

*Civil Defamation Turning into Criminal Defamation – Should All Defamation Cases Go  
Through Criminal Procedure*

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*Civil Defamation Turning into Criminal Defamation & Procedure*

*Should All Defamation Cases Go Through Criminal Procedure?*

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## Abstract

Mr. Kevin J. Johnston ("Johnston") is known as a "social media performer" and states he is a "journalist." He previously ran as a candidate for mayor in Calgary, Alberta, in the 2021 municipal election. In addition, Johnston runs a podcast called the "Kevin J. Johnston Show", which airs from Monday to Friday from 7 PM – 9 PM MST.

Mohamad Fakh ("Fakh") owns and operates a company called Paramount Fine Foods ("Paramount") in Ontario, Canada. Fakh was a Canadian businessperson known for his charitable works. Both Fakh and Paramount have sued Johnston for defamation for hateful and defamatory statements published by Mr. Johnston in 2017 and 2018.

Johnston made claims against Faith due to his religion, being a Canadian Muslim, such as "terrorists", "terrorist scumbags", "racist terrorist scumbags", "Nazis", that Islam is "non-civilized garbage", that Muslims are "rapists" and that Muslim immigrants bring sexually transmitted diseases to Canada. Johnston also stated that Muslims are part of a "system designed to rape, kill and pillage and destroy" that would force a Canadian man to "pin his daughter down on the ground and cut her labia and clitoris off with a razor blade". Johnston also states that Muslims are in Canada "to take this country over", "to kill me, and kill my children, and kill the entire future of this entire nation" and have "the maple leaf removed from the flag to be replaced by the crescent moon".

There were no defences available to the Johnston defendant.

Johnston makes a series of defamatory statements ruled as hate speech; those statements are seen in *Paramount Fine Foods v Johnston, 2021 ONSC 6558*.

This analysis will look at character assassination, cyberbullying, procedural history, fair comment, the responsible communication defence, what constitutes defamatory words, the Canadian *Charter of Rights and Freedoms*, imputations of crime, publication in mass media, and appropriate remedies.

## **Civil Defamation Turning into Criminal Defamation & Procedure**

### **Should All Defamation Cases Go Through Criminal Procedure?**

According to the Canadian *Criminal Code*, "A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published."

There are two defamatory libel sections of the *Criminal Code*, 301 and 300. In section 301 of the *Criminal Code*, "every person who publishes a defamatory libel is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than two years; or (b) an offence punishable on summary conviction." In section 300 of the *Criminal Code*, "Every person who publishes a defamatory libel that they know is false is guilty of (a) an indictable offence and liable to imprisonment for a term of not more than five years; or (b) an offence punishable on summary conviction." These two offences, specifically the section 301 offence, "publishing defamatory libel" is unconstitutional.

This paper will look at the unconstitutionality and *Charter* issues regarding section 301 of the *Criminal Code* and if section 300 offences should be brought from civil litigation into the criminal procedure, such as the Kevin J. Johnston ("Johnston") and Mohamad Fakh ("Fakh").

### **Why is Section 301 of the Criminal Code unconstitutional?**

The *Criminal Code* does contain offences for defaming individuals. The *Criminal Code* has been reviewed and upheld by the Supreme Court of Canada (SCC). Individuals continue to be charged under section 300 of the *Criminal Code*, and prosecutions in the Canadian Courts are still seen. Section 301, however, has never been reviewed in any appellate court. Any person charged under section 301 has had their *Charter* rights violated as the section itself is unconstitutional as it simply violates the freedom of expression seen in Section 2(b) of the *Charter of Rights and Freedoms*. The defamatory libel offences initially came from the English Lord's Campbell Act, and in 1892, they were added to the Canadian *Criminal Code* <sup>1</sup>. In 2017, the offence "blasphemous libel" was removed from the *Criminal Code* <sup>2</sup>. Why would Parliament leave these two offences when Section 301 violates the *Charter of Rights and Freedoms*?

When looking within Section 300 of the *Criminal Code*, it appears to be constitutional. No individual can publish libel that is known to be false. This action has both criminal and civil consequences, as seen in *Paramount Fine Foods v Johnston, 2021 ONSC 6558*.

In section 301 of the *Criminal Code*, there are several elements. When looking at the actus reus of the offence, an individual must (1) publish material which is (2) likely to injure the reputation or designed to insult and must (3) engage in no lawful justification or excuse.

### **Defences for Section 301 offences**

There are several statutory defences for individuals charged under section 301 of the *Criminal Code*, such as (a) coverage of court proceedings, (b) case law, (c) fair comment, and (d) the defence of truth as seen in section 311 of the *Criminal Code*. The defence under section 311 requires that "the publication of the defamatory matter in the manner in which it was published was for the public benefit" in addition to being factually accurate<sup>5</sup>. The *mens rea* for section 301 requires that the statements be intentionally published. However, there is not much of a defence for section 300 offences as the accused must know that what they have published is false. However, the only defence is that what has been published must be proven that the statement is indeed false.

With section 301 offences, unfortunately, Crown prosecutors can lay charges under this section if it reaches Crown approval. In most jurisdictions, RCMP, provincial, or municipal police are responsible for initial charge approval. Peace officers do not look at *Charter* scrutiny when they lay an initial charge as they leave that responsibility to the Crown to assess. As such, people residing in these jurisdictions may face section 301 charges even though it has obvious *Charter* issues. When looking at the research performed by Taylor & Prichard, it is seen that defamatory libel charges are

unfortunately still being used across Canada <sup>6</sup>. They found that approximately 20 defamatory libel charges were laid between 2006-2010, and that number climbed to 40 between 2011-2015 <sup>7</sup>. For example, Taylor & Prichard saw that the prosecution of individuals who called public officials' statements such as "criminal "crooked" came about <sup>8</sup>.

### **Civil litigation and defamatory libel offences**

Defamatory libel offences have been highly controversial since the initiation of the *Charter*. Criminal defamation cases are outright outrageous compared to civil defamation cases. When looking at the criminal elements, these two offences are prone to Charter scrutiny under sections 2(b) and 11(d). The Law Reform Commission of Canada looked at the defamatory libel offences in sections 300 and 301 of the *Criminal Code* and called for its repeal in a paper in 1984 <sup>9</sup>. In civil cases, truth alone is a defence. However, when looking at the *Criminal Code* offences of defamatory libel, two elements are required for defence, those being truth and public benefit. There is jurisprudence on defamatory libel charges for section 300 and section 301 of the *Criminal Code*. For Section 301, courts in Ontario, Alberta, Saskatchewan, New Brunswick, and Newfoundland have evaluated the section 301 constitutionality. The total five court decisions in the lower courts all failed *Charter* evaluation <sup>10</sup>.

When evaluating a case such as *R. v Lucas (Sask Q.B.)* <sup>11</sup>, the accused faced charges under sections 300 and 301 of the *Criminal Code*. This was due to their protest signs aimed at a police officer. When a police officer or public person is mentioned, *Criminal*

*Code* (R.S., 1985, c. C-46, s. 310) should be immediately initiated. Section 310 states that "No person shall be deemed to publish a defamatory libel by reason only that [they] publish [emphasis added] fair comments" The offences were constitutionally challenged under the *Charter* during the trial. Eventually, through reasonable limits analysis, the court ultimately decided that section 301 limits section 2(b) of the *Charter*. We had seen cases such as *R v Gill* <sup>12</sup>, where the Canadian Civil Liberties Association intervened when a section 2(b) *Charter* challenge was brought forward. The court ultimately declared that section 301 does not minimally impair free expression.

Cyberbullying minorities with defamatory libel – civil litigation and criminal offences

Bullying and hate speech are nothing new. However, Cyberbullying, hate speech, and the non-consensual distribution of intimate images are gaining popularity in Canada.

This is due to the number of high-profile cases where cyberbullying activities resulted in suicide <sup>15</sup>. When looking at the case of Johnston and Fakhri, calling Fakhri a "terrorist[s]", "terrorist scumbag[s]", "racist terrorist scumbag[s]", "Nazi[s]" and that his religion, Islam, is "non-civilized garbage", is defamatory libel under section 300 of the *Criminal Code*, as these are statements that Mr. Johnston knew were false.

Most civil litigation cases surrounding defamatory libel, I believe, are section 300 offences. However, the question is, why aren't these cases brought into *Criminal Code* proceedings? When approaching RCMP about cyberbullying and/or defamatory libel under section 300, RCMP does not proceed with charges as it "has not reached the threshold." This is from personal experience. However, don't the RCMP have a duty to

protect and serve the public and proceed with charges? Where is this invisible "threshold"? When looking at the case of Amanda Todd as an example, shouldn't these defamatory statements towards her have been investigated immediately instead of waiting for intimate content to be shared? We see this time and time again where the RCMP will proceed with a mantra of "proceed with civil litigation." However, if the statements made are substantial to proceed with civil litigation and the RCMP knows this, why aren't they proceeding with an investigation under section 300 of the *Criminal Code*?

Statements that Johnston made toward Fakhri were harmful. Offensive, hateful, and violent comments were made by Johnston that should have warranted an immediate investigation, not just proceed into civil litigation. For example, Johnston allegedly stated that Muslims are a "system designed to rape, kill and pillage and destroy" that would force a Canadian man to "pin his daughter down on the ground and cut her labia and clitoris off with a razor blade." These statements were proceeded as "hate speech" but not under section 300 offences. However, do you have to be a targeted minority for the RCMP and Crown to proceed?

A Senate Report stated that "belong[ing] to minority groups or who are perceived to be different are at increased risk of being targeted, such as those who have a disability, are overweight, are members of ethnic minority groups and those who identify as, or are perceived to be, lesbian, gay, bisexual, or transgendered" <sup>15</sup>.



**Fair comment, cyberbullying, and section 301**

Section 301 of the *Criminal Code* protects fair comment as these are statements published that are known to be accurate and uncontested. Section 2(b) of the *Charter* protects individuals making factual statements. This is where Johnston could not defend himself, as his many hateful and defamatory statements were false toward Fakhri. While the *Charter* protects free expression, it does not protect individuals against false comments, as this is where the *Criminal Code* would override that *Charter* protection under section 2(b). Character assassination is not protected under section 2(b) of the *Charter* and would apply under a section 300 charge. What Johnston did was character assassination. As such, Fakhri won a 2.5-million-dollar settlement due to the damages caused by Johnston. However, Johnston claimed that he was "marked for death" and decided to flee Canada <sup>14</sup> after receiving his sentence of 18 months due to his hate speech, not the defamatory libel under section 300 of the *Criminal Code*. There is simply no defence and no fair comment to say that Fakhri and/or Muslims, in general, would "pin his daughter down on the ground and cut her labia and clitoris off with a razor blade."

British Columbia has tools for cyberbullying and defamation, such as "Erase-it" however, there are no tools for adults, only for students in elementary or high school, not post-secondary, or adults. So, the question is, why?

There are no provisions under the *Criminal Code* for cyberbullying. Lots of cyberbullying occurs under defamatory libel. For example, posting comments calling individuals "fat" and "hookers", and the RCMP does not act upon other defamatory words if you are not in elementary or high school. The question I raise is, "could this be considered age-based discrimination under the B.C. Human Rights Code?" My answer is, "most definitely." There are zero reasons why individuals under 18 should receive protections from RCMP, municipal police, and provincial police, whereas individuals over 18 do not receive any protections or reporting tools.

### **Conclusion**

Overall, section 301 offences under the *Criminal Code* are unconstitutional. They violate the *Charter of Rights and Freedoms* under section 2(b). There are many defences to section 301 offences. After five courts have found it unconstitutional, why hasn't it been removed from the *Criminal Code*? Unfortunately, police officers can charge individuals under this section when they feel "offended" by an individual posting about them. Even though there is significant *Charter* scrutiny regarding section 301, peace officers are of their free will to harass and charge individuals under this section until the court strikes down this charge. Until individuals such as I go to the Supreme Court of Canada to shut down the section 301 offence in the *Criminal Code*, jurisdictions will continue to charge individuals under this section to harass and belittle them, even though it is unconstitutional in the research performed by Taylor & Prichard. Peace officers in jurisdictions across Canada need to do more to protect individuals from defamatory libel and erase this invisible "threshold" they claim there is.

There is no mechanism to report defamatory libel in Canada, nor is there a mechanism for individuals over 18 to report hate speech or cyberbullying. Defamatory libel is a form of bullying, yet we do not see our law enforcement do anything to enforce it. Looking at Taylor & Prichard, we see 46 individuals charged from 2011-2015 for defamatory libel? That is approximately 11.5 individuals charged per year across Canada. This shows that the charges for defamatory libel need to be repealed and/or revised so that law enforcement does more to charge individuals under this section that comply with the *Charter*.

Civil defamation cases across Canada need to be reviewed to see if there are elements under the *Criminal Code* that can be acted on. For example, 11.5 criminal charges per year, while there are most likely 5-6 times more cases in civil litigation across Canada for defamatory libel, is simply unacceptable. Seeing cases like the case of Johnston and Fakhri with an award of \$2.5 million in damages is what more cases in civil litigation for defamatory libel need to go by. Severe damages for defamatory libel that rides into section 300 of the *Criminal Code* but does not violate section 2(b) of the *Charter* or any defences available under the *Criminal Code* for published defamatory libel.

#### References

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3. *Canadian Charter of Rights and Freedoms*, s 2(b), Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, [Charter].
4. *Criminal Code*, RSC 1985, c C-46, ss 298-301 [Criminal Code] [emphasis added].
5. *Ibid*, s 311 [emphasis added].
6. Lisa Taylor & David Pritchard, “*The Process is the Punishment: Criminal Libel and Political Speech in Canada*” (2018) 23:3 *Communication Law and Policy* 243.
7. *Ibid* at 251.
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