SCC Court File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

CYNTHIA KAREN MACKINNON

APPLICANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

APPLICATION FOR LEAVE TO APPEAL
(CYNTHIA KAREN MACKINNON, APPLICANT)
(Pursuant to Section 40 of the *Supreme Court Act)*

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PART I – POSITION WITH RESPECT TO ISSUES OF PUBLIC IMPORTANCE AND STATEMENT OF FACTS

Position on Issues of Public Importance

1. Cynthia Karen MacKinnon applies for leave to appeal the decision of the Court of Appeal of Alberta chambers judge reported as *R. v MacKinnon*, 2017 ABCA 93, which denied leave to appeal the decision of the Court of Queen's Bench (Drumheller Action No.: 140617671S1) dismissing Ms. MacKinnon's appeal of *R. v MacKinnon*, 2015 ABPC 268.

2. Her positions on the issues of public importance are first that section 301 of the *Criminal Code* violates sections 2(b) and 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") in a manner that cannot be justified under section 1 of the *Charter*.

3. She also takes the position that Canadians should be able to retroactively challenge consent orders of the court accepted by an accused to escape prosecution under criminal or penal provisions already declared unconstitutional by a superior court of that jurisdiction. Such orders should be held to be void *ab initio* and "transparently invalid". Such an exception to the rule against collateral attack would provide a much-needed protection against rogue prosecutions. It would also give Parliament a much-needed incentive to remove unconstitutional criminal provisions from the *Criminal Code*. The absence of such a rule will invite prosecutions under unconstitutional *Criminal Code* provisions, and lead to constitutional havoc long after the provisions have been declared unconstitutional.

Statement of Facts

4. The facts are more fully set out in the Affidavit of Cynthia Karen MacKinnon, sworn May 18, 2017. This Statement of Facts will only summarize them briefly.

5. Ms. MacKinnon is a former municipal council member in Drumheller, Alberta, where she has lived most of her life and continues to reside. She served as councillor from October 2004 to September 2007 and served as acting Mayor for four months between October 2006 and January 2007.

6. Her decision to enter municipal politics was spurred by a local business executive who expressed to her a belief that she would be less inclined to "go-along-to-get-along" and, that she was "holden-to-no-one." There was a general concern amongst the citizens that the long-time Chief Administrative Officer ("CAO"), Mr. Ray Romanetz, was entirely too "powerful" and secretive and that council after council didn't appear willing or able to hold him accountable. During her time on city council, a petition was started by residents of Drumheller for more accountability and transparency from city council. It received 995 signatures.

7. Ms. Mackinnon took her responsibilities very seriously, paying close attention to the direction of the *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*") that municipal councils are to be responsible for "developing and evaluating the policies and programs of the municipality," for "making sure that the powers, duties and functions of the municipality are appropriately carried out," and for "carrying out the powers, duties and functions expressly given to it under this or any other enactment."

8. In 2007, after faithfully doing her duty as a councillor for three years, including her challenge to a series of questionable and suspicious acts, she was expelled from the city council at the instigation of Mr. Romanetz, with the help of a lawyer who worked for the City, Mr. Colin Kloot.

9. The circumstances of her expulsion were highly suspect. It came only days after she had submitted a negative performance review regarding Mr. Romanetz. Mr. Kloot relied on section 174(1)(d) of the *MGA,* which provides for disqualification if "the councillor is absent from all regular council meetings held during any period of 8 consecutive weeks, starting with the date that the first meeting is missed." She in fact would not have missed the last meeting if the regularly scheduled meeting on September 4, 2007 had not been postponed because of the mayor's vacation. Furthermore, she had reported the reason for her absence from the meeting in July and August to the council and explained the July absence was because of her son's motorcycle accident, and the August was because of a long-planned family vacation.

10. When she refused to resign, Mr. Colin Kloot wrote to the council that she must be excluded regardless of her refusal to resign, which was clearly false, since section 175 of the

MGA, provides that if a council member refuses to resign a court application must be made by city council to force her to resign.

11. This expulsion was, by any view of it, a heavy handed and arbitrary maneuver for improper purposes, especially given the fact that although Ms. MacKinnon had missed a few regular meetings for good reasons, she had throughout the summer attended the Municipal Planning Commission meetings, attended at municipal special events, and completed other municipal functions. In the end, the timing of this declaration of disqualification, just a few weeks before the municipal elections, damaged her reputation and likely kept her from getting re-elected.

12. Given what she had witnessed while on the council, Ms. MacKinnon became an increasingly vocal and public critic of Mr. Romanetz and Mr. Kloot, as well as the city council in general. She was charged on March 25, 2011 after posting on a Facebook discussion page that Mr. Romanetz and Mr. Kloot were “repulsive, corrupted, lying, thieving, deviant bastards both.”

13. Ms. MacKinnon was not only charged, but put in jail and not released until 3:30 am on an undertaking to (1) have no contact directly or indirectly with Ray Romanetz or Colin Kloot, or (2) not make any postings on any social media site.

14. On October 29, 2012, being out of money and sick with stress to the point where she couldn’t take it anymore, she entered into a two year common law peace bond with various conditions including two years regularly reporting to a probation officer and that any future comments by her anywhere on the Internet about the complainants "shall be civil and temperate."

15. On June 4, 2014, she was charged again under s. 301 and, in addition, also charged under s. 127(1) of the criminal code for disobeying an order of the court, being the "civil and temperate" language requirement of the peace bond. New conditions for her release included that she "shall not use Facebook".

16. On April 14, 2015 she was charged again with breach of a condition. This time it was under s. 145(3) of the criminal code for breaching the new condition: "Shall not use Facebook." On this occasion, she had simply posted a critical comment about council in general and not named or alluded to any specific individual.

17. Ms. MacKinnon was tried by summary trial on October 29, 2015 before a Provincial Court judge for breaching her peace bond under section 127(1) of the *Criminal Code*. She was found guilty and ordered to pay a fine of $3900 by May 15, 2017, failing which she would be imprisoned for 43 days. The Court refused to consider any argument regarding the validity of the underlying peace bond or the constitutionality of section 301 of the *Criminal Code*. The Court of Queen's Bench dismissed her appeal and the Court of Appeal denied her leave to appeal.

PART II - QUESTION IN ISSUE

18. The issues on this application for leave to appeal are as follows:

(a) Whether leave to appeal ought to be granted to determine whether Canadian law should recognize an exception to the rule against collateral attack in situations similar to those before the Court in this matter.

(b) Whether leave to appeal ought to be granted to determine the constitutionality of section 301 of the *Charter*; and

PART III – ARGUMENT

Collateral Attack

19. In denying leave to appeal, the Court of Appeal of Alberta ignored the constitutional question altogether and instead disposed of the matter on the basis of the rule against collateral attack. Relying on *R. v Domm*[1] and *R. v Curragh Inc.*[2], it found that Ms. MacKinnon was bound to comply with the peace bond until she successfully challenged it and that she was not entitled to challenge it at her trial for breaching it.[3]

20. The Court of Appeal decision failed to account for the difference in the case of Ms. MacKinnon. The underpinning for the conviction of Ms. MacKinnon was a law found to be unconstitutional by a superior court long before she was ever charged with an offence.

[1] *R. v Domm*, (1996), 31 OR (3d) 540 (CA) (WL) [*Domm*].
[2] *R. v Curragh Inc*., [1997] 1 SCR 537, 144 DLR (4th) 614 [*Curragh Inc.*]
[3] *R. v MacKinnon*, 2017 ABCA 93 at paras 10-11.

21. Both cases the Court of Appeal relied upon involved the determination of rights by the courts. In those cases, the accused flagrantly disobeyed established laws, based solely on their own perception of what the law should be.

22. In exercising her *Charter* right to free speech, Ms. MacKinnon did not follow her own view of what the law should be, but rather acted consistent with the judicial decision in *R. v Finnegan*,[4] which and which had determined section 301 of the *Criminal Code* to be unconstitutional in Alberta. This was the law in Alberta at the time Ms. MacKinnon was originally charged and it remains the law today.

23. It was not Ms. MacKinnon, but the Crown who had substituted a misperception of the law by charging her under Section 301. This was a violation of the principle of *stare decisis*. It is the unconstitutional basis for the peace bond that undermines the rule of law, not Ms. MacKinnon's alleged breach of the bond (We note in passing that it constitutionally scandalous for the Crown to withhold from Ms. MacKinnon the knowledge that section 301 had been declared unconstitutional in Alberta and in multiple other Canadian jurisdictions. This entire case was a miscarriage of justice, and the Crown was the midwife.).

24. In order to appreciate why an exception to the rule against collateral attack (similar to the "transparently invalid" rule in the United States) ought to be applied by in this case, just consider how the absence of such an exception would work to undermine the rule of law and bring the administration of justice into disrepute.

25. Since the advent of the *Charter*, section 301 of the *Criminal Code* has invariably been found to be unconstitutional. Nevertheless, it continues to be used by prosecutors to punish criticism of public officials, including those administering justice.

26. In *R. v Gill*[5], Bradley Waugh and Ravin Gill, were charged under section 301 for putting up fake "wanted" posters of Kingston Penitentiary guards after a man was killed in custody. In *R. v Lucas* [6], John and Johanna Lucas were accused of defaming a Saskatchewan police officer. In

[4] *R. v Finnegan*, [1992] AJ No 1208 (Alta QB) [*Finnegan*].
[5] (1996), 29 OR (3d) 250 (Ont Gen Div) [*Gill*].
[6] (1995), 129 Sask R 53 (Sask QB) (aff'd [1998] 1 SCR 439 [*Lucas*]

R. v Prior[7], it was a Newfoundland police officer. In each of these cases, the courts held that section 301 is an unconstitutional restriction on speech.

27. Other cases involving section 301 have not proceeded to trial. In 2006 David Charney, a law student at Osgood Hall was charged with defamatory libel for distributing a poster that accused a police officer of brutality. In 2002, Stephen Charles Osborne was charged with defaming a New Brunswick judge. In 2011, Dan Keller was charged with defaming an undercover Ontario police officer. On January 19, 2012, blogger and activist Charles Leblanc was arrested in Fredericton, New Brunswick, for defaming a police officer and had his computer equipment seized in the process. On August 9, 2012, Randolph Steepe was arrested for defamatory libel after spreading unflatering information about several lawyers, members of the police, and justice officials in Guelph, Ontario.[8]

28. These cases may lead one to conclude that section 301 offers protection for public officials that is not available to average citizens, who must bring civil suits to defend their reputations. This should be deeply troubling to anyone who cares about the equal application of rule of law and the public's regard for the administration of justice.

29. Litigation to silence public participation has been recognized by law makers as a problem in Canada. Defamation lawsuits have been abused to the point where various jurisdictions are now considering what is referred to as "anti-SLAPP"[9] legislation. Such legislation already exists in British Columbia,[10] as well as in Quebec.[11] On October 28, 2010 the Attorney General of Ontario published the "Anti-Slapp Advisory Panel Report to the Attorney General" ("Anti-Slapp Report")[12] which recommended such legislation for Ontario.[13]

7 (2008), 231 CCC (3d) 12 (NL TD) [*Prior*].
8 See Affidavit of Cynthia MacKinnon, sworn May 18, 2017, at para 54.[Tab 4]
9 SLAPP is an acronym for Strategic Litigation Against Public Participation.[Tab 5]
10 *Protection of Public Participation Act*, SBC 2001, c 19;
11 *Code of Civil Procedure*, CQLR c C-25.01, ss 51-56.
12 Ontario, Anti-Slapp Advisory Panel, "Anti-Slapp Advisory Panel Report to the Attorney General" (October 28, 2010) [Anti-Slapp Report].[Tab 5]
13 *Ibid*, at para 10.

30. SLAPP litigation is defined as "a lawsuit initiated against one or more individuals or groups that speak out or take a position on an issue of public interest."[14] As the Anti-Slapp Report explains, anti-SLAPP legislation has broad support in Canada.

> The Panel was referred to the 2008 report of the Environmental Commissioner of Ontario, which stressed the need for legislation to end strategic litigation against public participation. One submission in favour of anti-SLAPP legislation was signed by some 46 organizations and individuals involved in a wide variety of community matters and referred to resolutions in favour of such legislation by some sixty-four Ontario municipalities.[15]

31. The history of SLAPP litigation suggests that freedom of expression is a right that can be effectively suppressed simply through the threat of civil litigation; how much more so from the threat of criminal prosecution! Civil litigation used for the purpose of discouraging public participation is broadly seen as a problem in Canada and has been condemned by law makers. Unconstitutional criminal procedures available to the Crown for the same purpose should be equally condemned by this Court.

32. The use of section 301 by the Crown in what are essentially criminal SLAPP proceedings, backed by the threat of prison and a criminal record, is a pressing and on-going problem in need of this Court's attention. Despite the fact that multiple jurisdictions have declared section 301 to be unconstitutional, history has demonstrated that it is unlikely Parliament will remove this provision from the *Criminal Code* until this Court finally declares section 301 unconstitutional. Until then, there is a real possibility that orders unwittingly entered into and made pursuant to this provision will continue to be used to violate freedom of expression and limit public comment on matters of public interest.

33. There are sound legal policy reasons for allowing the narrow exception to the general rule against collateral attacks being sought in this appeal. In *Domm*, Doherty J.A. surveyed the

[14] *Ibid*, at p 4.
[15] *Ibid*, at para 7.

decisions of this Court in *Litchfield*[16] and *Dagenais*[17] and summarized the applicable law as follows:

> 30 The rule against collateral attack on court orders will bar the appellant's attempt to challenge the validity of Justice Kovacs' order unless he can show **either that the interests underlying the rule are not served by adherence to it in these circumstances, or that the remedial component of the rule of law demands an exception to the rule against collateral attack**.
>
> 31 **The rule against collateral attack on court orders serves to reinforce the compliance component of the rule of law and enhance the repute of the administration of justice by providing for the orderly and functional administration of justice**: *R. v. Litchfield*, supra, at pp. 349-50 S.C.R., pp. 110-11 C.C.C. If a collateral attack on an order can be taken without harm to those interests, then the rule should be relaxed. Review by a trial judge of orders made on pre-trial motions provides an example of a situation in which those interests are not harmed by collateral attack: Litchfield, supra, at 350 S.C.R., p. 111 C.C.C.; *Dagenais*, supra, at 870 S.C.R., pp. 311-12 C.C.C.
>
> …
>
> 34 The second rationale for exceptions to the rule against collateral attack is concisely put by Iacobucci J. in *Litchfield* at 349 S.C.R., p. 110 C.C.C., where he observes **that the rule against collateral attack was not intended to immunize court orders from review.** I take this to be a recognition that as important as the compliance component of the rule of law is, it must accommodate the equally important right of individuals to challenge orders which adversely affect their interests. The availability of an effective remedy to right a constitutional wrong has been a dominant theme of our *Charter* case-law. The requirement that there must always exist a court of competent jurisdiction for s. 24(1) purposes and the willingness to modify traditional common law remedies such as habeas corpus to ensure relief against constitutional violations sound that theme: *Kourtessis, supra*; *Rahey v. R.*, [1987] 1 S.C.R. 588, 33 C.C.C. (3d) 289, per Lamer J. at pp. 603-04 S.C.R., pp. 298-99 C.C.C., per La Forest J. at 630 S.C.R., p. 319 C.C.C.; R. v. Gamble, 1988 CanLII 15 (SCC),

[16] *R. v Litchfield*, [1993] 4 SCR 333 (WL) [*Litchfield*].
[17] *Dagenais v Canadian Broadcasting Corp.*, [1994] 3 SCR 835 [*Dagenais*].

> [1988] 2 S.C.R. 595 at pp. 640-46, 45 C.C.C. (3d) 204 at pp. 237-41.
>
> 35 **The remedial component of the rule of law demands that the collateral attack bar not stand in the way of an accused who cannot effectively challenge an imputed court order except after violating it**. *R. v. Fields* can be seen as an example of a situation in which deviation from the rule was necessary. Fields could not comply with the trial judge's order, answer the question, and then challenge the order. His right to refuse to answer irrelevant questions would have been irretrievably lost when he answered the question. Furthermore, Fields had no effective means to challenge the order of the trial judge prior to his breach. [emphasis added]

34. Thus, the rule against collateral attack on court orders serves to reinforce the compliance component of the rule of law and enhance the repute of the administration of justice by providing for the orderly and functional administration of justice.

35. Generally, the courts have frowned upon a "breach now, attack later" approach to challenging potentially invalid court orders.[18] The rationale behind this aversion is that such an approach "effectively subjugates the rule of law to the uncertainty associated with third parties interpreting and applying it in diverse ways."[19]

36. In *Litchfield*, Iacobucci J., discussed the rationale for the rule in the following terms:

> 22 In my opinion, however, this is not the case for a strict application of the rule against collateral attack which **was not intended to immunize court orders from review**. The rationale behind the rule is powerful: the rule seeks to maintain the rule of law and to preserve the repute of the administration of justice. **To allow parties to govern their affairs according to their perception of matters such as the jurisdiction of the court issuing the order would result in uncertainty** [emphasis added].

37. A similar rationale was explained by McLachlin J. (as she then was) in *Canada v Taylor*: "If people are free to ignore court orders because they believe that their foundation is

[18] *R. v Canadian Broadcasting Corp.*, 2004 SKQB 320, [2005] 3 WWR 77, at para 32.
[19] *Ibid*.

unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them." [20]:

38. But, in the passage by Iacobucci, J., writing for the majority in *Litchfield*, quoted above, it is clear that if a collateral attack (1) can be taken without harm to the repute of the administration of justice, and (2) is necessary for an individual to challenge an order adversely affecting her interests, then a collateral attack should be permitted.

39. These exceptions apply perforce if a collateral attack is the only way to remedy a miscarriage of justice and prevent an ongoing constitutional violation that itself undermines the repute of the administration of justice, which is the case here.

40. The rationale against the "anarchy" of individuals claiming for themselves the power to determine the law simply does not apply in cases of "transparently invalid" orders in the criminal context where (1) the order is a consent order and not a judicial determination, and (2) at the time the consent order was entered into, and unbeknownst to the defendant, the provision underlying the criminal prosecution had already been declared unconstitutional in that jurisdiction.

41. It is hard to argue in such cases that the accused is being permitted to govern their affairs according to their own perception of matters in contradiction of what the courts have determined. If there is a potential for "anarchy" in this case, it is the potential for the ongoing "anarchy" of prosecutors enforcing unconstitutional provisions of the *Criminal Code*. On the other hand, this exception is sufficiently narrow and rare that it can be recognized in cases such as this without any risk of undermining the broader administration of justice.

42. The exception described here is rare, narrow, and easily delineated. The impugned peace bond was entered into because the Crown (and, as a result of the Crown's failings, the Court) did not follow the law of the jurisdiction. To uphold such peace bonds encourages further inadvertent prosecutorial non-compliance with the law or even future deliberate misconduct. To allow collateral challenges to laws that have already been declared unconstitutional poses no risk to the repute of the administration of law and would, in fact, serve to reinforce it.

[20] *Canada v Taylor*, [1990] 3 SCR 892 at para 184 (WL) [Taylor].

43. Such a policy would resemble the exception to the rule against collateral attack in the United States, which exists for "transparently invalid" court orders.[21] If the rule of law can continue to hold in the United States alongside such an exception, there is no reason it cannot also hold in Canada.

44. To summarize, the principle that the rule of law requires court orders ought to be obeyed would not suffer because the exception would only be allowed where there is:

(a) a consent order,

(b) a criminal proceeding brought under a criminal law provision already declared unconstitutional by a superior court (or higher) of that jurisdiction.

45. Freedom of expression is a fragile right. It can be effectively denied by the mere threat of legal action. For most individuals, giving up some expression may in the moment seem less costly than the price of a legal action. Individuals may see little benefit to be gained from fighting, at substantial personal and financial cost, a legal battle for the right to post political views on Facebook. However, without robust judicial protection of this right, we live in something less than a free society.

46. Though some expression entails an economic or political benefit to the individual, large swaths of expression have no measurable economic or political benefit and are, therefore, in danger of receiving no real protection from abusive prosecution. Therefore, the Court must be vigilant to protect Canadians from unlawful prosecution. An exception to the rule against collateral attack which permits individuals to collaterally attack consent orders restricting free speech rights that are "transparently invalid" would add a warranted layer of protection.

47. It is respectfully submitted that this Court should grant leave to appeal in order to protect the *Charter* right to free speech and to end unlawful and abusive prosecutions under *Criminal Code* provisions that have been declared unconstitutional.

[21] *Walker v City of Birmingham*, 388 US 307 (1967); referred to by McLachlin J (as she then was) *Taylor, supra* note 20, at para 181 (WL) [*Taylor*].

Constitutionality of Section 301 of the Criminal Code

48. This Court will grant leave to appeal to determine whether a statutory provision is constitutional in cases where the appellant's rights are directly affected by such a determination. This Court granted leave in *Lucas* to determine the constitutional validity of section 300 of the *Criminal Code*, but was not asked to determine the constitutionality of section 301 and left that question for another day.

49. The situation here is very similar to the facts in *Taylor*. In that case the appellant, Mr. Taylor, had repeatedly infringed a court order that had been entered into pursuant to a decision of the Canadian Human Rights Commission. It was only at the second contempt hearing that Mr. Taylor for the first time raised a *Charter* issue in regards to section 13(1) of the *Canadian Human Rights* Act, SC 1976-1977, c 33. Both the Trial Division and the Federal Court of Appeal answered the constitutional question, notwithstanding the fact that the narrow issue before it was whether Mr. Taylor was in violation of the previous court order. This Court should likewise grant leave to appeal and determine the constitutionality of section 301 – the heart of this case.

50. That day has now come and, respectfully, the time is ripe to determine once and for all the constitutionality of section 301. Without the certainty that can only be provided by this Court, Canadians will face a patchwork of law, subject to criminal prosecution for defamatory libel, depending on where they choose to speak.

51. The freedom to express oneself openly and fully is of crucial importance in a free and democratic society.[22] In *Lucas*, this Court wrote:

> [24] Decisions of this Court have stressed the vital and fundamental importance of freedom of expression in our democratic society. Indeed, in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, at 1336, it was noted that "a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions". This right must be accorded vigilant protection in

[22] *R. v Keegstra*, [1990] 3 SCR 697 at 726 and 802-808 [*Keegstra*].

> order to ensure that it is only restricted in clearly appropriate circumstances.

52. In *RWDSU v Dolphin Delivery Ltd.*[23] McIntyre J., recognized the deep roots of free expression in our society and its key role in our democratic development:

> 19 … Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

53. It is, therefore, a cause for concern that 35 years after the coming into force of the *Charter,* a criminal law provision is being used to suppress freedom of expression, despite numerous lower court determinations that it is unconstitutional. Without a decision of this Court on the matter, prosecutions under section 301 are likely to persist and to continue to bring the administration of justice into disrepute.

54. This case represents an important opportunity for this Court to finally address the constitutionality of section 301. Crown prosecutors have so far declined to appeal decisions of lower courts that have struck down section 301 as unconstitutional. As this case illustrates, prosecutors continue benefit from the uncertainty they have created. They continue to bring or threaten charges under section 301.

55. There is a pressing need for a more authoritative voice than the superior courts to pronounce on this issue once and for all. This case, because of its unique facts, is one of the rare opportunities this Court will have to do so.

56. As evidenced by the consensus of judges who have considered the question, there are strong reasons to doubt the constitutionality of section 301 of the *Charter*. Ultimately, section 301 will have to pass the *Oakes* test of rational connection to a pressing and substantial societal objective. The pressing and substantial objective behind section 301, which is the protection of

[23] *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 (WL).

reputations from malicious attacks, does not justify a provision that permits conviction without proof of malice.

57. In *R. v Zundel*, this Court struck down a provision of the *Criminal Code* which criminalized "fake news", even though this provision **did** require that the accused actually know that what they were publishing was false. The Court wrote[24]:

> [22] …a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression

58. A fortiori should a criminal provision which does not require any malice or intention to knowingly say what is untrue, but simply rude words against public officials, be struck down as unconstitutional. In *Saskatchewan (Human Rights Commission) v Whatcott*,[25] this Court restated the principle first set forth in *Keegstra* and *Taylor* that provisions which sanction speech that makes up the core values behind the freedom receive greater protection:

> [112] …different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.

59. In this case, the type of speech at issue, being the criticism of public officials, is at the very core of the values behind freedom of expression. For this reason, if the objective is to protect reputations, regardless of truth, it is doubtful that such an objective can be considered "pressing and substantial"[26] given that (a) the civil tort of defamation already provides ample protection of this interest, and (b) such an objective would be in direct conflict with one of the underlying the purposes of freedom of expression, which is the seeking and finding of truth.[27] This case may give this Court the opportunity to elaborate on the principle, set forth in *R. v Big*

[24] *R. v Zundel*, [1992] 2 SCR 731 at para 22 (WL).
[25] 2013 SCC 11, [2013] 1 SCR 467
[26] [1986] 1 SCR 103 at para 73 (WL).
[27] *Irwin Toy v Quebec*, [1989] 1 SCR 927 at para 54 (WL).

M Drug Mart,[28] that a legislative object in direct contradiction with a *Charter* right cannot be a purpose that justifies limiting the right.

60. The provision being attacked in this case may also be unconstitutional on the basis that it does not have the requisite *mens rea*.[29] Is it enough for this type of offense that the subjective element require an intention to harm a reputation, or must it include an intention to knowingly harm a worthy reputation?

61. This Court has previously welcomed constitutional challenges by interested parties, even when the unconstitutional law is not directly at issue in the specific proceeding below. If the impugned legislative provision forms the basis of a court order, this Court will permit a *Charter* challenge to that provision on appeal of a prosecution for breach of that order. This approach is in line with this Court's jurisprudence on public interest standing, articulated in *Thorson v Attorney General of Canada*:[30] legislation should always be open to constitutional review by people of sufficient interest. No one has greater interest in the constitutionality of a law than someone threatened with a fine or jail for breach of an order based on an unconstitutional law.

62. Although public interest standing is not sought or required here, it is noteworthy that Ms. MacKinnon would qualify for standing under that test. Public interest standing was most recently discussed by this Court in *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*:[31]

> [2] In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: Canadian Council of Churches v. Canada (Minister of Employment and Immigration), 1992 CanLII 116 (SCC), [1992] 1

[28] *R. v Big M Drug Mart*, [1985] 1 SCR 295 at para 44 (WL).
[29] *R. v Wholesale Travel Group*, [1991] 3 SCR 154 at para 26 (WL).
[30] *Thorson v Attorney General of Canada*, [1975] 1 SCR 138.
[31] *(Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45, [2012] 2 SCR 524.

> S.C.R. 236, at 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

63. In this case, the numerous decisions of lower courts declaring section 301 unconstitutional certainly indicate that there is a serious issue as to its validity.

64. Ms. MacKinnon has been directly affected by the lack of clarity, having even gone to prison because of this provision. She is obviously no busybody litigant, as she was dragged unwillingly into court and forced to defend herself from prosecution. She has been directly affected by section 301, having been charged under it. She has sworn in her affidavit that she has a genuine interest in the validity of section 301.

65. This Court should also be satisfied that this issue is not one which will likely be brought before it by any other effective manner. Crown prosecutors have repeatedly declined to appeal decisions declaring section 301 unconstitutional. In order for a decision directly determining the constitutionality of section 301 to be appealed before this Court, a superior court judge would have to disagree with four previous superior court decisions. This is unlikely to occur. In any event, *Taylor* is relied upon here.

66. As the Court did in granting leave to appeal in *Taylor*, and more recently in *R. v Comeau*,[32] we request that this Court agree to hear this appeal on the merits and not simply send the constitutional question back to the trial court, should this Court determine that the rule against collateral attack does not apply. It is submitted that the relevant facts are well established and the constitutional process would not benefit from lower court review (indeed, the Court of Queen's Bench of Alberta has already answered the constitutional question in *R. v. Finnegan*). The constitutionality of section 301 is ready for decision on the basis of Brandeis briefs. Proceeding by way of Brandeis briefs in this matter is appropriate given that this would be the approach if the Government were to question the constitutionality of section 301 of the *Charter* by way of a reference.[33] Peter Hogg states it this way, at 60.14:

[32] *R. v Comeau* Case # 37398, leave to appeal granted May 4, 2017.

[33] Peter Hogg, *Constitutional Law of Canada*, vol 2, 5th ed suppl (loose-leaf consulted on May 15, 2017), (Toronto: Thomson Carswell, 2007), 60.13-60.15 [Peter Hogg].

> Occasionally, a constitutional issue in a case is recognized for the first time on appeal. In such a case, the appeal resembles a reference, in that there is no practical way to receive factual material other than through the case on appeal or the factums of counsel. In these cases, the Supreme Court of Canada has accepted factual material that was filed, without formal proof, in the Court of Appeal or the Supreme Court of Canada.[34]

67. Recently, in *R. v KRJ,*[35] an 8-1 majority of this Court permitted the Crown to adduce fresh social science evidence that had been untested at trial. The Court applied *R. v Sharpe*[36] and permitted fresh evidence, "supplemented by common sense and inferential reasoning", in addition to the jurisprudence and legislative debates proffered by the parties.[37]

68. The test, therefore, is whether the facts at issue are likely to be specific to Ms. MacKinnon or of a more general nature, whether they would be uncontroversial (but not necessarily undisputable),[38] and whether they would be impossible or very costly to prove by conventional means.[39]

69. The legislative history of section 301 is well established in numerous judicial decisions. Whether section 301 is rationally connected and minimally impairing of freedom of expression is a policy driven analysis based on the Court's common sense and inferential reasoning, which does not require input from experts. Instead, it will be based on the weighing of fundamental Canadian values by this Court.

70. In *Taylor*, both the majority and dissenting reasons relied entirely on reports and social science documents to apply the various elements of the *Oakes* test and had no need to resort to transcripts of *viva voce* evidence of experts.

[34] To make this point, Peter Hogg relied on two freedom of expression cases, *Ford v Quebec*, [1988] 2 SCR 712, at 774-777 and *Irwin Toy v Quebec*, [1989] 1 SCR 927, at 983-984.
[35] *R. v KRJ*, 2016 SCC 31, [2016] 1 SCR 906 [*KRJ*]
[36] *R. v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45.
[37] *KRJ*, *supra* note 35 at para 60.
[38] This last requirement does not require that the facts be undisputable; see Hogg, *supra*, *note* 33 at 60.14.
[39] *Ibid*.

71. In *Keegstra*, this Court determined whether hate propaganda in Canada was significant enough to warrant legislative intervention on the basis of several government or expert reports on the question, including The Report of the Special Committee on Hate Propaganda in Canada (Cohen Committee), the House of Commons Special Committee on Participation of Visible Minorities in Canadian Society, the 1981 Report Arising Out of the Activities of the Ku Klux Klan in British Columbia, and 1984, and the Canadian Bar Association's Report of the Special Committee on Racial and Religious Hatred, to name a few.[40]

72. In *Lucas*, this Court determined the constitutionality of section 300 and relied extensively on Twaddle J.A.'s comprehensive review of the history of defamatory libel and his "thorough and very helpful analysis of proportionality".[41] The Court went on to consider a number of international instruments and foreign laws, as well as a few reports.[42] This Court ultimately applied the Oakes test, without expert evidence on the issue. Much of the analysis in *Lucas* will be useful in this case.

73. Indeed, we have found no decision of this Court dealing with freedom of expression where the *Oakes* analysis relied upon evidence that cannot be properly placed in a Brandeis brief. As Brown J. stated in his dissent in *KRJ*, a rigorous section 1 analysis can still be conducted:

> [145] This is not to say that these evidentiary difficulties compel acceptance of the Crown's claims. This Court has held that a rigorous s. 1 analysis may also be accomplished by employing "logic [and] reason" in assessing justifiable limits on *Charter* rights: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para 78; see also *R. v. Butler*, [1992] 1 S.C.R. 452, at 503-4, per Sopinka J.; *Keegstra*, at 776, per Dickson C.J.; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877, at para 107, per Bastarache J.; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at paras. 85-94, per McLachlin C.J.; *R. v. Bryan*, 2007 SCC 12, [2007] 1 S.C.R. 527, at para 20, per Bastarache J., and paras. 100-103, per Abella J., dissenting. …

[40] *Keegstra*, *supra* note 22 at pp. 749 and 847.
[41] *Lucas*, *supra* note 6 at paras 23, 42-47.
[42] *Ibid*, at paras 50-51, 75.

74. Finally, if this Court were to decline to determine the constitutionality of section 301, and instead simply send the issue back to the Provincial Court, the trial judge would be bound by *Finnegan*, [43] *Lucas,* [44] *Gill,* [45] and *Prior* [46] and the Crown would almost certainly again elect not to appeal, as it chose not to appeal Hrabinsky J.'s finding on section 301 in *Lucas*.[47] Unless this Court settles the constitutionality of section 301 now, the issue is almost certain to continue to evade this Court's reach.

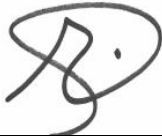
PART IV - COSTS

75. The Applicant seeks to appeal issues of public importance and which are fundamental to freedom of expression in Canada. An award of costs at the leave to appeal stage is rare,[48] but justified in this case because of the actions of the Crown in charging Ms. MacKinnon under an unconstitutional provision of the criminal law.[49]

PART V - ORDERS SOUGHT

76. The Applicant requests that leave to appeal the decision of the Court of Appeal of Alberta be granted and that this Court consider the substance of the decision of the Court of Queen's Bench of Alberta and the decision of the Provincial Court of Alberta herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2017.



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[43] *supra*, note 4.
[44] *supra* note 6.
[45] *supra* note 7.
[46] *supra* note 9.
[47] *supra*, note 6 at para 17.
[48] *Carter v Canada (Attorney General)*, 2015 SCC at paras 139-143; *Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue*, 2007 SCC 2 at para 36.
[49] See *R. v Comeau*, *supra* note 33 (Costs granted to accused in any event of the cause).

PART VI – AUTHORITIES

Cases **At Para.**

(Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 SCR 524 16

Canada v Taylor, [1990] 3 SCR 892 (WL) 10, 15, 17, 18

Carter v Canada (Attorney General), 2015 SCC 20

Dagenais v Canadian Broadcasting Corp., [1994] 3 SCR 835 9

Ford v Quebec, [1988] 2 SCR 712 17

Irwin Toy v Quebec, [1989] 1 SCR 927 at para 54 (WL) 15, 17

Little Sisters Book and Art Emporium v Canada (Commissioner of Customs and Revenue, 2007 SCC 2 20

Lucas v Saskatchewan (Minister of Justice) (1995), 129 Sask R 53 (Sask QB) 6, 19

R. v Big M Drug Mart, [1985] 1 SCR 295 at para 44 (WL) 15

R. v Canadian Broadcasting Corp., 2004 SKQB 320, [2005] 3 WWR 77 10

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R. v Domm, (1996), 31 OR (3d) 540 (CA) (WL) 5, 8

R. v Finnegan, [1992] AJ No 1208 (Alta QB) 6, 17, 19

R. v Gill (1996), 29 OR (3d) 250 (Ont Gen Div) 6, 19

R. v Keegstra, [1990] 3 SCR 697 at 726 and 802-808 ..... 13, 15, 18

R. v KRJ, 2016 SCC 31, [2016] 1 SCR 906 ..... 17, 19

R. v Litchfield, [1993] 4 SCR 333 (WL) 9, 10

R. v Lucas, [1998] 1 SCR 439 ..... 12, 13, 18, 19

R. v MacKinnon, 2015 ABPC 268 1

R. v MacKinnon, 2017 ABCA 93 ..... 1, 5

R. v Prior (2008), 231 CCC (3d) 12 (NL TD) 6, 19

R. v Sharpe, 2001 SCC 2, [2001] 1 SCR 45 17

R. v Shea, 2010 SCC 26, [2010] 2 SCR 17 2

R. v Wholesale Travel Group, [1991] 3 SCR 154 at para 26 (WL) 15

R. v Zundel, [1992] 2 SCR 731 14

RWDSU v Dolphin Delivery Ltd., [1986] 2 SCR 573 (WL) 13

Saskatchewan (Human Rights Commission) v Whatcott, 2013 SCC 11, [2013] 1 SCR 467 ...15

Thorson v Attorney General of Canada, [1975] 1 SCR 138..16

Walker v City of Birmingham, 388 US 307 (1967)...11

REPORT

Ontario, Anti-Slapp Advisory Panel, "Anti-Slapp Advisory Panel Report to the Attorney General" (October 28, 2010)..29, 30

PART VII – STATUTES, REGULATIONS AND RULES

Code of Civil Procedure, CQLR c C-25.01, ss 51-56.

Criminal Code, RSC 1985, c C-46

Punishment for defamatory libel

301 Every one who publishes a defamatory libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

Disobeying order of court

127 (1) Everyone who, without lawful excuse, disobeys a lawful order made by a court of justice or by a person or body of persons authorized by any Act to make or give the order, other than an order for the payment of money, is, unless a punishment or other mode of proceeding is expressly provided by law, guilty of

(a) an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Escape and being at large without excuse

145 Failure to comply with condition of undertaking or recognizance

(3) Every person who is at large on an

Diffamation

301 Quiconque publie un libelle diffamatoire est coupable d'un acte criminel et passible d'un emprisonnement maximal de deux ans.

Désobéissance à une ordonnance du tribunal

127 (1) Quiconque, sans excuse légitime, désobéit à une ordonnance légale donnée par un tribunal judiciaire ou par une personne ou un corps de personnes autorisé par une loi à donner ou décerner l'ordonnance, autre qu'une ordonnance visant le paiement d'argent, est, à moins que la loi ne prévoie expressément une peine ou un autre mode de procédure, coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Personne qui s'évade ou qui est en liberté sans excuse

145 Omission de se conformer à une condition

undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

d'une promesse ou d'un engagement

(3) Quiconque, étant en liberté sur sa promesse remise ou son engagement contracté devant un juge de paix ou un juge et étant tenu de se conformer à une condition de cette promesse ou de cet engagement, ou étant tenu de se conformer à une ordonnance prise en vertu des paragraphes 515(12), 516(2) ou 522(2.1), omet, sans excuse légitime, dont la preuve lui incombe, de se conformer à cette condition ou ordonnance est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de deux ans;

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Municipal Government Act, RSA 2000, c M-26

Reasons for disqualification

174(1) A councillor is disqualified from council if

(d) the councillor is absent from all regular council meetings held during any period of 8 consecutive weeks, starting with the date that the first meeting is missed, unless subsection (2) applies

Resignation on disqualification

175(1) A councillor that is disqualified must resign immediately.

(2) If a councillor does not resign immediately,

(a) the council may apply to a judge of the Court of Queen's Bench for

- (i) an order determining whether the person was never qualified to be or has ceased to be qualified to remain a councillor, or
- (ii) an order declaring the person to be disqualified from council,

or

(b) an elector who

(i) files an affidavit showing reasonable grounds for believing that a person never was or has ceased to be qualified as a councillor, and
(ii) pays into court the sum of $500 as security for costs,

may apply to a judge of the Court of Queen's Bench for an order declaring the person to be disqualified from council.

(3) An application under this section may only be made within 3 years from the date the disqualification is alleged to have occurred.

(4) An application under this section may be started or continued whether or not an election has been held between the time the disqualification is alleged to have occurred and the time the application is or was commenced and whether or not the person in respect of whom the application is being brought

(a) resigns before or after the election,
(b) was re-elected in the election,
(c) was not re-elected or did not run in the election, or
(d) has completed a term of office.