

VANCOUVER
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COURT OF APPEAL
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COURT OF APPEAL FILE NO. CA45940

B.C. Supreme Court File No. E190334
Vancouver Registry

COURT OF APPEAL

ON APPEAL FROM the Order of Mr. Justice Bowden of the Supreme Court of B.C. pronounced on the 27th day of February, 2019, and the Orders of Madam Justice Marzari of the Supreme Court of B.C. pronounced on the 15th day of April, 2019

BETWEEN:

A.B.

RESPONDENT
(Claimant)

AND:

C.D.

APPELLANT
(Respondent)

AND:

E.F.

RESPONDENT
(Respondent)

AND:

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

PROPOSED INTERVENER

AFFIDAVIT OF JOHN CARPAY
(In support of the application for leave to intervene of
the Justice Centre for Constitutional Freedoms)

I, John Carpay, Barrister and Solicitor, of the City of Calgary, in the Province of Alberta, **MAKE OATH AND SAY AS FOLLOWS:**

A. Background

1. I am a barrister and solicitor and the president of the Justice Centre for Constitutional Freedoms ("Justice Centre"), the proposed Intervenor. I have read and I understand the foregoing application. I have personal knowledge of the facts contained therein and they are true to the best of my knowledge, information and belief. I am authorized to swear this affidavit on behalf of the Justice Centre.
2. I received my Bachelor of Arts in political science from Laval University and my law degree from the University of Calgary. I have been a member of the Law Society of Alberta since 1999. For most of my legal career, I have practiced in constitutional litigation on behalf of both *Charter* litigants and interveners. I was in-house counsel with the Canadian Taxpayers Federation ("CTF") from 2001-2005, where I managed its intervention in *Benoit v. Canada*, (2003 FCA 236) at both the trial and appellate levels.
3. I served as the Executive Director of the Canadian Constitution Foundation from 2005 to 2010, managing that organization's court interventions in *Kingstreet Investments v. New Brunswick*, 2007 SCC 1; *Whatcott v. Saskatchewan Human Rights Commission*, 2010 SKCA 26; and other cases. In *R. v. Kapp*, 2008 SCC 41, I acted for the Japanese Canadian Fishermen's Association when it intervened at the Supreme Court of Canada to argue for racial equality within the commercial fishery.
4. Since 2010 I have served as the President of the Justice Centre, and have been responsible for all of its constitutional litigation files.

B. About the Justice Centre's Experience and Expertise

5. The Justice Centre is a secular, independent charitable organization which focuses on defending the constitutional freedoms of Canadians through litigation and education. The Justice Centre was established as a non-profit corporation by Letters Patent in October 2010 under the *Canada Corporations Act*. It is based in Calgary, Alberta. The Justice Centre relies on voluntary donations from charitable foundations and from over 5,000 individual donors across Canada. It does not seek or accept funding from any level of government.
6. The Justice Centre's Board of Directors and Advisory Council include lawyers, law professors, academics and others active in the realm of Canadian public policy. The Board and the Advisory Council enhance the Justice Centre's experience and expertise in Canadian constitutional matters. The Justice Centre also maintains collaborative relationships with approximately thirty lawyers across Canada, including law professors and retired judges who are involved on a *pro bono* basis with the Justice Centre's litigation files. The Justice Centre staff currently includes myself as president, several administrative and support staff, and a five-member legal team with extensive experience litigating constitutional matters.
7. Through its various activities and efforts in and out of the courtroom, the Justice Centre has developed expertise regarding the purpose, scope, application and importance of the fundamental freedoms and rights protected by sections 2 and 7 of the *Charter*, including in the context in which those rights and freedoms intersect with transgenderism and the legal protections recently attached to gender identity and gender expression.
8. The Justice Centre acts, on a *pro bono* basis, for citizens whose *Charter* rights and freedoms have been infringed by government decisions or legislation. The Justice Centre has defended *Charter* freedoms in cases involving schools, families, professional regulatory bodies, public libraries, universities, student unions, human rights tribunals, municipal and provincial governments and the

federal government.

9. The Justice Centre recently represented approximately 30 independent schools and 10 parents in *P.T. et al. v Alberta*, a case involving a constitutional challenge to Alberta legislation that infringed the section 2 and 7 *Charter* rights of the schools and parents.
10. The Justice Centre is an experienced intervener. In addition to having been granted intervener status before various courts of all levels in most jurisdictions across the country, it has twice previously intervened before this Honourable Appellate Court in *Trinity Wester University v The Law Society of British Columbia*, 2016 BCCA 423 and *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162, submitting arguments based on section 2 of the *Charter*.
11. Intervener status was granted to the Justice Centre by the Supreme Court of Canada in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 and by the Ontario Court of Appeal in *Christian Medical and Dental Society of Canada et al v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393. Most recently, the Justice Centre intervened before the BC Human Rights Tribunal in the matter of *Oger v Whatcott*, 2019 BCHRT, submitting arguments regarding the application of freedom of expression in the context of a political campaign involving a transgender candidate.
12. The Justice Centre has also presented to parliamentary committees in both the House of Commons and the Senate, including to the *Standing Senate Committee on Legal and Constitutional Affairs* in 2017 regarding Bill C-16 and its impact on freedom of expression as protected by the *Charter*.
13. The Justice Centre regularly publishes reports and legal research papers regarding issues that invoke the rights protected by section 2 and 7 of the *Charter*, such as parental rights in education, the conscience rights of civil servants and government service providers, and the rights of third parties to

engage in political expression.

14. The Justice Centre's efforts to educate Canadians on the nature and importance of their constitutional freedoms frequently include public presentations and appearances in radio, television, and newspaper media including the publication of columns in the *Globe and Mail*, *National Post* and other papers across Canada.

C. The Justice Centre's Proposed Intervention in this case

15. The Justice Centre proposes to focus its submissions exclusively on two issues that align with its mandate and expertise, specifically the issue of children's and parent's rights as protected by section 7 of the *Charter* and the issue of state-compelled speech, protection from which is guaranteed by section 2(b) of the *Charter*.

Section 7

16. The Justice Centre, if granted intervener status, will submit arguments concerning the broad liberty interests of parents in raising and protecting their children. Section 7 constitutionalizes the liberty and security interests of parents to raise their children, including a right to make decisions for them in fundamental matters such as participating in irreversible medical interventions. Further, a child's section 7 *Charter* rights include the right to have the protection of parents, and the right to have parents make decisions for the well-being of the child.
17. Parents across Canada, both religious and non-religious, have a deep personal and abiding interest in their children's health and long-term happiness. This interest is constitutionalized in recognition that parents are typically in a far better position than the state to raise children and to make decisions regarding their care. The law recognizes that nobody is more invested in protecting children than their parents. In regard to section 7, the Supreme Court of Canada has recognized that the *Charter* gives parents plain rights generally to make decisions for the good of their children.

18. The rights of children to life and security are protected via their right to have their own parents appropriately informed and enabled to provide necessary support and protection. According to the Supreme Court, this vital link between parent and child may only be interfered with on a case-by-case basis when necessity is demonstrated, and it is justified in doing so.
19. In the instant case, the lower courts overrode parental objections to an elective and experimental procedure, namely the administering of puberty blockers and testosterone to the child, A.B. (the "Treatment"). The parents of A.B. were not *ad idem* regarding the elective treatment. The lower court's decisions were a profound interference with child and parental rights protected by section 7, and a serious intervention in the balance of parental authority that had been equally balanced between C.D. and E.F.
20. The Treatment interrupts and interferes with puberty, a natural and necessary component of both human growth and psychological stability *vis a vis* a sense of one's identity rooted in biological sex. Given the experimental and elective nature of the Treatment and the known side effects (some of which are irreversible), the lower court's interference with parental authority has deeply concerning implications for parental rights across Canada.
21. If granted leave to intervene, the Justice Centre will provide useful submissions to the Court regarding the nature, scope and broader national implications of the section 7 infringement occasioned by the impugned Orders of the lower court, specifically the Order of Justice Bowden permitting A.B. to proceed with gender transition treatment without the consent of the father, C.D. and the Orders of both Justices Bowden and Mazari prohibiting C.D. from attempting to dissuade A.B. to cease treatment.
22. The Justice Centre will argue that these Orders and the resulting infringement of constitutional rights are neither necessary nor justified in the circumstances. The state, which includes the courts, is precluded—except in the rarest of circumstances not present in the within case—from interfering with C.D.'s rights

to raise his child in accordance with what he reasonably believes is best for the child, and to protect the child from the irreversible consequences of unnecessary and risky medical interventions with irreversible consequences, such as gender transition treatment.

State-compelled expression

23. If granted intervener status, the Justice Centre will also submit arguments regarding the section 2(b) right to not be compelled by the state, including the courts, to utter words which are not one's own. In addition to protecting every person's freedom to speak, hear and listen, *Charter* section 2(b) also protects citizens from being coerced to utter words and opinions imposed on them by other citizens or the state.
24. Section 2(b) of the *Charter* "guarantee[s] to every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own." The Supreme Court of Canada has referred to state compelled speech as "totalitarian and as such alien to the tradition of free nations like Canada".
25. Justice Bowden issued two orders compelling all the parties to this litigation and even the general public to refer to the Respondent A.B. as a male, to refer to A.B. with only male pronouns and to refer to A.B. by the male name A.B. has adopted, all notwithstanding the fact that transgenderism claims gender is fluid, and notwithstanding that A.B. is a biological female. The Justice Centre will argue these orders compel all citizens who encounter A.B., including A.B.'s own father, to express words, opinions and beliefs that may not be their own are therefore not in compliance with section 2(b) of the *Charter*. It is not lawful for the courts or any apparatus of government to demand citizens refer to any individual with words that are not freely chosen by them, especially when uttering such words commits the speaker to a belief they do not adhere to.

26. Freedom from state-enforced expression is a “fundamental” to the “free and democratic society” envisioned in section 1 of the *Charter*. Without freedom from state compulsion regarding speech, the various rights, responsibilities and protections accorded to parents and children, including by section 7 of *Charter*, are worth little.

D. The Justice Centre’s Unique and Valuable Perspective

27. As an organization wholly dedicated to, and experienced in, advancing *Charter* freedoms, the Justice Centre is in an advantageous and unique position to assist in illuminating the *Charter* issues of this case, for the Court’s consideration. The Justice Centre was founded with the mission of advancing and promoting the core principles of freedom and equality as protected by the *Canadian Charter of Rights and Freedoms*. This mission is supported and voluntarily funded by thousands of Canadians who desire to see Canada’s fundamental freedoms upheld by the courts and adhered to by government.
28. The Justice Centre represents the interests of Canadians in ensuring their constitutional rights are protected, including the *Charter* section 7 right to raise and protect their children without undue interference from the state, and the right to not be compelled by the state to say things they don’t want to.
29. In granting the Justice Centre’s motion to intervene in *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 at para 48, Justice Nordheimer recognized the Justice Centre’s unique perspective:

Unlike the organizations that I have just dealt with, JCCF is a non-religious organization. As such, it brings a different perspective to the issues. ... In my view, its view point is sufficiently distinct that it may be valuable to the court hearing this matter.

30. This Court’s decision in this case will serve as a precedent that will impact families and health care providers all across the country. The proper application

of the *Charter's* guarantees in section 7, which lies at the core of the Justice Centre's purpose and expertise, is of paramount importance in this case.

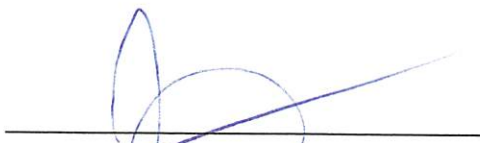
C. Impact on the litigation

- 31. The Justice Centre is aware of the need to avoid undue delay in the proceedings or prejudice to any of the parties to this case. It is that awareness that motivates the Justice Centre not to duplicate arguments already fully before the Court, and to focus its argument on the *Charter* arguments described above. The Justice Centre proposes to address the relevant application of sections 7 and 2(b) of the *Charter* from its unique perspective, and with the intent of giving the Court the fullest perspective on which to rule on the merits of those issues.
- 32. The Justice Centre proposes to file a single factum of a maximum of 20 pages, and it requests a maximum of 30 minutes for oral argument. The Justice Centre will not raise new issues or present any evidence, and agrees to accept service of all materials by e-mail. It will not seek costs on the intervention, and also requests that no costs be awarded against it.
- 33. I make this Affidavit in support of the Justice Centre's motion to intervene in this appeal and no other or improper purpose.

SWORN BEFORE ME at the City of)
 CALGARY, in the Province of Alberta, this 11th)
 day of July 2019.)
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 James Kitchen
 Barrister and Solicitor



 JOHN GARPAY