S.C.C. File No. 34240

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE NOVA SCOTIA COURT OF APPEAL)

BETWEEN:

A.B. BY HER LITIGATION GUARDIAN, C.D.

APPELLANT
(Appellant)

AND:

BRAGG COMMUNICATIONS INCORPORATED, A BODY CORPORATE,
THE HALIFAX HERALD LIMITED, A BODY CORPORATE

RESPONDENTS
(Respondents)

AND:

DANIEL W. BURNETT

AMICUS CURIAE

AND:

BullyingCanada Inc.; British Columbia Civil Liberties Association; Kids Help Phone; Canadian Civil Liberties Association; Privacy Commissioner of Canada; Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada and Book and Periodical Council; Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic; Canadian Unicef Committee; Information and Privacy Commissioner of Ontario; Beyond Borders

INTERVENERS

FACTUM OF THE INTERVENER BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

(Rule 42 of the *Rules of the Supreme Court of Canada)*

Lawson Lundell LLP
Barristers and Solicitors
1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Tel: 604.685.3456
Fax: 604.669.1620

Chris W. Sanderson, Q.C.
Marko Vesely
M. Toby Kruger

Agent for the Intervener, British Columbia Civil Liberties Association

Borden Ladner Gervais LLP
Barristers and Solicitors
1100 – 100 Queen Street
Ottawa, ON K1P 1J9

Tel: 613.237.5160
Fax: 613.230.8842

Nadia Effendi

Agent for the Intervener, British Columbia Civil Liberties Association

ORIGINAL TO: **THE REGISTRAR**

COPIES TO:

Michelle Awad, Q.C./Jane O'Neill MCINNES COOPER Purdy's Wharf Tower II 1969 Upper Water Street, Suite 1300 Halifax, NS B3J 2V1 Tel: (902) 425-6500/444-8822 Fax: (902) 425-6350 **Counsel for the Appellant, A.B. by her Litigation Guardian, C.D.**	**Patricia J. Wilson** OSLER, HOSKIN, and HARCOURT, LLP Suite 1900, 340 Albert Street Ottawa, ON K1R 7Y6 Tel: (613) 797-1009 Fax: (613) 235-2867 Email: pwilson@osler.com **Ottawa Agent for the Appellant, A.B. by her Litigation Guardian, C.D.**
Kimberley Hayes 801-6080 Young Street Box 8660, Station "A" Halifax, NS B3K 5M3 Email: Kimberley.Hayes@corp.eastlink.ca **Counsel for Bragg Communications Incorporated, a body corporate**	
Nancy G. Rubin STEWART MCKELVEY 900-1959 Upper Water St Halifax, NS B3J2X2 Tel: (902) 420-3200 Fax: (902) 420-1417 E-mail: nrubin@stewartmckelvey.com **Counsel for Halifax Herald Limited, a body corporate**	**Jeffrey W. Beedall** MCMILLAN LLP 50 O'Connor Street Ottawa, ON KIP 6L2 Tel: (613) 232-7171 Fax: (613) 231-3191 E-mail: jeff.beedall@mcmillan.ca **Ottawa Agent for Halifax Herald Limited, a body corporate**

Brian F. P. Murphy MURPHY GROUP 128 Highfield Street Moncton, NB E1C 5N7 Tel: (506) 877-0077 Ext: 701 Fax: (506) 877-0079 E-mail: brian@murphygroup.ca **Counsel for Bullying Canada Inc.**	**Colin S. Baxter** CAVANAGH WILLIAMS CONWAY BAXTER LLP Suite 401 - 1111 Prince of Wales Dr. Ottawa, ON K2C 3T2 Tel: (613) 569-8558 Fax: (613) 569-8668 E-mail: cbaxter@cwcb-law.com **Ottawa Agent for Bullying Canada Inc.**
Mahmud Jamal / Jason MacLean / Carly Fidler OSLER, HOSKIN & HARCOURT LLP Box 50, 1 First Canadian Place Toronto, ON M5X 1B8 Tel: (416) 862-6764 Fax: (416) 862-6666 E-mail: mjamal@osler.com **Counsel for Kids Help Phone**	**Patricia J. Wilson** OSLER, HOSKIN & HARCOURT LLP 340 Albert Street, Suite 1900 Ottawa, ON K1R 7Y6 Tel: (613) 787-1009 Fax: (613) 235-2867 E-mail: pwilson@osler.com **Ottawa Agent for Kids Help Phone**
BLAKE CASSELS & GRAYDON LLP Commerce Court West Suite 4000, 199 Bay Street, Toronto, ON M5L 1A9 **Iris Fischer** Tel: (416) 863-2408 Fax: (416) 863-2653 **Dustin Kenall** Tel: (613) 788-2245 Fax: (613) 788-2247 **Counsel for the Intervener, The Canadian Civil Liberties Association**	**BLAKE CASSELS & GRAYDON LLP** World Exchange Plaza Suite 2000, 45 O'Connor Street Ottawa, ON K1P 1A4 **Nancy Brooks** Tel: (613) 788-2218 Fax: (613) 788-2247 E-mail: nancy.brooks@blakes.com **Ottawa Agent for the Intervener, The Canadian Civil Liberties Association**

Megan Brady / Joseph E. Magnet OFFICE OF THE PRIVACY COMMISSIONER OF CANADA Place de Ville, Tower B 112 Kent Street, 3rd Floor Ottawa, ON K1A 1H3 Tel: (613) 992-3068 Fax: (613) 947-4192 E-mail: megan.brady@priv.gc.ca **Counsel for the Privacy Commissioner of Canada**	
Ryder Gilliland / Adam Lazier BLAKE, CASSELS & GRAYDON LLP Commerce Court West 2800 - 199 Bay St. Toronto, ON M5L 1A9 Tel: (416) 863-5849 Fax: (416) 863-2653 E-mail: ryder.gilliland@blakes.com **Counsel for Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada, and Book and Periodical Council**	**Nancy K. Brooks** BLAKE, CASSELS & GRAYDON LLP World Exchange Plaza 45 O'Connor St., 20th Floor Ottawa, ON K1P 1A4 Tel: (613) 788-2200 Fax: (613) 788-2247 E-mail: nancy.brooks@blakes.com **Ottawa Agent for Newspaper Canada, Ad IDEM/Canadian Media Lawyers Association, Canadian Association of Journalists, Professional Writers Association of Canada, and Book and Periodical Council**
Tamir Israel UNIVERSITY OF OTTAWA Faculty of Law - 57 Louis Pasteur Street Ottawa, ON K1N 6N5 Tel: (613) 562-5800 Ext: 2914 Fax: (613) 562-5417 E-mail: tisrael@cippic.ca **Counsel for Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic**	

Jeffrey S. Leon BENNETT JONES LLP 3400 One First Canadian Place P.O. Box 130 Toronto, ON M5X 1A4 Tel: (416) 777-7472 Fax: (416) 863-1716 **Counsel for Canadian Unicef Committee**	**Ranjan Agarwal** BENNETT JONES LLP World Exchange Plaza 1900 - 45 O'Connor Street Ottawa, ON K1P 1A4 Tel: (613) 683-2300 Fax: (613) 683-2323 E-mail: agarwalr@bennettjones.com **Ottawa Agent for Canadian Unicef Committee**
William S. Challis INFORMATION AND PRIVACY COMMISSIONER/ONTARIO 2 Bloor Street East Suite 1400 Toronto, ON M4W 1A8 Tel: (416) 326-3921 Fax: (416) 325-9186 E-mail: bill.challis@ipc.on.ca **Counsel for Information and Privacy Commissioner of Ontario**	**Colleen Bauman** SACK GOLDBLATT MITCHELL LLP 500 - 30 Metcalfe St. Ottawa, ON K1P 5L4 Tel: (613) 235-5327 Fax: (613) 235-3041 E-mail: cbauman@sgmlaw.com **Ottawa Agent for Information and Privacy Commissioner of Ontario**
Jonathan M. Rosenthal / Frank D. Crewe 500 - 70 Bond Street Toronto, ON M5B 1X3 Tel: (416) 360-7768 Fax: (416) 863-4896 E-mail: jrosenthal@bondlaw.net **Counsel for Beyond Borders**	

Daniel Burnett OWEN BIRD LAW CORPORATION 2900 - 595 Burrard Street Vancouver, BC V7X 1J5 Tel: (604) 691-7506 Fax: (604) 632-4433 E-mail: dburnett@owenbird.com **Amicus Curiae**	**Nancy K. Brooks** BLAKE, CASSELS & GRAYDON LLP World Exchange Plaza Suite 2000, 45 O'Connor Street Ottawa, ON K1P 1A4 Tel: (613) 788-2200 Fax: (613) 788-2247 E-mail: nancy.brooks@blakes.com **Ottawa agent for Amicus Curiae**

Table of Contents

PART I: STATEMENT OF FACTS

A. CONCISE OVERVIEW OF ARGUMENT

1. The Appellant seeks to pursue a defamation action shielded by a confidentiality order that would mask her identity. She also seeks a publication ban that would remove from the public record the whole of the speech that she seeks to have the court proscribe as being defamatory. The submissions and the reasons for judgment in this case thus far have concentrated on the burden of proof required by the *Dagenais/Mentuck* test and whether the Appellant has discharged the evidentiary burden on her in the circumstances. In the British Columbia Civil Liberties Association's ("BCCLA") submissions, something vitally important to the protection of civil liberties has been given insufficient attention in the analysis: the different impact that the two remedies sought by the Appellant would have on freedom of expression and the open courts principle.

2. The BCCLA submits that if the Court is persuaded to grant relief to the Appellant, that relief should be limited to a confidentiality order that protects her identity and should not include a publication ban over the allegedly defamatory content.

3. Subjecting the allegedly defamatory content to a publication ban would be inappropriate for several reasons. In every libel case the court must strike an appropriate balance between the twin values of the protection of reputation and freedom of expression. If the public is not permitted to know in a particular case what speech is being held to be defamatory, then it will not be able to understand, scrutinize or question whether the courts are striking that balance appropriately. The law of defamation cannot be permitted to develop in the shadows in the manner proposed by the Appellant. Furthermore, imposing a publication ban on the contents of the Fake Profile would deprive the courts and the public of guidance as to what constitutes defamatory speech.

4. A publication ban is also inappropriate in the context of a third-party production order for several reasons. An application for third-party disclosure requires the court to balance the public interest favouring disclosure against an anonymous author's rights to freedom of expression and privacy. The public will only be able to understand and assess whether the court has struck that balance appropriately if they can see the speech that has been found by the court, in the name of

the public interest, to justify an order disclosing the identity of the Fake Profile's anonymous author.

5. Finally, a publication ban cannot be justified where a confidentiality order shielding the Appellant's identity would be sufficient to protect her from the harm she alleges she would suffer if her identity was revealed.

B. FACTS

6. The Appellant's motion for an order that the Respondent reveal the creator of the Fake Profile's identity is grounded in her allegation that the contents of the Fake Profile are defamatory. In particular:

i. in her Notice of Application in Chambers, the Appellant seeks, amongst other things, "a publication ban concerning the substance of the defamatory statements";

ii. the legal test for third-party production applied by the motions judge required the Appellant to show that the Fake Profile was *prima facie* defamatory; and

iii. in her factum submitted to this Court, the Appellant several times refers to the Fake Profile as being defamatory, and states that "[t]he public knows, through open court and reports in the media that … the Fake Profile is defamatory and sexualized".

Appellant's Notice of Application in Chambers, para 1, Appellant's Record, Tab 8

***AB (Litigation guardian of) v Bragg Communications Inc*, 2010 NSSC 215 at paras 17, 22, Appellant's Record Tab 3**

Appellant's Factum, para 14

7. Contrary to the Appellant's submission that "all matters of importance to this case will be (and have already been) disclosed in open court and to the public" and her contention that this case involves a "partial publication ban", the entire contents of the Fake Profile have been the subject of a publication ban throughout these proceedings.

Appellant's Factum, paras 22, 114

8. The Appellant has provided no evidence or argument as to why publication of the Fake Profile, redacted to remove her name and photo, would identify her.

PART II: INTERVENER'S POSITION ON THE APPELLANT'S QUESTIONS

9. The BCCLA does not wish to minimize the inherent vulnerability of minors subject to on-line sexualized bullying or the risk of harm they may face in pursuing a legal remedy. In the BCCLA's view, however, the need to balance the harm the Appellant says she will suffer against the open courts principle does not arise with respect to the content of the Fake Profile. That concern can be addressed, if necessary, by a confidentiality order. The BCCLA submits that if this Court is inclined to grant a remedy, it should permit the Appellant to proceed using a pseudonym, but not under a publication ban concerning the substance of the Fake Profile.

PART III: ARGUMENT

A. PROPER DEVELOPMENT OF DEFAMATION LAW REQUIRES PUBLICATION OF THE FAKE PROFILE

10. When applying the *Dagenais/Mentuck* test to determine whether to impose a publication ban, a court must consider the context of the case and the particular rights and interests at issue. The relevant rights and interests will be aligned differently in different cases, and the purposes and effects invoked by the parties must be taken into account in a case-specific manner.

***Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, Appellant's BOA Tab 10**

***R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442, at para 37, Appellant's BOA Tab 38**

***Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522, at paras 37-38, Appellant's BOA Tab 44**

11. In the present case, the Appellant's complaint and her intended claim is founded on the law of defamation, and the harm she says she will suffer if a publication ban is not granted is based on the allegation that certain speech in the Fake Profile is defamatory.

12. This Court has recognized that what is at stake in action for defamation is not only an individual's interest in protecting his or her reputation, but also the public's interest in protecting freedom of expression. This Court has also confirmed that the law of defamation must be developed in accordance with *Charter* values.

***Crookes v Newton*, 2011 SCC 47, [2011] 3 SCR 269, at para 31, BCCLA BOA Tab 1**

***Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 97, BCCLA BOA Tab 6**

13. There are two problems with the Appellant's request for a publication ban over the allegedly defamatory material in this case. First, the public must be able to scrutinize and question whether the courts are imposing appropriate restrictions on freedom of speech in deciding whether certain speech gives rise to liability for defamation. Second, courts must be permitted to develop the law of defamation in a principled manner, which requires guidance as to what speech is being found by other courts to give rise to liability.

(i) The public must be able to scrutinize the speech courts consider to be defamatory

14. This Court has recognized that in every libel case the twin values of reputation and freedom of expression will clash, and that the real question is whether the common law strikes an appropriate balance between the two.

Hill, _supra_ at para 100, BCCLA BOA Tab 6

15. The objective of ensuring that this balance is struck appropriately is not something that can be achieved solely by the appellate courts as they articulate and refine the overarching principles of defamation law. Rather, the balance must be struck through the just disposition of each and every libel action because, as Edgerton J. observed in *Sweeney v Patterson*, 128 F2d 457 (DC Cir 1942), at 458, cert denied 317 US 678 (1942), whatever is "added to the field of libel is taken from the field of free debate."

cited in _Hill_, _supra_ at para 100, BCCLA BOA Tab 6

16. The right to discuss and debate ideas forms the very foundation of democracy. Democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. That freedom is protected by section 2(b) of the *Charter*, which encompasses not only the right to speak, but also the right to listen. As stated by this Court:

> There can be no doubt that courts play an important role in any democratic society ... as a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.

Edmonton Journal v Alberta (AG), [1989] 2 SCR 1326 at 1337, BCCLA BOA Tab 2

Harper v Canada (AG), 2004 SCC 33, [2004] 1 SCR 827, at paras 12, 17, BCCLA BOA Tab 4

17. If the public is not permitted to know in a particular case what speech is being held to be defamatory and impermissible to say, then they will not be able to understand, assess or question whether the courts are striking the balance appropriately. Academics, civil liberties advocates and members of the public would not have the means of scrutinizing whether that speech ought to be permitted because they would not know what speech was being found by the courts to give rise to liability.

18. The public should always be able to ask: are our courts leaning too heavily towards the protection of either individual reputation or freedom of expression? Are judges deciding the cases before them with a due regard for changes in societal values, the evolution of language, and revolutions in the means of communication? When the speech found to be defamatory is shielded from view, those concerned with freedom of expression and civil liberties would be denied the ability to answer questions such as these for themselves and to test how the general principles of defamation law are being applied in practice in all cases.

19. As noted above, this concern is grounded in the open courts principle. The open courts principle guarantees the public's right to discuss and put forward opinions and criticisms of court practices and proceedings. The full and fair discussion of public institutions, vital to any democracy, depends on this freedom of expression.

***Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at para 23, Appellant's BOA Tab 7**

20. Public confidence in the integrity of the court system and understanding of the administration of justice – values this Court has recognized as being deeply entrenched in Canadian law – depend on publicity of the proceedings. In the BCCLA's submission, the risk that those values may be compromised is heightened where the balancing of *Charter* values is at stake.

***Nova Scotia (AG) v MacIntyre*, [1982] 1 SCR 175 at 185, Appellant's BOA Tab 30**

(ii) <u>Courts must apply the law evenly</u>

21. Furthermore, subjecting the contents of the Fake Profile to a publication ban would deprive the courts and the public of guidance as to what constitutes defamatory speech in certain cases.

22. It has long been held that "[i]n libel and slander everything may turn on the form of words" and "the very words complained of are the facts on which the action is grounded". The question of what constitutes defamatory language cannot be determined in the abstract.

Harris v Warre (1879), 4 CPD 125 at 128, BCCLA BOA Tab 5

23. Pleading the general tenor, substance or purport of the libel, or an approximation of the defamatory words, has long been held to be insufficient.

Raymond Brown, _The Law of Defamation in Canada_, loose-leaf, 2d ed, (Scarborough: Carswell, 1994-) cited in _Rotenberg v Modi_, 2006 CarswellOnt 6184 at para 21 (Sup Ct J), aff'd 2006 CarswellOnt 5915 (CA) BCCLA BOA Tab 9

24. To pursue an action in defamation, the plaintiff must show that the pleaded words were reasonably understood by others to be defamatory.

Grant v Torstar Corp, [2009] 3 SCR 640, 2009 SCC 61 at para 28, BCCLA BOA Tab 3

25. In an age where there is significant potential for online bullying of the type suffered by the Appellant, it is particularly important for the courts to provide guidance as to what speech is acceptable and what speech requires sanction. Concealing the words used in the Fake Profile would impair the ability of judges to develop the law in a principled manner and to apply it evenly to the cases before them.

26. The risk is not an abstract one in the present case. The allegedly defamatory words in the Fake Profile are sufficiently common to make it likely that they would be used by others in a similar context. In fact, some portions of the Fake Profile consist of only one word. If the Appellant is allowed to proceed under a publication ban, and in the event the allegedly defamatory words are uttered in another context, courts faced with similar circumstances would have no guidance as to what the Court considers to be defamatory in this case, heightening the risk of an uneven application of the law.

B. A PUBLICATION BAN IS INAPPROPRIATE IN THE CONTEXT OF A THIRD-PARTY PRODUCTION ORDER

(i) Principles governing third-party disclosure of anonymous content

27. The Appellant's application for third-party disclosure requires the court to balance the public interest favouring disclosure against the anonymous author of the Fake Profile's rights and interests.

***Norwich Pharmacal Co v Comrs of Customs and Excise*, [1974] AC 133 at 174, 182, 188 (HL), BCCLA BOA Tab 8**

***Warman v Fournier*, 2010 ONSC 2126 at paras 27, 34 (Div Ct), BCCLA BOA Tab 11**

28. The ability to publish anonymously forms part of freedom of expression and the right to privacy that are protected by the *Charter*.

***Warman, supra* at para 17, BCCLA BOA Tab 11**

29. The conclusion reached by the Ontario Divisional Court in *Warman* is consistent with this Court's finding that an important aspect of freedom of expression is the right to speak in the absence of coercion or constraint. As stated by this Court, if a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.

***R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 95, BCCLA BOA Tab 7**

30. Even if the right to speak anonymously is not a *Charter*-protected right, which the BCCLA submits that it is, an anonymous author's rights and interests would still be relevant and legitimate considerations in deciding whether to impose a publication ban in the context of an application for third-party production.

***Sierra Club of Canada, supra* at para 47, Appellant's BOA Tab 44**

(ii) Publication bans and third-party disclosure

31. The allegation that the Fake Profile is defamatory is the circumstance which the Appellant says justifies the third-party production order in this case. As the motions judge correctly recognized, an allegation that words are defamatory does not automatically trump an author's *Charter*-protected rights and interests, including the desire to publish anonymously.

32. As part of the analysis on whether infringing the creator of the Fake Profile's right to freedom of expression is appropriate in this case, the motions judge correctly required the Appellant to demonstrate a *prima facie* case of defamation. Requiring applicants for third-party disclosure in planned actions for defamation to establish a *prima facie* case furthers the objective of striking an appropriate balance between the *Charter*-protected rights of persons who create content online and the legitimate interest of individuals to protect their reputations from unlawful attack.

33. Central to the application for disclosure in this case is a concern that, on one hand, disclosure of the creator of the Fake Profile's identity could have a chilling effect on the right to freedom of expression, privacy, and anonymity. On the other hand, there is no compelling public interest in allowing the creator of the Fake Profile to destroy the Appellant's reputation while hiding behind a cloak of anonymity.

34. The public will only be able to understand and assess whether the court has struck that balance appropriately if they can see the speech that has been found by the court to justify an order disclosing the identity of the Fake Profile's anonymous author.

35. As described above, the open courts principle guarantees the public's right to discuss and put forward opinions and criticisms of court practices and proceedings. The values protected by the open courts principle are particularly important in applications for third-party disclosure, where the heart of the inquiry requires courts to weigh the public interest. The public should always be able to identify what the courts consider to be in the public interest and why.

C. A CONFIDENTIALITY ORDER WOULD BE SUFFICIENT

36. As between the two remedies sought by the Appellant, a publication ban is more damaging to freedom of expression and the open courts principle than a confidentiality order. The content of the Fake Profile is far more important to a planned defamation action and a request for third-party disclosure than the legal name of the Appellant. The different impacts that these two remedies would have on the competing interests at issue in this case, which are of great importance to civil liberties advocates, have received little attention from the Appellant or the courts below.

37. The jurisprudence from this Court is clear that where a party seeks to justify the limitation of a right, in this case the right of freedom of expression, it bears the burden of justifying that limitation. A party seeking a publication ban bears the burden of proving "that the proposed ban is as limited (in scope, time, content, etc.) as possible" (emphasis added).

***Dagenais, supra* at 890-891, Appellant's BOA Tab 10**

38. When a publication ban has a serious deleterious effect on freedom of expression and few salutary effects on the fairness of a proceeding, the ban will not be authorized at common law.

***Dagenais, supra* at 889, Appellant's BOA Tab 10**

39. Contrary to the Appellant's assertions in her factum, this case involves serious matters of importance to the proper administration of justice that have not been disclosed in open court or to the public. The Appellant's characterization of the remedy being sought as a "partial" publication ban is not accurate in these circumstances.

40. This Court should do no more than is necessary to protect the Appellant from harm. Even if this Court finds that the Appellant is not required to produce evidence of harm, the Appellant has not established why a publication ban of all the content of the Fake Profile would be necessary to prevent that harm, and she bears the burden of proof on that issue. There is no inherent nexus between the words the Appellant alleges are defamatory and her identity. The Fake Profile can easily be redacted to remove information that would identify the Appellant.

41. A confidentiality order is a less severe restriction on freedom of expression than a publication ban. Though it also restricts the public's access to the court process, it at least permits the public to understand the substantive issues in the case. If this Court finds that some measure to protect the Appellant's vulnerability is necessary to allow her to proceed without fear of further harm or embarrassment, then a confidentiality order would be the appropriate remedy.

42. The deleterious effects of a publication ban on the public's right to scrutinize the court process in an application for third-party disclosure and a resulting action for defamation cannot be justified in a case where the less intrusive remedy of a confidentiality order could be granted. If the Appellant's identity is protected, there is no justification for further restricting the public's access to the courts.

D. Conclusion

43. A publication ban over the contents of the Fake Profile would constitute a serious incursion on freedom of speech and the open courts principle by depriving the courts and the public of the ability to understand or question the balance being struck by courts in deciding whether certain speech is defamatory. Moreover, in the context of a third-party production order, a publication ban deprives the public of the right to understand and assess the balance between the public interest and the rights and interests of an individual who posts content online anonymously.

44. A confidentiality order, by contrast, would address any harm to the Appellant while minimally intruding on the open courts principle and the right to freedom of expression.

45. For these reasons, should this Court find that some measure of relief is required in order to protect the Appellant from harm, the BCCLA submits that a confidentiality order would be sufficient.

PART IV: SUBMISSIONS CONCERNING COSTS

46. The BCCLA does not seek any costs and asks that it not be subject to any costs orders.

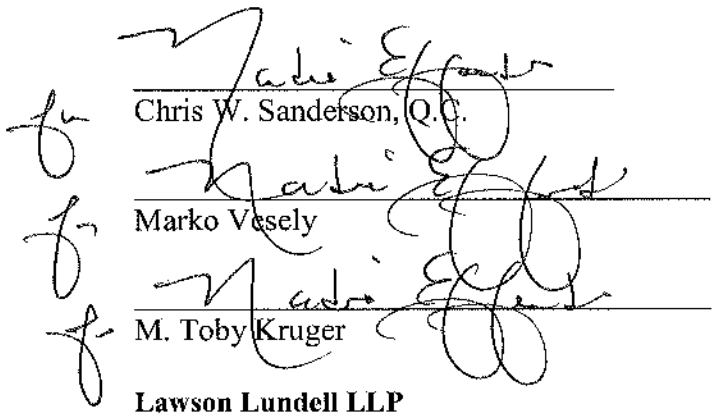
PART V: NATURE OF ORDER SOUGHT

47. The BCCLA requests that the following orders be made:

i. If the appeal is allowed, this Court should limit the remedy to a confidentiality order and not a publication ban; and

ii. The BCCLA may make oral argument at the hearing of this appeal, the duration of which shall not exceed 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF APRIL, 2012.



Chris W. Sanderson, Q.C.

Marko Vesely

M. Toby Kruger

Lawson Lundell LLP
1600 – 925 West Georgia Street
Vancouver, BC V6C 3L2

Counsel for the Intervener,
British Columbia Civil Liberties
Association

PART VI: TABLE OF AUTHORITIES

PART VII: STATUTES, REGULATIONS, RULES

N/A