

VANCOUVER

MAY 13 2009

Court of Appeal File No. CA036762

COURT OF APPEAL  
REGISTRY  
IN THE COURT OF APPEAL OF BRITISH COLUMBIA

ON APPEAL FROM the Order of the Honourable Mr. Justice Ehrcke of the Supreme Court of British Columbia made the 15<sup>th</sup> of December, 2008

BETWEEN:

DOWNTOWN EASTSIDE SEX WORKERS UNITED  
AGAINST VIOLENCE SOCIETY and SHERYL KISELBACH

APPELLANTS  
(PLAINTIFFS)

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT  
(DEFENDANT)

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**MEMORANDUM OF ARGUMENT ON THE APPLICATION FOR LEAVE TO  
INTERVENE OF THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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United Against Violence Society and  
Sheryl Kiselbach, APPELLANTS**

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## INTRODUCTION

1. This is the application of the British Columbia Civil Liberties Association ("BCCLA") under Rule 36(1) of the *Court of Appeal Rules* for leave to intervene in the appeal brought by the Downtown Eastside Sex Workers United Against Violence ("SWUAV") and Sheryl Kiselbach from the decision of Ehrcke J. in *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726.
2. The BCCLA specifically seeks leave to file written submissions not exceeding twenty (20) pages in length and leave to make oral submissions at the appeal.

## THE BCCLA'S INTEREST IN THE APPEAL

3. The BCCLA is a non-profit and non-partisan advocacy group and is one of the country's pre-eminent civil liberties organizations. The BCCLA's interest in the appeal includes: (1) an interest in ensuring access to justice for the most vulnerable members of society, including sex trade workers; (2) an interest in the adjudication the constitutional validity of the *Criminal Code* prohibition on the consensual adult sex trade; and (3) an interest in maintaining and enhancing the proper supervisory role of the judiciary with respect to the *Charter of Rights and Freedoms* (the "Charter").
4. Since its incorporation in 1963, the BCCLA has played an important and prominent role in promoting, defending, sustaining and extending civil liberties and human rights throughout British Columbia and Canada. The BCCLA's commitment to the promotion of individual liberties and human dignity generally includes advocacy relating to privacy, freedom of expression, the right to equality before and under the law, and the protection of liberty and physical integrity from unjust laws.

*Affidavit #1 of David Eby, at paras. 2, 5 and 6*

5. The BCCLA has long maintained an interest in the prohibition against sex work. In 1978, the BCCLA took the position that Bill C-51, which amended provisions of the Criminal Code criminalizing solicitation for the purposes of prostitution. In 1982, the BCCLA took the position that the criminalization of sex work causes more social harm than it prevents. In 2005, the BCCLA updated its position to prohibition against sex work and again endorsed the repeal of criminalization of sex work.

*Affidavit #1 of David Eby, at para.11, Exs. E, F and G*

6. From its inception, the BCCLA has been a strong proponent of access to justice within British Columbia and Canada. In 1963, the BCCLA supported the establishment of a legal aid system for both civil and criminal law matters. Its interest in the legal aid system continues to this day. In 1986, the BCCLA advocated for a formal code permitting public interest interventions before the Courts. Throughout its history, a portion of the BCCLA's work has involved facilitating litigation either by bringing lawyers together with principled clients or by participating in proceedings. Apart from judicial review proceedings, the BCCLA has initiated litigation as a party on a number of occasions.

*Affidavit #1 of David Eby, at paras. 9 and 10, Exs.A, B and C*

## **SUMMARY OF SUBMISSIONS**

7. If granted intervener status, the BCCLA intends to argue for incremental improvements to the existing common law test for public interest standing. In particular, the BCCLA will focus on the third branch of the test for public standing: whether there exists a reasonable and effective alternative to public interest standing that will facilitate comprehensive and contextualized adjudication of the issues in dispute. The BCCLA will argue that the test for public standing should reflect the proper supervisory role of the judiciary appropriate to a constitutional democracy and consistent with the rule of law.

8. The question of public interest inexorably leads to an examination of the role of the judiciary in a constitutional democracy. The role of the judiciary in the maintenance of respect for the limits of legislative authority was central to the decisions in *Thorson* and *McNeil*. In *Thorson*, Laskin J. stated that a "telling consideration" for him was "whether a question of constitutionality should be immunized from judicial review by denying standing to anyone to challenge the impugned statute" and that "it would be strange and, indeed alarming, if there was no way in which a question of alleged excess of legislated power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication."
  
9. In *Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (S.C.C.), the role of the judiciary played a central role in the extension of the public interest standing criteria in *Borowski* to cases involving the limits of administrative authority. Le Dain J. provided the following explanation of the judicial concerns underlying the criteria for public interest standing:

The traditional concerns about the expansion of public interest standing may be summarized as follows: the concern about the allocation of scarce judicial resources and the need to screen out the mere busybody; the concern that in the determination of issues the courts should have the benefit of contending points of view of those most directly affected by them; and the concern about the proper role of the courts and the constitutional relationship to the other branches of government.

10. In *Canadian Council of Churches*, the role of the judiciary was again central to the reasoning of the Court:

Parliament and the legislatures are thus required to act within the bounds of the constitution and in accordance with the *Charter*. Courts are the final arbiters as to when that duty has been breached. As a result, courts will undoubtedly seek to ensure that their discretion is exercised so that

standing is granted in those situations where it is necessary to ensure that legislation conforms to the Constitution and the *Charter*.

*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (S.C.C.)

11. *Canadian Council of Churches* determined that that the criteria for granting public interest standing set forth in *Borowski*, while they should be given a liberal and generous interpretation, need not and should not be expanded. The BCCLA's interest on this appeal is to ensure that the *Borowski* criteria are given a liberal and generous interpretation, and to follow the caution in *Council of Churches* that the third criterion "should not be interpreted as a mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immune from challenge."
12. If granted leave to intervene, the BCCLA intends to make submissions on developments in the law of standing in Australia and the United Kingdom. Australian and UK law were viewed as significant in *Canadian Council of Churches*, and developments in those jurisdictions may be useful to the Court.
13. The third *Borowski* criterion is that public interest standing will be denied where there exists a reasonable and effective alternative to the process initiated by the public interest litigant. The BCCLA will propose an interpretation of this criterion that would emphasize the requirement of an "effective alternative". The BCCLA proposes to emphasize a more liberal and generous interpretation that involves a balanced assessment of the relative legal and factual merits of the actual lawsuit proposed by the public interest organization before the Court.
14. This approach would involve a direct assessment of the litigation capacity of the party seeking public interest standing, an appraisal of the type and quality of evidence the party is prepared to place before the Court, an assessment of the efficacy of the legal frame in which the challenge is put, and, ultimately, a balanced consideration of whether a private party who is not before the Court

could bring a case of similar scope and quality before the Court. This approach finds some support in the contextualized analysis of public interest standing the *Chaoulli* decision.

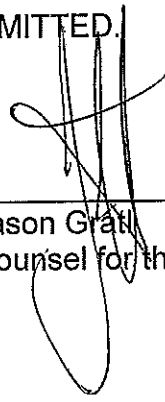
*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para.189

15. The BCCLA would advocate a move away from the emphasis placed in the decision under appeal on whether there exist impediments to a private interest suit. An undue emphasis on the narrow question of impediments to private interest litigation inappropriately shifts the issue away from the requirement that the government demonstrate that the judicial role of ensuring the constitutionality of legislation is likely to be fulfilled if the public interest litigant's lawsuit is dismissed.

#### **THE SUBMISSIONS WILL BE USEFUL AND DISTINCTIVE**

16. The BCCLA submits that its perspective will be useful and distinct from the submissions of the parties or other interveners. Although the Appellant's factum addresses the criteria for public interest standing, the Appellant's submissions do not focus on the role of public interest litigation in activating the judicial role in an adversarial system.
17. The BCCLA has a proven track record as an intervener before this court in constitutional cases and in cases concerning privacy interests. The BCCLA wishes to intervene in this case to guide the development of the law in a manner consistent with the organization's commitment to civil liberties and human rights.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Jason Grat  
Counsel for the Applicant

Vancouver, BC  
May 13, 2009

## LIST OF AUTHORITIES

*Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*,  
1992 CanLII 116 (S.C.C.)

*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 (S.C.C.)

*Finlay v. Canada (Minister of Finance)*, 1986 CanLII 6 (S.C.C.)

*Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265 (S.C.C.)

*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138 (S.C.C.)