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File Number: 36653

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***)

NOTICE OF CONSTITUTIONAL QUESTION
(in the application for leave to appeal)

October 7, 2015

Dr. Denis Rancourt
(Applicant)

The applicant, Denis Rancourt, intends to question the constitutional validity and applicability of the common law test or rule for making permanent injunctions against defendants following rulings in civil lawsuits for defamation (here, referred to as the "*Astley* test"), intends to question the constitutional validity and applicability of the common law test or rule for reasonable apprehension of bias (judicial bias), and intends to claim remedies under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to acts or omissions of the Government of Ontario (specifically, of the courts).

The question is to be heard in writing at the Court's discretion, after October 30, 2015, at the Supreme Court of Canada, 301 Wellington Street, Ottawa, Ontario, K1A 0J1, in the application for leave to appeal.

The Court confirmed that the application for leave to appeal is filed, by letter dated September 30, 2015, which was received by the applicant on October 2, 2015. The complete application book is posted for convenience at the secure URL:

https://archive.org/details/PostFULLAPPLICATIONLTAAllWSigsOCR

There are five constitutional questions:

i. Constitutionality of the common-law "*Astley* test":
Is the common-law "Astley test" used in ordering permanent injunctions against unknown expression following findings of defamation constitutional and consistent with Canada's obligations pursuant to the International Covenant on Civil and Political Rights, and was the applicant's right of freedom of expression thereby violated by the permanent injunction?

ii. Rights infringed or denied by selecting trial evidence in barring defences:
Under what conditions, if any, can a judge disregard evidence on the trial record because one party did not "call" or "introduce" it, in deciding whether to put defences to the jury, and were the applicant's Charter rights of a fair trial and of freedom of expression thereby infringed or denied by the lower courts themselves?

iii. Freedom of expression infringed or denied by costs of defamation trial:
Under what conditions are costs of trial ordered against a defendant in a defamation action unconstitutional and incompatible with Canada's obligations pursuant to the International Covenant on Civil and Political Rights, and did the lower courts themselves violate the applicant's right of freedom of expression with costs?

iv. Constitutionality of the Canadian common law of judicial bias:
Is the Canadian common law test for reasonable apprehension of bias (judicial bias) unconstitutional by virtue of being a violation of Article 14(1) of the International Covenant on Civil and Political Rights, and did the lower courts themselves thereby violate the applicant's right to a fair trial?

v. French language *Charter* rights infringed or denied by the appellate court itself:
Did the appellate court itself violate the applicant's equal-language Charter rights and privileges?

The following are the material facts giving rise to the constitutional questions, and the legal basis for the constitutional questions:

1. A previous notice of constitutional question is dated May 12, 2015, was served to the attorneys general on that date, and was duly filed with the Court of Appeal for Ontario. It outlined the above questions "i", "ii", and "iii". The appellate court was silent on the question of the constitutionality of the "*Astley* test" ("i"), endorsed the trial judge's

selection of matter-of-record evidence in barring all defences ("ii"), and failed to address the question of constitutionality of costs of a defamation trial ("iii").

2. The appellate court was silent on, and did not turn its attention to the applicant's appeal submission that the Canadian common law test for reasonable apprehension of bias, which applies a "heavy burden on a party who seeks to rebut the presumption of judicial impartiality", is in violation of Article 14(1) (fair trial) of the *International Covenant on Civil and Political Rights* (question "iv").

3. Question "v" is a new constitutional question for the Court because it involves the appellate court being itself implicated in violating the applicant's equal-language *Charter* rights.

Constitutionality of the common-law "*Astley* test"

4. *History of Astley test.* Since 1999 but especially in recent years, in the courts of first instance in Canada, there has emerged a new species of permanent-injunction orders that follow internet libel judgements. The new test for these orders is (1) there is a likelihood that the defendant will continue to defame the plaintiff, and/or (2) there is little likelihood that the defendant will ever pay the ordered damages. The test has been conjunctive or disjunctive: it was stated as disjunctive in the particular *Astley* case (2011) cited by the appellate court.[1] The associated permanent injunctions have been broad and have variably included (and not been limited to):[2]
   (a) an order not to defame the plaintiff (in any unknown way, prior to a determination of defamation and of defences)
   (b) an order not to make any statement about the plaintiff (any unknown statement, whether it is considered defamatory or not)

which are orders, enforceable by imprisonment, that are not justified protections of reputation in a free and democratic society.

[1] *St. Lewis v. Rancourt*, Endorsement on appeal, 2015 ONCA 513, paras. 13 and 14

[2] See: *Astley v. Verdun*, 2011 ONSC 3651 (CanLII), at para. 21; *Warman v. Fournier*, 2014 ONSC 412 (CanLII), at para. 34; *Kim v. Dongpo News*, 2013 ONSC 4426 (CanLII), para. 58; *Rodrigues v Rodrigues*, 2013 ABQB 718 (CanLII), para. 49; *122164 Canada Limited v. C.M. Takacs Holdings Corp. et. al.*, 2012 ONSC 6338 (CanLII), at para. 32; *Daboll v. DeMarco*, 2011 ONSC 1 (CanLII), at para. 58; *Hunter Dickinson Inc. v. Butler*, 2010 BCSC 939 (CanLII), para. 82; *Cragg v. Stephens*, 2010 BCSC 1177 (CanLII), para. 40; *Henderson v. Pearlman*, 2009 CanLII 43641 (ON SC), paras. 51-55; *Griffin v. Sullivan*, 2008 BCSC 827 (CanLII), paras. 119-127; *Ottawa-Carleton District School Board v. Scharf*, 2007 CanLII 31571 (ON SC), at para. 30; *Newman et al v. Halstead et al*, 2006 BCSC 65 (CanLII), para. 300; *Credit Valley (Conservation Authority) v. Burko*, 2004 CanLII 12274 (ON SC), para. 8; *Campbell v. Cartmell* [1999] O.J. No. 3553 (ONSC), para. 60

5. The appellate court endorsed and applied the *Astley* test, and expressly cited the *Astley* conditions.[3] The permanent injunction includes both any quoting of the words found to be defamatory by the jury, in any expression that itself is not defamatory, and any unknown new "defamation", prior to a fresh determination of defamation and of absence of defences.

6. Never before the Astley-test orders has impecuniosity been a sufficient condition to apply a permanent gag against a citizen, as a preventative measure, with the possible consequence of imprisonment. These orders in effect criminalize disobedience of expression, and are preferentially applied to those without financial means.

7. The Astley test has not previously been reviewed by an appellate court regarding consistency with the values embodied in *s*. 2(b) of the *Charter*.[4] The unconstitutionality of the common-law *Astley* test was argued by the appellant, at trial and on appeal.

8. Thus, in the Ontario appellate decision, the guiding principle described by the Court[5]

> The law of defamation does not forbid people from expressing themselves. It merely provides that if a person defames another, that person may be required to pay damages to the other for the harm caused to the other's reputation.

has been replaced by preventative deterrents, including jail, against unknown expression by those who cannot pay, without a constitutional analysis of the test and of resulting orders having been performed.

9. The permanent injunction provisions of ordering against future unknown and undetermined defamations (as in the instant case) and of ordering not to make any future statement about the plaintiff whatsoever are problematic in particular because exactly the same established principle as for interim injunctions is relevant to the circumstances: in a democratic society the courts will extremely rarely impose prior restraints on unknown expression, not knowing if the alleged or presumed future defamation would be protected by law.[6]

10. The *Astley* test and orders made pursuant to the Astley test are violations of Article 19 of the *International Covenant on Civil and Political Rights*, which Canada has ratified. In Article

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[3] See: *St. Lewis v. Rancourt*, Endorsement on appeal, 2015 ONCA 513, paras. 13 and 14

[4] In *Barrick Gold Corp. v. Lopehandia*, 2004 CanLII 12938 (ON CA), paras. 68-78, the Court of Appeal for Ontario **did not** review the said "test" (*Astley* test) or any test regarding *Charter* consistency. Rather, the Court of Appeal, in *Barrick*, solely addressed the question of jurisdiction to make permanent injunctions.

[5] *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 (CanLII), at para. 2

[6] *Canada Metal Co. Ltd. et al. v. Canadian Broadcasting Corp. et al.*, 1975 CanLII 661 (ON DC), 2nd para.

19, the allowed restrictions on freedom of expression regarding respect of reputations must be provided by law and necessary, with the State Party having the onus.

11. Furthermore, the *Covenant* does not admit that defamation can be punishable by imprisonment, irrespective of impecuniosity or other circumstances.[7]

12. The Court recently expressed the position that[8]

> 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.

13. The applicant submits that the *Astley* test for a permanent injunction against unknown expression following a finding of defamation should not be allowed to become law in Ontario.

<u>Rights infringed or denied by selecting trial evidence in barring defences</u>

14. ●The fair-comment-defence circumstances of this case are simple: the blog comments complained of were expressly based on access-to-information documents and on a plaintiff's "evaluation report", all of which were entered and authenticated, on the trial record, by the plaintiff. ●The defendant chose not to enter additional evidence. ●The trial judge did not consider the totality of the trial-record evidence in deciding whether defences could be put to the jury, and barred all the defences because the supporting evidence had been entered by the plaintiff. ●This, even though access to defences is what makes defamation law constitutional in Canada.[9]

15. The appellate court found[10]

> The defence of fair comment was not available to the appellant. He called no evidence, and without evidence, he could not establish the five criteria just set out. Although the appellant mentioned fair comment in his opening statement to the jury, the statement was not evidence and could not establish a defence. The trial judge did not err in this regard.

thereby endorsing the trial judge's charge to the jury that

> The defendant here has not introduced any evidence establishing a defence. Therefore, there is no defence for you to consider.

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[7] General comment No. 34, *International Covenant on Civil and Political Rights*, Human Rights Committee, 102nd session, CCPR/C/GC/34, at para. 47: "imprisonment is never an appropriate penalty".

[8] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII); at para. 64

[9] It is trivial law that without the defences the common law of defamation is incompatible with the *Charter* right of freedom of expression.

[10] *St. Lewis v. Rancourt*, Endorsement on appeal, 2015 ONCA 513, at para. 7

●whereas, as matters of record:

(a) the defendant had explained his defences of fair comment and statutory limitation to the jury, and had explained the relation of the evidence to the defences; and

(b) the said evidence was amply entered by the plaintiff during trial.

16. The appellate court's judgement endorses the trial judge's selection of the evidence, based solely on which party "called" or "introduced" the evidence. Supporting evidence was disregarded because it had been entered by the other side, despite that the applicant had spelled out the said supporting evidence and its relevance to his defences in his opening statement to the jury.

17. The applicant submitted on appeal that the trial judge did not have the jurisdiction to thus disregard evidence, on the sole basis of who entered the evidence, in determining whether a defence could be put to the jury. The opposite proposition of allowing a judge to select evidence on the sole basis of which party entered the evidence, in determining whether pleaded and standing defences can be put to the jury in a civil case, is an absurdity.

18. The appellate court was bound by the same principle, and did not have the jurisdiction to endorse the trial judge's particular and partial selection of evidence in deciding whether the pleaded and standing defences could be put to the jury.

19. *Violation of Charter.* Thus, both lower courts denied the applicant's constitutional right to a fair trial by applying incorrect selection or non-consideration of evidence in deciding whether defences can be put before the jury, which must be remedied pursuant to s. 24 (enforcement) of the *Charter*.

20. As a result, all the pleaded and standing defences against the infringement or denial of the applicant's *Charter* right of freedom of expression were expressly barred from the jury's consideration and a permanent gag was ordered, which carries a possible penalty of imprisonment.

21. It is a matter of record that there was ample supporting documentary and testimony evidence for the two standing defences of fair comment and statutory limitation. While it is true that there is no expert evidence on the trial record regarding the statutory limitation defence, such expert evidence is needed solely for the statutory-interpretation question of whether the blog is a "broadcast", not for the disjunctive question of whether the blog is a "newspaper". Indeed, the Court of Appeal determined that the word "paper" in the *Libel and Slander Act* of Ontario is broad enough to encompass a newspaper which is published on the internet. The Court made this determination about "paper", as an immediate

purposeful interpretation of the *Act*, without requiring expert evidence to have been presented in the lower court.[11]

22. *Violation of Covenant.* The trial court's said incorrect selection or non-consideration of evidence in barring defences — upheld by the appellate court — is antithetical to the constitutional guarantee of a fair trial, and is in violation of Article 14(1) of the *Covenant*.

23. The applicant was denied any defence in a defamation action, which is contrary to Canada's obligations pursuant to Article 19 of the *International Covenant on Civil and Political Rights*.

24. The Court recently expressed the position that[12]

> 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.

<u>Freedom of expression infringed or denied by costs of defamation trial</u>

25. The applicant brought the ground for appeal that, in the circumstances of this case, the trial costs are unconstitutional or contrary to the *Covenant* — at every stage of his appeal:
    (a) in his Notice of Appeal;
    (b) in his Supplementary Notice of Appeal;
    (c) in his appeal-court May 12, 2015 Notice of Constitutional Question;
    (d) in his appeal factum;
    (e) with many supporting documents and affidavit-exhibits in his Appeal Book and Compendium; and
    (f) in his attempted submissions before the appellate panel at the hearing.

26. Despite the thus advanced *Charter* ground for appeal of the costs of trial, the appellate court appears not to have turned its mind to constitutionality of costs in a defamation action, failed to rule on the said *Charter* ground for appeal, and stated:[13]

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[11] *Weiss v. Sawyer*, 2002 CanLII 45064 (ON CA), see paras. 24-26; and *Libel and Slander Act* (Ontario), R.S.O. 1990, c.L.12, s. 5(1); and see *St. Lewis v. Rancourt*, Endorsement on appeal, para. 8, Tab E4a

[12] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII); at para. 64

[13] *St. Lewis v. Rancourt*, Endorsement on appeal, 2015 ONCA 513, para. 10; It is a matter of record that the jury was asked to answer about malice solely regarding aggravated damages, and not regarding dominant motive for publishing the blog words complained of in the action, which is necessary to defeat defences — *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII), see paras. 4 and 106: "The requirement that malice be the ***dominant*** motive for expressing an opinion in order to defeat fair comment helps maintain a proper balance between protecting freedom of expression and reputation." [emphasis in the original]

> In light of the jury's finding of liability grounded in malice, we see no reason to interfere with the trial judge's exercise of discretion in connection with costs.

27. The omission itself of disregarding a *Charter* ground for appealing costs of trial in a defamation case is a violation of the *Covenant*.[14]

28. The trial court is itself implicated in infringing or denying the applicant's *Charter* right to freedom of expression with the costs of trial,[15] and no express consideration or remedy was provided by the appellate court, pursuant to s. 24 of the *Charter*.

Constitutionality of the Canadian common law of judicial bias

29. The *Charter* guarantees a fair trial,[16] and the Court has recently expressed that "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".[17]

30. The trial judge refused to recuse himself for apparent bias, despite both having obtained all of his university degrees from the University of Ottawa (which intervened at trial, and entirely funded the plaintiffs lawsuit) and being a registered annual financial donator of the university, and went on to make an injunction Endorsement that is factually incorrect and partial. The trial judge was the second judge in the action who had proven financial and emotional ties to the University of Ottawa that also intervened in a motion to end the action for abuse of process (champerty and maintenance).

31. The appellate court applied the Canadian common law test for judicial bias and ruled:[18]

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[14] 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."

[15] *Joanne St. Lewis v. Denis Rancourt*, 2014 ONSC 4840, Endorsement on costs, dated August 21, 2014, paras. 24(b), 37(v), and 42

[16] S. 15(1) of the *Charter* "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."; and ss. 7 and 11(d), where, in the instant case, any violation of the permanent injunction against unknown expression carries a possible penalty of imprisonment.

[17] *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII); at para. 64

[18] *St. Lewis v. Rancourt*, Endorsement on appeal, 2015 ONCA 513, para. 18

> There is a heavy burden on a party who seeks to rebut the presumption of judicial impartiality: *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at paras. 20-26. There is nothing on the record that would satisfy that burden. A reasonable, informed person would not think it more likely than not that the trial judge, whether consciously or unconsciously, would not decide fairly.

32. In so doing, the appellate court was silent on, and did not turn its attention to the applicant's appeal submission that the Canadian common law test for reasonable apprehension of bias, which applies a "heavy burden on a party who seeks to rebut the presumption of judicial impartiality", is in violation of Article 14(1) (fair trial) of the *International Covenant on Civil and Political Rights*.

33. The *Covenant* test for bias does not provide this high threshold.[19] The *Covenant* test is whether the complainant can reasonably harbour doubts as to the impartiality of the trial court, and whether his apprehensions as to the impartiality of the trial judge are objectively justified with facts, in which case Canada is required to furnish him with an effective remedy.[20] Canadian common law appears to have strayed from the concept of "appearance" of bias while deviating toward a burden to prove bias. This is difficult to justify within the policy presumption that one judge is as good as another.

<u>French language *Charter* rights infringed or denied by the appellate court itself</u>

34. Canada's constitution provides an unqualified guarantee of language equality of French and English in any court process, which is a substantive right.[21]

35. The applicant's equal-language *Charter* rights and privileges were violated in the June 26, 2015, hearing before the appellate court because the language-interpretation service and facilities were defective and inadequate, which in effect deprived the applicant of his allowed time to complete his submissions — see the affidavit of Denis Rancourt.[22]

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[19] *Lagunas Castedo v. Spain*, Comm. 1122/2002, U.N. Doc. CCPR/C/94/D/1122/2002 (HRC 2008), see para. 9.7 to para. 11, and see the dissenting-view description of the facts, in the Appendix, last page.

[20] *Ibid.*

[21] *Canadian Charter of Rights and Freedoms*, ss. 16(1) and 19(1): ●16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada. ●19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

[22] Affidavit de Denis Rancourt, dated September 22, 2015, at Tab G12 (pages 291-340) of the Application Book, which is posted for convenience at the secure URL: https://archive.org/details/PostFULLAPPLICATIONLTAAllWSigsOCR

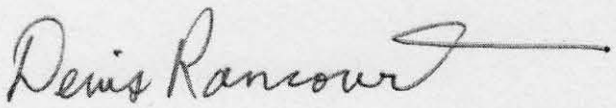
36. This occurred because the applicant chose to make his oral presentation in French, as he had done throughout the action; and occurred despite his March 6, 2015, and June 22, 2015, letters to the appellate court about its inadequate language-interpretation facilities.[23]

37. The appellate court itself is implicated, and it does not by-its-actions appear willing to remediate its long-standing deficiency.[24] S. 24(1) of the *Charter* guarantees that the applicant may apply to a court of competent jurisdiction to obtain remedy for such a breach.[25]

38. The appellate court's conduct and inadequate facilities risk undermining the integrity of the Canadian justice system. The applicant submits that both the appellate court's permanent technical inadequacies for language interpretation into English and its conduct[26] are offensive to Canadian societal notions of fair play and decency, in addition to being blatant violations of the unqualified *Charter* guarantee of language equality in any court process.

Dated at Ottawa, this October 7, 2015

SIGNED BY



Denis Rancourt
Appellant

Email: denis.rancourt@gmail.com

[23] *Ibid.*
[24] *Ibid.*
[25] *Charter*, s. 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
[26] Affidavit de Denis Rancourt, dated September 22, 2015, paras. 24 to 46

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COPIES TO:

The Attorney General of Ontario
Constitutional Law Branch
4th floor
720 Bay Street
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

The Attorney General of Canada
Justice Building
234 Wellington Street
Ottawa, Ontario K1A 0H8
fax: (613) 954-1920

Mr. Richard Dearden
Counsel for the respondent
Gowlings
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
fax: (613) 788-3430
email: richard.dearden@gowlings.com