Court File No.: C56905

COURT OF APPEAL FOR ONTARIO

BETWEEN:

JOANNE ST. LEWIS

Plaintiff
(Respondent)

and

DENIS RANCOURT

Defendant
(Appellant)

FACTUM OF THE APPELLANT

May 9, 2013

Denis Rancourt
(Appellant)

[redacted]

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Factum of the Appellant

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PART I—INTRODUCTION

1. The Appellant (Defendant), Denis Rancourt, appeals from a decision in the Ontario Superior Court of Justice. The decision was to dismiss his motion ("impugned motion") to stay or dismiss a defamation action on the grounds that the action is an abuse of process as maintenance and champerty. As such, the lower court's decision is a final decision, with right of appeal to the Court of Appeal.

2. The Respondent (Plaintiff) is Joanne St. Lewis. The alleged maintainer of the Plaintiff in the defamation action, the University of Ottawa, was granted permission to intervene in the impugned motion, and is thus a responding party in the instant appeal.

PART II—OVERVIEW

3. The Appellant submits that the judicial administration and judgment of the impugned motion contain fatal errors (apparent bias, time limitation, law of maintenance, admissibility of evidence, trial of an issue) which have deprived the Appellant of his rights to fair and just treatment. Furthermore, the impugned decision allows a costly private defamation action to be pursued against the Appellant, while being funded without impediment by the University of Ottawa using public money.

4. The $1,000,000 private defamation action at the heart of the litigation is for a blog post. The action was brought after third-party funding was guaranteed, more than two years after a critical blog post was published, presents no evidence of actual damage to reputation, and opportunistically uses a recent blog post's racial language. It is funded by proxy to suppress critical reporting about the funding institution (the "U of O Watch" blog). According to testimony, the decision for unlimited funding of the Respondent's lawsuit was made at a 30-minute meeting without any of the persons involved having read the blog post complained of, only its title appearing in a Google search result.

5. The Appellant is a caustic critic of the University of Ottawa ("University") and its management: In particular through his "U of O Watch" blog, on-line since 2007. He was a tenured Full Professor of physics at the University until he was dismissed in 2009. His dismissal case is currently in binding labour arbitration between his union and the University.

6. In a February 2011 U of O Watch blog post, the Appellant used the Malcolm X phrase “house negro”, a political term meaning privileged servitude to hierarchical superiors in minimizing the reality of institutional racism, in criticizing the academic work of tenured Assistant Professor of law Joanne St. Lewis (Respondent) at the University.

7. The Appellant had made all the same (and more) criticisms of the academic work of the Respondent in a December 2008 blog post, without using the term “house negro”, and without the benefit of access to information documents made public in 2011.

8. Soon after the Respondent was made aware by the Appellant of the February 2011 “house negro” blog post, on February 14, 2011 she wrote to the University president:

> Hi there Allan,
> I make it a practice to delete the communications from Mr. Rancourt and have done that in this case. lt has spared me a great deal of aggravation in the past.
> Do let me know if you want me to do anything. I will happy to fit into whatever strategy you decide but until then I intend to make no comment.
> Do take care,
> Joanne

9. The University guaranteed the Respondent unlimited University funding for a lawsuit against the Appellant regarding the “house negro” blog post and suggested Mr. Richard Dearden as a counsel to the Respondent. Following this, in April 2011 or later, the Respondent retained Mr. Dearden and then decided to pursue the $1,000,000 private defamation lawsuit against the Appellant, more than two years after the 2008 blog post was published.

10. The Respondent's June 2011 Statement of Claim states that the Respondent will donate half of awarded punitive damages to a University scholarship endowment fund.[1] No evidence for actual damage to the Respondent's reputation is claimed, nor was any such evidence disclosed in discovery.

11. The Appellant's Statement of Defence contains the fair comment defence, and a *Charter* defence that the action is a lawsuit by proxy using public funds. As soon as the University disclosed that it was funding the lawsuit, the Appellant brought the impugned motion to stay or dismiss the action on the grounds of abuse of process for maintenance and champerty.

PART III—FACTS

12. **The Appellant submits that there are five fatal errors with the impugned motion, as follows:**

(a) the motion is tainted with reasonable apprehension of bias;

(b) the imposed time limitation for oral argument of the Appellant at the hearing was unfair;

(c) the motions judge did not consider determinative evidence for maintenance, and misdirecting himself on the law of maintenance and champerty;

(d) the motions judge did not admit material evidence that was in evidence, and/or that should have been admitted; and

(e) the motions judge should have directed trial of the motion and/or of issues in the motion.

[1] **[Appeal Book Tab 12-2]**: Statement of Claim, p.23, at para. 60.

REASONABLE APPREHENSION OF BIAS

13. Overview: The process of the impugned motion is substantively pervaded by a reasonable apprehension of bias, based on cogent evidence and a judge who recused himself by stating that he could not be impartial towards the Appellant moving forward. The lower court circumvented ever making a judicial determination of apparent bias. The impugned decision relies heavily and explicitly on the recused judge's findings, released after the judge recused himself.

14. The Appellant cross-examined several affiants and witnesses for the impugned motion, including the president, the dean of the law faculty, and the chair of the board of governors of the University of Ottawa. This was followed by an Appellant's refusals and productions motion resulting from the cross-examinations.

15. During the refusals motion hearings, the Appellant discovered that the refusals motions and case management judge, Mr. Justice Robert Beaudoin, had a financial contract with the University of Ottawa, and a personal interest in the BLG law firm which represented the University. The appellant sought a judicial determination of reasonable apprehension of bias: On July 24, 2012, Beaudoin J. recused himself for a given reason other than apparent bias, and stated that he could not be impartial moving forward.[2]

[2] **[Appeal Book Tab 13-2]**: Excerpt of transcript of court hearing of July 24, 2012, Justice Beaudoin, p. 34-37.

16. The Appellant sought a judicial determination of apparent bias through motions, but the lower court circumvented ever providing a judicial determination of reasonable apprehension of bias of Beaudoin J.

17. A new case management judge was named, Mr. Justice Robert Smith, who continued the refusals motion(s), and heard and determined the impugned motion. Smith J. in the impugned decision relies extensively on a refusals motion decision of Beaudoin J.,[3] which was released on August 2, 2012, after Beaudoin J. recused himself on July 24, 2012 by finding that he could not be impartial moving forward.

18. The impugned Reasons also rely on case management decisions made by judge Beaudoin J., made prior to Beaudoin J. recusing himself on July 24, 2012.[4]

19. The cogent evidence supporting a reasonable apprehension of bias includes:[5]

(a) A terms of reference contract for a law faculty scholarship endowment fund between Beaudoin J. and the University of Ottawa, an intervening party;

(b) A boardroom named in honour of Beaudoin J.'s deceased son, at the law firm representing the University of Ottawa;

(c) A newspaper article quoting Beaudoin J. expressing the personal and emotional importance to him of the said scholarship fund and of the said boardroom honour;

[3] **[Appeal Book Tab 7]**: Impugned Reasons, Smith J., released March 13, 2013, at paras. 27, 30-31, 34-35, 45-50, 52, 55, 62, 66, 71-72, 76.
[4] **[Appeal Book Tab 7]**: Impugned Reasons, Smith J., released March 13, 2013, at paras. 20, 22, 25, 49.
[5] **[Appeal Book Tab 13-5]**: Excerpt of July 24, 2012 court transcript, p. 32-33; **[Appeal Book Tab 14-5a]**: Terms of Reference contract; **[Appeal Book Tab 14-5b]**: Newspaper article read in court; and **[Exhibit Book Tab 2-8]**: July 30, 2012 affidavit of Denis Rancourt.

(d) The fact that, at the hearing where the bias concern was first raised, Beaudoin J. threatened the Appellant with contempt of court if the Appellant continued to advance the concern.

20. The cogent evidence supporting an appearance of bias occurred in circumstances where Beaudoin J. had not disclosed his ties to the intervener, the University of Ottawa, and to its counsel.[6]

TIME LIMITATION AT THE HEARING

21. Overview: The presiding judge had, prior to the hearing, set one day of hearing, over sustained objections of the self-represented Appellant. Two additional substantive issues arose: one described in the motion factum (directing trial of the motion/issues), the other described in the motion confirmation (adjourning to make an application to the Supreme Court of Canada). The motions judge imposed a strict time limit on the Appellant to make oral arguments, thereby effectively not allowing the Appellant to proceed beyond completion of the two additional issues.

22. Smith J. imposed a strict time limit of one day for the entire hearing, over the objections of the Appellant, while not adjusting this time limit (originally decided in a pre-hearing case conference) for two preliminary issues which needed to be heard:[7]

[6] **[Exhibit Book Tab 2-8]**: July 30, 2012 affidavit of Denis Rancourt.
[7] **[Appeal Book Tab 13-7]**: Excerpts from the December 13, 2012 court transcript of the impugned motion.

(a) An Appellant's request to adjourn in order to allow a notice for leave to appeal to the Supreme Court of Canada to be filed, a matter that was ruled on after one hour; and

(b) An Appellant's request that the impugned motion be directed into trial of an issue, a matter which required the Appellant's remaining allotted time at the hearing.

23. Time limitation at the December 13, 2013 hearing of the impugned motion can best be seen in the court transcript as:

(a) The first matter (adjournment to make an application to the Supreme Court) took one hour, and the judge made his ruling on the record starting at 11:00 am (p. 37 l. 12); [8]

(b) After the ruling was pronounced, the following exchange occurred (p. 39-40):

> **M. RANCOURT:** La prochaine question c'est, si on veut, ma motion pour que cette motion soit amenée à procès.
> **LA COUR:** Et ça, ça va être une partie de votre -- vos représentations dans votre motion. Mais je veux pas entendre -- au tout, c'est pas une matière préliminaire.
> Donc, selon vous, ça devrait être un procès pour déterminer une question. Je vais vous entendre ---
> **M. RANCOURT:** Oui.
> **LA COUR:** --- mais ça c'est -- ça fait partie de votre représentation.
> **M. RANCOURT:** Donc, vous voulez que -- entendre ça au début -- au début de la motion comme telle.
> **LA COUR:** Au début et à la fin.
> **M. RANCOURT:** Parce que ce que je vais -- non, ça peut pas être à la fin parce que je demande ---
> **LA COUR:** Oui.
> **M. RANCOURT:** --- que la motion ne soit pas faite sous cette forme sur papier ---
> **LA COUR:** Oui.
> **M. RANCOURT:** --- mais qu'elle soit faite sous forme procès.
> **LA COUR:** O.k.
> **M. RANCOURT:** Donc, c'est évident que cette question doit être entendue en premier.
> **LA COUR:** Ça c'est à vous. Ça c'est à vous. ...

(c) Thus, the Appellant next made his oral arguments about the second matter (directing trial of the motion);

[8] **[Appeal Book Tab 13-7]**: December 13, 2012 court transcript of the impugned motion. p. 37-42.

(d) The second matter ended at 1:10 pm, and the motions judge ruled that this would be the end of the Appellant's oral arguments (p. 122 l. 23 to p. 123 l. 5):[9]

> **M. RANCOURT:** ... Donc, c'est ça le -- c'est ça, comme ça qu'on complète la chose.
> Donc, c'est pour ça qu'on a besoin d'un procès.
> **LA COUR:** O.k.
> **M. RANCOURT:** C'est pour ça qu'on a besoin d'un procès, monsieur le juge, c'est pour justement évaluer ces questions-là.
> **LA COUR:** O.k. Donc, c'est tout. Vous aurez votre droit de réplique. We'll adjourn until 2:00 and we'll have Mr. Deardon who will be up to bat.
> **THE REGISTRAR:** Order, all rise. À l'ordre, levez-vous.

(e) Thus, the Applicant was not heard on the main motion per say, nor on his motion to admit his May 23, 2012 affidavit.

24. Smith J. did not allow the Appellant time for an oral argument regarding admissibility of the Appellant's May 23, 2012 affidavit that was submitted after cross-examinations, and imposed that the entire hearing of the impugned motion would be completed in the absence of a ruling on admissibility of the affidavits.[10]

EVIDENCE OF MAINTENANCE AND CHAMPERTY

25. Overview: There is ample material evidence for improper motives of both the Respondent and the University regarding maintenance. Motive is a determinative factor in maintenance, especially regarding the maintained litigant's prior intent to litigate. The impugned decision makes no mention/use of the said material evidence, despite such evidence having been duly identified as exhibits in examinations, given by the respondents in transcripts of examinations, disclosed by the Respondent in discovery, and filed by the Appellant in supporting

[9] **[Appeal Book Tab 13-7]**: December 13, 2012 court transcript of the impugned motion. p. 122-123.
[10] **[Exhibit Book Tab 7]**: Impugned Reasons; **[Appeal Book Tab 13-7]**: Excerpts from the December 13, 2012 court transcript of the impugned motion, at p. 123 l. 23-29, and p. 221 l. 6-23.

affidavits. This evidence shows that the Respondent did not (for years and months) decide to litigate until after she was guaranteed unlimited funding by the University; and shows that the University suggested her choice of counsel, a choice decided at a meeting with President Rock.

26. The Appellant started his "U of O Watch" blog in May 2007, while he was a tenured Full Professor at the University. Mr. Allan Rock started his first mandate as president of the University on July 15, 2008.

27. On December 6, 2008, the Appellant published a U of O Watch blog post entitled "Rock Administration Prefers to Confuse 'Independent' with 'Internal' Rather Than Address Systemic Racism". The blog post extensively and directly questions the Respondent's professional ethics, in relation to a Respondent's November 2008 published report critical of a November 2008 student union report about systemic racism on campus. The Appellant at the time advised the Respondent about the publication of the blog post.[11, 12]

28. The Appellant was dismissed by President Rock on April 1, 2009.[13] On April 18-19, 2009, after the dismissal, President Rock had a five-part email exchange with Bruce Feldthusen about finding persons to help create a negative media image of the Appellant ("How best to get the facts out?").[14] Mr. Feldthusen is a protagonist, with Mr. Rock, in providing the 2011 funding for the Respondent's private lawsuit (below). This email exchange was identified as

[11] **[Appeal Book Tab 14-11]**: December 6, 2008 U of O Watch blog post; and December 7, 2008 email to the Respondent.
[12] **[Appeal Book Tab 12-3]**: Statement of Defence, paras. 27-28.
[13] The dismissal was covered internationally in the media at the time: *Globe and Mail*, *New York Times*, etc.
[14] **[Appeal Book Tab 14-14]**: April 18-19, 2009 email exchange between Allan Rock and Bruce Feldthusen.

an exhibit by Mr. Rock, yet it was found to be not admissible by Smith J. (impugned Reasons, at para. 59).

29. On April 20, 2009, after the dismissal of the Appellant, President Rock wrote to his chief of staff and to his head of communications to complain about the Appellant's published "toxic rants". This email was identified as an exhibit by Mr. Rock, yet it was found to be not admissible by Smith J. (impugned Reasons, at para. 59).[15] President Rock refused to answer all questions about his "view about"/"view of" the Appellant in his cross-examination, and the refusals were upheld in the August 2, 2012 Reasons of Beaudoin J.[16]

30. On February 11, 2011, the Appellant published his U of O Watch blog post which is complained of in the defamation action, entitled "Did Professor Joanne St. Lewis act as Allan Rock's house negro?"[17] The Appellant immediately advised the Respondent and Mr. Rock of the publication.

31. On February 14, 2011, at 3:28 PM, the Respondent received an email from former student Lia Tarachansky, about the February 11, 2011 U of O Watch blog post, stating:[18]

> … where he refers to you in derogatory and racist language is really disturbing. I wanted to write to you to say I'm sorry that you have been forced to endure such a disgusting attack. [Emphasis added.]

[15] **[Appeal Book Tab 14-15]**: April 20, 2009 email from Allan Rock to staff.
[16] **[Appeal Book Tab 13-16]**: Excerpt of examination transcript of Allan Rock, p. 110 to 114; **[Book of Authorities Tab 11]**: *St. Lewis v. Rancourt*, 2012 ONSC 4494, (Justice Beaudoin, released August 2, 2012), at para. 38.
[17] **[Appeal Book Tab 14-17]**: February 11, 2011 U of O Watch blog post.
[18] **[Appeal Book Tab 14-18]**: February 14, 2011 emails of Respondent with Lia Tarachansky -- **This document was also identified as Exhibit 1 in the April 23, 2012 cross-examination of Joanne St. Lewis, see [Exhibit Book Tab 4-3].**

The Respondent responded to Ms. Tarachansky at 5:16 PM on the same day (same document). This email exchange was disclosed by the Respondent in discovery, yet it was found to be not admissible by Smith J. (impugned Reasons, para. 59).

32. On February 14, 2011, at 5:06 PM, after receiving the email from Ms. Tarachansky, the Respondent wrote to President Rock about the Appellant's February 11, 2011 blog post:[19]

> Do let me know if you want me to do anything. I will happy to fit into whatever strategy you decide but until then I intend to make no comment. [Emphasis added.]

This email was disclosed by the Respondent in discovery, yet it was found to be not admissible by Smith J. (impugned Reasons, para. 59).

33. On Friday April 8, 2011, the Respondent did a Google search of her own name and found that the February 11, 2011 U of O Watch blog post was on the first page of the Google search results, with the title of the blog post featured in the Google results. This made the Respondent furious: "my head was on fire".[20]

34. On Monday April 11, 2011, the Respondent went to meet her dean, dean of law Bruce Feldthusen, to discuss her great concern about the Google search results. The dean, who is an executive officer of the University, has testified that at that day's meeting with the

[19] **[Appeal Book Tab 14-19]**: Respondent's February 14, 2011 email to President Rock.
[20] **[Appeal Book Tab 13-20]**: Excerpt from the transcript of cross-examination of Joanne St. Lewis, p. 57 l.19 to p.59 l.8.

Respondent it was he who suggested that the University might provide assistance, and that it was he who suggested Mr. Richard Dearden as a counsel:[21]

> 59. Q. Was there anything else of substance that was discussed at that meeting?
> A. Well, we did discuss Professor St. Lewis was determined to do something about it, to put a stop to it. And at my suggestion, I said that we should go and see the President of the university to see what assistance the university would be prepared to offer her. And we discussed possible remedies. I really don't remember the full depth of the discussion, but I do remember we discussed defamation. And I do remember, as I say in my Affidavit, that I had mentioned possibly among others, but I had mentioned Mr. Dearden because I knew him to be an expert in this area.

35. On April 11, 2011, Dean Bruce Feldthusen, through a law faculty assistant, contacted the president's office to schedule a meeting with President Rock. The President's Outlook Schedule shows that: on April 11, 2011 Mr. Rock scheduled a meeting for that Friday April 15, 2011, which was to last 30 minutes, starting at 11:00 AM, having "Required Attendees" Allan Rock and Bruce Feldthusen, and "Optional Attendees" Joanne St. Lewis and Richard Dearden.[22, 23]

36. On April 15, 2011, the foreseen meeting between Mr. Feldthusen and Mr. Rock took place. Optional attendee Ms. St. Lewis was also present. Mr. Dearden was not present. Dean Feldthusen testified as follows regarding material aspects of this meeting:

(a) No firm prior intention of Respondent to litigate; Dean makes request for the funding:[24]

[21] **[Appeal Book Tab 13-21]**: Excerpt from the transcript of cross-examination of Bruce Feldthusen, p. 13 l.25 to p.14 l.12.
[22] **[Appeal Book Tab 14-22]**: Exhibit 3, Cross-examination of Joanne St. Lewis: President's Outlook schedule.
[23] **[Appeal Book Tab 15-23]**: Documents provided by Allan Rock prior to his cross-examination -- Impugned motion record pages 199-204.
[24] **[Appeal Book Tab 13-24]**: Excerpt of cross-examination transcript of Bruce Feldthusen, p. 21 l. 24 to p. 22 l. 16.

93. Q. So, if I understand correctly, Professor St. Lewis by this time had decided firmly that she was going to litigate this matter?
A. I think that would be an overstatement, but she was certainly feeling out her options.
94. Q. Did Professor St. Lewis make any requests at the meeting?
A. Well, I made a request which -- I requested that the university support her in her efforts to put a stop to this defamation.
95. Q. When you say "support her", could you be more specific?
A. Well, support her financially, absolutely.
96. Q. How did Allan Rock respond to your request?
A. Well, I think Allan Rock was as upset -- well, maybe not as upset as Professor St. Lewis, but as upset as I was about this turn of affairs. And he was definitely interested in supporting Professor St. Lewis. …

(b) Dean does not know if Respondent was to contact Mr. Dearden; but states obvious it would be "a client":[25]

195. Q. No, but you mentioned just now that there was mention at the meeting that Mr. Dearden would be consulted.
A. Correct.
196. Q. What did you mean by that?
A. What did I mean by what, I'm sorry, I don't ---
197. Q. You said "correct" as your answer. Is that correct?
A. Correct, that Mr. Dearden would be consulted.
198. Q. Thank you. And who would consult Mr. Dearden?
A. Well, I don't know. I guess I'll just leave it at that. I think it's fairly obvious it would be a client that would consult Mr. Dearden.
199. Q. But you don't know?
A. Correct.
200. Q. Did Mr. Rock approve of the choice of Mr. Dearden?
A. I believe he was favourably disposed to Mr. Dearden.
201. Q. And you yourself also recommended it?
A. I certainly did.

(c) Dean clarifies his answer on re-examination by Mr. Dearden:[26]

220. Q. At one point in your Cross-Examination, Dean, you said a client would consult me, Rick Dearden. Who was the client you were referring to when you gave that answer to Mr. Rancourt?
A. Oh, Professor St. Lewis.

[25] **[Appeal Book Tab 13-24]**: Excerpt of cross-examination transcript of Bruce Feldthusen, p. 43 l. 21 to p. 44 l. 18.
[26] **[Appeal Book Tab 13-24]**: Excerpt of cross-examination transcript of Bruce Feldthusen, p. 48 l. 10-14.

37. Mr. Rock testified that he granted funding for the Respondent's private defamation lawsuit about the "house negro" blog post at the April 15, 2011 meeting itself, and "without a cap" (without a spending limit). It is not contested that the litigation is funded without a spending limit.[27]

38. The Respondent testified that she engaged her counsel Mr. Dearden on April 15, 2011, after the morning meeting of that day with president Rock. Furthermore, the contacting of Mr. Dearden was decided at the morning meeting of April 15, 2011 (Dean's testimony above: paragraph 36(b)).

39. All cross-examined participants of the April 15, 2011 meeting (Rock, Feldthusen, St. Lewis) testified that each had not read the "house negro" blog post prior to the April 15, 2011 meeting. The position of the responding parties is that they did not read the "house negro" blog post until after April 15, 2011, if at all:

(a) Mr. Feldthusen testified: "I don't believe I ever have read the blog post." (transcript: p.11 l. 3-4)

(b) Mr. Rock testified that he only ever read the blog post as part of reading the June 23, 2011 Statement of Claim of the Respondent.[28]

(c) The Respondent Ms. St. Lewis testified that she first read the blog post after April 15, 2011, after retaining her counsel, and prior to finalizing her Statement of Claim:[29]

> Q. And when did you first read the February 11, 2011, "U of O Watch" blog article about you?

[27] **[Appeal Book Tab 13-27]**: Excerpt of cross-examination of Allan Rock, p. 35 l.9 to p. 36 l.9.
[28] **[Appeal Book Tab 13-27]**: Excerpt of cross-examination of Allan Rock, p. 6 l. 14 to p. 7 l.14.
[29] **[Appeal Book Tab 13-29]**: Excerpt of the cross-examination of Joanne St. Lewis, p. 59 l. 9-17.

> A. I told you, I read it later in April when my counsel asked me to read it prior to the preparation of the Statement of Claim. So, it was sometime between my engaging Mr. Dearden on April 15th and our actually producing the Statement of Claim. I had to read it then. It was essential that I read it then, he said, and I did.

40. That the Respondent swears to having read the "house negro" February 11, 2011 blog post after April 15, 2011, is significant because in her February 21, 2012 affidavit (at para. 20), the Respondent swears that she made the decision to commence the action "as soon as I read the Defendant's 'house negro' article in April, 2011."[30]

41. Furthermore, in cross-examination the Respondent explained her meaning of "read the blog post":[31]

> 200. Q. Oh, okay, let me clarify. Had you read it before the meeting began with Allan Rock?
> A. Mr. Rancourt, I've answered this several times. I did not read the blog post. In other words, what I mean by "read the blog post" is go to the Page 1 of the Google search results in my name in quotes, and click on the title to see the blog post. I did not do that until later in April when Mr. Dearden told me, "Joanne, you must do it."

42. The above described evidence supports that the Respondent decided to commence the action years after the December 2, 2008 blog post, months after the February 11, 2011 blog post, and after President Rock's April 15, 2011 guaranty of unlimited funding. As such, the Respondent did not have a prior intent. This evidence was presented and argued at the hearing of the impugned motion, as part of the Appellant's argument to direct a trial of the motion, yet it was not considered in the impugned Reasons.

[30] **[Appeal Book Tab 15-30]**: Excerpt from the February 21, 2012 affidavit of Joanne St. Lewis, at para. 20 -- from **[Exhibit Book Tab 2-5]**: Complete affidavit.
[31] **[Appeal Book Tab 13-29]**: Excerpt of the cross-examination of Joanne St. Lewis, p. 79 l. 20 to p. 80 l. 3.

PART IV—ISSUES ON APPEAL AND THE LAW

REASONABLE APPREHENSION OF BIAS

43. Issue: The Appellant submits that reasonable apprehension of bias is a ground to appeal the impugned decision, within the Court of Appeal's jurisdiction, and further submits that there is reasonable apprehension of bias of the lower court, in the impugned motion.

44. The bias argument which is a ground to appeal the impugned motion is distinct from the bias argument in the Appellant's filed application for leave to appeal from a different lower court decision to the Supreme Court of Canada. Although the factual basis for apparent bias of lower court Justice Beaudoin is the same, the Supreme Court application concerns distinct and broad issues outside of the Court of Appeal's jurisdiction: (a) a litigant's right to a judicial determination of apparent bias at the lower court in which the bias concern is first raised, and (b) the unconstitutionality of the rules for lower court leave to appeal motions, which can definitively bar a litigant from of a judicial determination of apparent bias.[32]

45. In the impugned motion, the bias issue is not whether a judicial determination of apparent bias should have been made in the lower court, but rather the issue is whether there is a reasonable apprehension of bias in the process of the impugned motion, which permeates the impugned decision.

[32] **[Appeal Book Tab 15-32]**: Letters from SCC, and Memorandum of Argument for the application to SCC.

46. The evidence for reasonable apprehension of bias of lower court Justice Beaudoin is presented in the above Facts section, and in the July 30, 2012 affidavit of Denis Rancourt (Exhibit Book). Also: court transcript of the brief July 24, 2012 hearing at which lower court Justice Beaudoin threatened the Applicant with contempt of court, and recused himself by stating that he could not be impartial moving forward (Exhibit Book).

47. The Appellant made the bias complaint about Beaudoin J. at the December 13, 2012 hearing of the impugned motion, including describing its impact on the impugned motion: Court transcript p. 24 l. 29 to p.28 l. 14.[33]

48. Regarding the effects and consequences of bias on the litigation process, in 1997 the Supreme Court of Canada established:[34]

> 99 If actual or apprehended bias arises from a judge's words or conduct, then the judge has exceeded his or her jurisdiction. ... 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. In the context of appellate review, it has recently been held that a "properly drawn conclusion that there is a reasonable apprehension of bias will ordinarily lead inexorably to the decision that a new trial must be held": *Curragh, supra*, at para. 5.
>
> 100 If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. … [Emphasis added.]

[33] **[Appeal Book Tab 13-7]**: Excerpt of December 13, 2012 court transcript, pages 24-28.
[34] *R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 SCR 484, at paras. 99, 100. **[Appellant's Book of Authorities]**

49. Regarding effects and consequences of bias on interlocutory motions in final decisions, this Court found:[35]

> [38] I pause to observe that the above cases arose from challenges to final decisions rather than interlocutory rulings like the one at issue. In my view, this is not a meaningful difference. If, as the recusal motion alleges, there exists a reasonable apprehension of bias that would taint the final decision, that same apprehension of bias taints the decision on the recusal motion itself. Further, there is no reason why the Divisional Court should approach an interlocutory ruling on bias in a different manner than if the issue was raised after the completion of the proceedings. [Emphasis added.]

TIME LIMITATION AT THE HEARING

50. Issue: The self-represented Appellant submits that the imposed time limitation for his oral arguments at the December 13, 2012 hearing of the impugned motion was such as to deny the Appellant his substantive rights to be heard fully.

51. The impugned motion was one that could end the action, and that involved conflicting material evidence. As explained in the above Facts section, despite objections the moving party (Appellant) was not given time to:

(a) make oral arguments in the main (impugned) motion, beyond two substantive matters heard first (request to adjourn, and request to direct trial of the motion); or

(b) make oral arguments in his request to admit his May 23, 2012 affidavit which had been served after cross-examinations.

[35] *Ontario Provincial Police v. Mac*, 2009 ONCA 805 (CanLII), para. 38

52. The Appellant submits that the December 13, 2012 court transcript of the impugned motion shows an embattled self-represented litigant, unfamiliar with the practice of motions, not being provided with a fair process to make his case to the best of his ability, nor even to be heard on material matters in the intended motion (his motion).

At approximately 4:50 pm, the Appellant started the reply by stating the day's unfairness to him, as he saw it (in part, p. 221-222):[36]

> ... Donc, ça je trouve ça des erreurs procédurales très importantes et, en plus, les contraintes de temps, pour moi -- je l'ai dit au début et je le répète -- je continue par respect à la Cour mais je continue en objection.
>
> J'estime que ce processus a été injuste à cause des contraintes pas raisonnables. Il y a plein de choses que je sais que je n'aurai pas la chance de dire, que je n'aurai pas la chance de répondre. Il y a des choses qui me sont venues après l'écriture de mon factum que je n'aurai pas la chance de dire.
>
> Donc, pour moi, c'est une injustice fondamentale qui vient de se produire aujourd'hui ...

The motion ended on page 250 of the transcript, followed by case management matters.

53. The Divisional Court considered a case where an experienced counsel was given 40 minutes by a motions court judge to speak directly to the issues of the day. It found that this was enough time in the circumstances. It also described the general principle as:[37]

> … The general rule is clear: <u>every litigant is entitled to have his case fully presented and fairly considered</u>: *Baker v. Hutchinson et al.* (1976), 13 O.R. (2d) 591 at p. 597, 1 C.P.C. 291. But that does not mean that the court must listen to everything that every counsel (or litigant appearing in person) wishes to say. … [Emphasis added.]

[36] **[Appeal Book Tab 13-7]**: Excerpt from December 13, 2012 court transcript of impugned motion, p. 219-222
[37] *Ferguson and Imax Systems Corp. et al.* (1984), 47 O.R. (2d) 225, 11 D.L.R. (4th) 249, at p.13

54. Regarding hearing self-represented litigants, this Court, in *Davids v. Davids*, found:[38]

> … Fairness does not demand that the unrepresented litigant be able to present his case as effectively as a competent lawyer. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the unrepresented litigant have a lawyer's familiarity with procedures and forensic tactics. It does require that the trial judge treat the litigant fairly and attempt to accommodate unrepresented litigants' unfamiliarity with the process so as to permit them to present their case. … [Emphasis added.]

55. And, in *Toronto-Dominion Bank v. Hylton*, this Court found:[39]

> Once again, the fact that a party is self-represented is a relevant factor. That is not to say that a self-represented party is entitled to a "pass". However, as part of the court's obligation to ensure that all litigants have a fair opportunity to advance their positions, the court must assist self-represented parties so they can present their cases to the best of their abilities. … [Emphasis added.]

56. The Canadian Judicial Council, in 2006, put it this way:[40]

> Judges and court administrators should do whatever is possible to provide a fair and impartial process and prevent an unfair disadvantage to self-represented persons.

EVIDENCE FOR MAINTENANCE AND CHAMPERTY

57. Issue: The Appellant submits that the judge erred by not considering determinative evidence for maintenance, and by misdirecting himself on the law of maintenance and champerty.

[38] *Davids v. Davids*, 1999 CanLII 9289 (ON CA), at para. 36
[39] *Toronto-Dominion Bank v. Hylton*, 2010 ONCA 752 (CanLII), at para. 39
[40] Statement of Principles on Self-represented Litigants and Accused Persons, Adopted by the Canadian Judicial Council, September 2006, p. 4, para. 1

58. The Supreme Court of Canada has consistently until present held the same definition of maintenance since 1907, reaffirmed in 1939, and in 1993, as centrally based on intervening "officiously or improperly":[41]

> A person must intervene "officiously or improperly" to be liable for the tort of maintenance. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife. The society's support was "out of charity and religious sympathy" and so did not constitute maintenance.
>
> To be liable for maintenance, a person must intervene "officiously or improperly": *Goodman v. The King*, [1939] S.C.R. 446. Provision of financial assistance to a litigant by a non-party will not always constitute maintenance. Funding by a relative or out of charity must be distinguished from cases where a person wilfully and improperly stirs up litigation and strife: *Newswander v. Giegerich* 1907 CanLII 33 (SCC), (1907), 39 S.C.R. 354.

59. The latter is a disjunctive condition. The intervening need only be either officious or improper to establish maintenance.

60. Smith J. erred by not following the binding Supreme Court of Canada definition of maintenance as consisting of intervening officiously or improperly, and as requiring a valid excuse, such as charity. A dictionary definition of officiously is "Marked by excessive eagerness in offering unwanted services or advice to others". Smith J. failed to consider officiousness, nor was a test for officiousness applied. Instead, the judge conflated officiousness with impropriety, and did not consider the evidence for officiousness (impugned Reasons).

[41] *Young v. Young*, 1993 CanLII 34 (SCC), at pages 22 and 155.

61. This Court found that justification or excuse for funding the litigation is relevant in establishing maintenance and champerty:[42]

> Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. [Emphasis added]

And that propriety of motive is a relevant and determinative consideration in establishing maintenance (*ibid.*, at para. 27):

> The courts have made clear that a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer. [Emphasis added.]

62. Smith J. erred by failing to consider, as argued by the defendant, that maintenance alone, without champerty, can give rise to an abuse of process which can end an action, or cause the maintenance to be stopped. Abuse of process is a finding made on the totality of the evidence and conduct, not on features in isolation:[43]

> Abuse of the court's process can take many forms and may include a combination of two or more strands of abuse which might not individually result in a stay.

63. Smith J. erred by failing to consider the maintained litigant's prior intent to litigate as a determinative factor in finding officious interference, and maintenance and champerty. Smith J. said nothing about the evidence that the plaintiff did not, for years, have an

[42] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA), para. 26
[43] *Stocznia Gdanska SA v. Latreefers Inc*., [2000] E.W.J. No. 469 (QL), as cited in: *Operation 1 Inc. v. Phillips*, 2004 CanLII 48689 (ONSC), para. 45

intent to litigate until after she was offered and guaranteed unlimited funding for the lawsuit, in April 2011. Regarding such encouragement to litigate, this Court found:[44]

> Whatever its historical origin, the authorities, both English and Canadian, have consistently treated champerty as a form of maintenance requiring proof not only of an agreement to share in the proceeds but also the element of encouraging litigation that the parties would not otherwise be disposed to commence. [Emphasis added.]

64. Smith J. erred by using a meaning of the term "trafficking in litigation" which is too limited for the factual context, and which is not consistent with the body of relevant case law (impugned Reasons, paras. 102-103). The judge's adopted meaning of "trafficking in litigation" would render the Ontario statute *An Act respecting Champerty*, and the principle of champerty itself, meaningless in most factual circumstances, including where there is both officious interference (maintenance) and sharing of the proceeds. Rather, "trafficking in litigation" is a broad concept which is consistent with the Supreme Court of Canada definition of maintenance:[45]

> Trafficking in litigation is, by the very use of the word "trafficking" something which is objectionable and may amount to or contribute to an abuse of the process. We think that it is undesirable to try to define in different words what would constitute trafficking in litigation. It seems to us to connote unjustified buying and selling of rights to litigation where the purchaser has no proper reason to be concerned with the litigation. 'Wanton and officious intermeddling with the disputes of others in which they [the funders] have no interest and where that assistance is without justification or excuse' may be a form of trafficking in litigation. [Emphasis added.]

65. The Appellant submits that Smith J. erred by failing to consider that if maintenance is established, and there is a sharing of the proceeds of the litigation, then there is champerty, even if the maintainer's dominant motive for the maintenance is not the sharing in

[44] *Buday v. Locator of Missing Heirs Inc.*, 1993 CanLII 961 (ON CA), 5th-last para.
[45] *Stocznia Gdanska SA v. Latreefers Inc.*, [2000] E.W.J. No. 469 (QL), as cited in: *Operation 1 Inc. v. Phillips*, 2004 CanLII 48689 (ONSC), para. 45

the proceeds. Consequently, Smith J. erred by failing to apply the Ontario statute *An Act respecting Champerty*, which stipulates "All champertous agreements are forbidden, and invalid."

66. Smith J. erred by failing to consider the vulnerability of the Respondent, who is an Assistant Professor employee of the alleged maintainer, the University. This Court has found that vulnerability of the funded litigant is relevant to a determination of abuse in the relationship with the maintainer, and is a central public policy concern in maintenance and champerty.[46]

67. Smith J. erred by not considering or determining the defendant's requested order (para. 90(b) of the impugned motion Appellant's factum):[47]

> "Alternatively, that the champertous maintenance be ordered terminated, with reimbursement of funds from the plaintiff to the University, and that the punitive damages paragraphs in the Statement of Claim be struck out."

The said punitive damages paragraphs stipulate that half of the punitive damages will be given to the University.[48]

ADMISSIBILITY OF EVIDENCE FOR MAINTENANCE AND CHAMPERTY

68. Issue: The Appellant submits that Smith J. erred by adopting Beaudoin J.'s August 2, 2012 Reasons, regarding relevancy for upholding refusals in the refusals motion, as defining relevancy for his purpose in determining evidence admissibility in the main (impugned) motion. Smith J. was not bound by Beaudoin J.'s Reasons for judging refusals, but rather had a

[46] *McIntyre Estate v. Ontario (Attorney General)*, 2002 CanLII 45046 (ON CA), paras. 47, 76.
[47] **[Appeal Book Tab 15-47]**: November 30, 2012 factum of the Appellant in the impugned motion, para. 90(b).
[48] **[Appeal Book Tab 12-2]**: Statement of Claim in the main action, p.23, at para. 60.

duty to determine relevancy based on the pleadings in the main motion before him, which in a motion includes the supporting affidavits.

69. In adopting Beaudoin J.'s August 2, 2012 Reasons regarding relevancy, Smith J. erred by failing to recognize that:

(a) It is the order of the Court which is binding, not the reasons assigned for making it;[49] and

(b) Beaudoin J. did not intend to bind the hand of the judge hearing the main motion regarding admissibility of evidence,[50] and did not have the jurisdiction to usurp the function of the judge hearing the main motion.

70. Consequently, having misdirected himself on finding the August 2, 2012 Reasons to be binding, Smith J. erred by not applying all the factors needed to determine maintenance and champerty. Namely, the judge was bound to a detailed examination of motives, of both the maintainer, and the maintained litigant, in determining both the main maintenance/champerty issue, and the issue of relevancy/admissibility of the evidence.

DIRECTING A TRIAL OF THE MOTION OR ISSUES

71. Issue: The Appellant submits that the motions judge erred by not directing a trial of the motion and/or of one or more issues of the motion, in the impugned motion that could end the $1,000,000 action for abuse of process.

72. The Appellant strenuously argued (court transcript of the December 13, 2012 motion hearing, p. 39 l. 14 to p. 122 l. 33, Exhibit Book) that the impugned motion should be directed to a trial of the motion and/or issues.

[49] *St. Lewis v. Rancourt*, 2013 ONSC 49 (CanLII), at para. 25, referencing the Court of Appeal.
[50] **[Appeal Book Tab 13-50]**: Excerpt from the June 20, 2012 court transcript for the refusals motion with Justice Beaudoin (which gave the August 2, 2012 Reasons), p. 140-141.

73. Rule 37.13(2)(b) foresees:[51]

> A judge who hears a motion may,
> …
> (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge.

74. As described in the above facts section, and additionally in the court transcript of the December 13, 2012 hearing (p. 39 l. 14 to p. 122 l. 33), there are conflicts of material evidence which require a judicial determination of credibility. Notably:

(a) The Respondent and Allan Rock testified that the Respondent had a firm intension to litigate in arriving at the April 15, 2012 meeting to request the funding for the said litigation. Mr. Rock testified that he granted funding for the litigation, without a spending limit, at that April 15, 2012 meeting. To the contrary, the Respondent's own affidavit, and Bruce Feldthusen's testimony are that the Respondent did not have a firm intension/decision to litigate at the time of the said April 15, 2012 meeting. This is determinative of prior intent.

(b) Allan Rock testified to having proper motives for funding the litigation, yet Mr. Rock would not answer questions about email evidence of his animosity towards the Appellant, regarding Mr. Rock's "view about" the Appellant.[52]

[51] *Rules of Civil Procedure*, Rule 37.13(2).
[52] **[Appeal Book Tab 13-16]**: Excerpt of examination transcript of Allan Rock, p. 110 to 114

75. This Court has determined:[53]

> It is beyond the proper role of an application judge to determine the credibility of a deponent to resolve material facts which are disputed and which may affect the result: *Moyle v Palmerston Police Services Board* (1995), 25 O.R. (3d) 127 (Div. Ct.) at p. 136, *Yoo v. Kang*, [2002] O.J. 4041 (S.C.J.) at para. 24. [Emphasis added.]

76. The general principle that conflicting facts cannot be resolved using witness credibility from a paper record is the same in lower court motions where the settled case law is that questions testing personal credibility of affiants in out of court examinations are not proper questions. For example, the frequently cited *Caputo* case:[54]

> Questions may also be asked to test the credibility of the facts deposed or the answers given although questions otherwise irrelevant which are directed solely at credibility are improper.

OTHER FACTOR IN MAINTENANCE NOT CONSIDERED IN IMPUGNED REASONS

77. It is consistent with the common law that large corporations should not be allowed to sue individuals for defamation, either directly or by proxy, as the imbalance of arms necessarily causes an undue imbalance between freedom of expression rights and the right to protect reputation. The degree to which a litigation has the characteristics of a SLAPP, is therefore a relevant factor in a judicial determination of maintenance;[55] especially where the plaintiff is a lawyer and has monetary means, and where the defendant was dismissed by the alleged maintainer.

[53] *Newcastle Recycling Ltd. v. Clarington (Municipality)*, 2005 CanLII 46384 (ON CA), para. 11
[54] *Caputo v. Imperial Tobacco Ltd.*, [2002] O.J. No. 3767, at para. 14
[55] **[Appeal Book Tab 15-47]**: November 30, 2012 factum of the Appellant in the impugned motion, paras. 82-87.

PART V—ORDER REQUESTED

78. THE APPELLANT ASKS that the judgment be set aside and a judgment be granted as follows:

1. Ordering re-hearing of the entire defendant's motion ("champerty motion"), including the defendant's refusals motion in the champerty motion, with the champerty motion treated as a trial;

2. In the alternative, granting the defendant's champerty motion to dismiss the action;

3. In the alternative, granting the defendant's champerty motion to terminate and repeal the University's funding of the plaintiff's litigation and bar sharing in the proceeds of the action;

Costs and other

4. The costs of the motion (impugned motion) and/or motions (refusals motion in the impugned motion) set aside by this Honourable Court;

5. The costs of this appeal on an appropriate scale;

6. Such further and other relief as the appellant may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 9, 2013

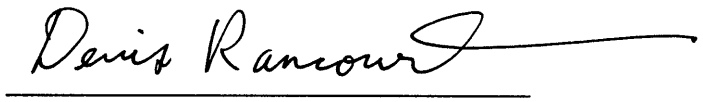
Denis Rancourt
(Appellant)

CERTIFICATE: ORIGINAL RECORD, AND ESTIMATED TIME REQUIRED

An order under subrule 61.09(2) (original record and exhibits) is not required.

The self-represented Appellant estimates that he will require 2 hours to make his oral argument, not including reply.

May 9, 2013



Denis Rancourt
(Appellant)

SCHEDULE A

Authorities Referred To By The Appellant

Case Law

Buday v. Locator of Missing Heirs Inc., 1993 CanLII 961 (ON CA)

Caputo v. Imperial Tobacco Ltd., [2002] O.J. No. 3767

Davids v. Davids, 1999 CanLII 9289 (ON CA)

Ferguson and Imax Systems Corp. et al. (1984), 47 O.R. (2d) 225, 11 D.L.R. (4th) 249, (ON DC)

McIntyre Estate v. Ontario (Attorney General), 2002 CanLII 45046 (ON CA)

Newcastle Recycling Ltd. v. Clarington (Municipality), 2005 CanLII 46384 (ON CA)

Ontario Provincial Police v. Mac, 2009 ONCA 805 (CanLII)

Operation 1 Inc. v. Phillips, 2004 CanLII 48689 (ONSC)

R. v. S. (R.D.), 1997 CanLII 324 (SCC), [1997] 3 SCR 484

St. Lewis v. Rancourt, 2013 ONSC 49 (CanLII) (Justice Annis)

St. Lewis v. Rancourt, 2012 ONSC 4494 (Justice Beaudoin, released August 2, 2012)

St. Lewis v. Rancourt, 2013 ONSC 1564 (CanLII) (Justice Smith, impugned Reasons)

Toronto-Dominion Bank v. Hylton, 2010 ONCA 752 (CanLII)

Young v. Young, 1993 CanLII 34 (SCC)

Directives

Statement of Principles on Self-represented Litigants and Accused Persons, Adopted by the Canadian Judicial Council, September 2006

SCHEDULE B

Statutes and Regulations

1. *Rules of Civil Procedure*, Rule 21.01(3)

21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

2. *Rules of Civil Procedure*, Rule 37.13(2) [cited at paras. 51, 73]

37.13(2) A judge who hears a motion may,

(a) in proper case, order that the motion be converted into a motion for judgment; or

(b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge.

3. *An Act respecting Champerty* [cited at paras. 64, 65]

An Act respecting Champerty
R.S.O. 1897, Chapter 327

His Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

Definition of Champertors

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains. 33 Edw. I.

Champertous agreements void

2. All champertous agreements are forbidden, and invalid. (*Added in the Revision of 1897.*)