

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

BRADFORD WHITCOMBE and SCOTT WILSON

Plaintiff

- and -

WILLIAM SMITH MANDERSON

Defendant

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenor

**FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

November •, 2009

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**FACTUM OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

**PART I - INTRODUCTION**

1. This is a motion by the Intervenor the Canadian Civil Liberties Association (“CCLA”) for an order under Rules 2.03, 21.01(1)(a), 21.01(3)(b), and 21.01(3)(d) determining a question of law and striking the defamation claim of Bradley Whitcombe (“Whitcombe”) and Scott Wilson (“Wilson”) on the grounds that this action is an abuse of process, as it unconstitutionally circumvents the principle that a public body cannot sue an individual for defamation.

2. It is settled law in Ontario governments cannot sue individuals for defamation. Such actions are inconsistent with the values protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”), because they pit the resources of the state against the much lesser resources of the individual for purposes of silencing speech.

3. Manderson is seventy-three years old and retired. He operates a website, smelly-welly.com, which covers local politics and which is often critical of local government, including the County of Wellington (the “County”) and the plaintiffs in this action.

4. The CCLA submits that the principle that government cannot sue individuals for defamation is improperly circumvented in this case. The forty-nine page Amended Statement of Claim lists three McCarthy Tétrault lawyers as authors. They are suing Manderson for \$2.4 million dollars. The County is paying for the litigation. It receives regular reports from counsel McCarthy Tétrault. The litigation has been discussed at County Council meetings since well before the statement of claim was filed. Details of what has been discussed at Council meetings and the extent to which Council has directed the litigation are not available because the litigation has been discussed at *in camera* meetings. The meetings are closed on the basis that they relate to litigation “affecting the County”.

5. If the plaintiffs wish to sue Manderson without the financial support and involvement of the County, there is no constitutional rule that prevents them from doing so. The extent and manner of the involvement of the County in these proceedings, however, makes the litigation unconstitutional. The action should be struck.

## **PART II - ISSUE**

6. The only issue on this motion is whether this action should be struck on the basis that the involvement of the County in this litigation violates the principle that governments must not be permitted to sue citizens for defamation.

**PART III - FACTS****A. The Parties**

7. The plaintiff Bradford Whitcombe (“Whitcombe”) is the Mayor for the Township of Puslinch. He is also a member of the County Council.

**Motion Record, Tab 2(D), Amended Statement of Claim at para. 2.**

8. The plaintiff Scott Wilson (“Wilson”) is the Chief Administrative Officer for the County. He is also a councillor for the town of Orangeville.

**Amended Statement of Claim at para. 3.**

9. The defendant William Smith Manderson (“Manderson”) is a resident of Guelph, which is located in the County. He is seventy-three years old. Manderson operates a website, smelly-welly.com, which contains information and commentary on a wide range of local government issues. These include spending on a number of local public works projects, environmental concerns in the region, and the performance and integrity of local politicians. Manderson is a fearless critic of the local government.

**Amended Statement of Claim at para. 5.**

10. The County Council consists of 16 members. Seven of the members are Mayors of the seven member municipalities of the County. There are nine county wards. Each ward is represented by a directly elected county councillor and the head of County Council, the Warden, is elected by the County Councillors on an annual basis.

**Cross-Examination of Whitcombe**

**B. History of the Case**

11. This case arises out of a statement of claim filed on January 21, 2009 by the plaintiffs against Manderson. The plaintiffs seek \$2.4 million in damages arising out of alleged libels in articles and letters written by the defendant between 2007 and early 2009. The amended statement of claim is 49 pages long and alleges libels arising out of a total of eighteen articles and letters authored by Manderson. The amended statement of claim was authored by three lawyers from the Bay Street law firm McCarthy Tétrault.

12. Though the articles and letters in question mention the plaintiffs by name, the plaintiffs' names are mentioned in the context of this broader critique of local government. The tone of the articles and letters is often hyperbolic and satiric. One of the plaintiffs is referred to as "the Prince of Darkness". Wellington County Council is compared to the English Star Chamber.

**See Amended Statement of Claim at paras. 27, 42, 45, 51,  
54, 60.**

13. After the Intervenor filed motion materials that included a newspaper article in which County Warden Joanne Ross-Zuj was quoted stating that the County is funding the litigation, the plaintiffs filed affidavits in which they confirmed this (their lawyers had previously declined to comment on who was paying for this litigation).

14. The plaintiffs state that because the County is funding the litigation, McCarthy Tétrault makes periodic reports to the County Council about the litigation. The first report was in November 2007, more than a year before the action was commenced. Little else can be known about the extent and nature of the County's involvement in this litigation, as the litigation is discussed only at *in camera* meetings of the County.

15. At a February 2009 court appearance, in the face of questions from the judge, the plaintiffs' declined to state who provides instructions in connection with this litigation.

**MR WAYLAND:** I don't believe it's appropriate for me to speak to who my client is or who is paying our legal bills, or all of that, that's a completely separate issue. The only representation I make is that I represent in these proceedings Bradford Whitcombe and Scott Wilson personally.

**THE COURT:** They instruct you and that is whom you get your instructions from.

**MR. WAYLAND:** Well that's a – instructions are a completely different issue and that's privileged, but they're not – the issue is that they are not here representing anyone. [emphasis added]

**Motion Record, Tab 2(B) Court Transcripts, February 6, 2009 at 93-94.**

16. At a court appearance on May 6, 2009, Justice Herold – who did not know then that the County was funding the litigation and receiving periodic reports from McCarthy Tétrault – expressed concern that the County might be behind the litigation.

And the only reason that that was what [*Montague v. Page*] stood for, was because in that case the municipality had the – give me a polite word – they were prepared to be upfront and say it's us. Manderson says that it has always been an issue, right from day one, that Mr. Whitcombe and Mr. Wilson aren't fighting this litigation, his tax dollars are fighting this litigation and that it's the County of Wellington...I know that this case has an issue bigger than a disgruntled taxpayer, I know that, that I knew it from the outset, and I would have thought that McCarthy and McCarthy [sic] knew that; that's all I'm concerned about. [emphasis added]

**Motion Record, Tab 2(A) Court Transcripts, May 6, 2009 at 22-23.**

## PART IV - THE LAW

### A. Defamation Actions Chill Free Speech

17. The importance of political expression to Canadian democracy has been recognized repeatedly by the Supreme Court of Canada, including in the following passage from *Edmonton Journal v. Alberta*:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed, a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. [emphasis added]

*Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1336.

18. Defamation actions can chill debate about public institutions. As Justice Binnie stated in *WIC Radio v. Simpson*:

The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of legitimate public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a [page438] rough trade, and the law needs to accommodate its requirements. [emphasis added]

*WIC, supra para. 18 at para. 15*

19. Our Court of Appeal has also recognized the potential deleterious effect upon free speech that can be wrought by defamation actions. As Justice Sharpe stated in *Cusson v.*

*Quan* in the context of recognizing a responsible journalism defence that makes untrue statements defensible in certain circumstances:

It is hardly necessary to repeat here the importance of the rights protected by s. 2(b) of the *Charter*, namely "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". These rights are an inherent aspect of our system of government and have been generously interpreted by the courts. Democracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those, such as police officers, who exercise power and authority in our society. Freedom of expression extends beyond political debate to embrace the "core values" of "self-fulfilment", "the communal exchange of ideas", "human dignity and the right to think and reflect freely on one's circumstances and condition": *R.W.D.S.U. v. Pepsi-Cola*, [2002] 1 S.C.R. 156 at para. 32. Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy. This court recognized in *R. v. Kopyto* (1987), 62 O.R. (2d) 449 at 462 that "[i]f these exchanges are stifled, democratic government itself is threatened."

...

In its traditional form, the law of defamation is designed to have a "chilling effect" on freedom of expression where a speaker or publisher is about to make a statement that may affect an individual's reputation. The fact that "[t]he threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech" (*Derbyshire County Council v. Times Newspapers Ltd.*, [1993] 1 All E.R. 1011 at 1017 (H.L.)), and "the tendency of the law of defamation to inhibit the exercise of the freedom of communication - 'the chilling effect'" (*Theophanous, supra*, at 19) has been recognized on high authority. The common law no-fault standard creates a powerful incentive to err on the side of caution and to avoid controversy. A judgment such as that in the case at bar sends a strong message: there is simply no margin for error or allowance for the expression of views honestly and reasonably held. A newspaper that has properly investigated the story and has every reason to believe it to be true still walks on thin ice. The fear or risk of being unable to prove the truth of controversial matters is bound to discourage the publication of information the public has a legitimate interest in hearing. [emphasis added]

***Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 341 at paras. 125 and 127 [*Cusson*].**

**B. Governments Cannot Sue For Defamation**

20. Modern Canadian courts have recognized that attempts by governments to sue for libel are contrary to the freedom of expression guarantees contained in s. 2(b) of the *Canadian Charter of Rights and Freedoms*. This is consistent with a long line of cases from other jurisdictions.

*Montague (Township) v. Page* (2006), 79 O.R. (3d) 515 (S.C.) (QL) [*Page*].

*Halton Hills (Town) v. Kerouac* (2006), 80 O.R. (3d) 577 (S.C.) (QL) [*Kerouac*].

*Dixon v. Powell River (City)* 2009 BCSC 406, 58 M.P.L.R. (4th) 175 (QL) [*Dixon*].

*Derbyshire County Council v. Times Newspapers Ltd.*, [1993] A.C. 534 (H.L.) (Lexis).

*Chicago (City) v. The Tribune Co.* (1923), 139 N.E. 86 (Ill. Sup. Ct.) (Lexis).

*Council of the Shire of Ballina v. Ringland*, 1994 NSW LEXIS 14010 (C.A.) [*Ringland*].

*Die Spoorbond and Another v. South African Railways*, [1946] A.D. 999 [*Die Spoorbond*]

*Romanenko v. Russia*, [2009] ECHR 11751/03 (Spielman and Malinverni JJ., concurring).

21. At the heart of the principle that governments cannot silence criticism through lawsuits is the concern about libel chill. As the House of Lords stated in *Derbyshire*: “It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech”.

*Derbyshire County Council v. Times Newspapers Ltd.*, [1993]  
A.C. 534 (H.L.) (Lexis), p. 9

**C. State Resources Must Not Be Used To Stifle Public Criticism**

22. Courts do not permit governments to sue individuals for defamation because public debate and criticism of public institutions is to be encouraged, not “chilled”. The tremendous disparity in resources between the state and individuals inevitably means that individuals will be at a huge disadvantage in defamation litigation brought by government. This disparity, absent a rule that prevents governments from suing to prevent criticism, chills free speech.

23. In the first Canadian case to prohibit libel actions by government against individuals, Justice Pedlar stated:

I accept the reasoning of the House of Lords, as expressed in the Derbyshire County Council case, and those cases which have adopted the same. Factors taken into consideration in arriving at this decision include not only the inequality of resources between a government and a citizen, but also the troubling issue of the use of public funds, obtained from citizens through taxation, to sue them for criticizing that same government...

...

In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above,

governments also have other means of protecting their reputations through the political process to respond to criticisms. [emphasis added]

*Page, at paras. 28 and 29*

24. Over fifty-years ago, Schreiner J.A., of the Supreme Court of South Africa stated:

I have no doubt that it would involve a serious interference with the free expression of opinion hitherto enjoyed in this country if the wealth of the State, derived from the State's subjects, could be used to launch against those subjects actions for defamation because have, falsely and unfairly it may be, criticised or condemned the management of the country.

*Die Spoorbond, supra at 1013*

25. More recently, President Kirby of the Supreme Court of New South Wales Australia stated:

It is entirely misconceived for such a public organ of government to use public funds, levied from rate-payers, to sue a rate-payer for the publication of statements – “false and unfair though they may be” – by which the public body has been criticised or condemned. If this could be done, it would open the way to oppression of a most serious kind...

*Ringland, supra para. at \*76-\*77.*

**D. This Action Should be Dismissed**

26. For constitutional guarantees to have any meaning, courts must ensure that they are devoid of loopholes which allow governments to evade their responsibilities and limitations. In *Godbout v. Longueuil (City)*, Justice La Forest warned that “in view of their fundamental importance, *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender.”

*Godbout, supra para. 18, at para. 48.*

27. The principle that governments cannot sue individuals for defamation would be meaningless if governments could circumvent the principle through involvement in litigation brought by individuals to silence government critics. The fact that Whitcombe and Wilson are the plaintiffs instead of the County is a meaningless distinction when it comes to the threat to free expression.

28. On the undisputed facts, it is apparent that the County has an unconstitutional interest in this litigation. Indeed, the extent of the County's involvement is unknown because the litigation is discussed at *in camera* meetings employed to discuss litigation "affecting the County". The litigation is funded by the County. The County has appointed a spokesperson in respect of this matter and it receives periodic reports from McCarthy Tétrault.

**E. Related Authorities**

29. The Intervenor is not aware of a case with exactly the same facts as those before the Court. The following cases, however, may be of interest to this Court.

*Hill v. Scientology*

30. The Court in that case held that government funding of a public official's lawsuit does not make that lawsuit government action for the purpose of s. 32 of the *Charter*.

***Hill, supra* para. 18 at paras. 137-142.**

31. Although *Derbyshire* was decided two years before *Hill*, there is no indication that it was ever raised before the Supreme Court. At the time, there was no bar in Canada on government suits against individuals. The issue likely did not arise in *Hill* because of

its very different facts. The impugned statements in *Hill* were not political. They were statements critical of a Crown attorney's conduct of a case and they were made by a (notoriously well-financed) church.

32. The issue before this Court, unlike *Hill*, is whether the facts before this Court reflect an end-run around the now established *Charter* rule that governments cannot sue for defamation. It is interesting to note, nevertheless that while the Court in *Hill* held that mere funding of a defamation suit was not enough to make the suit "government action" and trigger direct application of the *Charter*, it qualified that conclusion by noting that:

There was no evidence that the Ministry of the Attorney General or the Government of Ontario required or even requested [that the plaintiff file suit]. Neither is there any indication that the Ministry controlled the conduct of the litigation in any way.

***Hill, supra* para. 18 at para. 75.**

**See *Prince George v. B.C. Television System Ltd.*, [1979] 2 W.W.R. 404 (B.C.C.A), cited in *Page, supra* para. 26 at para. 20.**

33. As the facts of this case illustrate, a defendant to a libel action in which the government is involved will have limited ability to explore the extent to which the government was involved in commencing or controlling the litigation where, as here, the litigation is discussed only at *in camera* meetings. The extent to which the government initiated and/or controls the litigation may be unknowable for the defendant in a defamation action.

34. In any event, responsibility for legal fees gives a party a measure of control over a case., A government body controlling a lawyer's payments retains the ability to stop

paying those fees if it disapproves of the conduct of the litigation. In this case it is not disputed that the conduct of the litigation is monitored.

***Varela v. Reeves* (Ariz. C.A. Oct. 1, 2009) at 7. [References omitted]**

**Randal Graham, *Legal Ethics: Theories, Cases, and Professional Regulation* (Toronto: Emond Montgomery, 2004) at 455.**

***R (Comninos) v. Bedford Borough Council***

35. *Comninos* involved a judicial review application where the County’s decision to support the Council’s decision to fund a libel claim brought by three officers. The issue in that case was whether the government body had statutory authority to fund the lawsuit. Although that issue is not before this Court, it is instructive that the court found that it would be an unlawful exercise of statutory power for a government to attempt to circumvent the principle in *Derbyshire*:

I accept that the important public policy expressed by the House of Lords in the *Derbyshire* case must not be circumvented. It follows that it would be an unlawful exercise of the power [to pay employees’ legal fees] for a local authority to attempt to do so...If a local authority’s true purpose is to sue for damage to its own reputation, and it gives its officers and indemnity in respect of the costs off defamation in order to circumvent the rule that it has no right to commence such proceedings itself, then it will have acted for an improper purpose and/or taken irrelevant considerations into account and its decision will be liable to be quashed on normal public law grounds. Given the importance of the rights in question...appointed auditors and the court would no doubt be astute to prevent any attempt by a local authority to circumvent the *Derbyshire* decision.” [*emphasis added*]

***R (Comninos) v. Bedford Borough Council*, [2003] EWHC 121 (Admin.) at para. 39.**

36. The Intervenor submits that the intention of government body is not relevant to the question of whether the government's actions unconstitutionally chill free speech. The issue is not what the government intends, but rather whether the result of the government action is to unduly interfere with free speech. The free speech issue was not before the court in *Comminos*. Moreover, as noted, the intention of government is difficult, if not impossible to discern where, as here, the government's decisions are made behind closed doors.

**PART V - ORDER SOUGHT**

37. The CCLA seeks an order pursuant to Rule 21.01 dismissing the plaintiff's action.

38. The CCLA seeks no order as to costs either in respect of this application or in respect of any intervention in this matter. The CCLA requests that no order as to costs be awarded against the CCLA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this • day of December, 2009.

\_\_\_\_\_  
Ryder Gilliland

Lawyer for the Intervener

**SCHEDULE “A”****Canadian Jurisprudence**

<u>Tab</u>	<u>Authority</u>
1.	<i>Cusson v. Quan</i> , 2007 ONCA 771, 87 O.R. (3d) 341
2.	<i>Dixon v. Powell River (City)</i> 2009 BCSC 406, 58 M.P.L.R. (4th) 175
3.	<i>Edmonton Journal v. Alberta (A.G.)</i> , [1989] 2 S.C.R. 1326
4.	<i>Eldridge v. British Columbia (A.G.)</i> , [1997] 3 S.C.R. 624
5.	<i>Godbout v. Longueuil (City)</i> , [1997] 3 S.C.R. 844
6.	<i>Halton Hills (Town) v. Kerouac</i> (2006), 80 O.R. (3d) 577
7.	<i>Hill v. Church of Scientology of Toronto</i> , [1995] 2 S.C.R. 1130
8.	<i>Montague (Township) v. Page</i> (2006), 79 O.R. (3d) 515
9.	<i>WIC Radio v. Simpson</i> , 2008 SCC 40, [2008] 2 S.C.R. 420

**American Jurisprudence**

<u>Tab</u>	<u>Authority</u>
10.	<i>Chicago (City) v. The Tribune Co.</i> (1923), 139 N.E. 86 (Ill. Sup. Ct.)
11.	<i>Cox Enterprises v. Carroll City/County Hospital Authority</i> , 273 S.E. 2d 841 (Ga. Sup. Ct. 1981)
12.	<i>Edgartown Police Patrolmen’s Assoc. v. Johnson</i> , 522 F. Supp. 1149 (D. Mass. 1981)
13.	<i>Varela v. Reeves</i> (Ariz. C.A. Oct. 1, 2009).

**English Jurisprudence**

<u>Tab</u>	<u>Authority</u>
14.	<i>Derbyshire County Council v. Times Newspapers Ltd.</i> , [1993] A.C. 534 (H.L.)
15.	<i>R (Comninos) v. Bedford Borough Council</i> , [2003] EWHC 121 (Admin.)

**Australian Jurisprudence**

<u>Tab</u>	<u>Authority</u>
16.	<i>Council of the Shire of Ballina v. Ringland</i> , 1994 NSW LEXIS 14010 (C.A.)

**South African Jurisprudence**

<u>Tab</u>	<u>Authority</u>
17.	<i>Die Spoorbond and Another v. South African Railways</i> , [1946] A.D. 999

**European Jurisprudence**

<u>Tab</u>	<u>Authority</u>
18.	<i>Romanenko v. Russia</i> , [2009] ECHR 11751/03

**Other Authorities**

<u>Tab</u>	<u>Authority</u>
18.	
19.	

## SCHEDULE “B”

### *Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11*

2. Everyone has the following fundamental freedoms:

- a) freedom of conscience and religion;
- b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- c) freedom of peaceful assembly; and
- d) freedom of association

### *Municipal Act, 2001, S.O. 2001, c. 25*

239. (1) Except as provided in this section, all meetings shall be open to the public.

#### **Exceptions**

(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the municipality or local board;
- (b) personal matters about an identifiable individual, including municipal or local board employees;
- (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
- (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.