a crime of “inciting hatred” must have both: (1) an onus on the state to prove intent to incite hatred, and (2) an onus on the state to prove causation of actual harm (discrimination, hostility, or violence) to one or more actual victim(s). We should reject “victimless crimes of expression, especially those “perpetrated” merely through public internet diffusion from a personal website or blog or social media account, and in the absence of any actual (not perceived) power relationship. Canada should not enforce “crimes” that consist in publicly publishing words arbitrarily judged to induce hypothetical emotional responses.”<sup>28</sup>

25. But the Supreme Court of Canada goes in the opposite direction. It goes so far as to find that there is no constitutional right to the defence of truth against prosecutions of “hate speech”, whether the prosecutions arise in a criminal code or in a human rights code.<sup>29,30</sup> This is truly remarkable considering that one is dealing with a category of offenses, in Canada, in which the state does not require proof or any evidence of actual harm to one or more persons (there is no victim that testifies), and in which intent is presumed. It is simply baffling to read the contortions that are in these rulings.<sup>31</sup> This author does not know of any case where true

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<sup>25</sup> General comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, *International Covenant on Civil and Political Rights*, Human Rights Committee, 80th session, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, <<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=478b26ae2>>, para. 13

<sup>26</sup> See Article 20 of the *Covenant*; and see General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, paras. 35 and 50 to 52

<sup>27</sup> 13 January 2016 letter of the Ontario Civil Liberties Association regarding “Unconstitutionality of s. 319(2) of the Criminal Code (R. v. Topham, Court File No. 25166, Quesnel Registry)”

<<http://ocla.ca/wp-content/uploads/2016/01/2016-01-13-Letter-OCLA-re-R-v-Topham.pdf>>

<sup>28</sup> Ontario Civil Liberties Association letter to Justice Butler, “Re: Unconstitutionality of s. 319(2) of the *Criminal Code* (R. v. Topham, Court File No. 25166, Quesnel Registry)”, 13 January 2016, <<http://ocla.ca/wp-content/uploads/2016/01/2016-01-13-Letter-OCLA-re-R-v-Topham.pdf>>

<sup>29</sup> *R. v. Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC), <<http://canlii.ca/t/1fsr1>>, p. 781

<sup>30</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 (CanLII), <<http://canlii.ca/t/fw8x4>>, paras. 137 and 138

<sup>31</sup> *Ibid.*, paras. 137 to 143

statements can be considered the pith of “advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.<sup>32</sup>

26. Thus, Canada is a well-armed nation for broadly and arbitrarily suppressing individual expression, and it does not shy away from jail sentences to achieve its goal of controlling speech.

27. These statutory realities (and the coming “anti-terrorist” legislations) are inconsistent with continuous Supreme Court pronouncements that “the [*Canadian Charter of Rights and Freedoms*] 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.”<sup>33</sup> Given the said pronouncements, we must conclude that Canadian common law of defamation is unconstitutional, not to mention the expression provisions of the *Criminal Code*.

## Part 2: How defamation law has developed and is applied in Canada

28. Ever since the defamation trial of Socrates,<sup>34</sup> many public figures and jurists have tried to explain the concept of free expression in a free society:<sup>35</sup>

“Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.”----John Milton, *Areopagitica: A Speech for the Liberty of Unlicens'd Printing, to the Parliament of England* (published November 23, 1644).

“Every man has a right to utter what he thinks truth, and every other man has a right to knock him down for it.”----Samuel Johnson, as quoted in James Boswell's *The Life of Samuel Johnson*, Vol. 1 (1791), p. 335.

“Strange it is that men should admit the validity of the arguments for free speech but object to their being “pushed to an extreme”, not seeing that unless the reasons are good for an extreme case, they are not good for any case.”----John Stuart Mill, *On Liberty* (1859) Ch. 2, Mill (1985). *On Liberty*. Penguin. pp. p. 108.

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<sup>32</sup> At Article 20(2) of the *Covenant*. The French is clearer: “Article 20 : 1. Toute propagande en faveur de la guerre est interdite par la loi. 2. Tout appel à la haine nationale, raciale ou religieuse qui constitue une incitation à la discrimination, à l'hostilité ou à la violence est interdit par la loi.” Article 20 delimitates all such “hate speech” laws allowed and required by the *Covenant*.

<sup>33</sup> *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), <<http://canlii.ca/t/gg40r>>, at para. 64

<sup>34</sup> “The *Apology* (Greek: Ἀπολογία Σωκράτους; *Apologia Sokratous*, Latinized as *Apologia Socratis*) is Plato's version of the speech given by Socrates as he defended himself in 399 BC against the charges of “corrupting the young, and by not believing in the gods in whom the city believes, but in other daimonia that are novel.”—*Wikipedia* (accessed on 26 January 2016).

<sup>35</sup> See: [https://en.wikiquote.org/wiki/Freedom\\_of\\_speech](https://en.wikiquote.org/wiki/Freedom_of_speech)

“Without free speech no search for Truth is possible; without free speech no discovery of Truth is useful; without free speech progress is checked, and the nations no longer march forward towards the nobler life which the future holds for man. Better a thousandfold abuse of free speech than denial of free speech. The abuse dies in a day; the denial slays the life of the people and entombs the hope of the race.”----Charles Bradlaugh, Speech at Hall of Science c.1880 quoted in *An Autobiography of Annie Besant*; reported in Edmund Fuller, *Thesaurus of Quotations* (1941), p. 398; reported as unverified in *Respectfully Quoted: A Dictionary of Quotations* (1989).

“The censor is always quick to justify his function in terms that are protective of society. But the First Amendment, written in terms that are absolute, deprives the States of any power to pass on the value, the propriety, or the morality of a particular expression.”----William O. Douglas, Associate Justice of the Supreme Court of the United States (*Memoirs v. Massachusetts*, 1966).

"Censorship reflects a society's lack of confidence in itself. It is a hallmark of an authoritarian regime. Long ago those who wrote our First Amendment charted a different course. They believed a society can be truly strong only when it is truly free. In the realm of expression they put their faith, for better or for worse, in the enlightened choice of the people, free from the interference of a policeman's intrusive thumb or a judge's heavy hand. So it is that the Constitution protects coarse expression as well as refined, and vulgarity no less than elegance."----Potter Stewart, in dissenting opinion in *Ginzburg et al v. United States* (1965), also quoted in *Censorship Landmarks* (1969) by Edward De Grazia, p. 492

“What is freedom of expression? Without the freedom to offend, it ceases to exist.”----Salman Rushdie, *In Good Faith* (1990), p. 6.

“As a young constitutional lawyer, I was put to the first amendment test when I was called on to defend racists and neo-Nazis. I really had no choice. Surely now we know that none of us do. Free speech is unequivocal, unpolitical, and indivisible.”----Eleanor Holmes Norton, "Support for Free Speech", Congressional Record, Volume 141, Number 71 (Tuesday, May 2, 1995), United States House of Representatives, Page H4448.

“Free speech is the bedrock of liberty and a free society. And yes, it includes the right to blaspheme and offend.”----Ayaan Hirsi Ali (2010). *Nomad: From Islam to America*. Knopf Canada. p. 215. ISBN 0307398501.

“Free speech is not speech you agree with, uttered by someone you admire. It's speech that you find stupid, selfish, dangerous, uninformed or threatening, spoken and sponsored by someone you despise, fear or ridicule. Free speech is unpopular, contentious and sometimes ugly. It reflects a tolerance for differences. If everyone agreed on all things, we wouldn't need it.”----Robert J. Samuelson (April 6, 2014). "In politics, money is speech". *Washington Post*. Retrieved on April 7, 2014.

29. This is part of the social environment that has moved Supreme Court of Canada judges to utter similar sentiment on some occasions:

Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only “good” and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.<sup>36</sup> [Emphasis added]

This Court attaches great weight to freedom of expression. Since the Charter came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law. Very recently, in the highly sensitive context of an examination of the provisions of the *Criminal Code* relating to child pornography, McLachlin C.J. recalled the fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy. It protects not only accepted opinions but also those that are challenging and sometimes disturbing.<sup>37</sup> [Emphasis added] [Reference excluded]

In the absence of demonstrated malice on his part (which the trial judge concluded was not a dominant motive), his expression of opinion, however exaggerated, was protected by the law. We live in a free country where people have as much right to express outrageous and ridiculous opinions as moderate ones. I would therefore allow the appeal.<sup>38</sup> [Emphasis added]

30. Lofty statements made in particular cases notwithstanding, in the actual war against words that are defamation lawsuits in Canada, the social statuses of the litigants and their lawyers, and the cultural correctness of the expression, have far more weight with the court than any otherwise enunciated legal principle. Modern research is starting to elucidate such social-hierarchical rules in the practice of law,<sup>39</sup> which have always been apparent to those being managed by the legal system.<sup>40,41</sup>

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<sup>36</sup> *R. v. Sharpe*, [2001] 1 SCR 45, 2001 SCC 2 (CanLII), <<http://canlii.ca/t/523f>>, para. 21

<sup>37</sup> *R. v. Guignard*, [2002] 1 SCR 472, 2002 SCC 14 (CanLII), <<http://canlii.ca/t/51vd>>, para. 19

<sup>38</sup> *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII), <<http://canlii.ca/t/1z46d>>, at para. 4

<sup>39</sup> D.M. Katz *et al.*, “Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate”, *Journal of Legal Education*, Vol. 61, No. 1, August 2011, p. 1-28.

<sup>40</sup> In 1869, Mikhail Bakunin put it this way: “But these natural laws must be distinguished from the authoritarian, arbitrary, political, religious, criminal, and civil laws that the privileged classes have established over the course of history, always for the sole purpose of exploiting the labor of the working masses and muzzling their freedom— laws which have, under the pretext of a fictitious morality, always been the source of the lowest immorality.” *The Basic Bakunin, Writings 1869-1871*, translated and edited by Robert M. Cutler, Prometheus Books, NY, 1992, p. 121

31. A good example that demonstrates the degree to which cultural correctness bias, from the prevailing societal attitudes, and societal status of the litigants largely determine defamation case outcomes and appeals is seen by comparing two landmark Supreme Court of Canada judgements:

- (a) In *Hill v. Church of Scientology* the plaintiff was a rising and prominent Crown attorney and the critique was about his apparent conduct in a highly contentious matter, whereas the defendant was the *Church of Scientology*, which has a negative societal reputation of being a hierarchical sect,<sup>42</sup> it was criminally accused in Toronto in the relevant period. An extraordinarily large award of damages was made (the largest ever in Canada) and the Supreme Court made several determinations that materially weakened freedom of expression protections in Canada (and see above).<sup>43</sup>
- (b) In *WIC Radio v. Simpson* the plaintiff was an outspoken anti-gay-rights activist in the public school arena and the defendant was a radio show host who had, on air, compared her to Hitler and said that she would want to kill all gays, without there existing any evidence linking her to Nazis or remotely suggesting that she was violent and would exterminate gays if she could. The Supreme Court ruled fair comment protection, broadened the fair comment defence, and made a seminal dissenting view that judges should provide higher thresholds in finding that opinions expressed in public debates could be defamatory.<sup>44</sup>

32. The impact of cultural correctness bias on the practice of defamation law is also apparent in the conduct of civil liberty associations. Major civil liberty associations in Canada, when intervening in court to defend the principle of freedom of expression, will — in a case involving a controversial defendant whose views conflict with the prevailing culture — insist on stating on the record that the association repudiates the defendant’s views. In other words, these associations are primarily trying to safeguard a sufficient measure of free speech to defend societally sanctioned victims, rather than defending the human right itself of free expression. Agreeing or not agreeing with a defendant’s views is not relevant to defending the principle of freedom of expression, and expressly not agreeing harms both the defendant’s case and the principle. At best, the said conduct is intended to extract favourable consideration by exploiting the court’s cultural correctness bias sensitivity.

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<sup>41</sup> J. Macfarlane, “National Self-Represented Litigants Project - Final Report”, May 2013. <<https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf>>

<sup>42</sup> R. Behar, “The Thriving Cult of Greed and Power: Ruined lives. Lost fortunes. Federal crimes. Scientology poses as a religion but is really a ruthless global scam -- and aiming for the mainstream”, *Time*, 6 May 1991

<sup>43</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC), <<http://canlii.ca/t/1frgn>>

<sup>44</sup> *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII), <<http://canlii.ca/t/1z46d>>

33. Overall, the mechanism by which the common law of defamation is shaped, to limit and degrade any given recognition of an actual right to free expression, is succinctly explained by the US political activist and feminist Voltairine de Cleyre:<sup>45</sup>

Make no laws whatever concerning speech, and speech will be free; so soon as you make a declaration on paper that speech shall be free, you will have a hundred lawyers proving that "freedom does not mean abuse, nor liberty license"; and they will define and define freedom out of existence.

34. As a result, we have the "reputation" of the common law of defamation, which is not a possession or even a character trait but instead is what one believes about how one is perceived by others, at large. "Harm" to reputation is a distant and indefinable mosaic of unknown individual perceptions, opinions and judgements. "Damage" to reputation can be quantified<sup>46</sup> but instead it is simply presumed, thus guaranteeing a legal cause of action.<sup>47</sup>

35. By design, therefore, defamation law serves the interests of those powerful enough to use the courts to oppress critics against the subjective measure of how one is imagined to be perceived, using state-provided coercive means, without any objective and evidence-based determination of extent to which the said oppression or coercion is necessary, effective or unjustly harmful in itself.

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<sup>45</sup> In: *Selected Works of Voltairine de Cleyre*, published posthumously by *Mother Earth* in 1914, in the essay "Anarchism & American Traditions"; which is a position that is in accord with the First Amendment (1791) of the US constitution: "Congress shall make no law ... abridging the freedom of speech".

<sup>46</sup> As noted above, evidence of actual damage to reputation includes: loss of employment, not being promoted, loss of career development, loss of work assignments, loss of clients or contracts, loss of income, loss of memberships to clubs and groups, loss of friends, being barred from social circles, loss of social, public and business opportunities, loss of relationships, loss of access to public participation, and so on; such that pecuniary value can be ascribed in determining "actual" damage if there is a proven causal link.

<sup>47</sup> In the province of Quebec, the legality of the cause of action in defamation is different on paper than in English Canada. In Quebec, "[t]he basis for an action in defamation in Quebec is found in art. 1457 C.C.Q. [[Code Civil du Québec](#)], which lays down the general rules that apply to questions of civil liability. Thus, in an action in defamation, the plaintiff must establish, on a balance of probabilities, the existence of injury, of a wrongful act, and of a causal connection, as in the case of any other action in civil, delictual or quasi-delictual liability." [Emphasis added] *Prud'homme v. Prud'homme*, [2002] 4 SCR 663, 2002 SCC 85 (CanLII), <<http://canlii.ca/t/1g2w3>>, at para. 32. However, this statutory basis for correcting the common-law features that are noncompliant with the *Covenant* has not been used, and has instead been corrupted by: (1) an *ad hoc* adoption of a definition of "injury" that assimilates the common-law subjective and non-evidence-based definition of "defamation" (i.e., the so-called "objective standard" based on an imaginary member of the public, the "ordinary" or "reasonable" person), (2) an *ad hoc* determination of "intent" that also relies solely on the common law test for defamation, while (3) not imposing any evidentiary burden to establish a causal connection. Thus, the Quebec law has been effectively reduced to the common law for defamation. *Ibid.*, paras. 32 to 37; and *Bou Malhab v. Diffusion Métromédia CMR inc.*, [2011] 1 SCR 214, 2011 SCC 9 (CanLII), <<http://canlii.ca/t/2frk1>>, paras. 22 to 41

36. It goes very far. The Supreme Court of Canada, in the context of defamation lawsuits, has effectively given “reputation” the legal status of a constitutionally protected right, to be “balanced” against the statutory constitutional right of freedom of expression:<sup>48</sup>

[107] The other value to be balanced in a defamation action is the protection of the reputation of the individual. Although much has very properly been said and written about the importance of freedom of expression, little has been written of the importance of reputation. Yet, to most people, their good reputation is to be cherished above all. A good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society's laws. In order to undertake the balancing required by this case, something must be said about the value of reputation.

[108] Democracy has always recognized and cherished the fundamental importance of an individual. That importance must, in turn, be based upon the good repute of a person. It is that good repute which enhances an individual's sense of worth and value. False allegations can so very quickly and completely destroy a good reputation. A reputation tarnished by libel can seldom regain its former lustre. A democratic society, therefore, has an interest in ensuring that its members can enjoy and protect their good reputation so long as it is merited.

37. Thus, there is no onus on the plaintiff beyond convincing the judge that he/she was “defamed” (to the eye of the hypothetical observer), the constitutional “right of freedom of expression” has no special status, and the interests of the two sides must simply be “balanced”, within the accepted framework where both damage and malice of defamation (intent to harm) are presumed. That is the state of Canada’s constitutional protection of freedom of expression, and it is contrary to international law.

38. As such, when applied to opinions or non-factual comments, Canadian defamation law is in-essence the state enabling influential parties to suppress blasphemy, insult, ridicule, gossip, criticism, and so on — any expression that the judge subjectively considers diminishes the “reputation” of the complainant. After judgement, the Canadian court can make a broad gag order (permanent injunction) against the defendant, which is enforceable by imprisonment.<sup>49</sup>

39. Defamation law is also inherently hypocritical. On the one hand its jurists and scholars proclaim that its purpose is to protect reputation, and that reputation is a vital human attribute to be cherished by many above all else, while on the other hand a defamation lawsuit is a state-sanctioned ruthless defamation of the defendant, in which state power proclaims guilt

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<sup>48</sup> *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130, 1995 CanLII 59 (SCC), <<http://canlii.ca/t/1frgn>>, paras. 107 and 108

<sup>49</sup> *Gee Nam John et al. v. Byung Kyu Lee et al.*, 2009 BCSC 1157 (CanLII), <<http://canlii.ca/t/259r4>>, at paras. 23 to 25

regarding unacceptable behaviour and hands down a punishment intended to demonstrate guilt, accompanied by jail if the message is not clear enough.

40. In the real world, defamation is truly harmful to the person being defamed when the defamers have actual power over the defamed, such as in an employer-employee or teacher-student or leader-member or corporate-takeover or warring-nations context. However, virtually always in these contexts, the defamatory attacks are done covertly within power circles, and are often additionally covered using legal instruments related to “privilege” or “confidentiality” or “security”. Defamation in the absence of a power relationship is mere trading in impressions, whereas defamation made by power is projected by that power and acted upon. However, there is nothing in the common law of defamation that takes actual power into account. Society’s social hierarchy of dominance, which is an overriding and defining feature of any primate society,<sup>50</sup> is abstracted away to leave solely harmed “reputations” at large, which exist in the hypothetical mind of a hypothetical reasonable observer. Thus, defamation law is used at the court’s whim. Defamation actions of employees against employers, of subjects against their bosses, are rare, are rarely allowed and virtually never succeed.<sup>51</sup>

41. In practice, it is even worse than the record of case law shows. Leaving aside the entrenched systemic judicial culture that allows self-represented litigants to be bullied and disregarded in the courts,<sup>52,53</sup> the practice of a defamation action has many procedural features that should be of great concern, as follows:

- I. *Pre-trial litigation is oppressive.* The pre-trial litigation (demand for particulars, discovery examinations, refusals motions, motions to force the conditions of

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<sup>50</sup> R.M. Sapolsky, “The Influence of Social Hierarchy on Primate Health (Review)”, *Science*, 29 Apr 2005: Vol. 308, Issue 5722, pp. 648-652, DOI: 10.1126/science.1106477

<sup>51</sup> See the remarkable case of a fired and defamed cabinet minister who tried to sue the Prime Minister of Canada and officers. The Prime Minister, through his senior officer Mr. V. Raymond Novak, Principle Secretary, wrote to the RCMP (national police) to suggest that a criminal investigation be made of, at the time, Member of Parliament, Minister, and member of the caucus of the Conservative Party of Canada, Helena Guergis. The letter alleged: an existence of evidence relevant to fraud, extortion, and prostitution, that the writer and the PMO did not have first-hand knowledge of the said evidence, that a named third party (private investigator Derrick Snowdy) was available to provide the said evidence, and that the PMO had not communicated directly with Mr. Snowdy. The RCMP found no evidence worthy of acting upon, did not even question Guergis, and closed the case. Guergis sued for defamation. Judge Hackland of the trial court decided that a decision of a Prime Minister to dismiss a Minister, remove a party candidate, and so on, is a decision for which the Prime Minister is not answerable to the courts. It is a political decision, the merits of which cannot be questioned by the courts. Therefore, the learned trial judge argued, the court has no jurisdiction to examine the circumstances or reasons for the decisions and the case should not be heard — the pleadings must be struck. This machination was upheld on appeal: *Guergis v. Novak et al*, 2012 ONSC 4579 (CanLII), <<http://canlii.ca/t/fsg9t>>; and *Guergis v. Novak*, 2013 ONCA 449 (CanLII), <<http://canlii.ca/t/fzgil>> (Part of the claim survived.)

<sup>52</sup> D. Rancourt, “Rogue Courts in Canada Trample Self-Represented Litigants”, *Dissident Voice*, 29 September 2014, <<http://dissidentvoice.org/2014/09/rogue-courts-in-canada-trample-self-represented-litigants/>>

<sup>53</sup> J. Macfarlane, “National Self-Represented Litigants Project - Final Report”, May 2013. <<https://representingyourselfcanada.files.wordpress.com/2014/05/nsrlp-srl-research-study-final-report.pdf>>

mandatory mediation, mandatory mediation, cross-examinations on affidavits submitted in motions, motions for additional examinations and re-examinations, motions to strike out pleadings, motions for interim injunctions, motions to amend pleadings, motion to strike out a jury notice, motion to impose the format of court transcripts, motion to force case management, motion for summary judgement, motion for trial of an issue, pre-trial hearings, and so on, where each motion is essentially a mini-trial) can be as arduous and costly as a plaintiff can or wants to make it, where (in Ontario) the winning side's costs are payable by the loser at each step. If the loser cannot pay the costs, then he can be barred from bringing his own motions. The litigation can last many years and can be all-consuming.

- II. *No protection against asymmetry of means.* Limited provincial strategic lawsuit against public participation ("SLAPP") laws notwithstanding,<sup>54</sup> there is no general provision to correct for asymmetry of means when a corporation or otherwise wealthy plaintiff sues an ordinary citizen, in what can be years of litigation. Thus, the purely oppressive, intimidating and coercive nature of asymmetric litigation removes any freedom of speech protection that one has on paper.
- III. *No protection against lawsuits by covert proxies.* There is no statutory limit on non-parties to fund a plaintiff's legal costs, and there is no obligation for a plaintiff to disclose non-party funding. In fact, funding arrangements are considered privileged and cannot easily be discovered. The common law of maintenance and champerty is a weak protection against funding abuse and puts a heavy onus on the party complaining about covert funding to prove legal impropriety. Even government and public institutions can fund private defamation lawsuits of their employees or of any person, and do, not to mention political lobby groups. Thus, without transparency and without limit, there is a systemic condonation of defamation lawsuits by covert proxy.
- IV. *Disproportionate breadth of liability.* The common law of defamation allows the plaintiff to sue everyone or anyone that is involved in a publication that is alleged to be defamatory, including: the author of the words, the printer, the publisher, the book store, the delivery man, the web site, the software provider for the web venue, the server hosting the web site, the service provider, the host of an on-line forum, the social media user that did not block or delete a comment, and so on. Even a search engine can be sued for the display of search results, or a bulletin board for the display of automatic listings. The plaintiff can select targets from all these possibilities. Thus, defamation law attacks publication venues by forcing them to monitor and censor, which can be resource intensive, thereby closing down discussion forums. The chill effect on book publishers and specialized forum providers, in particular, is significant. If the publication involves speaking to a crowd

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<sup>54</sup> See OCLA's January 2014 position statement "OCLA position paper on Bill 83: The tort of defamation must be abolished in Ontario" <<http://ocla.ca/our-work/reports/report-bill-83/>>

with a voice amplification device, then, in principle, the provider of the amplification system and the venue can be sued. Thus, the reach of defamation actions goes far beyond the originating communicator, to any knowing or unknowing “enabler”, which is a disproportionate measure if ever there was one.

- V. *Effectively no time-limitation barring of litigation.* There is no time limitation for a defamation action against re-publication of the same words or pamphlet or book or blogpost alleged to be defamatory. In the Canadian common law, every re-publication is considered a fresh event. This could include a new printing of a book made decades after the original printing, even if no defamation action had been made against the first printing. It could include a newspaper that puts its paper archive on the internet, and so on. With internet material, the plaintiff can argue that the words complained of are continuously being published as long as they are on the internet: he need only show one new viewing of the material.
- VI. *No equality of arms, by design.* At trial, damages, intent and falsity are presumed, and there is no regulatory or statutory limit on character assassination of the defendant. The in-court motion and trial hearings are a legally protected venue where defamation of the defendant is, in practice, given free reign. That defamation can be published, based on the open court principle, and is not actionable. In contrast, the common law foresees that the entire in-court conduct of the defence is evidence to show malice towards awarding aggravated damages. Even advancing the defence of truth, if it fails, is evidence of malice for awarding aggravated damages, which are routinely thus awarded. In practice, the presumption of malice of defamation (intent) is extended to a presumption of malice of defence. The absence of a retraction or of an apology is also weighed negatively in awarding damages. By design, there is no equality of arms (equal access to justice) in a defamation lawsuit in Canada.
- VII. *Insufficient protection against judge’s prejudicial questions to the jury.* In the charge to the jury (final instructions to the jury, prior to its deliberation), it is part of the practice to submit questions to the jury about meanings of the words complained of. Judges have allowed such questions to include several proposed defamatory meanings for each of the phrases or statements complained of in a given publication (the set of proposed defamatory meanings can be different for the different phrases or statements). The jury must answer if each of the said phrases or statements has each of the proposed defamatory meanings. If the jury answers “yes” for any one of the proposed defamatory meanings, then the publication is deemed to have been proven to be defamatory.<sup>55,56</sup> By this artifice, the plaintiff can bring an array of

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<sup>55</sup> In an early case, the trial judge directed the jury to answer whether the words “There are no rooms for you.” imputed “unchastity”, as the sole proposed meaning: *Saunders v. Randolph Hotel Company, Limited and Pidutti*, 1945 CanLII 65 (ON CA), <<http://canlii.ca/t/g1gzf>>

<sup>56</sup> In a recent egregious example, the trial judge put 33 ordinary meanings and 12 innuendo meanings about 8 statements complained of, from two blogposts, to the jury: see book of questions for the jury, Tab E1a, pages 17 to

defamatory meanings and, if accepted by the judge, the jury is forced to consider each one, which unduly guides the jury's thinking. The original words are multiplied into a spectrum of defamatory meanings and shades. The defendant does not have a right to impose that the jury be left to decide for itself whether the words, in their context, carry defamatory sting ("general verdict"). A jury's general verdict determination of whether there is defamatory sting, without being questioned as to specific defamatory meanings, is an allowed possibility but it is not a defendant's right. Purely from a mathematical perspective, not to mention the psychological impact on perception, this multiplying of and elaboration of potential defamatory meanings necessarily skews the determination of whether there is defamatory sting, yet it has been allowed by the courts.<sup>57</sup>

- VIII. *Jury is directed away from considering the right of freedom of expression.* In the charge to the jury, the judge typically constrains himself to the determinations prescribed by the common law of defamation, and is thus required to explain the test for liability in defamation, and the tests for applicable and pleaded defences, but he is not required to describe the constitutional right of freedom of expression — the fundamental human right that is always attacked in a defamation lawsuit. Despite the Supreme Court's lofty statements about "balancing" reputation and the constitutional right of freedom of expression, the trial judge need never explain or describe or name the constitutional right that is in play. As a result, the jury is guided to a technical determination without being invited to ponder the societal and *Charter* value of freedom of expression. Typically, if the defendant attempts to bring the law of freedom of expression, then the judge instructs the jury to disregard any legal argument made by the litigants, and that he is the only authority on the legal framework.
- IX. *Judge can opine on quantum of damages, prior to jury's determination of liability.* In the charge to the jury, judges have been allowed in common law to express their opinions in characterizing the amount of non-pecuniary (and unproven) damages that would be warranted if a determination of liability for defamation is made, or to give "guidance" as to recommended ranges of damages.
- X. *Financial barrier to bringing the appeal.* After trial, if the defendant wishes to appeal, as a condition for bringing the appeal, the defendant must, under the rules of procedure, secure a transcript of the trial.<sup>58</sup> The costs of producing the transcript, which the defendant must assume, can typically be in the tens of thousands of dollars, and must be paid prior to securing the transcripts.

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39, application book, Application for Leave to Appeal to the Supreme Court of Canada, dated 28 September 2015, Court File No. 36653, *Rancourt v. St. Lewis*, <<https://archive.org/details/PostFULLAPPLICATIONLTAIIWSigsOCR>>

<sup>57</sup> *Ibid.*

<sup>58</sup> *Rules of Civil Procedure* (Ontario), Rule 61.09 <<https://www.ontario.ca/laws/regulation/900194>>

- XI. *Financial barrier to having the appeal heard.* After trial, if the defendant duly brings an appeal, the plaintiff can make a motion to stay the appeal on a basis of security for costs. This means that if the plaintiff can convince the court that the defendant would not be able to or would not pay the plaintiff's costs on appeal, in the event that the defendant loses the appeal, then the appeal can be dismissed.<sup>59,60</sup>

### Part 3: Social and historic perspective

42. From this author's perspective, the evolution of defamation law reflects an unending and primordial struggle between the need of the individual to have influence in society and the drive of society's dominance hierarchy<sup>61</sup> to maintain and increase its power. If individuals are allowed to interact truthfully and vehemently within and between social classes then they will form strong bonds and sentiments, and will develop, pit, parse and share experiential knowledge, all of which will make them unmanageable. The grip of hierarchical dominance is maintained by suppression of individual influence, and this is achieved by many strategies including the suppression of free expression.<sup>62</sup>

43. In pivotal historic periods, such as after the US war of independence, and after the Second World War, establishment forces enact strong freedom legislation in order to prevent recurrence of abuse of power. This is then followed by an erosion of freedom that accompanies gradual rising centralization and hierarchical control (monopolies, globalization, centralization, etc.). Both statutes and the case law follow these meta-trends, and the courts always represent the interests of centralized power, from which the judiciary is ordained. The statutes themselves represent a "balance of the period" between significant freedom and safeguards for the newly enacted power structure. In addition, there is an effort to ground and consolidate the statutes by establishing underlying moral principles, such as a right to life, a protection against torture, and a prohibition of genocide.

44. In this regard, the "societal value of reputation" is a call to discipline and to preservation of undemocratic power, whereas freedom of expression is a call to shake it up and interact in order to find meaning and influence by testing boundaries. Reputation is the force behind subservience to authority. Expression is the force of change and of resistance against unjustified control. Claims of hurt feelings and irreparable personal integrity, from expressed opinions or in an absence of proven actual damage, should carry no weight in the constant class struggle between reputation and free expression, which is a central business in democratic societies.

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<sup>59</sup> *Rules of Civil Procedure* (Ontario), Rule 61.06 <<https://www.ontario.ca/laws/regulation/900194>>

<sup>60</sup> *Astley v. Verdun*, 2015 ONCA 225 (CanLII), <<http://canlii.ca/t/gh0hc>>, paras. 5 and 6

<sup>61</sup> R.M. Sapolsky, "The Influence of Social Hierarchy on Primate Health (Review)", *Science*, 29 Apr 2005: Vol. 308, Issue 5722, pp. 648-652, DOI: 10.1126/science.1106477

<sup>62</sup> D. Rancourt, *Hierarchy and Free Expression in the Fight Against Racism*, Stairway Press, 2013.

<<http://www.stairwaypress.com/bookstore/hierarchy-and-free-expression-in-the-fight-against-racism/>>

45. Thus, defamation law is an incarnation of the eternal battle between Enlightenment and systemic oppression of the individual. And modern defamation law is largely a failed manifestation of and deviation from what Foucault called Kant's "contract of rational despotism with free reason":<sup>63,64,65</sup>

"And Kant, in conclusion, proposes to Frederick II, in scarcely veiled terms, a sort of contract — what might be called the contract of rational despotism with free reason: the public and free use of autonomous reason will be the best guarantee of obedience, on condition, however, that the political principle that must be obeyed itself be in conformity with universal reason."

46. An illustration of the said eternal battle, is that every time a new communication technology has emerged (printing press, radio and television, and now the internet), which gives new outreach potential to an underclass, the judiciary and its associated service intellectuals have gone nuts "fixing" defamation law.<sup>66</sup>

47. One aspect, in particular, of the *Covenant* illustrates how the ill-conceived task of negotiating the struggle between freedom and hierarchical control leads to incongruence. On the one hand, the *Covenant* prescribes that the right to hold an opinion is absolute,<sup>67</sup> while, on the other hand, the *Covenant* allows written defamation laws (that follow the strict requirements of necessity and proportionality) "[f]or respect of the rights or reputations of others".<sup>68</sup> What is the meaning of an absolute right to hold an opinion if one does not have an absolute right to express the opinion, with the obvious understanding that an opinion, by definition, is distinct from an order or directive, and cannot be true or false?

48. Why would a gag law be needed "for respect of the ... reputations of others"? Instead, a sound principle that is consistent with an absolute right to hold an opinion would be to presume that those closest (in influence) to the person will make their judgement of the person

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<sup>63</sup> The said "contract" is the rational basis for limited freedom in modern societies that institute forms of democratic representation (the so-called "free and democratic" societies of Western jurisprudence).

<sup>64</sup> I. Kant, "What is Enlightenment?" (essay, original in German), 1784.

<http://www.columbia.edu/acis/ets/CCREAD/etscc/kant.html>

<sup>65</sup> M. Foucault, "What is Enlightenment?" (essay, original in French), 1984. (In *The Foucault Reader*, edited by Paul Rabinow, pp. 32-50. New York: Pantheon Books, 1984. Original Publication: Qu'est-ce que les Lumières ?) <http://foucault.info/documents/whatisenlightenment/foucault.whatisenlightenment.en.html>

<sup>66</sup> The plethora of exaggerated claims of near-infinite harm from internet postings is noteworthy. Plaintiffs' counsels in defamation cases have been repeatedly arguing that internet publications are more damaging to reputation than conventional publications, without any basis in social science studies, without expert evidence, in legal circumstances where damage to reputation is presumed, and without considering the known counter arguments of "link rot", information overload, the ease of responding in the same venue, the inherent low reputation and recognized unreliability of both blogs and general internet information, and so on. And judges have been happy to go along.

<sup>67</sup> *Covenant*, Article 19, para. 1; and General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, paras. 5, 9, and 10

<sup>68</sup> *Covenant*, at Article 19, para. 3

from direct knowledge rather than from expressed third-party opinions, and that those that form judgement on the basis of hearsay opinion are distant and irrelevant.

49. The inconsistencies in defamation law itself are manifold worst, as should be amply evident from the instant article. One recent plea for reform of the US common law of defamation, which is already more rational than the Canadian variety, cited many sources in calling it:<sup>69</sup>

... an area of law that has been called "odd,"(ref) "senseless,"(ref) and "utterly confusing,"(ref) a "hodgepodge,"(ref) an "historical accident,"(ref) and a "rustic relic [] of ancient asininity"(ref) "for which no court and no writer has had a kind word for upwards of a century and a half."(ref) "Neither judicial nor academic fatigue can long serve to avoid coming to grips with ... the chaos that is the modern American law of defamation."

50. To those jurists who react by claiming that society would collapse without defamation law, I would answer along the following lines. A merchant's reputation is determined by the quality of his wares and services, and is thus robustly protected against opinions expressed by competitors and their clients. Allowing widespread defamation in advertisement has not caused a collapse of commerce, and consumers have adapted their judgments to suit their needs and desires. Likewise, allowing widespread defamation in the political discourse of representative politics has not caused a meltdown of democracy, and has not been the cause of systemic loss of democracy. The same is true among individuals in modern society. If defamation on the internet were such a poisonous substance, then surely modern civilization would have extinguished itself by mass suicide and gang wars by now. I would add that the iconic teen suicide is caused by deep societal problems, leading to bullying, isolation, and low self-esteem, not by insults and defamation. Freedom of expression is needed to solve those very societal problems, at the root. If the world allowed adults free expression, free expression would be practiced in all spheres, and teens would be more resilient. More expression is the answer, not suppression of expression.

51. Socrates has already answered the jurists. Defamation kills the gadfly and thereby kills society. The mule simply becomes stupid and lethargic. Democracy becomes a parody. And we become run and overrun by idiots who suffer from not having their self-images regularly challenged by stinging defamatory comments.

#### **Part 4: Recommendations**

52. Canada should develop a written and comprehensive defamation law that recognizes both freedom of expression as a fundamental human right, and the aggravated damages from

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<sup>69</sup> J.C. Sipe, "'Old Stinking, Old Nasty, Old Itchy Old Toad'\*: Defamation Law, Warts and All (A Call for Reform)", *Indiana Law Review*, 2008, vol. 41:137, pages 137-160

defamers (employers, leaders, hierarchical superiors, etc.) who have structural power over plaintiffs, having the following characteristics:

- (a) The presumptions of falsity, malice, and damages should be abolished.
- (b) The plaintiff should have an onus to prove actual damage to reputation, falsity in the case of a statement of fact, and actual malice (intent to inflict actual damage) or consequential negligence.
- (c) Damages should be limited to reparations for actual (pecuniary) damage to reputation, caused by the words spoken or published
- (d) Other remedies should include publishing corrections, and providing an equivalent venue for response.
- (e) There should be a complete bar against government and corporate plaintiffs, and a disclosure rule regarding third-party funding of the litigants.
- (f) Forum and medium providers should be excluded from any liability.
- (g) There should be a time-limitation bar, irrespective of re-publishing.
- (h) Conduct of the defence should be separate from the cause of action, and unusable in proving the charge.
- (i) The purpose of the statute should include protections against asymmetry of means, protection against social correctness bias, protections against using secrecy from privilege (including more probing discovery and transparency rules) to cover defamation attacks by defendants who have structural power over plaintiffs, and should take into account aggravating circumstances from structural power relations between the litigants.
- (j) There should be no systemic barriers to access, to litigation and to appeal, for a litigant defending his/her right of freedom of expression.

53. There should not be civil liability for a person's emotional or stress response to words. Such liability is disproportionate. Actual damage to reputation already covers all the circumstances where the words caused an effect on the plaintiff, through the responses of persons that change their relation to the plaintiff. Evidence of actual damage to reputation includes: loss of employment, not being promoted, loss of career development, loss of work assignments, loss of clients or contracts, loss of income, loss of memberships to clubs and groups, loss of friends, being barred from social circles, loss of social, public and business opportunities, loss of relationships, loss of access to public participation, and so on, to the full extent that these carry pecuniary consequences.

54. Put another way, being "mean" with words that do not project structural (hierarchical) power should not be punishable in itself. Being "mean" and emotional responses including stress are intrinsic to human interactions. Suppressing these elements suppresses the individual's influence in society, and produces a managerial dystopia rather than a healthy society of constantly colliding views and interests. Human motivation and perception are moulded by emotional responses, which alone can cause re-examination of self-image and identity. It is, at best, an irrational and unjustified project of social engineering to attempt to erase hurt feelings and stress reactions to words, by suppressing the speaker.