File number: 35676

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

BETWEEN:

Denis Rancourt

Applicant
(Defendant)

and

Joanne St. Lewis

Respondent
(Plaintiff)

and

University of Ottawa

Respondent
(Intervening Party)

REPLY TO THE UNIVERSITY OF OTTAWA & REPLY TO JOANNE ST. LEWIS

FILED BY THE APPLICANT, DR. DENIS RANCOURT

Dr. Denis Rancourt, Applicant, Self-Represented

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CERTIFICATE OF THE APPLICANT

I Denis Rancourt, applicant, hereby certify that

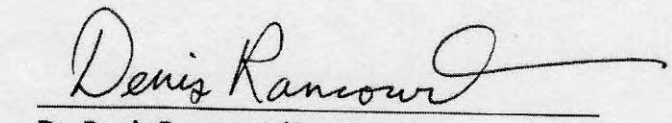
(a) there is no sealing or confidentiality order in effect in the file from a lower court or the Court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there is no ban on the publication of evidence or the names or identity of a party or witness and no document filed includes information that is subject to that ban, pursuant to an order or legislation; and

(c) there is, pursuant to legislation, no information that is subject to limitations on public access and no document filed includes information that is subject to those limitations;

Dated at the City of Ottawa in the Province of Ontario this 3rd day of February, 2014.

SIGNED BY:



Dr. Denis Rancourt (Applicant)

ORIGINAL TO: THE REGISTRAR

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Memorandum of Argument, Applicant's Reply to the University of Ottawa[1]

1. The Court has been prescriptive on the subject of apparent bias: "There are no shortcuts."[2] When a complaint of apparent bias is brought, it must be considered in the entire context and in detail. The repute and the integrity of the justice system depend on it.

2. Furthermore, the Court has directed that a complaint of apparent bias can either be determined on merits by the judge against whom it is brought, at any step of a litigation process, or used as a ground on appeal.[3]

3. The Court of Appeal for Ontario has determined that a judge cannot circumvent his obligation to make a determination of reasonable apprehension of bias by finding that there is no actual bias.[4]

4. Counsel Mr. Doody is incorrect in asserting that on July 24, 2012 "Beaudoin J. rules that he was not in a position of reasonable apprehension of bias": Beaudoin J. expressly refused to adjourn to permit preparation of a motion to determine his <u>apparent bias</u>, and made a cursory statement about his "contract" with the University and that there was no <u>actual bias</u>.[5]

5. **The position of both respondents and of the Court of Appeal that the lower court leave to appeal motions judge Annis J. made a proper determination of apparent bias on merits is incorrect because:**
   (a) the leave motions judge (Annis J.) did not have the jurisdiction to find actual or apparent bias of his colleague (Beaudoin J.) in the same court, in the absence of the said colleague;

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[1] The applicant's reply to the plaintiff Joanne St. Lewis is given separately, in this same bound book.
[2] *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, para. 77, and paras.70-76; **St. Lewis book of authorities Tab 6**.
[3] *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, at para. 99: "This excess of jurisdiction can be remedied by an application to the presiding judge for disqualification if the proceedings are still underway, or by appellate review of the judge's decision."
[4] *Benedict v. The Queen*, 2000 Canlii 16884 (ON CA), at para. 28; and see *Authorson v. Canada*, [2002] O.J. No. 2050 (ON DC), at para. 1; and applicant's Memorandum of Argument in the application, paras. 46-47.
[5] July 24, 2012, court transcript of hearing before Beaudoin J., p. 34 and whole 37-page transcript; **University response book Tab 3-D**, p. 103 and whole 37-page transcript.

(b) the limited purpose of a leave motion is to grant or deny leave to appeal to a higher court (here, to a panel of three judges of the Divisional Court);

(c) released reasons for granting or denying leave are not a judgement that can be appealed (reasons for making an order are not appealable judgements);[6]

(d) the test for granting leave is not a simple balance of probability, but is an onerous one;[7]

(e) Annis J. was silent on and did not consider the evidence of the *Ottawa Citizen* article that quotes Beaudoin J. regarding Beaudoin J.'s emotional attachment to the scholarship fund and to the named BLG boardroom;[8]

(f) Annis J. was silent on and did not consider, as evidence of apparent bias, the fact that Beaudoin J. recused himself for actual bias;[9]

(g) Annis J. was silent on and did not consider the uncontested evidence that Beaudoin J. did not disclose his ties, including the concurrent financial contract, to the parties;

(h) Annis J. was silent on and did not consider, as evidence of apparent bias, the events of the July 24, 2012 hearing before Beaudoin J. (threat of contempt of court and findings on the character of the defendant, made after the events that Beaudoin J. cited as causing his actual bias moving forward);[9] and

(i) Annis J. was silent on and did not consider, as evidence of apparent bias, the fact that Beaudoin J. released decisions, findings, and reasons on August 2, 2012, after recusing himself on July 24, 2012.

6. Thus, a proper determination on merits of reasonable apprehension of bias <u>was not made</u> prior to (nor at) the appeal to the Court of Appeal for Ontario, in this egregious evidence-based case, including hard evidence of a financial contract.

7. As such, reasonable apprehension of bias <u>should have been admitted as a permitted ground for appeal at the Court of Appeal for Ontario</u>, because many decisions and findings (thus

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[6] *St. Lewis v. Rancourt*, 2013 ONSC 49 (CanLII), at para. 25 Annis J. referencing the Court and several authorities: "An appeal is taken not from the reasons of the judgment, but from the judgment itself. It is the order of the Court which is binding, not the reasons assigned for making it."; **application book Tab E-10**

[7] *Bell Expressvu Limited Partnership v. Morgan*, 2008 CanLII 63136 (ON SCDC), para. 1; **application book Tab E-13**; and *St. Lewis v. Rancourt*, 2013 ONSC 49 (CanLII), at paras. 34-36; **application book Tab E-10**.

[8] *Citizen* article: July 30, 2012 Affidavit of applicant; **application book Tab E-5**; and article recognized in court by Beaudoin J., July 24, 2012, court transcript, **University response book Tab 3-D**

[9] July 24, 2012, court transcript of hearing before Beaudoin J., p. 35-37 and whole 37-page transcript; **University response book Tab 3-D**, p. 104-106 and whole 37-page transcript.

tainted by bias) materially affected the evidence available in the abuse of process motion that is the subject of the appeal.[10] Furthermore, the said evidence that was denied relates to the propriety of non-party funding in a major defamation lawsuit on a matter of public interest (systemic racism at a major Canadian university, described in a student union report),[11] a lawsuit that itself engages the *Charter* right of free expression.[11, 12]

8. The appellate court did not admit reasonable apprehension of bias as a ground for appeal. The brief endorsement statement of the Court of Appeal[13] should not be interpreted as a report of a consideration of the evidence-based bias issue on merits, nor is it a consideration of the bias issue, and certainly not in the careful and detailed manner required by the binding directives of the Court.[14] The appellate court is silent on the merits of any and all the evidence for apparent bias. Furthermore, the decision was made immediately, by endorsement, and without hearing any of the other parties (plaintiff and intervening party).

9. The argument of the responding parties and the expressed position of the Court of Appeal that Annis J.'s decision is not open to challenge in the appellate court is a straw man argument: While it is true that the appellate court does not have the jurisdiction to overturn the lower court's dismissal of the motion for leave to appeal interlocutory decisions of Beaudoin J., this in no way prevented the appellate court from admitting reasonable apprehension of bias as a ground for appeal, because there had not been a determination of the apparent bias issue on merits, <u>by the judge against whom it was brought (Beaudoin J.)</u>, or by any other judge, prior to the appeal.

10. **Thus, the applicant's complaint of reasonable apprehension of bias of Beaudoin J. was never heard on merits in the court of first instance, and was not admitted and considered as a ground for appeal in the appellate court.**

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[10] Applicant's factum in the impugned appeal, paras. 68-70, **application book Tab E-8**
[11] Ontario Civil Liberties Association, affidavit exhibits 2, **application book Tab E-9, pages 296-299**
[12] Applicant's factum in the impugned appeal, para. 77, **application book Tab E-8**
[13] Impugned endorsement of the Court of Appeal for Ontario, para. 2, **application book Tab C-2**
[14] *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, esp. paras. 36 and 113; *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, esp. paras. 2 and 70-77

11. S. 15(1) of the *Charter*, in French, states:

> La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques. [Emphasis added.]

12. This means *inter alia* that every individual has the right to equal protection and equal benefit of the law, irrespective of (indépendamment de, sans aucun égard à, en faisant abstraction de) any discrimination, notably discrimination based on race, etc.

13. **Thus, the language (in French) is clear that s. 15 enshrines the right to an impartial court for every litigant.** That the Court has previously dealt solely or mostly with s. 15 cases that treat discrimination does not alter the explicit meaning and *prima facie* intent of s. 15 regarding the right to an impartial court. Whereas the English text of s. 15 contains ambiguity, it is nonetheless entirely consistent with a right to an impartial court. In the English text, the first use of the word "discrimination" should be understood to include the "individual" species of discrimination, which means partiality or prejudice against any individual, followed by the particular and enumerated discriminations.

14. Indeed, the Court, in first considering s. 15, in 1989, stated:[15]

> To approach the ideal of full equality before and under the law -- and in human affairs an approach is all that can be expected -- the main consideration must be the impact of the law on the individual or the group concerned. Recognizing that there will always be an infinite variety of personal characteristics, capacities, entitlements and merits among those subject to a law, there must be accorded, as nearly as may be possible, an equality of benefit and protection and no more of the restrictions, penalties or burdens imposed upon one than another. In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another. [Emphasis added.]

15. The notable emphasis on discrimination in the jurisprudence about s. 15 reflects that the Court has not previously had to consider an evidence-based case where a litigant's right to an impartial court has been infringed or denied by denial of a hearing on merits, before a competent court, of a bias complaint; which is thereby of additional national importance.

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[15] *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 SCR 143, at p. 165

16. The arguments of the respondents that the *Charter* issue was not raised in the courts below is a straw man argument, as is their *res judicata* argument: The applicant's *Charter* right to an impartial court was infringed or denied by the appellate court's refusal to admit and consider reasonable apprehension of bias as a ground for appeal. The *Charter* issue did not arise in the courts below. The applicant did previously argue, in a separate application to the Court, that his *Charter* right to an impartial court was denied both by unconstitutional rules of procedure and by the denials (Beaudoin J., Smith J., Annis J.) of the court of first instance to provide a judicial determination of the apparent bias complaint, but the said separate application is irrelevant to the instant application, and does not attract the issue of *res judicata* raised by the respondents.[16]

17. The respondents argue that *Charter* issues are not raised. **In fact, the impugned appellate court's decision is a final judgement infringing or denying the applicant's *Charter* right to an impartial court.** Thus, the applicant submits that s. 24(1) of the *Charter* is an impetus, in the circumstances of the instant application, that the leave to appeal be granted by the Court:[17]

> 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. [S. 24(1), *Charter*]

18. The respondents also argue that there is no national importance. In fact, a high national importance is evident because Canada has committed to fundamental international agreements that state (emphasis added):

> **The Universal Declaration of Human Rights**
> Everyone is entitled in full equality to a fair and public hearing by an independent and <u>impartial tribunal</u>, in the determination of his rights and obligations and of any criminal charge against him. [Article 10]
>
> **International Covenant on Civil and Political Rights**
> <u>All persons shall be equal before the courts and tribunals</u>. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and <u>impartial tribunal</u> established by law. … [at Article 14(1)]

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[16] See: Applicant's factum in the impugned appeal, para. 44, **application book Tab E-8**
[17] See: Applicant's Memorandum of Argument of the application, para. 41, **application book Tab D, p. 48**

ALL OF WHICH is respectfully submitted this 3rd day of February 2014.

SIGNED BY:

Denis Rancourt

Dr. Denis Rancourt (Applicant)

Table of Authorities — Reply to University of Ottawa

Statutes, Regulations, and Rules

The Universal Declaration of Human Rights

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

International Covenant on Civil and Political Rights

Article 14(1)

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

S. 15(1), *Charte canadienne des droits et libertés*

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

S. 15(1), *Canadian Charter of Rights and Freedoms*

Equality before and under law and equal protection and benefit of law

15. (1) 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.

S. 24(1), *Canadian Charter of Rights and Freedoms*

Enforcement of guaranteed rights and freedoms

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.

Memorandum of Argument, Applicant's Reply to Joanne St. Lewis

Both respondents did not materially address the substantive issues

1. *Jurisdiction and patently deficient reasons of Annis J.:* The leave to appeal motions judge of the court of first instance (Annis J.) did not have the jurisdiction to make a determination on merits of the apparent bias complaint against Beaudoin J., and Annis J.'s reasons regarding bias are patently deficient **(see para. 5 (a) to (i), in the Reply to University, above)**. The respondents are silent on the said deficiencies.

2. *The appellate court's denial of its jurisdiction:* The Court of Appeal was silent on the issues before it of: the said lack of jurisdiction of Annis J. to make a bias judgement of Beaudoin J., and the said patent deficiencies of the reasons of Annis J. regarding bias. The Court of Appeal did not have the jurisdiction to deny apparent bias as a ground for appeal, by relying on the reasons of Annis J. The appellate court's treatment of the bias issue, including its said silence, the text of its endorsement, and the entire context, is incompatible with the jurisprudence on bias **(see paras. 7-9, in the Reply to University, above)**. The respondents do not materially address the issue of the appellate court's denial of its own jurisdiction.

3. *The bias complaint was never heard on merits before a court of competent jurisdiction:* not by the judge against whom the complaint was brought, and not by the appellate court on appeal. Consequently, the appellant's *Charter* right to an impartial court **(see paras. 11-15, of the Reply to University, above)** was infringed or denied, thus invoking the applicant's s. 24 *Charter* right to a hearing, a point that both respondents did not expressly address.

4. *National importance and "automatic disqualification":* The respondents state that there is no national importance. This is a textbook example of a case of national importance, involving the *Charter* rights to an impartial court, to free expression (see para. 11, below), and to be heard on a *Charter* matter. The case also presents a factual matrix allowing the common law

principle of "automatic disqualification" to be considered by the Court (see paras. 8-10, below), and it engages two international agreements affirmed by Canada.[18]

Untenable positions of both respondents

5. It is irrelevant that the *Charter* questions were not raised in the courts below because the *Charter* breach in issue first arises from the appellate court's final judgement denying a judicial determination of apparent bias on merits.

6. Both respondents assert that there is not a sufficient evidentiary basis, without giving any example of an evidentiary deficiency. Their assertions are incongruent with the extensive evidentiary record regarding the apparent bias matter, including: several court transcripts with Beaudoin J. presiding—especially the 37-page transcript of the July 24, 2012 hearing—; an uncontested chronology of events; hard and established (in court, by the judge) evidence of a concurrent financial contract between the judge and a party to the proceeding; uncontested evidence that the law firm representing that party named a boardroom in honour of the judge's son; and a verified media article—read in court before the judge to whom the bias concern was brought—quoting the judge expressing his strong personal and emotional attachments to the scholarship contract and to the named boardroom.[19]

7. Furthermore, the respondents did not contest in their replies any of the presented evidence for apparent bias of Beaudoin J., all of which was before the Court of Appeal.[20]

Common law principle of "automatic disqualification"

8. The respondent argues, based on *Wewaykum*, that the application of the common law principle of "automatic disqualification" is settled in Canada (her paras. 28-34). In *Wewaykum*

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[18] *The Universal Declaration of Human Rights*, Article 10; *International Covenant on Civil and Political Rights*, Article 14(1)

[19] July 30, 2012 Affidavit of applicant; **application book Tab E-5**; and July 24, 2012, court transcript of hearing before Beaudoin J.; **University response book Tab 3-D**, p. 69-106.

[20] Applicant's factum in the impugned appeal, paras. 13-20, **application book Tab E-8**

the Court does not, as argued by the respondent, reject automatic disqualification in general:[21]

> In any event, even on the assumption that the line of reasoning developed in *Pinochet*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.
> To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. … [Emphasis added.]

9. The factual circumstances in *Wewaykum* were not such that the principle of "automatic disqualification" could be considered, whereas in the present case there is both a financial contract and a shared interest in the outcome of the proceeding (reputation of the University and its scholarships, affecting scholarship financial value). This is not settled law in Canada.

10. Private-fund-based scholarships are arguably the main recruiting and prestige instrument of a Canadian university, while also conveying prestige to the funders and private funding entities, and to their causes.

Material omissions in the litigation background presented by the respondents

11. The respondents' descriptions of the litigation background are materially incomplete. The general litigation background is best described on the OCLA campaign web site.[22] The lawsuit is a $1 million defamation lawsuit about a blog article on "U of O Watch" in which the applicant expressed the opinion, which turned out to be true, that the university president, Allan Rock, had asked the plaintiff, a black professor, to criticize a student report that accused the university of racial discrimination. The opinion was based on access to information documents, and the words complained of are that the said access to information documents "suggest that law professor Joanne St. Lewis acted like president Allan Rock's house negro when she enthusiastically toiled to discredit a 2008 SAC report about systemic racial discrimination at the university." The term "house negro" is a common racial political

[21] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), [2003] 2 SCR 259, at paras. 72-73
[22] Ontario Civil Liberties Association, affidavit exhibits 2, **application book Tab E-9, pages 296-299**

criticism, defined in its modern use by iconic civil rights activist Malcolm X, which is regularly used in public discourse, and which means to serve the interests of powerful institutions in helping to maintain racial injustice. Two defendant's experts provide the history, meaning, and use of the term "house negro", and challenge the plaintiff's expert report on the history, meaning, and use of the term: Cynthia McKinney, former Black Congresswoman, Democratic Party, Georgia USA; and Professor Adele Mercier, *Ph.D.*, Queens University.[23]

12. In describing the maintenance and champerty motion, both respondents omitted to mention that the plaintiff has committed in her statement of claim to give proceeds of the defamation action to a University of Ottawa scholarship fund, while her legal costs are voluntarily paid by the University (a non-party to the action).

13. The respondent's characterizations of the Executive Director of the Ontario Civil Liberties Association (OCLA), and of OCLA, are irrelevant and sad. OCLA has a broad and varied spectrum of campaigns and activities, and a prestigious 9-member Advisory Board representative of societal concerns, as can be ascertained from its web site (ocla.ca).

14. The applicant's volunteer position as coordinator of OCLA's self-represented litigant's workgroup, and OCLA's work on administration of justice and public policy aspects of the defamation lawsuit, does not justify the respondent's characterizations.

COSTS: Impecuniosity of the applicant, and "spurious litigation"

15. The respondent states that the applicant is not impecunious (her para. 54). This statement is surprizing because the respondent's counsel obtained a court order for disclosures and cross-examined the applicant thoroughly about the applicant's "means, income and assets".[24] The documentary, sworn, and tested (by cross-examination) evidence for the applicant's impecuniosity is presently before the Court of Appeal for Ontario in an applicant's motion for

[23] http://ocla.ca/our-work/public-campaigns/public-money-is-not-for-silencing-critics/
[24] *St. Lewis v. Rancourt*, 2011 ONSC 5923 (CanLII), paras. 5-7, and 17-18; **Tab 1**

leave to appeal costs of over $100 thousand dollars.[25] In light of the respondent's argument regarding impecuniosity, the applicant requests permission to file evidence of his impecuniosity to the Court, if this is of assistance.

16. The respondent accuses the applicant of making a "pattern of endless and spurious litigation" (her paras. 54-55), which is not supported by a judicial finding. This statement is incompatible with the facts that:
    (a) The action is under case management by consent and every motion of all parties has had to pass a test of worthiness in order to be scheduled by the case management judge;
    (b) The applicant has had partial success on several motions, including leave to appeal motions; and
    (c) Several motions, including leave to appeal motions, were settled in favour of the applicant.

17. Notably, Kane J. of the court of first instance made a different finding about which party is causing spurious litigation, than the position put forth by the respondent, in reducing partial indemnity costs by 60% : [26]

> The point is however that this court should not be encouraging in the form of a costs award the pursuit of pre-trial examination of trial witnesses to be called by another party. This is clearly one of, or, the central purposes of this cross-examination. It is one of many causes of delay in getting this action on to trial thereby leading to more motions and additional costs. [Kane J., 2013 finding]

[25] Moving party's factum, paras. 16-19, Court of Appeal for Ontario, File No. M43049, motion record and factum filed on November 22, 2013, reply filed on December 23, 2013.
[26] *St. Lewis v. Rancourt*, 2013 ONSC 4729 (CanLII), para. 18, see also paras. 17-19, and 28; **Tab 2**

ALL OF WHICH is respectfully submitted this 3rd day of February 2014.

SIGNED BY:

Denis Rancourt

Dr. Denis Rancourt (Applicant)

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S. 15(1), *Charte canadienne des droits et libertés*

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

> **15.** (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

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> **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.

CITATION: St. Lewis v. Rancourt, 2011 ONSC 5923
COURT FILE NO.: 11-51657
MOTION HEARD: 2011/10/06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOANNE ST. LEWIS, Plaintiff

AND:

DENIS RANCOURT, Defendant

BEFORE: Master MacLeod

COUNSEL: Richard G. Dearden, for the plaintiff

Denis Rancourt, in person

No one appearing for Claude Lamontagne

HEARD: October 6, 2011

REASONS FOR DECISION

[1] This is an action for defamation. The motion before me today is to compel answers to certain undertakings and refusals arising from cross examination of the defendant and of Claude Lamontagne who is a deponent of an affidavit.

[2] By way of context, the affidavits themselves were sworn in opposition to a motion brought by the plaintiff to compel the defendant to participate in mandatory mediation under Rule 24.1. In fact the motion as I understand it is to abridge the time for mediation and to require the parties to use an experienced private mediator rather than a mediator from the roster. That motion (the main motion) is returnable tomorrow before a judge.

[3] In response to the main motion, the defendant filed his own affidavit and an affidavit of Claude Lamontagne which is proffered as expert opinion. Mr. Dearden cross examined on those affidavits and brings this motion today to compel answers to certain refusals by Mr. Rancourt as well as two undertakings given by Mr. Lamontagne.

[4] The undertakings and the first group of the refusals are in response to questions directed to the independence of Mr. Lamontagne, to his neutrality, to the instruction or information he received from Mr. Rancourt or to his qualifications to give expert opinion evidence.

[5] A second set of refusals has to do with the means, income and assets of Mr. Rancourt. These questions were asked in response to Mr. Rancourt's own affidavit in which he attests he is of limited means and cannot afford the fees for the proposed mediator.

[6] There is a further group of refusals which relate to an application made by Mr. Rancourt to Law Help Ontario. These questions are also directed to the means and income of Mr. Rancourt. Again, this relates to the evidence given by Mr. Rancourt that he cannot afford the mediator proposed by the plaintiff. Mr. Dearden seeks access to the applications made to Law Help Ontario in order to verify whether the financial information provided to Law Help confirms or contradicts the evidence in the Rancourt affidavit.

[7] Finally there are two questions directed to the issue of insurance coverage. Rule 30.02 (3) deals with the obligation to answer such questions but these questions also also relate to the affordability of mediation. If there is coverage then the defendant has access to funding for legal counsel and of course for mediation fees.

[8] Mr. Rancourt argues that the main motion is itself improper and does not comply with the Rules of Civil Procedure. He will argue that there is no jurisdiction in the court to grant the relief sought by Mr. Dearden on the main motion. He asks me to deal with that today but I have declined to do so. This is one of the issues on the main motion which is returnable tomorrow before a judge.

[9] The issue before me is whether or not the questions must be answered in relation to the evidence the defendant himself has tendered in response to that very motion. Obviously if the judge dismisses the main motion without the need to consider the affidavit evidence or the cross examination, that decision may render any order I make today moot. In that event perhaps the judge will stay the order and relieve the defendant from providing the answers. On the other hand if the judge believes it appropriate to review the evidence before him or her and in that context must decide whether or not to admit the opinion evidence of Mr. Lamontagne my ruling today will in all probability be germane.

[10] Both parties refer to the decision of Perell, J. in *Ontario v. Rothmans Inc*. 2001 ONSC 2504 (S.C.J.); leave to appeal refused 2011 ONSC 3685 (S.C.J) as well as my own decision in *Caputo v. Imperial Tobacco Ltd*. (2002) 25 C.P.C. (5th) 78; [2002] O.J. No 3767 (Master). These cases contain the guiding principles in assessing cross examination on affidavits as opposed to discovery. *Caputo* is directly on point since it also deals with the relevance of questions directed to admissibility and weight of expert testimony proffered by way of affidavit.

[11] There can be no doubt that all of the questions asked are relevant because they are either directed to the admissibility of the expert testimony (including impartiality, bias and qualifications of the expert) or flow directly from evidence tendered by the

defendant himself. Relevance is the first consideration but just because a question is of some relevance does not mean the court will order it to be answered. Other considerations come into play.

[12] The defendant focuses on paragraphs 144-146 of the *Rothmans* decision. He interprets the comments of Perrell J. having to do with premature discoveries and not disturbing the fairness of the adversary system as somehow establishing a novel principle that would block any question which might also be asked on discovery.

[13] With respect, that is not the thrust of the Rothman decision. Perrell J. is simply exemplifying instances where the court will not order answers to apparently relevant questions. The court for example will not condone questions that are:

- Abusive or improper;
- Disproportionate in the sense of requiring efforts or expense not justified by the nature of the issues in dispute;
- Not directed to evidence which is admissible or probative; or,
- Asked for an improper purpose

[14] These categories are not exclusive. In any event, there is no blanket prohibition on asking a question on cross examination just because it might also be a question asked on discovery. The issue, once relevance has been established, is whether or not there is a basis for withholding an order because it would be unjust to make the order notwithstanding that the question may be relevant.

[15] In these matters the question of relevance is a question of law. The question of whether the court ought to order answers to be given is a matter of discretion.

[16] All of the questions are relevant as a consequence of the affidavits tendered in response to the main motion and the answers given under cross examination with the possible exception of the members of the committee discussed in the Lamontagne cross examination. Mr. Lamontagne volunteered the information however and it may be relevant to the question of bias. This is in my view was an undertaking and it should be answered.

[17] In the exercise of my discretion I am not prepared to order the Law Help Ontario applications to be produced. I regard that as overly intrusive and while the financial component of such a discussion may not itself be privileged, the extent to which lawyer client privilege attaches to discussions with a service such as Law Help has yet to be fully explored. I do not regard these answers as necessary in light of the other questions I am ordering answered. All of the other questions are to be answered.

[18] Mr. Dearden wishes to have the witnesses reattend to answer the questions under oath and to permit reasonable follow up questions. Notwithstanding that some of the questions might usefully be completely answered in written form, clearly not all of the questions are simple yes or no answers and many of them may invite proper follow up questions. In my view and notwithstanding the defendant's argument that the previous examination was conducted aggressively (a submission that I do not find to be supported by the evidence) I am ordering that the questions for production of documents be answered in writing by October 11th, 2011, that is prior to reattendance, and that the witnesses then reattend for examination. Mr. Rancourt and Mr. Dearden both confirmed their availability for October 14th, 2011. Unless otherwise agreed the witnesses are to attend on that date.

[19] Mr Dearden also asks for clear direction as to who may attend at the cross examination. The need for that is demonstrated by the exhibit at p. 154 of the motion record. Certain individuals who are not parties to the action attended at the cross examination and refused to leave notwithstanding Mr. Dearden's objections. One of these observers then posted comments on the internet describing the cross examination and attributing unethical behaviour to Mr. Dearden while also suggesting the plaintiff herself was somehow associated with evidence of wrongdoing at the university.

[20] Mr. Rancourt objects to such direction on the basis of the open court principle. In that he is misguided. Cross examination or discovery does not take place in open court (although it does take place under court supervision). It is only once a transcript or portions of a transcript are tendered in evidence that they become part of the court record. Motion records and exhibits at trial are part of the court record. Court hearings (such as this motion) are held in open court though that was not always the case. Prior to adoption of the "new rules" chambers motions were not considered to be in open court or on the record. In any event it is quite clear that there is no right for the public to attend an examination out of court at the office of the special examiner or court reporter. Even were that not the case however, the court could give direction about the conduct of such examinations.

[21] There will be a follow up cross examination if the plaintiff wishes it. No one but the parties and their lawyers and the reporter may be in attendance unless otherwise agreed.

[22] The plaintiff asks for costs. She, through her lawyer, seek costs against both Mr. Rancourt and Mr. Lamontagne. Mr. Lamontagne did not appear today although Mr. Rancourt stated that he was authorized to speak for him and advised the court that Mr. Lamontagne objected to answering the undertakings. I am advised that at one time Mr. Lamontagne had agreed to answer his undertakings but he did not do so. Mr. Lamontagne was advised that costs would be sought against him both in the notice of motion and subsequently. A minor costs award is appropriate for a non

party failing to comply with what he had agreed to do in a timely fashion. Claude Lamontagne shall pay costs fixed at $350.00 payable forthwith.

[23] The situation concerning Mr. Rancourt is more difficult. The motion was scheduled to take 1 hour and Mr. Dearden completed his submissions in half that time. The submissions of Mr. Rancourt then took until 4:30 p.m. On the other hand, of course, he will be submitting to the judge on the main motion that the entire motion – and therefore all of the costs – is improper and misguided. In the event that the judge agrees with this, it might not be reasonable for the defendant to be saddled with the costs of a motion within that motion. Of course he also argues that in the action as a whole he is the person being wronged because the action is simply an improper – and indeed unconstitutional – attempt by the University of Ottawa to muzzle free speech and criticism.

[24] The putative rule under our current costs regime is a "pay as you go" rule in which costs are presumptively to be fixed at each stage and payable forthwith. A main purpose of this is to encourage the parties not to argue unnecessary motions and to adhere to the rules. There is however the possibility that the judge hearing the main motion will dismiss it and as I have stated earlier – without in any way pre-judging that issue or suggesting it is the correct result - in that eventuality the judge might consider it appropriate to stay my order. Thus I am awarding costs of the motion before me. The defendant shall pay the plaintiff the sum of $3,000.00 on a partial indemnity scale. Subject to any contrary order of the judge hearing the main motion, those costs are to be paid within 30 days.

[25] In summary an order will go as follows:

a. The questions but for the Law Help questions are to be answered.

b. All questions that called for production of documents or copies of documents are to be answered in writing by October 11th, 2011.

c. The witnesses are to reattend at a place and time designated by counsel for the plaintiff to answer the questions under oath and to answer reasonable follow up questions on October 14th, 2011 unless otherwise agreed.

d. No one but the witness, the parties, their legal counsel and the court reporter may be present at the cross examination unless otherwise agreed.

e. Mr. Lamontagne shall pay costs of $350.00

f. The defendant shall pay costs of $3,000.00.

g. This order and the costs award is subject to variation by the judge hearing the main motion if she or he considers it appropriate.

Master MacLeod

Date: October 6, 2011

CITATION: St. Lewis v. Rancourt, 2013 ONSC 4729
COURT FILE NO.: 11-51657
DATE: 2013/07/26

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
JOANNE ST. LEWIS	)	Richard G. Dearden and Anastasia Semenova, for the Plaintiff
Plaintiff	)	
– and –	)	
DENIS RANCOURT	)	Self-Represented
Defendant	)	
	)	**HEARD:** By Written Submissions

COSTS DECISION – DEFENDANT SEEKING LEAVE TO APPEAL DECEMBER 7, 2012 DECISION RE: PLAINTIFF'S CROSS-EXAMINATION OF GERVAIS

KANE J.

[1] The plaintiff seeks costs of this motion in an amount of some $14,000 or $19,000 based on the scale of partial or substantial indemnity.

[2] The defendant opposes a costs award to the plaintiff and seeks costs against the plaintiff of some $8,600.

CONSIDERATIONS UNDER RULE 57

Success

[3] The defendant was, subject to further cross-examination ordered to occur by June 30, 2013, granted leave to appeal 8 refusals by Gervais out of approximately 90 questions objected to during Gervais' cross-examination.

[4] The limited leave granted was conditional on Gervais' further cross-examination by June 30, 2013 and her answering whether she prepared her affidavit or whether it was prepared by Mr. Rancourt. In the former case as stated in my decision, litigation privilege would not apply as Gervais is not the defendant and is not entitled to litigation privilege. If she prepared the affidavit, the objection to the questions would be invalid and leave to appeal the order directing they be answered was not granted.

[5] In the latter case of the defendant preparing the affidavit, litigation privilege would apply with the result that leave was granted to appeal the order requiring these questions to be answered.

[6] This court in its decision set the June 30 limit to conduct the cross-examination of Gravis and ordered the parties to advise this court of Gervais' response whether she or the defendant prepared her affidavit.

[7] In evidence on the motion for leave was the fact that Gervais, unlike the defendant, graduated from law school and provides advice to students and their association regarding internal university appeal proceedings as part of her employment.

[8] In submissions as to costs:

a) The defendant advised that Gervais by letter dated June 19, 2013 stated that "My affidavit … was prepared in consultation/discussion with the defendant."

b) The plaintiff advised that Gervais during her June 28, 2013 cross-examination stated that her affidavit was drafted and typed on her home computer by she and the defendant.

[9] Under a), the implication clearly is that Gervais used her legal education and training to prepare her affidavit and had consultation/discussion with the defendant in doing so. Translated, the defendant talked to Gervais as she drafted/typed her affidavit.

[10] Counsel preparing affidavits for the signature of their clients or witnesses customarily discuss the subject(s) addressed in the affidavit with the deponent before and at the time of the signing of the affidavit. Those discussions do not alter who authored the affidavit.

[11] With her degree in law and law related experience, Gervais could have easily stated in her letter or said under oath on June 28 that the affidavit was prepared by the defendant if that was the case. She was unable to state that. The conclusion therefore is that she prepared her affidavit which was then served by the defendant on the plaintiff with the result that no litigation privilege may be claimed by the defendant as to the affidavit and its preparation. As a result, the defendant does not have leave to appeal the order that those questions be answered.

[12] It is inappropriate for this court to consider proposals made by the defendant to the plaintiff after release of my decision. Those submissions, therefore, are not relevant.

[13] The result therefore is the dismissal of the defendant's motion for leave to appeal in relation to all or virtually all of the 90 questions objected to. The plaintiff was accordingly successful in defeating the defendant's motion.

AMOUNT CLAIMED AND THE AMOUNT RECOVERED

[14] Not applicable.

APPORTIONMENT OF LIABILITY

[15] Not applicable.

COMPLEXITY OF THE PROCEEDING

[16] The motion was voluminous and exceeded what was central. It did however have to be addressed by the plaintiff.

IMPORTANCE OF THE ISSUE

[17] Further cross-examination of Gervais is not central to the defamatory issues of this action. The service of this affidavit was a "gift" to the plaintiff who has gone to great lengths to maximize the benefits thereof which includes being able to examine a future trial witness of the defendant. This court recognizes that this affidavit also relates to the defendant's motion for further examination for discovery of the plaintiff.

[18] The point is however that this court should not be encouraging in the form of a costs award the pursuit of pre-trial examination of trial witnesses to be called by another party. This is clearly one of, or, the central purposes of this cross-examination. It is one of many causes of delay in getting this action on to trial thereby leading to more motions and additional costs.

[19] The above considerations are not determinative as to entitlement to costs. They are however a relevant consideration on the issue of quantum.

CONDUCT OF ANY PARTY THAT TENDED TO SHORTEN OR TO LENGTHEN THE PROCEEDING UNNECESSARILY

[20] See para. 5 above.

WHETHER ANY STEP WAS IMPROPER, VEXATIOUS OR UNNECESSARY OR TAKEN THROUGH NEGLIGENCE, MISTAKE OR EXCESSIVE CAUTION

[21] Not applicable.

A PARTY'S DENIAL OF OR REFUSAL TO ADMIT ANYTHING THAT SHOULD HAVE BEEN ADMITTED

[22] Not applicable.

EXPERIENCE OF THE LAWYER OF PARTY ENTITLED TO THE COSTS INCLUDING RATES CHARGED AND HOURS SPENT

[23] The hourly rates given the year of call and the hours expended are considered appropriate.

WRITTEN OFFERS OF SETTLEMENT

[24] No written offers of settlement of this motion for leave to appeal, served prior to my decision dated June 7, 2013, have been produced.

LEVEL OF COSTS TO BE AWARDED

[25] The appropriate scale of costs to be awarded is partial indemnity. The plaintiff does not argue otherwise.

AMOUNT OF COSTS THAT AN UNSUCCESSFUL PARTY COULD REASONABLY EXPECT TO PAY IN RELATION TO THIS PROCEEDING

[26] Subject to paras. 17 to 19 above, the amount of costs claimed using the above scales are within the reasonable expectations of an unsuccessful party in this action. They are proportional within that context.

[27] Given the outcome, the defendant is not entitled to costs.

[28] The plaintiff is entitled costs on a partial indemnity scale reduced by 60% for the reasons stated in paras. 17 to 19.

[29] The defendant is ordered to pay costs to the plaintiff within 30 days in the amount of $5,600 including disbursements and tax. That amount is also proportional to a motion for leave to appeal on a partial indemnity scale.

Kane J.

Released: July 26, 2013

CITATION: St. Lewis v. Rancour, 2013 ONSC 4729
COURT FILE NO.: 11-51657
DATE: 2013/07/26

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JOANNE ST. LEWIS

Plaintiff

– and –

DENIS RANCOURT

Defendant

COSTS DECISION – DEFENDANT SEEKING LEAVE TO APPEAL DECEMBER 7, 2012 DECISION RE: PLAINTIFF'S CROSS-EXAMINATION OF GERVAIS

Released: July 26, 2013