

Libel Chill: Silencing Dissent and Equality— Promoting Speech

Anne S. DERRICK*

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* Q.C., Beaton, Derrick & Ring. The author, a Halifax lawyer, was sued for defamation with another lawyer, Burnley A. (“Rocky”) Jones for statements made at a press conference in April 1995. The May 2001 jury verdict awarding the Plaintiff police officer \$240,000 was overturned on appeal: *Campbell v. Jones*, [2002] N.S.J. No. 450 (QL). An application for leave to appeal to the Supreme Court of Canada by Campbell was dismissed with costs on May 29, 2003. A portion of this paper was presented at the CIAJ Annual Conference “Dialogues About Justice: The Public, Legislators, Courts and The Media” in Gatineau, Quebec on October 17, 2002.

The very essence of a democratic state is the freedom of its citizens to dissent publicly, their opinions and ideas protected from sanction. The space in which such dissent can flourish shrinks when speech is curtailed and punished. The use of defamation law to silence advocates calling for accountability in public institutions is a disturbing development at a time when speaking out is particularly critical, post September 11th, in the era of anti-terrorism initiatives and the enhancement of state authority.

Defamation actions by state actors against social justice advocates protects the power and inviolability of public institutions while discouraging advocacy for those whose rights have been subordinated and denied. The appropriate and necessary use of democratic speech to further social justice is imperiled. Fundamental democratic principles are placed at risk by defamation actions that attack public discussion about the conduct of state officials. This silencing of dissent represents a triumph of private interests over constitutionally guaranteed rights and reinforces the power of defamation law, a law that protects private interests exclusively, to extinguish criticism and protest.

I. AN AMERICAN EXAMPLE—APPLYING *NEW YORK TIMES COMPANY V. SULLIVAN*

The tremendous silencing power of defamation law is revealed by the litigation that ensued following the publication of Peter Matthiessen's book about the American Indian Movement and Leonard Peltier, *In the Spirit of Crazy Horse*.¹ Defamation suits stopped the author and his publisher, Viking, from further publication of the book after the initial hardcover edition. The defamation suit, brought by the former South Dakota Governor William Janklow, the Federal Bureau of Investigation (FBI), and FBI Special Agent, David Price, suppressed publication of the

¹ P. Matthiessen, *In the Spirit of Crazy Horse*, (New York: Viking, 1991). The defamation actions that suppressed publication of Matthiessen's book are documented in the book from which the description in this paper is taken.

book, including paperback and foreign editions, for eight years while the litigation was ongoing in three states.

William Janklow, a former state Attorney General who was subsequently twice elected Governor of South Dakota, asserted in his lawsuit that *In the Spirit of Crazy Horse* libeled him. He sued Viking and Matthiessen, named three South Dakota bookstores as co-defendants, and sought \$24 million dollars in damages. Intimidated booksellers removed *In the Spirit of Crazy Horse* from their shelves. Janklow claimed, amongst other things, that the book portrayed him as “a racist and a bigot” and “an antagonist of the environment.”

In his defamation action, FBI Special Agent David Price attacked the book’s description of events leading up to a gunfight between FBI agents and AIM members of the Pine Ridge Reservation in South Dakota on June 26, 1975. Price was one of the principal FBI agents at Pine Ridge. In the Pine Ridge shoot out, two FBI agents and an Aboriginal man were shot and killed. Leonard Peltier, a member of AIM, was later convicted of the murders of the FBI agents, convictions that have remained controversial and the subject of continuing claims that there was a miscarriage of justice.

Price alleged Matthiessen defamed him by stating that he and other FBI agents engaged in illegal conduct. Price claimed the book contained allegations that FBI agents induced witnesses to commit perjury and obstructed justice in the Peltier case. He disputed Matthiessen’s conclusions that Peltier was wrongfully convicted due to FBI misconduct and that the Bureau’s actions were part of a larger conspiracy to crush the American Indian Movement.

The *Price* case eventually reached the United States Court of Appeals for the Eighth Circuit² which applied *New York Times Company v. Sullivan*.³ Judge Gerald Heaney, writing for the three judge Court of Appeal Panel held that “the motivating factor in the Court’s analysis [in *Sullivan*] was protection for criticism of public officials and speech regarding issues of political concern.” The Court felt the debate on matters of public concern “should be uninhibited, robust and wide open [...]

² Price made two separate and unsuccessful applications to the United States Supreme Court to have the Eighth Circuit Court of Appeal decision reversed.

³ 376 US 254 (1964).

[though] it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”⁴

Sullivan held that defamation actions brought by public officials will not succeed unless it can be established that the publisher of the comments either knew that the defamatory material was false or acted with reckless indifference as to whether it was false or not. The “actual malice” standard of liability was developed to ensure compliance with the guarantee of free speech under the First Amendment of the American Constitution. *Sullivan* ensured the existence of a qualified privilege for comments made about the public aspects of the life of public officials, unless malice on the part of the publisher of the comments could be shown, defeating the privilege.

After the case concluded, in the long awaited re-publication of *In the Spirit of Crazy Horse*, Martin Garbus, observing that a decision in favour of Price and Janklow would have been “calamitous”, noted:

“I myself still find the *Sullivan* case most persuasive. It appropriately balances the scales between a free press and responsible reporting. Justice Hugh Black, in his opinion in that case, wrote, ‘I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials.’”⁵

The application of *Sullivan* to police officers was recently recognized by the Massachusetts Judicial Supreme Court in *Rotkiewicz v. Sadowsky* which ruled that police officers are “public officials” subject to the *Sullivan* principle requiring actual malice. The Court found that:

“Because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers’ high visibility with and impact on a community [...] police officers, even patrol-level police officers [...] are ‘public officials’ for the purposes of defamation.”⁶

The Court’s ruling in *Rotkiewicz v. Sadowsky* overturned a \$200,000 (US) defamation award against a bricklayer who had been sued by a state police officer after complaining about the officer’s conduct. The Court

⁴ Matthiessen, *supra* note 2 at 594-595.

⁵ *Ibid.*, at 596: “Afterword” by Martin Garbus.

⁶ *Rotkiewicz v. Sadowsky*, [2000] 431 Mass. 748 at 4 (QL).

held that to recover damages in a defamation action, a police officer must show that the impugned statements were made with knowledge that they were false or in reckless disregard of their probable falsity. In the Court's opinion:

“The abuse of a patrolman's office can have great potentiality for social harm; hence public discussion and public criticism directed toward the performance of that office cannot constitutionally be inhibited by prosecution under state libel laws.”⁷

The case demonstrates the importance of the *Sullivan* protections for citizens who criticize police.

II. THE CANADIAN FRAMEWORK—*HILL V. CHURCH OF SCIENTOLOGY*

It is useful to contrast these American examples with the Supreme Court of Canada's rejection of the “actual malice” standard of liability established in *Sullivan* in relation to criticism of public officials. Justice Cory writing for the Court in *Hill v. Church of Scientology*⁸ determined that an “actual malice” test is not required to make the common law of defamation consistent with the *Charter* value of freedom of expression. The Court held: “Therefore, in the context of civil litigation involving only *private parties*, the *Charter* will apply to the common law only to the extent that the common law is found to be inconsistent with *Charter* values.”⁹ The *Charter* “challenge” in a case between private litigants addresses “a conflict between principles”¹⁰ with

“[...] *Charter* values, framed in general terms, [being] weighed against the principles which underlie the common law. The *Charter* values will then provide the guidelines for any modification to the common law which the court feels is necessary.”¹¹

⁷ *Ibid.*, at 5.

⁸ [1995] 2 S.C.R. 1130.

⁹ *Ibid.*, at para. 95 (emphasis added).

¹⁰ *Ibid.*, at para. 97.

¹¹ *Ibid.*

While the Court acknowledged that the common law must operate in a manner consistent with *Charter* values, other values inherent in the common law of defamation, dignity of the person and the right to privacy, were placed on equal constitutional footing with freedom of expression. Justice Cory held that: “[A] good reputation is closely related to the innate worthiness and dignity of the individual. It is an attribute that must, just as much as freedom of expression, be protected by society’s law.”¹²

What exactly is reputation and how is it entitled to such an elevated status at the expense of expressions of criticism that should be seen as essential to a vibrant democracy? Notwithstanding Justice Cory’s description in *Hill* of reputation as “[...] the most distinguishing feature of [an individual’s] character, personality and, perhaps, identity”,¹³ perhaps reputation is merely: “[...] the public’s perception of who the Plaintiff is. It is a person’s character that represents and reflects the innate dignity of the individual.”¹⁴

Dignity is a concept that is fundamentally private, personal and individualistic. In *Hill*, the Court refers to the publication of defamatory comments as constituting “an invasion” of an individual’s personal dignity and “an affront” to the person’s dignity.¹⁵ The importation of this conceptual framework into civil actions involving state actors discharging public duties raises significant issues for those engaged in the struggle for equality in Canada.

III. PROTECTING EQUALITY-PROMOTING SPEECH

What *Hill v. Church of Scientology* did not give the Supreme Court of Canada the opportunity to consider is the relationship between the common law of defamation and the *Charter* value of equality. In *Hill*, after rejecting the *Sullivan* standard, the Court examined the question of whether the common law defence of qualified privilege should be expanded to comply with freedom of expression values. The Court concluded that the common law of defamation was not inconsistent with the *Charter* value of freedom of expression. However the case provided no

¹² *Ibid.*, at para. 107.

¹³ *Ibid.*, at para. 137.

¹⁴ R.E. Brown, “*Hill v. Church of Scientology of Toronto*” (1997) 8 (2d) Supreme Court L.R. 553 at 573.

¹⁵ *Hill v. Church of Scientology*, *supra* note 8 at para. 120.

basis for considering the issue of whether the defence of qualified privilege needs to reflect equality values.

An equality analysis of defamation law needs to extend beyond the focus on individual dignity and, as emphasized by Justice Cory in *Hill*, its centrality to all *Charter* rights:

“Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. It follows that the protection of the good reputation of an individual is of fundamental importance to our democratic society.”¹⁶

In delineating the relationship between equality and defamation law, it is essential to consider the social justice dimensions of equality-promotion:

“[...] dignity belongs more to the realm of individual rights than to group based historical disadvantage [...] too great a focus on equal individual rights yields a restrictive and impoverished view. The move from historic disadvantage to human dignity may dilute section 15. *Substantive equality rights ought to purchase more social justice than equal dignity.*”¹⁷ [emphasis added]

Equality values, which are enshrined in the *Charter*, should promote social justice, not merely individual dignity. Defamation however is ostensibly about dignity, but consistency with the equality values in the *Charter* requires the law of defamation to conform to equality’s pursuit and/or advancement of social justice.

IV. *CAMPBELL V. JONES*

Equality values and the law of defamation in the context of the defence of qualified privilege did arise in the case of *Campbell v. Jones*.¹⁸ *Campbell v. Jones* involved statements made by two lawyers (myself and my co-defendant, Rocky Jones) at a press conference about an unlawful

¹⁶ *Ibid.*, at para. 121.

¹⁷ S. Martin, “*Balancing Individual Rights to Equality and Social Goals*” (2001) 80 *Can. Bar Rev.* 299 at 328-330.

¹⁸ [2001] N.S.J. No. 373 (QL) rev’d [2002] N.S.J. No. 450 (QL).

search by a White police officer of three 12-year-old Black girls following a petty theft at an inner-city school. At the press conference, references were made about systemic racism and policing and the strip search of the girls at the school. Sued by the police officer for defamation, we pleaded a limited defence of justification relating to the allegations of a strip search, fair comment on a matter of public interest, and qualified privilege. The Plaintiff alleged malice. After a six weeks trial during which the Trial Judge concluded that the press conference was not an occasion of qualified privilege, the jury found in favour of the Plaintiff police officer and awarded her \$240,000 in damages, the largest libel award in favour of an individual Plaintiff in Nova Scotia's history. With costs and prejudgment interest, the award totaled \$345,000.¹⁹

On appeal²⁰, Roscoe, J.A. of the Nova Scotia Court of Appeal (Glube, C.J. concurring) found that the Trial Judge had erred in concluding that the press conference was not an occasion of qualified privilege, stating that while not all public statements made by lawyers constitute protected speech,

“[...] a lawyer faced with a patent injustice, such as the violation of her clients' Charter rights by law enforcement officers, has a substantial and compelling duty to ensure such injustice is remedied in an effective and timely manner. Such duty may well provide a basis for qualified privilege.”²¹

This case provides many illustrations of the problems associated with the melding of private interests and what should be the separate concern for the integrity of public institutions and the discharge by their officials of public duties.

The press conference engaged a public discussion about constitutionally enshrined *Charter* rights and values. For equality rights and freedom of expression to be effective forces for change, disadvantaged groups and

¹⁹ The Plaintiff pleaded malice against the Defendants however the Trial Judge determined there was insufficient evidence for that issue to be put to the jury and there was no appeal from that ruling. There was no award by the jury for aggravated or punitive damages although these were sought by the Plaintiff.

²⁰ *Campbell v. Jones*, *supra* note 1 (Roscoe, J. A. and Glube, C.J., concurring; Saunders, J. A., dissenting).

²¹ *Ibid.*, at para. 56.

their advocates must be able to criticize state conduct and to articulate the systemic and constitutional issues inherent in the facts of a case.

Our lawyers argued on appeal that the press conference was an occasion of qualified privilege because of the considerable public interest in the events involving the search of the girls and the importance of public scrutiny of police action, particularly when directed against systemically disadvantaged groups. This argument emphasized the benefit of public discussion in combating issues of systemic racism and the social or moral duty of lawyers to seek improvements in the administration of justice and to speak out against injustices, especially on behalf of disadvantaged groups who may not otherwise have the means to ensure that their interests are addressed in an effective manner.²²

The serious rights violations experienced by the girls—intrusive personal searches not incidental to lawful arrest, the ignoring of their personal dignity and privacy in the absence of exigent circumstances, the failure to advise them of their right to counsel and the failure to contact their parents and guardian—constituted, in the opinion of the majority of the Nova Scotia Court of Appeal, “a patent injustice triggering the duty of the lawyers pursuant to their codified professional responsibilities.” Roscoe, J.A. found:

“[...] lawyers, by virtue of their role as officers of the court with a specific duty to improve the administration of justice and uphold the law, have a special relationship with and responsibility to the public to speak out when those involved in enforcing our laws violate the fundamental rights of citizens.”²³

Roscoe, J.A. observed that the girls were members of a historically “doubly-disadvantaged group”, whose rights to equal protection of the law pursuant to section 15 of the *Charter* were being examined at the press conference. She concluded that the protections of qualified privilege should be extended to speakers who exercise their constitutionally protected right to freedom of expression on behalf of disadvantaged persons, in accordance with their duty to “[...] encourage public respect for justice and to uphold and try to improve the administration of justice”,

²² *Appeal Factum for Anne S. Derrick*, at para. 41.

²³ *Campbell v. Jones*, *supra* note 1 at para. 58.

provided that the speakers' comments are not motivated by malice and do not exceed the privilege.²⁴

Deciding that the Trial Judge should have considered the “myriad” of *Charter* rights and values at issue in the case, the Court of Appeal held:

“If constitutional rights are to have any meaning, they must surely include the freedom of persons whose *Charter* guarantees have been deliberately violated by state agencies, to cry out loud and long against their transgressors in the public forum, and in the case of children and others less capable of articulation of the issues, to have their advocates cry out on their behalf.”²⁵

V. EQUALITY-PROMOTING SPEECH—GRASPING THE NETTLE

In considering the risks presented by defamation law, it is imperative to address the context of social justice advocacy. Such work is often done in collaboration, by grassroots organizations and professional advocates working together. This joint effort is essential because social justice work is under-resourced and because coalitions ensure the cross-pollination of ideas and the integrity of the analysis of the issues. Advocacy work, if done by lawyers, may involve individual clients or may focus on the broader issues that a client's case reveals. In *Campbell v. Jones*, Rocky Jones utilized the resources at the legal aid clinic where he then worked, including senior law students to research and draft the *Police Act* complaints. Deciding it was unnecessary and undesirable to duplicate the work, in developing my clients' complaint, I also relied on and adopted the language in the complaint Jones prepared for his clients. These complaints were distributed at the press conference and I was subsequently sued for re-publishing what was referred to in the Statement of Claim as the “Jones letter.”

The defamation action recited what each of us said at the press conference that was alleged by the Plaintiff to be defamatory. We made separate statements at the press conference and in interviews immediately afterwards. Rocky was not sued for what I said nor was I sued for what Rocky said, but, we sat together at the press conference and were obviously working together. Could the Plaintiff have sued each of us for

²⁴ *Ibid.*, at para. 67.

²⁵ *Ibid.*, at para. 70.

the other's statements? The potential for expanding the liability of social justice cohorts represents a serious threat to the collaborative endeavours undertaken in equality-promoting work where the conduct and accountability of state institutions and institutional actors is in issue.

Social justice advocates may also face defamation actions without the protections afforded by professional liability insurance. Spokespersons for national organizations²⁶ could find themselves defending a defamation action brought against them personally with their organizations having to raise the money for their defence and, in the event they are found liable, for the damages awarded for the defamation.

The fact that Rocky and I have professional liability insurance through the Nova Scotia Barristers' Liability Fund²⁷ has meant that the crucial issues in the case have been advanced in a skilled and comprehensive way by outstanding counsel²⁸. A specialized insurer understood that this case was critical to the independence of the Bar and recognized the importance of lawyers' obligations to advocate on behalf of the historically disadvantaged. A commercial insurer may have not have adopted a similarly principled approach to the litigation.

The *Police Act* complaints brought on behalf of the three girls were resolved in May 1997, two years after the incident at the school. At the internal police investigation stage, the police officer was disciplined for failing to afford the girls their right to counsel and for her handling of evidence—the stolen \$10. Dissatisfied with the results at the first stage of the complaints process, the clients sought a hearing by the Police Review Board. Just before that hearing was to proceed, Rocky and I worked out an informal resolution with the lawyer representing the police officer and Police Department. By agreement it did not deal with the contested allegations by the girls against the officer that were the subject of the defamation action and a separate constitutional action by the girls, their

²⁶ Walter Thompson, Q.C., a local director of the Canadian Civil Liberties Association was interviewed by the media about the incident at the school very soon after it happened and before the press conference. He was quoted in the March 11, 1995 edition of the Chronicle Herald as saying: "It seems to me that (she was) way out of line, especially a strip search and especially with children." He was however never sued for his remarks.

²⁷ I am very grateful to the Liability Fund for its support of the case, through trial and appeal and in the Supreme Court of Canada.

²⁸ I have been represented by S. Bruce Outhouse, Q.C. and Lester Jesudason. Rocky's lawyers are W.L. (Mick) Ryan, Q.C. and Nancy Rubin.

mothers and guardian against the police officer, the Police Department, the School Board and school officials. That action was settled between the parties in February 2002 on undisclosed terms.²⁹

The conventional legal process involving the *Police Act* complaints took two years to complete and at its end there was still no resolution of the girls' allegations about the unlawful search at the school. Roscoe, J.A., addressing qualified privilege and the issue of the timing of the press conference, recognized that:

“A right to criticize the conduct of public officials in the exercise of their authority, must be exercised in a timely manner, if it is to be effective. The trial judge found, however, that the public interest in the police conduct had not been sufficiently engaged at the time of the press conference. That finding is inconsistent with the admission by the respondent during the trial that there was sufficient public interest in the matter for the purposes of the defence of fair comment. As [the trial judge] accepted, public discussion is an effective tool in combating systemic racism. I would add that discussion close to the time of the relevant events would reasonably be expected to be more effective than discussion months after the fact.”³⁰

The experience of being successfully sued at trial for defamation has left its mark on me. Even with a strong and reassuring Court of Appeal decision, it is necessary to ponder new issues in the challenge to effectively pursue equality on behalf of historically disadvantaged clients. Equality-promoting speech carries fresh hazards, not just the familiar ones occasioned by confronting powerful opponents. Notwithstanding the risks, the advancement of equality requires the naming of injustice and the articulation of its dimensions and mechanisms.

VI. POLICE USE OF DEFAMATION

In *Perspectives on the Tort of Defamation: The Police Use of Libel*,³¹ Sue Lott, a graduate of the Ottawa Law School, refers to three recent

²⁹ Rocky and I were not involved in the civil case.

³⁰ *Campbell v. Jones*, *supra* note 1 at para. 62.

³¹ S. Lott, *Perspectives on the Tort of Defamation: The Police Use of Libel* (Ottawa Law School, 1999) [unpublished]. Unpublished student paper written in 1999 for a course in *Advanced Torts* at the Ottawa Law School.

Ontario cases in which police officers succeeded in defamation actions: *Collins v. Hull (ville)*; *Treitz v. Suvila*; *Kenora (Town) Police Service v. Savino*.³² Two of these cases were brought against visible minorities or their lawyers and in all three cases the Defendants had criticized the police for their conduct.

In *Collins*, a young Black woman made a claim against the Hull police for false imprisonment after she was detained overnight at the police station. She also accused the police of making racist remarks and of mistreatment. The City of Hull counterclaimed for defamation and the two police officers involved were each awarded \$7,500 in damages. The alleged defamation involved Collins making statements to the media about racist treatment and having circulated a pamphlet within a local neighbourhood inviting residents to a community meeting to support Collins, who was described as a “victim of needless excess force by the members of the City Hull police force.”

Suvila was successfully sued for defamation and assessed \$25,000 in general damages and \$10,000 in aggravated damages after telling several friends that a police officer, in the course of arresting him, had put a gun to his head and threatened to shoot him, that his rights were never read to him and that he was assaulted by the police officer while handcuffed in the police station.

The Plaintiff brought his action against Suvila for statements made by Suvila in the official complaint he made under the *Police Services Act*³³ statements regarded as privileged. The trial judge permitted an amendment to the Plaintiff’s Statement of Claim to allow the action based on comments Suvila had made during discovery, as Ms. Lott notes, in spite of the fact that case law has argued that statements made in discovery examinations are absolutely privileged. Suvila also asserted that he had not disclosed the police officer’s name to his friends because he had not known it at the time and that he had merely described the incident.

In the *Kenora* case, Kenora Police Services Board and Chief of Police sought to have a class action for defamation certified against the lawyer for the family of an Aboriginal man who had died while in police custody. The lawyer had brought an action for wrongful death. The police claimed

³² *Collins c. Hull (Ville)*, [1995] A.Q. No. 62 (QL); *Treitz v. Suvila*, [1996] O.J. No. 4579 (QL); *Kenora (Town) Police Service v. Savino*, [1995] O.J. No. 486 (QL).

³³ R.S.O. 1990, c. P.15.

the lawyer had made statements to the media accusing the Kenora police of racist practices toward Aboriginal persons. The judge found the statements attributed to the lawyer were, on their face, capable in law of being defamatory of the Police Services Board and the individual Plaintiff. However, the class action failed because the Plaintiff's could not prove that the alleged defamatory words referred to any specific individuals who could be identified as being part of a class, which is required for defamation of a group.

Ms. Lott also notes in her paper a defamation action (*Senecal et al. v. Kirkland*) brought by three police officers in Ottawa against Ralph Kirkland, a past President of the National Council of Jamaicans and Supportive Organizations. Kirkland alleged racism and police brutality in his mistaken arrest. He had been stopped by police in an upscale Toronto neighbourhood after a computer check indicated his license plates did not match the vehicle he was driving. Before the discrepancy was found to be a clerical error, Kirkland “ended up face down on the ground in handcuffs and detained in jail for several hours.” He sustained injuries to his face, neck and rib cage. A private assault charge laid by Kirkland against the arresting officers was withdrawn by the Crown on the basis that there was no reasonable prospect of conviction. It was following the withdrawal of the charges that the defamation action was commenced, because, the officers indicated, Kirkland had not responded to a request for an apology. The three officers sought general damages totaling \$750,000 as well as special, aggravated and punitive damages.³⁴ Kirkland filed a Statement of Defence and Counterclaim. The case was ultimately settled through mediation between the parties. The African Canadian Legal Clinic, who represented Kirkland, described the defamation action as “[...] a clear attempt to silence members of the African Canadian community who have the courage to stand up to an abuse of state power.”³⁵

A further example of the police appetite to use defamation law to silence public discourse about police practices is the *Metropolitan Toronto Police v. Toronto Star* class action in which the Star is being sued for two billion dollars in damages for a series of articles on racial profiling by Toronto Police. The damages claimed represent a calculation of \$375,000 for every Toronto police officer. The case is at a preliminary stage and is

³⁴ *Senecal et al. v. Kirkland*, (September 12, 1995), 94195/95.

³⁵ *African Canadian Legal Clinic Annual Report 1999*, online: http://www.aclc.net/annual_reports/99-2.html.

no doubt being carefully watched by media and advocates throughout the country. Whether the Plaintiffs ever succeed is beside the point³⁶: the chilling effect of the case will already be felt by smaller media entities, those who do not have the resources to adequately defend themselves against a libel action. It is ironic to note that the case emerges at a time when the judiciary are making connections more frequently between systemic racism and criminal justice³⁷ and have acknowledged that racial profiling occurs.³⁸

VII. PUBLIC DUTIES—PRIVATE RIGHTS

The use of defamation law, which was originally intended to vindicate private rights, by state institutions and their agents, has critical implications for democratic processes and speech. The effect of such defamation actions is to blunt, deflect or suppress future scrutiny of these institutions and their practices. Sue Lott makes the important point about the “artificial separation of the public and the private” in the use of defamation suits by the police:

“The tort of defamation allows the police and other institutional actors to bring actions as private individuals against citizens who criticize them in their public duties and official capacities, thus masking the political nature of the interaction and, even if unsuccessful, legally extinguishing any further public comment about the event in question.”³⁹

This public role/private rights dichotomy is illustrated in reasons from a pre-trial decision in *Campbell v. Jones* dealing with certain questions posed at discovery that the Plaintiff objected to answering:

“Counsel for Jones, in her submissions, says that as a matter of public concern and interest is how police deal with visible minorities and disadvantaged groups. With such a statement, there can obviously be no disagreement. However, this is a lawsuit

³⁶ E. Di Matteo, “Shooting Blanks: *Legal Eagles Say Cop Union’s Lawsuit Against The Star Sure To Bomb*” (2002) 22 NOW Online Edition, online: http://www.now.toronto.com/issues/2002-11-14/news_feature.php.

³⁷ *R. v. Borde*, (2003) 8 C.R. (6th) 203 (Ont. C.A.); *R. v. Hamilton*, (2003) O.J. No. 532 (QL).

³⁸ *R. v. Brown*, [2003] O.J. No. 1251 (QL).

³⁹ Lott, *supra* note 31 at 29.

commenced by the plaintiff alleging defamation by the defendants with respect to certain comments made by them in respect to her. This is not a lawsuit by the Halifax Regional Police Department, nor are they a party to this proceeding. The scope of examination of the plaintiff is in respect of her lawsuit and her allegations of defamation as against the defendants and is not, in respect to the general question of how ‘[...] police respond to situations involving minorities and disadvantaged groups.’”⁴⁰

In the same decision, dealing with questions concerning whether the Plaintiff, or the police union, is funding the litigation:

“As noted, the plaintiff is personally bringing this action and the allegation is that the publications defamed her personally. Whether she is paying her counsel, her counsel is acting on a contingency, counsel is being paid by others are matters between her and her counsel and again, on the same basis as outlined in respect of question 7, there is nothing presented to this court to necessitate the plaintiff responding to such a question.”⁴¹

These rulings, and the determination at trial that expert evidence called by the defendants could not address systemic racism in policing⁴², bring into focus the strictures on defending a defamation action brought by a public official. Of further interest on this point is the fact that in the *Campbell v. Jones* case the original *Police Act* complaints brought by the girls and their mothers/guardian were against the police officer and the Halifax Regional Police Department.

Despite the discharge by police of public duties at public expense, defamation actions by police have been described as “quintessentially personal [...] indistinguishable from the private squabbles that [the courts] have consistently refused to attribute to the state.”⁴³

In the context of equality-promoting speech that critiques the practices and conduct of state actors such as the police, defamation law permits the privatization of both the offending acts of the state agent and the acts of

⁴⁰ *Campbell v. Jones*, [1998] N.S.J. No. 167 (QL) at para. 18 (per MacAdam, J.).

⁴¹ *Ibid.*, at para. 24 (per MacAdam, J.).

⁴² *Appeal Factum for Anne S. Derrick*, at para. 166-194.

⁴³ *Gritchen v. Collier*, 254 F.3d 807 (9th Cir. 2001) at 6 (QL).

public dissent by the defendant. In this way it is a highly effective weapon against individuals who would assist the public in scrutinizing those who discharge public duties.

VIII. PRACTICING DEMOCRACY AND CRITICAL SPEECH

Defamation law can be employed to subjugate lawyers' speech and advocacy on behalf of individual clients and in relation to the broader interests they represent. The independence of the Bar and the crucial constitutional role lawyers discharge in a democracy are both jeopardized. The protections afforded solicitor-client privilege and the right to counsel as a gateway right are just two examples of the vital role lawyers have in the administration of justice. However, it is not only lawyers' ability to talk back that is at risk. Across the country, there are equality-seeking organizations and individuals that are vulnerable to attack for their advocacy on behalf of historically disadvantaged people. The silencing of any of these critical voices will impair our democracy.

These are relatively peaceful, stable times in Canada although there are some external threats to our security, as there are against other western countries. We have seen a ratcheting-up of state power and authority which demands a counter-balancing amplification of the role of lawyers as advocates and protectors of civil and constitutional rights and practices. The obligations of critical speech by lawyers and community activists in this context is even more imperative.

At a time when democratic freedoms are under siege and the equality entitlements of historically disadvantaged persons remain largely unrealized, the objectives of equality and the guarantees of the *Charter* require more speech not less, with robust protections for speech that challenges and criticizes state authority and the conduct of its agents. The law must not favour those seeking to suppress dissent: it must protect and empower the voices that speak out for justice and equality.