FEDERAL COURT

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

APPLICANT

AND

RICHARD WARMAN, ATTORNEY GENERAL OF CANADA
and MARC LEMIRE

RESPONDENTS

MOTION RECORD OF THE PROPOSED INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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Court File T-1640-09

FEDERAL COURT

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RICHARD WARMAN, ATTORNEY GENERAL OF CANADA
and MARC LEMIRE

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NOTICE OF MOTION

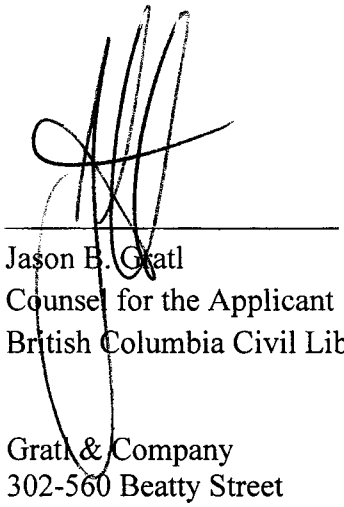
TAKE NOTICE that the British Columbia Civil Liberties ("BCCLA") hereby applies in writing pursuant to Rule 369 of the *Federal Court Rules* for an order granting the BCCLA:

1. leave to intervene in the hearing of this appeal pursuant to Rule 109 of the *Federal Court Rules*, SOR/98/106;
2. leave to file a Memorandum of Fact and Law up to 20 pages in length;
3. leave to make oral argument at the hearing, up to 20 minutes in length; and
4. such further and other Order as this Honourable Court may deem appropriate.

AND FURTHER TAKE NOTICE that the said motion shall be made on the following grounds:

1. The BCCLA has an interest in the matter;
2. The BCCLA's submissions will be useful to the court and different from those of other parties; and
3. The BCCLA will not expand the issues to be argued.

Dated in the City of Vancouver, Province of British Columbia, this 25th day of February, 2010.



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AFFIDAVIT OF DAVID EBY

I, DAVID EBY, Barrister and Solicitor and Executive Director of the British Columbia Civil Liberties Association, of 550 - 1188 West Georgia Street, in the City of Vancouver, Province of British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Executive Director of the British Columbia Civil Liberties Association ("BCCLA"), and accordingly I have personal knowledge of the facts and matters hereinafter deposed to, save and except where the same are stated to be on information and belief and, as to such facts, I verily believe the same to be true.

2. The BCCLA is a non-profit, non-partisan advocacy group incorporated on February 27, 1963, pursuant to the *Society Act*, with its registered office at 550 – 1188 West Georgia Street, Vancouver, British Columbia. The objects of the BCCLA include the defence, promotion and extension of civil liberties and human rights throughout Canada. We promote individual rights and freedoms, including freedom of thought, belief, conscience, religion, opinion and expression, equality rights, and autonomy rights generally.

3. The BCCLA has a collective expertise in considering civil liberties issues. Our

organization includes over twelve hundred members, thirty directors, four full-time lawyers, and eight full-time staff members engaged in public education, complaint assistance, law reform and litigation. We have played an important and prominent role on almost every significant national civil liberties issue for over 40 years.

4. The BCCLA is an autonomous civil liberties organization. We have no formal, and few informal, ties to the Canadian Civil Liberties Association ('CCLA'), based in Toronto. Although both organizations address civil liberties issues with national scope, as well as issues arising in their respective home provinces, we generally do not coordinate our efforts or share our resources. The BCCLA has been able to tap the expertise and energies of a wide range of academics, professionals, and lay persons with expertise in civil liberties work. This has given the BCCLA a unique status in this country as Canada's oldest and most active organization devoted exclusively to civil liberties.

5. Freedom of expression, as a fundamental democratic right, is central to the BCCLA mandate. The BCCLA believes that the free expression is at the core of the ability of citizens to participate as an individual in our collective political and ethical discourse and inseparable from our right to attempt to influence our political process. The BCCLA is seeking leave to intervene in this case because of its potential to extract what we consider to be a persistent thorn in the side of free expression. Within our membership, staff and Board we deplore and routinely criticize racist and discriminatory speech, and we cherish the value of racial, gender and sexual equality as a critical aspect of a free society. However, we remain deeply skeptical of the long-term value of administrative hate speech restrictions. As an organization, we know of no justification for hate speech restrictions that is sufficient to displace the overarching and pervasive value of political expression.

6. The BCCLA has frequently engaged with the need to balance freedom of expression interests against competing freedom of expression (and other civil liberties) interests held by those advocating on either side of a controversial issue. The BCCLA has considerable experience as interveners in assisting the Supreme Court of Canada to craft leading decisions on freedom of expression. Examples include:

(a) *Grant v. Torstar*, 2009 SCC 61 (CanLII), in which the Supreme Court of Canada created a defence of responsible communication in the context of defamation.

(b) *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31 (CanLII), in which the Supreme Court of Canada declared the transportation authority to be government for the purpose of s.32 of the *Charter of Rights and Freedoms*, and in which the Court struck down the transportation authority's policy restricting political advertising.

(c) *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (CanLII), in which the Supreme Court of Canada expanded the defence of fair comment.

(d) *Chamberlain et al. v. Surrey School District No. 36*, [2002] S.C.J. No. 87, on the subject of the censorship of books depicting same-sex parented families in schools.

(e) *R. v. O.N.E.*, [2001] 3 S.C.R. 478, on the subject of the appropriate scope of publication bans given the value of freedom of the press.

(f) *R. v. Sharpe*, [2001] 1 S.C.R. 478, on the definition of "child pornography" in section 163 of the *Criminal Code*.

(g) *Little Sisters Book and Art Emporium and the British Columbia Civil Liberties Association v. Minister of National Revenue and Minister of Justice*, [2000] 2 S.C.R. 1120, in which the BCCLA acted as co-plaintiff in a ten year battle against Canada Customs regarding their censorship of gay and lesbian literature.

(h) *R. v. Butler*, [1992] 1 S.C.R. 452, regarding the constitutionality of the obscenity provisions of the *Criminal Code*.

7. The BCCLA has been granted intervener status or has litigated in its own right in cases before other courts and tribunals dealing specifically with freedom of expression issues, including:

(a) *Elmasry and Habib v. Roger's Publishing and Steyn (No.4)*, 2008 BCHRT 378 (CanLII), which dealt with the publication of alleged Islamophobic hate speech by journalist Mark Steyn in Maclean's magazine.

(b) *Dixon v. Powell River (City)*, 2009 BCSC 406 (CanLII), in which restrictions were imposed on the right of municipalities to sue for defamation.

(c) *Kempling v. The British Columbia College of Teachers,* 2005 BCCA 327, in which the Court balanced freedom of expression with the responsibilities of high school teachers to confine themselves to their *Education Act* mandate.

(d) *Davidson v. Attorney General of B.C.,* 2005 BCSC 1765, in which the BCCLA intervened to oppose a publication ban in the context of a highly political private prosecution).

(e) *City of Vancouver v. Maurice et al.,* 2002 BCSC 1421, in which the BCCLA intervened in support of freedom of expression in the context of court injunctions against protesters.

(f) *R. v. Small*, [1973] 4 W.W.R. 563 (B.C.C.A.), in which the BCCLA provided legal assistance to a theatre company on the appeal of their conviction under the obscenity provision of the *Criminal Code* for the performance of the play "The Beard."

(g) *Canadian Jewish Congress v North Shore Free Press and Doug Collins,* (November 4, 1997), [1997] B.C.H.R.T.D. No. 23, in which the constitutionality of the hate speech provisions of BC *Human Rights Code* were addressed.

8. Other examples of cases engaging civil liberty interests and questions of constitutional validity in which we have intervened include:

(a) *Charkaoui v Canada (Minister of Citizenship and Immigration),* 2007 SCC 9, in which the Supreme Court of Canada dealt with the constitutionality of security certificate procedures.

(b) *May v. Ferndale Institution,* 2005 SCC 82, which engaged the right to habeas corpus in Provincial superior courts.

(c) *Reference re Same Sex Marriage*, 2004 SCC 79.

(d) *R. v. Malmo-Levine, R. v. Caine,* [2003] 3 S.C.R. 571; *R. v. Clay,* [2003] 3 S.C.R. 735, which tested the validity of the criminal prohibition against marijuana use.

(e) *Sauve v. Canada (Chief Electoral Officer),* [2002] *3 S.C.R.* 519, which affirmed the voting rights of federal prisoners.

(f) *Babcock v. Attorney General (Canada),* [2002] 3 S.C.R. 3, which elaborated the scope of Crown Privilege provisions under the *Canada Evidence Act.*

(g) *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, which addressed the scope of religious freedom in private colleges.

(h) *R. v. Cuerrier*, [1998] 2 S.C.R. 371, which dealt with the vitiation of consent to sexual assault by failure of a HIV positive individual to disclose his or her status.

(i) *Reference Re Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, which set guidelines for the creation of electoral districts.

9. Freedom of expression is central to BCCLA's public advocacy and education programs. We are widely recognized as one of the foremost defenders of free expression in Canada. Examples of this public advocacy work in past years include:

(a) Making submissions to the Canadian Radio and Telecommunications Commission regarding the overarching importance of net neutrality to the preservation of free expression on the internet.

(b) Supporting the Falun Gong's efforts to maintain their round-the-clock peaceful protest of Chinese persecution. The City of Vancouver ordered the group to remove the small structure in which a single person sits in vigil outside the Chinese Consulate. Since January of 2005, the BCCLA has acted as a consultant to the group and their counsel, in addition to corresponding with City officials and commenting extensively in the media on the freedom of speech issues involved.

(c) Calling on the York School Board in Ontario and the Canadian Jewish Congress to reconsider their opposition to the nomination of *Three Wishes*, a book of interviews with Israeli and Palestinian children, for the prestigious SilverBirch Award. In our open letter dated March 7, 2006, the BCCLA expressed concern that this opposition would effectively discourage children from reading the book. We argued that intellectual freedom and access to controversial written material are a necessary pre-condition for democratic self-rule, and that these values merited protection for young readers as well as old.

(d) Denouncing the decision of Telus management to block a website set up by their own employees regarding an ongoing labour dispute. The BCCLA took no position in the labour dispute itself, but pointed out that Telus was leveraging its power as a telecommunications service provider to censor a specific group, shut down debate and limit the messages conveyed about the labour dispute.

(e) The BCCLA has frequently supported the expressive rights of libraries and librarians. In 2004, for example, largely in response to a defamation suit initiated

by Richard Warman against the Vancouver Public Library, the BCCLA urged the Attorney General of British Columbia to provide legal immunity for public libraries who distribute materials in their collection which are the subject of a suit for defamation, but which have not yet been found to be defamatory by a court of law. We argued that holding libraries liable for 'publishing' material that is merely potentially defamatory is a blatant violation of free expression by way of prior restraint. The Attorney General heeded our advice and on October 7, 2004 the government passed Bill 62 amending the *Libel and Slander Act,* R.S.B.C. 1996, c.263 accordingly.

(f) Making submissions to the Standing Committee on Justice and Human Rights regarding Bill C-20, which amended the child pornography provisions of the *Criminal Code.* In our submissions of August 11, 2003, we supported prohibition of mere possession of pornography, which depended on the assault of actual children for its production. However, we argued that other aspects of the provision departed from the principle of harm, and therefore represented unjustifiable infringements of free expression.

(g) Issuing a January 10, 2002 press release in support of the protesters in Edmonton who chose to express their views about Canada's electoral system by eating their ballots. The BCCLA condemned the decision of Elections Canada to attempt to silence the protest by prosecuting them under provisions of the *Elections Act* clearly designed for another purpose.

10. I believe that the submissions of the BCCLA will make argument that will advance the issues and assist the Court without broadening the issues on this Application.

11. I swear this Affidavit in support of an application by the BCCLA for leave to intervene in this matter.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia this 23rd day of February, 2010

A Commissioner for taking Affidavits for British Columbia.

DAVID EBY

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Tel: 604-630-9751

Court File T-1640-09

FEDERAL COURT

BETWEEN:

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APPLICANT

AND

RICHARD WARMAN, ATTORNEY GENERAL OF CANADA
and MARC LEMIRE

RESPONDENTS

WRITTEN REPRESENTATIONS OF THE PROPOSED INTERVENER
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PART I: STATEMENT OF FACT

1. This is an application by the British Columbia Civil Liberties Association ("BCCLA") for the following:

    a. leave to intervene in the hearing of this appeal pursuant to Rule 109 of the *Federal Court Rules*, SOR/98/106;

    b. leave to file a Memorandum of Fact and Law up to 20 pages in length;

    c. leave to make oral argument at the hearing, up to 20 minutes in length; and

    d. such further and other Order as this Honourable Court may deem appropriate.

2. The BCCLA is a non-profit, non-partisan advocacy group incorporated in 1963 pursuant to the *Society Act*. The objects of the BCCLA include the defence, promotion and extension of civil liberties and human rights throughout Canada. The BCCLA promotes freedom of thought, belief, conscience, religion, opinion and expression, equality rights, and autonomy rights generally.

    Affidavit of David Eby, sworn February 23, 2010 at para.2

3. The BCCLA includes over twelve hundred members, thirty directors, four full-time lawyers, and eight full-time staff members engaged in public education, complaint assistance, law reform and litigation. The BCCLA has played an important and prominent role on almost every significant national civil liberties issue for over 40 years.

    Affidavit of David Eby, sworn February 23, 2010 at para.3

4. Freedom of expression, as a fundamental democratic right, is central to the BCCLA mandate. The BCCLA believes that the free expression is at the core of the ability of citizens to participate in political and ethical discourse and that free expression is inseparable from our right to attempt to influence our political process. The BCCLA's membership, staff and Board deplore and routinely criticize racist and discriminatory speech, and cherish the value of racial, gender and sexual equality as a critical aspect of a free society.

    Affidavit of David Eby, sworn February 23, 2010 at para.4

5. The BCCLA has experience with the need to balance freedom of expression interests against competing constitutional interests, and has a wealth of experience with interventions before

the Supreme Court of Canada and other Courts and Tribunals, including the BC Human Rights Tribunal.

Affidavit of David Eby, sworn February 23, 2010 at paras.6, 7 and 8

PART II: STATEMENT OF ISSUES

6. This is an application by the British Columbia Civil Liberties Association ("BCCLA") for the following:

    a. leave to intervene in the hearing of this appeal pursuant to Rule 109 of the *Federal Court Rules*, SOR/98/106;

    b. leave to file a Memorandum of Fact and Law up to 20 pages in length;

    c. leave to make oral argument at the hearing, up to 20 minutes in length; and

    d. such further and other Order as this Honourable Court may deem appropriate.

PART III: SUBMISSIONS

The Legal Test for Intervention

7. The test for intervener status generally considers the following questions:

    a) whether the applicant has an interest in the matter; and
    b) whether the applicant's submissions will be useful to the court and different from those of other parties.

    R. v. Finta, [1993] 1 S.C.R. 1138.
    Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335

8. It is respectfully submitted the BCCLA meets the test for intervenor status.

The BCCLA has an Interest in this Matter

9. The BCCLA has a substantial and distinct interest in this judicial review. The issues before the Court in this case fall squarely within the mandate of the BCCLA to preserve, defend, maintain and extend civil liberties and human rights across Canada. The BCCLA has a long history of involvement in issues of law that arise when freedom of expression interests are perceived to clash with society's interest in promoting tolerance and equality. The BCCLA is recognized as an important public interest organization in respect of freedom of expression as well as being recognized for its work in the area of discrimination.

    Affidavit of David Eby, sworn February 23, 2010 at para.5

10. The BCCLA has significant experience with constitutional litigation regarding freedom of expression and discrimination/ equality matters. The BCCLA intervened before the BC Human Rights Tribunal in *Canadian Jewish Congress v. North Shore Free Press and Doug Collins* (7) (1997), 30 C.H.R.R.D./5 (B.C. Human Rights Tribunal) and *Elmasry and Habib v. Roger's Publishing and Steyn*, 2008 BCHRT 378 (CanLII). The former involved the constitutionality of hate speech provisions of the BC *Human Rights Code*, and the latter dealt with the proper interpretation of the hate speech provisions under the *Human Rights Code*. Both cases bear many similarities to the matter before the Court in this case.

11. The BCCLA was also granted intervener status by the B.C. Human Rights Tribunal in *Pegura and Forster v. School District No.36 (No.4), 2004 BCHRT 237*. In granting intervener status to the BCCLA, the Tribunal Member noted:

> I find, first, that the material before me indicates that the BCCLA has a demonstrated interest in issues such as the one before the Tribunal in this matter. The BCCLA is an important public interest organization in respect of freedom of expression, and has done significant work on matters of expressive freedom, including those that require a balancing of free speech with equality rights…
>
> Further, this case raises some unique issues which do not appear to have been extensively canvassed in the human rights jurisprudence. Given BCCLA's specific interest and experience in matters such as these, I am prepared to accept that the BCCLA's participation may assist the Tribunal in its resolution of the interpretation issue relating to s.8(1) of the *Code.*

12. The BCCLA has recently intervened in a number of appeals at the Supreme Court of Canada that have arguably changed the legal landscape for free expression in Canada. *WIC v. Simpson* dramatically expanded the defence of fair comment in defamation law. *Grant v. Torstar* created the common law defence of responsible communication in defamation law. *Greater Vancouver Transportation Authority ("Translink")* brought numerous public actors within the ambit of s.2(b).

Affidavit of David Eby, sworn February 23, 2010 at para.6

13. BCCLA's involvement in free expression cases is not a recent development. Past interventions include *Chamberlain et al. v. Surrey School District No. 36*, [2002] S.C.J. No. 87 (S.C.C.), *Little Sisters Book and Art Emporium and the British Columbia Civil Liberties Association v. Minister of National Revenue and Minister of Justice*, [2000] 2 S.C.R. 1120 (S.C.C.), and *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), all of which are important to the development of the right to free expression.

Affidavit of David Eby, sworn February 23, 2010 at para.6

14. The BCCLA has a strong record of advocacy outside the courtroom in defence of the constitutional rights and civil liberties of all Canadians. In relation to free expression, the BCCLA has made submissions to House of Commons Committees, engaged in public education, media advocacy, and lobbied successfully for legislative change. As a result of this work, the BCCLA has developed a degree of institutional expertise in this field.

Affidavit of David Eby, sworn February 23, 2010 at para.9

15. Notably, the BCCLA's interest differs from Mr. Lemire's. Mr. Lemire's interest in this judicial review is, understandably, intensely personal. Although s.13 was ultimately not applied, the Tribunal member found Mr. Lemire responsible for hate speech that was posted to his website. Mr. Lemire plainly considers himself to be persecuted by the Human Rights Commission, and his submissions are to some extent focused on the Commission's exercise of its discretion. The BCCLA's interest is oriented towards freedom of expression more generally and its perspective and experience may accordingly be of assistance to the Court.

16. BCCLA's mandate and historical involvement in issues of freedom of expression constitute a significant interest in the present matter. The intervention of the BCCLA will add this institutional experience and historical perspective to the arguments before the Tribunal.

Position of the Proposed Intervener

17. The BCCLA seeks leave to make written and oral submission on the proper interpretation and constitutional status of sections 13 and 54 of the *Canadian Human Rights Act* (the "CHRA"). If granted leave to intervene, the BCCLA intends to take the position that ss.13 and 54 of the CHRA infringe s. 2(b) of the *Charter of Rights and Freedoms* and that the infringements cannot be justified under s. 1 of the *Charter*.

18. At the center of this judicial review is the question of whether the *Taylor v. Canadian Human Rights Commission*, 1990 CanLII 26 (S.C.C.) decision remains good law in Canada. The Canadian Human Rights Commission ("CHRC") argues that, with the exception from the penalty provisions under s.54 of the Act enacted in 1998, the hate speech provision under

s.13(1) of the CHRA was found to be constitutional in *Taylor*. According to the CHRC, the penalty provisions can be severed and the hate speech provisions under s.13 can be preserved. The CHRC thus advances what appears to be an easy formula with which to restore the status quo set in 1990 by the majority decision in *Taylor*.

19. The BCCLA intends to argue that the easy formula proposed by the CHRC is untenable because the constitutional, statutory and factual context in which the *Taylor* decision was made no longer exists. Constitutionally, the Supreme Court of Canada has sent strong signals that free expression interests are to be accorded greater weight and that rigour is to be shown in the analysis of attitudinal and societal harm under s.1. Statutorily, the scope of s.13 was extended in 1998 to include internet communications. And factually, the *Taylor* decision was rendered before the digital era, in the days of the telephone answering machine. Ultimately, it is not appropriate for this Court to uncritically accept the s.1 analysis set out in the *Taylor* decision or to bypass the necessary step of engaging in a renewed proportionality analysis under s.1 of the *Charter*.

Changes to the Constitutional Context

20. If granted leave to intervene, the BCCLA intends to argue that the constitutional landscape has changed significantly since the *Taylor* decision in 1990. Recent decisions signal that free expression interests are to be accorded greater weight than in the past. In *WIC Radio v. Simpson*, the majority determined that an "overly solicitous regard for reputation" should not be permitted to trump vigorous debate on matters of public importance. In balancing free expression values against reputational interests, the Court determined that an objectively honest belief is sufficient to ground a defence of fair comment. The decision is a departure from the earlier approach, which required a defendant to prove the truth of facts supporting a fair comment defence. Binnie, J. noted for the majority that "[w]e live in a free country where people have as much right to express ridiculous and outrageous opinions as moderate ones."

> *WIC Radio Inc. v. Simpson*, 2008 SCC 40 (CanLII) at para.4

21. In *Grant v. Torstar*, the Court modified the common law of defamation to recognize a defence of responsible communication on matters of public interest. Writing for the majority, McLaughlin CJ. made the following comment:

> Having considered the arguments on both sides of the debate from the perspective of principle, I conclude that the current law with respect to statements that are reliable and important to public debate does not give adequate weight to the constitutional value of free expression. While the law must protect reputation, the level of protection currently accorded by the law — in effect a regime of strict liability — is not justifiable. The law of defamation currently accords no protection for statements on matters of public interest published to the world at large if they cannot, for whatever reason, be proven to be true. But such communications advance both free expression rationales mentioned above — democratic discourse and truth-finding — and therefore require some protection within the law of defamation. When proper weight is given to the constitutional value of free expression on matters of public interest, the balance tips in favour of broadening the defences available to those who communicate facts it is in the public's interest to know.
>
> *Grant v. Torstar*, 2009 SCC 61 (CanLII) at para.64 (emphasis added)

22. The emphasis in *Grant v. Torstar* on the lack of justification for a regime of strict liability signals that the Supreme Court of Canada has likely moved beyond the majority decision in *Taylor*. The minority decision in *Taylor*, written by McLaughlin, J. (as she then was), makes a similar point in respect of the requirement for minimal impairment:

> There may be good reasons to defer to legislative judgment on the appropriate balance between furthering equality and safeguarding free expression, particularly in the context of a human rights statute. The problem here, however, is that no serious attempt to strike such a balance appears to have been made. The Act does not, as other human rights Codes do, admonish the tribunal to have regard to the speaker's freedom of expression in applying the provision. Nor does it contain even one of the various defences or exceptions included in s. 319(3) of the *Criminal Code*, and thought to be so significant in striking the balance by the Cohen Committee: *Report of the Special Committee on Hate Propaganda in Canada*

(1966), at pp. 65-66. Rather, it simply applies to all expression "likely to expose a person or persons to hatred or contempt".

Canada (Human Rights Commission) v. Taylor, 1990 CanLII 26 (S.C.C.)

23. Since *Taylor*, the Supreme Court of Canada has also adopted a rigorous approach to the analysis of harm that the BCCLA submits should inform this judicial review. In *Kouri*, the Court reformed the requirement set out in *R. v. Butler* to prove harm in relation to a criminal conviction for indecency or obscenity. In referring to the need for proof of "attitudinal harm", or the creation of attitudes inimical to the proper functioning of society, the Court made the following comment:

> Where actual harm is not established and the Crown is relying on risk, the test of incompatibility with the proper functioning of society requires the Crown to establish a significant risk. Risk is a relative concept. The more extreme the nature of the harm, the lower the degree of risk that may be required to permit use of the ultimate sanction of criminal law. Sometimes, a small risk can be said to be incompatible with the proper functioning of society. For example, the risk of a terrorist attack, although small, might be so devastating in potential impact that using the criminal law to counter the risk might be appropriate. However, in most cases, the nature of the harm engendered by sexual conduct will require at least a probability that the risk will develop to justify convicting and imprisoning those engaged in or facilitating the conduct.

R. v. Kouri, 2005 SCC 80 (CanLII) at para.61

24. The approach taken by the Court in *Kouri* represents the adoption of a more rigourous evidentiary approach to attitudinal harm than the approach taken by the Court in *Taylor*. In *Taylor*, the Court gave the government considerably more latitude in this area. The constitutional context underlying the Court's decision in *Taylor* has changed.

Changes to the Statutory Context

25. The statutory context has changed since the *Taylor* decision. In *Taylor*, the Court dealt with conciliatory hate speech provisions as they applied to telephonic communications. Since

Taylor, the remedies under the CHRA were expanded to include compensatory and penal provisions. Moreover, the scope of the hate speech provisions was expanded in 2001 by s.13(2) to include internet communications (S.C. 2001, c. 41, s. 88).

26. The expansion of s.13(1) precludes the uncritical application of the s.1 analysis in *Taylor* to this new statutory context. In particular, the inclusion of communication by any "means of a computer of a group of interconnected or related computers" extends the scope of s.13(1) to include both a wider range of media and private communications. The expansion of s.13(1) to apply to a wider range of media requires a comprehensive s.1 analysis that accounts for the purpose and effect of the statutory amendments. It is overly simplistic to suggest that *Taylor* is controlling because the text of s.13(1) is unchanged. Such an analysis falls into the trap of decontextualizing s.13(1) by ignoring the combined purpose and effect of ss.13(1) and 13(2) of the CHRA; it breaks the basic rule of statutory interpretation that the words of an Act are to be read in their entire context.

Changes to the Factual Context

27. If granted leave to appeal, the BCCLA will argue that the factual context has also changed since *Taylor*. In *Taylor* the Court dealt with messages delivered by telephone answering service. In this case, more than twenty years later, this Court is dealing with the medium of a chat room on the internet which required a user login and password to view the text of the document that was found to constitute hate speech.

28. If granted leave to intervene, the BCCLA will argue that the extension of hate speech provisions to the internet is a new restriction on free expression that requires a new justification under s.1 of the *Charter*. The s.1 justification in *Taylor* did not anticipate the digital era. The 1967 Cohen Committee report on hate propaganda, on which reliance was placed by the Court in *Taylor*, did not anticipate the digital era and provides little or no support for restricting expression on the internet.

29. Unlike the medium of the telephone answering machine, the internet medium is *par excellence* a democratic "marketplace of ideas". Unlike the medium of the answering

machine, truth and falsity may grapple in the internet arena. The BCCLA regards the internet as a forum in which ignorant, outdated and spiteful articles such as "AIDS Secrets: What the Government and the Media don't want you to know" should be published so as to provide a forum for their refutation and denunciation. The internet provides its own self-corrective solution to problems of inaccurate, offensive and hurtful content.

30. Hateful and discriminatory speech on the internet provides all people, including members of a targeted group, with an opportunity to enhance their dignity and exercise their autonomy by responding with critical expression of equal or greater force. The same cannot be said of the telephone answering machine. The remedial objectives of the Act – public education, shaming, deterrence, compensation, even conciliation – can all be effected by the innumerable contributors to the internet. Censorship of internet content is unnecessary to achieve the statutory objective, and is therefore not minimally impairing.

31. The cost of restricting hateful expression on the internet may also be disproportionate to its benefits. Even if government intervention succeeds in removing or deterring hateful expression from the internet, the intervention will interfere with democratic discourse by depriving critics of an opportunity to denounce bigotry and racism.

32. The internet provides individuals with a high degree of control over the information that they wish to see. Those who wish to avoid hurtful messages on the internet may for the most part choose inoffensive sites and content. The potential for psychological injury to members of the target group, which figured prominently in the s.1 analysis in *Taylor*, is lessened by user control over content.

Severance of Penalty Provisions

33. If granted leave to intervene, the BCCLA will provide detailed submissions regarding the severability of the penalty provisions under s.54(1)(c) of the CHRA. In the view of the BCCLA, the lack of constitutional justification for expressive restriction imposed by the hate speech provisions stems from the combined effect of the following: (1) strict liability and the absence of defences under s.13(1); (2) the extension of the hate speech provisions to the

internet by s.13(2) of the CHRA; and (3) the penalty provisions under s.54(1)(c). The removal of the penalty provision alone cannot cure the constitutional defect, and s.13(1) must be struck in its entirety.

The BCCLA will present a s.1 Analysis Useful to the Court

34. If granted leave to intervene, the BCCLA will make s.1 submissions that are useful to the Court. The BCCLA will provide a *R. v. Oakes* proportionality analysis that places the hate speech in their constitutional, statutory and factual context.

Restrictions on BCCLA Submission

35. The BCCLA seeks to make submissions restricted to ss.1 and 2(b) of the *Charter of Rights and Freedoms*, as well as the appropriateness of the *Charter* remedy sought by the CHRC. The BCCLA does not intend to repeat any arguments already being put forward by other parties.

PART IV: STATEMENT OF ORDER SOUGHT

36. In conclusion, the BCCLA respectfully requests leave to intervene in this matter, leave to file a written argument no longer than 20 pages in length and to leave to make oral submissions not longer than 20 minutes in length.

PART V: LIST OF AUTHORITIES

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, ss.1 and 2

Canadian Human Rights Act (R.S., 1985, c. H-6), ss.13 and 54

Case Law

Canadian Jewish Congress v. North Shore Free Press and Doug Collins (7) (1997), 30 C.H.R.R.D./5 (B.C. Human Rights Tribunal)

Chamberlain et al. v. Surrey School District No. 36, [2002] S.C.J. No. 87 (S.C.C.)

Elmasry and Habib v. Roger's Publishing and Steyn, 2008 BCHRT 378 (CanLII)

Grant v. Torstar, 2009 SCC 61 (CanLII)

Little Sisters Book and Art Emporium and the British Columbia Civil Liberties Association v. Minister of National Revenue and Minister of Justice, [2000] 2 S.C.R. 1120 (S.C.C.)

Pegura and Forster v. School District No.36 (No.4), 2004 BCHRT 237

R. v. Butler, [1992] 1 S.C.R. 452 (S.C.C.)

R. v. Finta, [1993] 1 S.C.R. 1138

R. v. Kouri, 2005 SCC 80 (CanLII)

Reference Re Workers' Compensation Act, 1983 (Nfld.), [1989] 2 S.C.R. 335

Taylor v. Canadian Human Rights Commission, 1990 CanLII 26 (S.C.C.)

WIC Radio Inc. v. Simpson, 2008 SCC 40 (CanLII)

APPENDIX A: STATUTES AND REGULATIONS (Bound Separately)

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, ss.1 and 2

Canadian Human Rights Act (R.S., 1985, c. H-6), ss.13 and 54

APPENDIX B: BOOK OF AUTHORITIES (Bound Separately)

Canadian Jewish Congress v. North Shore Free Press and Doug Collins (7) (1997), 30 C.H.R.R.D./5 (B.C. Human Rights Tribunal)

Chamberlain et al. v. Surrey School District No. 36, [2002] S.C.J. No. 87 (S.C.C.)

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