bc civil liberties association
L'Association des libertés civiles de la Colombie-Britannique




April 3, 2008

Mayor and Council
City of Powell River
6910 Duncan Street
Powell River, B.C.
V8A 1V4

Dear Mayor and Councilors:

**Letter to Powell River City Council re the "Powell River Three"**

I am writing to you on behalf of the British Columbia Civil Liberties Association.

We are in receipt of four letters sent by your solicitors, Woodward Walker, to residents of Powell River. Three of the letters, addressed respectively to Noel Hopkins, Winslow Brown, and Patricia Aldworth, require retractions and public apologies from the addressees as a condition of the City refraining from suing them for defamation. The publications of the "Powell River Three", as we shall refer to them, are variously characterized in the threatening legal letters as "the accusation that the City has utilized funds in an improper way which requires a comprehensive criminal investigation", that the City "is involved in a corrupt election preceding (sic) and is unethical", and that the City "will be conducting the present elector assent process in a corrupt manner".

A fourth letter (again from the City's solicitors) informs David Harris that "there is simply no legal basis" for Harris' statement in a letter to the PRSC Land Development Ltd. "that two Powell River councillors are in a conflict of interest" with respect to their tenure on the PRSC, or his suggestion that an application before the PRSC is "not an unbiased request". While this letter does not explicitly threaten legal action, the use of the quoted "no legal basis" phrase seems calculated to at least raise an apprehension of such. If there is no legal basis for Mr. Harris' statements, as the City's solicitors ominously conclude, the implication is that they might be actionable as illegal.

This pattern of conduct on the part of the City of Powell River is profoundly undemocratic. The fundamental idea of a democracy is that sovereign political authority is never delegated or alienated by the citizenry. The electorate does not subside into passivity as a subject political entity after it has delegated a measure of its legislative authority in an election of representatives.

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BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION
Suite 550 - 1188 West Georgia Street, Vancouver, BC, Canada V6E 4A2
t: 604.687.2919 | f: 604.687.3045 | w: www.bccla.org | e: info@bccla.org

The *inalienable* sovereignty of The People is the core principle of genuine, as opposed to merely nominal, democracy, and it finds its enduring political expression in the uninhibited right to criticize the conduct of government in the public forum. The crown always remains on the head of the citizenry, never legitimately on the head of the Prime Minister, the Premier, or the Mayor.

So when we see a municipal government using the wealth, power, and legal resources placed at its disposal by the citizenry to act in the public interest, turned to the perverse employment of SLAPP suits (Strategic Lawsuits Against Public Participation) to cleanse the forum of political criticism, we know that we are in the presence of an attack upon democracy itself.

It is hard to over-estimate the intimidating power of the threat of a lawsuit brought by a government, or even by an individual politician. Defending a defamation action brought by a powerful litigant is enormously costly in time, wealth, and emotional energy. It is a game for the wealthy or those with institutional support, and most ordinary people reasonably regard the threat of such a lawsuit as rising to the level of an attack upon their fundamental well-being. It is completely understandable that Mr. Brown appeared at a council meeting to retract his criticism and make the required apology, citing the fact that he could not imaginably bear the expense of the legal action threatened by the City. We understand that when Mr. Brown asked if his retraction and apology meant that the threat was "over", the Mayor refused him any such relief, magisterially remarking that his statement was merely noted.

This underscores one of the most insidious features of the use of the threat of lawsuits in the SLAPP mode. The purpose aimed at is not a genuine resolution of the matter through any response of those threatened: rather, the goal is a general and persistent atmosphere of intimidation, warning off any citizen contemplating public criticism of the government. That is why "libel chill" is so powerfully corrosive of democratic spirit and action.

Turning now from the undemocratic character of the City's threatened lawsuits, it is our considered opinion that they are also legally baseless. Indeed, our reading of recent cases on this issue in senior Canadian courts is that there can be no legitimate action for defamation on the part of any government of Canada.

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We begin with a consideration of the precedent alluded to by the City's solicitors in their letters to the Powell River Three. Every letter includes the quote "freedom of speech is not a license to defame" from a decision of Justice Wilson of the B.C. Supreme Court in a 2004 case called *Clark v. East Sooke Rural Association.* In that action, Clark was an individual political figure suing an informal citizen's group that he claimed had defamed them in a desk-topped flier they had distributed in East Sooke concerning a real estate development. *Clark v. East Sooke* is not an action brought by an actual government, as is the case in Powell River, and so is fundamentally distinguishable from the Powell River situation. As it turned out, the rural association people turned up in court unrepresented, and the judge levied considerable general and aggravated damages against them in excess of $200K. This is a good case to cite if the aim is to make people think not twice, but several times before daring to raise their voice in criticism of the conduct of public persons. With respect, it is our opinion that *Clark v. East Sooke* was wrongly decided, and it stands as a potent warning that access to justice translates into access to professional legal representation, which is costly in roughly direct proportion to its effectiveness.

Nonetheless, this case is, as we have noted, distinguishable and so generally irrelevant to the Powell River situation. Two more recent (2006) cases in the Superior Court of Ontario are directly on point, in that they both concern defamation actions brought by municipalities.

The first case, from January 31, 2006, concerned a defamation action by the Township of Montague against Donald Page. The case was identified as raising important constitutional issues, and Mr. Page was supported by the Canadian Civil Liberties Association. Justice Pedlar dismissed the plaintiff Township's case, concluding that:

> *29 In a free and democratic system, every citizen must be guaranteed the right to freedom of expression about issues relating to government as an absolute privilege, without threat of a civil action for defamation being initiated against them by that government. It is the very essence of a democracy to engage many voices in the process, not just those who are positive and supportive. By its very nature, the democratic process is complex, cumbersome, difficult, messy and at times frustrating, but always worthwhile, with a broad based participation absolutely essential. A democracy cannot exist without freedom of expression, within the law, permeating all of its institutions. If governments were entitled to sue citizens who are critical, only those with the means to defend civil actions would be able to criticize government entities. As noted above, governments also have other means of protecting their reputations through the political process to respond to criticisms.*

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A subsequent case in the same court, on April 7, involved a defamation action brought by the Town of Halton Hills against a local internet provider who had alleged corruption. This case was quickly resolved in favour on the defendant, following roughly the same line of argument developed in *Montague v. Page.* Justice Corbett in his concluding reasons stating that

> *58 Speech About Government Is Absolutely Privileged: The reason for the prohibition of defamation suits by government lies not with the use of taxes, or with some abstruse theory about the indivisibility of the state and the people who make up the state. Rather, it lies in the nature of democracy itself. Governments are accountable to the people through the ballot box, and not to judges or juries in courts of law. When a government is criticized, its recourse is in the public domain, not the courts. The government may not imprison, or fine, or sue, those who criticize it. The government may respond. This is fundamental. Litigation is a form of force, and the government must not silence its critics by force.*

The Ontario Superior Court is considered one of the more authoritative senior trial divisions in the country, and both of these cases involved a particularly thorough canvass of the relevant constitutional issues by all parties. We think that *Montague* and *Halton Hills* establish a very strong starting point for our argument that the actions threatened against the Powell River Three are baseless, undemocratic SLAPP exercises in libel chill.

The BCCLA has decided that if the City of Powell River proceeds with the threatened lawsuits we will immediately offer our full support to the defendants. These cases engage absolutely fundamental democratic and civil libertarian principles, and we would be comfortable arguing them all the way to the Supreme Court of Canada if necessary.

Further, given the baseless and illegitimate nature of the lawsuits threatened, serious questions arise as to the legal position of the City. What is the legality of a government of Canada using the resources delegated to it by its electorate to bully and silence opposition to the government's actions by threatening to sue anybody who dares criticize them? Is the conduct of the City of Powell River in this matter subject to an action by way of constitutional tort? Should there not be a remedy available at law for the Powell River Three, recognizing the serious infringement of their civil rights, and by extension the infringement of the civil rights of all residents of Powell River?

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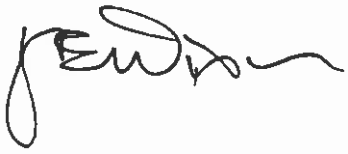
Rather than immediately enter into a vigorous exploration of these questions with the City in the relevant place, we would prefer to see this matter resolved by the City quickly withdrawing its threat of lawsuits and making a public apology to the Powell River Three. In this connection, we believe that special and emphatic weight should be placed upon an apology to Mr. Brown, whose attempt to resolve the issue with Council was so summarily dismissed. This is an aggravating factor that cannot be ignored.

Finally, we believe that it would be helpful for the Powell River City Council to have an opportunity to respond to this letter in a setting in which any misapprehensions or errors of fact on our part could be addressed and perhaps remedied, and any questions the councilors might have about our position could be answered. In aid of this, we propose that the Council invite us to make a short (about 15 minutes) presentation to them about our approach to this matter with an opportunity for questions and answers to follow. A simple call (604.630.9752) to our Executive Director, Mr. Murray Mollard, at our office, could set this up. Contact and general information about the BCCLA, its mandate and range of activities, is available on our website at bccla.org.

Yours sincerely,



Dr. John Dixon for the B.C. Civil Liberties Association