

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

CANWEST MEDIA PUBLICATIONS INC.

Plaintiff

And:

GORDON MURRAY, CAREL MOISEIWITSCH,
JOHN DOE #2, JOHN DOE #3, JANE DOE #2 and JANE DOE #3

Defendants

OUTLINE

PART I

The following relief will be sought at the hearing:

An Order that:

1. the British Columbia Civil Liberties Association ("BCCLA") be granted leave to intervene in these proceedings;
2. the BCCLA be permitted to file written argument and make oral submissions in these proceedings on the following conditions:
 - a. the BCCLA's written argument and oral submissions shall include only those submissions that relate to the facts and issues raised by the parties to the action;
 - b. the BCCLA shall not be entitled to adduce evidence in the action; and
 - c. the BCCLA shall not, in its written and oral submissions, duplicate the submissions of the parties in the action;
3. the style of cause in these proceedings be amended to include the BCCLA as "Intervenor"; and
4. the BCCLA shall not claim costs from any party, nor be held liable for costs by any party to these proceedings.

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PART II

Basis for seeking relief:

The Action:

1. The Plaintiff is the publisher of the *Vancouver Sun*. The action arises from the publication by the Defendants (or some of them) of mock or parody editions of the *Vancouver Sun* newspaper in 2002 and 2007 (the "2002 Parody" and the "2007 Parody", respectively; collectively the "Parodies"). The content of the Parodies criticizes Israeli policy towards the Palestinians and the *Vancouver Sun*'s reporting of Middle East issues.

Canwest Mediaworks Publications Inc. v. Murray 2009 BCSC 391
at para. 2.

2. The Plaintiff claims declaratory and injunctive relief and damages against the Defendants for copyright infringement contrary to the *Copyright Act*, R.S.C., C-42, trademark infringement contrary to the *Trade-marks Act*, R.S.C. 1985, c. T-13, and passing off at common law.

Second Further Amended Writ of Summons and Statement of
Claim at para. 25.

3. The Defendant Murray admits to publishing the Parodies but, *inter alia*, says that the statutory and common law torts relied on by the Plaintiff must be interpreted so as to comport with the right to freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Further, and in the alternative, Murray says that if sections of the *Copyright Act* and the *Trade-marks Act* would prohibit him from publishing the parodies or impose liability on him, then those enactments offend s. 2(b) of the *Charter* and cannot be saved under s. 1.

Amended Statement of Defence of Gordon Murray at paras. 5, 9,
10 and 13B.

4. The Defendant Moiseiwitsch denies liability and says, *inter alia*, that s. 7 of the *Trade-marks Act*, as well as the tort of passing off must be interpreted according to *Charter* principles in relation to the free expression of matters of political opinion. Moiseiwitsch also claims that the action is a strategic lawsuit against public participation ("SLAPP") intended to stifle or suppress the free expression of political opinion.

Statement of Defence of Carel Moiseiwitsch at paras. 9 and 10.

Matters for the Court to consider in applications for intervenor status:

5. The BCCLA applies for standing in the action as a public interest intervenor, i.e. an intervenor that does not have a direct interest in the litigation.

6. The Court has inherent jurisdiction to appoint public interest intervenors. The Court will generally consider whether the proposed intervenor is likely to bring a different and useful perspective to the issues before the Court.

B.C.T.F. v. British Columbia Public School Employers' Assn. 2005 BCSC 2363 ("B.C.T.F.") at paras. 18 to 20.

7. In deciding whether to grant public interest intervenor status, the Court may consider:
- a. the nature of the issue(s) before it and, in particular, whether there is a public law issue;
 - b. whether the case has a dimension that legitimately engages the interests of the applicant;
 - c. the representativeness of the applicant of a particular point of view or perspective that may be of assistance to the Court; and
 - d. whether the applicant's viewpoint will assist the court in the resolution of the issues or "take the litigation away from" the parties.

R. v. Watson 2006 BCCA 234 at para. 3, as quoted in *Gehring v. Chevron Canada Limited* 2007 BCCA 557 at para. 7.

The BCCLA:

8. The BCCLA is a non-profit, non-partisan society that was incorporated in February 1963. It has approximately 1,200 members involved in various professions, trades and callings. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights in British Columbia and Canada.

Affidavit #1 of D. Eby, affirmed March 26, 2009 at paras. 2 and 3.

9. Development of the law around free expression is central to the BCCLA's mandate, and the BCCLA has developed considerable expertise on freedom of expression issues. The BCCLA has made submissions to Parliament and administrative bodies on laws and policies that affect freedom of expression. The BCCLA has also been granted intervenor status in a range of cases engaging freedom of expression issues. The BCCLA has been appointed an intervenor at all levels of court and before various administrative tribunals. A number of the past cases in which BCCLA intervened engaged facts where a balancing of rights and/or fundamental freedoms was involved.

Affidavit #1 of D. Eby, *supra*, at paras. 9 to 10.

10. The BCCLA believes that the present case offers an important opportunity to clarify the relationship between trademark law, copyright law and the right to free expression. In

applying for intervenor status, the BCCLA is fundamentally concerned with establishing a balanced framework for resolving conflicts where legitimate economic protections come into conflict with the right to free expression.

Affidavit #1 of D. Eby, *supra*, at paras. 7 and 8.

The legal issues in relation to which the BCCLA proposes to make submissions:

11. The BCCLA proposes to focus its submissions on the following four points:
 - a. The Parts III and IV of the *Copyright Act* and s. 7 of the *Trade-marks Act* should be interpreted in a manner that is consistent with s. 2(b) of the *Charter*. This entails a balancing of the statutory right to protect intellectual property and the constitutional right to free expression.
 - b. Parody is a form of expression that, where it is *bona fide* social or political criticism, warrants protection under s. 2(b) of the *Charter*. This means that damages (whether available under statute or at common law) ought rarely, if ever, to be awarded against the authors and publishers of *bona fide* parody. Damages awards are likely to have a chilling effect on the free exchange of ideas.
 - c. Parody is a form of expression that has received protection in other constitutional democracies.
 - d. Protection of parody as a form of expression is consistent with international law received in, and domesticated to, Canada.

The BCCLA ought to be granted standing as an intervenor:

12. Consideration of the factors enumerated in *R. v. Watson* and *Gehring v. Chevron Canada Limited*, both *supra*, supports the appointment of the BCCLA as a public interest intervenor:
 - a. A group of important public law issues arise in the case. They include: how should s. 2(b) of the *Charter* inform the interpretation of Parts III and IV of the *Copyright Act* and s. 7 of the *Trade-marks Act*; and, should a plaintiff like Canwest be able to prosecute a suit under the *Copyright Act* and the *Trade-marks Act* against the authors or publishers of *bona fide* parodies? As the Court of Appeal acknowledged in *Gehring v. Chevron Canada Limited*, the fact that the action is between private parties does not diminish the importance of consistency in the interpretation and application of the legislation at issue.

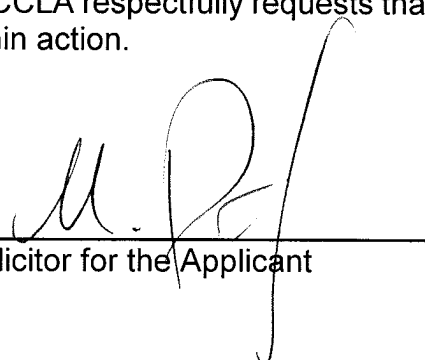
Gehring v. Chevron Canada Limited, supra, at para. 12.
 - b. The case engages issues that are central to the mandate of the BCCLA, as established by the affidavit evidence.

- c. The affidavit evidence indicates that courts, tribunals, Parliament and various administrative agencies have considered the BCCLA to be a credible advocate for freedom of expression that makes helpful submissions on the issues it is invited to address.
- d. The BCCLA's submissions will address issues that may not be canvassed by the parties, but which are material to the legal framework for the dispute between the parties. As such, the BCCLA's submissions will bring a "broader context" to the *lis inter partes*. In *B.C.T.F., supra*, this Court specifically acknowledged the desirability of there being a broader context in which to consider important freedom of expression issues.

B.C.T.F., supra, at para. 24.

- 13. Based on the totality of the foregoing, the BCCLA respectfully requests that the Court grant it standing as an intervenor in the within action.

Dated: April 4, 2009



Solicitor for the Applicant

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