

VANCOUVER
JUL 15 2019
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 Orders 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

MEMORANDUM OF ARGUMENT
(In support of the application for Leave to Intervene of
the Justice Centre for Constitutional Freedoms)

To: Counsel for the Proposed Intervener

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I. Order Sought

1. The Justice Centre for Constitutional Freedoms (“Justice Centre”) applies under s. 36 of the *Court of Appeal Rules* for the following Orders:
 - (a) Leave to intervene in the appeal to the Court of Appeal of British Columbia from the Orders 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;
 - (b) Leave to file a factum of up to 20 pages in length;
 - (c) Leave to present oral argument not to exceed 30 minutes in length, or as directed by the Court;
 - (d) An Order providing that there shall be no costs of this application or costs of the appeal for or against the Justice Centre for Constitutional Freedoms; and
 - (e) Such further and other relief as this Honourable Court deems just.

II. Test for granting leave to Intervene

2. Any entity interested in an appeal may apply to a justice of this Court for leave to intervene on any terms and conditions that the justice may determine.¹ As an Order incidental to the appeal, a justice in chambers may grant leave to intervene.²
3. This Honourable Appellate Court has admitted non-parties as interveners when doing so will assist the Court in determining the relevant issues on appeal.³ A

¹ Rule 36(1), *Court of Appeal Rules*, B.C. Reg. 297/2001.

² Section 10(2)(a), *Court of Appeal Act*, R.S.B.C. 1996, c. 77.

³ *British Columbia (Independent Investigations Office) v. Vancouver (City) Police Department*, 2019 BCCA 169; *Araya v. Nevsun Resources Ltd.*, 2017 BCCA 402; *Garcia v. Tahoe Resources Inc.*, 2016 BCCA 320 (*Garcia*);

proposed intervener is not required to show that it has a direct interest, only that it represents a public interest in the appeal.⁴

4. Intervener status has been granted by this Court when the proposed intervener has satisfied the Court that it will “make a valuable contribution or bring a different perspective to a consideration of the issues that differs from those of the parties.”⁵ More recently, the Court has stated that an applicant will meet the threshold to be admitted as an intervener “when it represents a public interest in a public law issue to which it can bring a perspective that is different and useful to the court in resolving that issue.”⁶

III. Application of the test to the facts

A. The Applicant

5. The Justice Centre is a secular, independent charitable organization which focuses on defending the constitutional freedoms of Canadians through litigation and education and is supported by over 5,000 individual donors across Canada.
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 Justice Centre staff currently includes 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

British Columbia Teachers’ Federation v. British Columbia, 2014 BCCA 341; *Director of Civil Forfeiture v. Lloydsmith*, 2013 BCCA 516; *Freidman v. MacGarvie*, 2012 BCCA 109.

⁴ *EGALE Canada Inc. v. Canada (A.G.)*, 2002 BCCA 396 at para 7 (*EGALE*); *Vincent v. Roche-Vincent*, 2013 BCCA 136 at para 4.

⁵ *EGALE*, para 7.

⁶ *Garcia*, at para 7.

gender identity and gender expression.

8. The Justice Centre recently represented approximately 30 independent schools and 10 parents in *P.T. et al. v Alberta*,⁷ a case involving a constitutional challenge to Alberta legislation that infringed the section 2 and 7 *Charter* rights of the schools and parents.
9. The Justice Centre has filed this application in a timely manner. It is familiar with the litigation process and is an experienced intervener. It is prepared to file its factum in a timely fashion and commits to cooperating with all counsel.

B. The Justice Centre's proposed arguments

10. This case is broad and complex, with a number of grounds advanced by the Appellant. 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

11. 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.
12. 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

⁷ Court of Queen's Bench of Alberta File No. 1808-00144.

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. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, the Honourable Justice LaForest stated:

...I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in R. v. Big M Drug Mart Ltd., supra, the Charter was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being. In Hepton v. Maat, 1957 CanLII 18 (SCC), [1957] S.C.R. 606, our Court stated (at p. 607): "The view of the child's welfare conceives it to lie, first, within the warmth and security of the home provided by his parents".

...

In recent years, courts have expressed some reluctance to interfere with parental rights, and state intervention has been tolerated **only when necessity was demonstrated**. This only serves to confirm that the parental interest in bringing up, nurturing and caring for a child, including medical care and moral upbringing, is an individual interest of fundamental importance to our society.

...

... parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it **necessary** to safeguard the child's autonomy or health. But such intervention **must be justified**. In other words, parental decision-making must receive the protection of the *Charter* in order for state interference to be properly monitored by the courts, and be permitted **only** when it conforms to the values underlying the *Charter*.⁸ [Emphasis added]

13. The rights of children to life and security are protected via their right to have their parents appropriately informed and enabled to provide necessary support and

⁸ [1995] 1 SCR 315 ("*B.R.*") at paras 83-85.

protection.⁹ 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.

14. 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.
15. 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.
16. 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.

⁹ *C.P.L., Re*, 1988 CanLII 5490 (NL SC), at paras 76-80, 87-88 and 97: "Almost secretly the Director was contacted, consent obtained and the operation performed. This effectively kept the parents out of the picture. In this case it was not what was actually done but how it was done, which was the denial of the child's rights. As I have already stated the medical treatment for the child was appropriate and performed in an expert manner. **The child was still denied his right to be informed through his parents.** I find the apprehension and detention of C.P.L. was not in accordance with fundamental principles of justice." [Emphasis Added]

State-compelled expression

17. If granted intervener status, the Justice Centre will also submit arguments regarding the constitutional 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.¹⁰
18. 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".¹¹
19. 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.
20. Freedom from state-enforced expression is "fundamental" to the "free and democratic society" envisioned in section 1 of the *Charter*. Without this freedom, the various rights, responsibilities and protections accorded to parents and children, including by section 7 of *Charter*, are worth little.

¹⁰ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 (S.C.C.) at page 1080.

¹¹ *National Bank of Canada v. Retail Clerks' International Union*, [1984] S.C.J. No. 15 at page 296.

C. The public law impact of this case and the public interest as represented by the Justice Centre

21. This case is not merely a private family dispute. It concerns deep social issues and questions regarding constitutional rights that take the case into the realm of the public sphere. 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 sections 7 and 2(b), which lies at the core of the Justice Centre's purpose and expertise, is of paramount importance in this case.
22. 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.
23. 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.
24. The Justice Centre's "broad representative base" as well as its mission, experience, expertise and unique perspective regarding litigation involving constitutional rights make it an ideal intervener to assist the Court in this case.¹²

D. Unique perspective and valuable contribution

25. The Justice Centre possesses a unique non-religious perspective regarding the

¹² *Freidman v. MacGarvie*, 2012 BCCA 109 at paras 14 and 21.

security and liberty interests parents have in their children and the corresponding protection for children and parents in section 7 of the *Charter*. This perspective is informed by the many parents the Justice Centre has represented in situations where their constitutional rights to raise and protect their children was infringed, to the detriment of their children. The Justice Centre will further provide the Court with a valuable contribution regarding free expression, specifically compelled speech, having dealt extensively with freedom of expression, including at the intersection with transgender issues, and having recently litigated a case in Ontario that involved state compelled speech.¹³

26. 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.

27. The Justice Centre recognizes the importance of providing "distinct submissions" that may be of assistance to the court,¹⁴ while not taking the litigation away from the parties. The Justice Centre proposes to do so by focusing on specific issues in the appeal and providing the Court with a useful analytical approach to resolving those issues.

All of which is respectfully submitted.

Dated: July 12, 2019



Jay Cameron
 Counsel for the Justice Centre for
 Constitutional Freedoms

¹³ *B. v. Children's Aid Society of Hamilton*, 2018 ONSC 1487.

¹⁴ *PHS Community Services Society v. Canada (Attorney General)*, 2008 BCCA 441 at paras 22-24.