

FEDERAL COURT

BETWEEN:

CANADIAN HUMAN RIGHTS COMMISSION

APPLICANT

AND

RICHARD WARMAN, ATTORNEY GENERAL OF CANADA
and MARC LEMIRE

RESPONDENTS

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 Silver Birch 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.)



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