Court File Number: T-8-18

FEDERAL COURT

B E T W E E N:

**RIGHT TO LIFE ASSOCIATION OF TORONTO AND AREA,
BLAISE ALLEYNE and MATTHEW BATTISTA**

Applicants

- and -

CANADA (MINISTER OF EMPLOYMENT, WORKFORCE AND LABOUR)

Respondent

-and-

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
ACTION CANADA FOR SEXUAL HEALTH AND RIGHTS**

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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B.C. CIVIL LIBERTIES ASSOCATION
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PART I – STATEMENT OF FACTS

Overview

1. The British Columbia Civil Liberties Association ("BCCLA") intervenes in this application for judicial review for the limited purpose of providing the Court with arguments concerning relevant American constitutional principles involving freedom of speech and expression and how it may inform Canadian caselaw in this matter.

2. Generally, if a party objects to a condition on the receipt of government funding, its recourse is to decline the funds. However, there are some circumstances where the conditions go too far, are unrelated to the purpose of the government program, and infringe on constitutional rights. In the present case, the Canada Summer Jobs program imposes a condition that requires to "attest" to statements that agree with or adopt the government's views on certain matters of public

concern. In the United States constitutional experience, requiring oaths, pledges and attestations as a condition for government funding or benefits are sometimes held to violate freedom of speech, as protected by the First Amendment in the U.S. Constitution.

3. The U.S. "unconstitutional conditions" doctrine seeks to address government action or legislation that withholds or leverages a government benefit simply to suppress or inhibit the expression of views it does not favour. The BCCLA submits that U.S. jurisprudence may assist this Court in assessing the Applicant's *Charter* claims in the present case.

4. In making the submissions that follow on freedom of expression, the BCCLA wishes to emphasize that it strongly disagrees with the Applicants' views on access to abortion services. Given the crucial role that freedom to control one's own reproductive health and health service interventions plays in women's liberty, autonomy, dignity and privacy, the BCCLA's position is that governments have a duty to ensure that ready and unconstrained access to this reproductive health procedure is available to all women in Canada. However, freedom of expression is a fundamental value in a free and democratic society and the BCCLA believes just as strongly that the government should not interfere with the peaceful expression of alternative views.

The Canada Summer Jobs Program

5. The Government of Canada has created a wage subsidy program to provide summer employment opportunities for secondary and post-secondary students. Called the Canada Summer Jobs ("CSJ") initiative, the 2018 Application Guide states that the objectives of the program are to contribute to student income and provide career-related or early work experience for youth.[1]

[1] Canada Summer Jobs 2018, Applicant's Guide ("CSJ 2018 Applicant's Guide") [Applicant's Application Record ("AAR"), p. 50]

6. The CSJ has been in place for over twenty years. The Applicant RTLA has benefitted from the program in the past.[2]

7. The Government of Canada added a controversial new condition for eligibility in 2018. According to the 2018 Application Guide, which was made available on December 19, 2017, all employer candidates must attest to the following statement:

> Both the job and the organization's core mandate respect individual human rights in Canada, including the values underlying the Canadian Charter of Rights and Freedoms as well other rights. These include reproductive rights, and the right to be free from discrimination on the basis of sex, religion, race, national or ethnic origin, colour, mental or physical disability, sexual identity, or gender identity or expression.[3]

8. The Application Guide provides the following explanation for the attestation:

> The employer attestation for CSJ 2018 is consistent with individual human rights in Canada, Charter rights and case law, and the Government of Canada's commitment to human rights, which includes women's rights and reproductive rights, and the rights of gender-diverse and transgender Canadians.
>
> The government recognizes that women's rights are human rights. This includes sexual and reproductive rights – and the right to access safe and legal abortions.[4]

9. In its evidence, the Respondent says that Employment and Social Development Canada ("ESDC") was concerned that religious organizations may exclude themselves from the job program due to the attestation. Senior Assistant Deputy Minister Rachel Wernick states this is why the Application Guide includes the following note about the attestation:

> **NOTE**: That an organization is affiliated with a religion does not itself constitute ineligibility for this program.[5]

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[2] Affidavit of Rachel Wernick, para 3 [Respondent's Record ("RR"), at p. RR002]; and Affidavit of Blaise Alleyne, paras 10-11 [AAR, p. 27]
[3] CSJ 2018 Applicant's Guide [AAR, p. 67]
[4] CSJ 2018 Applicant's Guide [AAR, pp. 49-50]
[5] Affidavit of Rachel Wernick, para 57 [RR, at p. RR020]; and CSJ 2018 Applicant's Guide [AAR, pp. 52 and 68]

10. Aside from this note, and ESDC's awareness that religious and faith-based organizations may be concerned that they are excluded by the attestation, there is no further clarification or explanation in the Application Guide about what "core mandate" means.

11. The Applicant submitted an application for funding under the program on December 20, 2017. However, the Applicant did not make the required attestation. Instead, the Applicant's president sent a letter which stated,

> On the basis of conscience, we are unable to express the words that the Minister has required in the Applicant's Guide. We are, however, able to attest that "we support all Canadian law, including Charter and human rights law." [...] We respectfully decline to make a statement that is inconsistent with our fundamental personal beliefs about the value of life and the right to life under section 7 of the Charter. Please confirm that you will accept our application with the above noted statement in substitution for the statement set forth in the online application process and in the Applicant's Guide.[6]

12. Due to the concerns raised by many about the CSJ attestation, the Respondent held a press conference on January 23, 2018. The Honourable Patty Hajdu, Minister for ESDC, made the following statements during the press conference:

> I have reached out to many of the religious leaders across the country, including the Canadian Council officials and spoken to them about how we got to this place and the decision that we've taken, encouraged them to work with their individual organizations and churches across the country to let them know that this is about the activities of the organization and the job description. This is not about beliefs or values. This is about the activities of the organizations, what they are doing as an organization, and what the job description of the people will be.
>
> [...]
>
> [W]e have incredible work being done across this country by faith-based organizations that include things like administering to people living in poverty, providing spiritual solace for people that are, you know, hurting. These are all perfectly fine activities. What we're talking about are activities that actively undermine the rights of Canadians, like distributing pamphlets of aborted

[6] Letter from Blaise Alleyne, dated December 20, 2017 [AAR, p. 75]

> fetuses, like actively discriminating against members of the GLBTQ community, from either being employed in their organization or taking part in (off microphone – technical difficulties).[7]

13. On the same date as the press conference, ESDC published on its website "Supplementary Information" concerning the attestation. The webpage provided clarification concerning the meaning of "core mandate" and "respect" for human rights for the purposes of the attestation:

> **Core mandate:** This is the primary activities undertaken by the organization that reflect the organization's ongoing services provided to the community. It is not the beliefs of the organization, and it is not the values of the organization.
>
> **Respect:** Individual human rights are respected when an organization's primary activities, and the job responsibilities, do not seek to remove or actively undermine these existing rights. [8]

14. The deadline for applying to the CSJ was subsequently extended from February 2, 2018 to February 9, 2018.[9]

PART II – SUBMISSIONS

15. Generally speaking, democratically elected governments have the power to fund whatever public programs, grants, initiatives or services that they see fit. Such funding decisions will understandably reflect the policy preferences, priorities and views of the government of the day. In exceptional cases, however, those funding decisions may attract constitutional scrutiny.

16. With respect to funding of certain programs or grants, it is well-established in the Canadian jurisprudence that there is no right to government funding or support

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[7] Transcripts of News Conference on January 23, 2018 (emphasis added) [RR, p. R246]
[8] Supplementary Information, ESDC website [RR, p. R779]
[9] RR, p. R210

for particular expression.[10] United States constitutional jurisprudence is similar, but it also recognizes that there is sometimes a distinction between subsidizing expression and penalizing it.

17. Many U.S. judgments are consistent with the line of cases in Canada that hold that freedom of speech is not infringed simply because the government decides to support or subsidize some opinions to the exclusion of others. For example, in *Rust v. Sullivan*, the U.S. government decided to provide funding for family planning services, but added a stipulation that none of the funds could be used where abortion was a method of family planning. Doctors challenged this condition as unconstitutional, arguing that it violated their First Amendment rights to express their views on abortion services in its counselling to women.[11] The U.S. Supreme Court disagreed, and held that the government did not have to fund abortion counselling services that it did not wish to support. Importantly, the Court emphasized that the recipients were nevertheless free to advocate for abortion services, provided they did not do so with the government funds:

> The regulations govern the scope of the Title X *project*'s activities, and leave the grantee unfettered in its other activities. The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds.[12]

18. U.S. jurisprudence draws a clear distinction between cases that involve programs directed at promoting certain views or activities, and conditions that restrict or limit expression <u>for reasons unrelated to the purpose of the program</u>.[13] The U.S. "unconstitutional conditions" doctrine seeks to address government action or

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[10] *Native Women's Assn. of Canada v. Canada*, [1994] 3 SCR 627 [BCCLA Book of Authorities, Tab 2]; and *Baier v. Alberta,* [2007] 2 SCR 673 [BCCLA Book of Authorities, Tab 1]
[11] *Rust v. Sullivan,* 500 U.S. 173 (1991) [BCCLA Book of Authorities, Tab 6]
[12] *Rust, supra* at 196 (italics in original) [BCCLA Book of Authorities, Tab 6]
[13] *Rust, supra*, paras. 38-39 [BCCLA Book of Authorities, Tab 6]

legislation that withholds or leverages a government benefit simply to suppress or inhibit the expression of views it does not favour.[14]

19. In *Perry v. Sindermann*, a college teacher employed under a series of one-year contracts found his contract was not renewed after he acted as president of the teachers association and publicly expressed views that were at odds with the college's Board of Regents. The college argued that the teacher did not have a positive right to the contract, and nonrenewal could not engage his constitutional rights. The U.S. Supreme Court disagreed:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech. <u>For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited</u>.[15]

20. The U.S. Supreme Court issued a more recent interpretation of the "unconstitutional conditions" doctrine in *United States Agency for International Development v. Alliance for Open Society International.* In that case, a U.S. statute authorized funding for organizations to combat AIDS worldwide. The statutes imposed two conditions to the program: (1) no funds could be used to promote or advocate for the legalization or practice of prostitution; and (2) no funds could be used by organizations that do not have a policy explicitly opposing prostitution (known as the "anti-prostitution pledge"). Some organizations preferred to remain neutral on the issue of prostitution to avoid alienating sex workers who were at higher risk of HIV. In the result, the U.S. Supreme Court held that the second condition went too far as it

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[14] *Rust, supra,* para.39 [BCCLA Book of Authorities, Tab 6]
[15] *Perry v. Sindermann*, 408 U.S. 593 (1972) at 597 (emphasis added) [BCCLA Book of Authorities, Tab 3]

attempted to leverage the funding to compel expression of a certain opinion. As the Court explained,

> In the present context, the relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.[16]

21. The previously cited judgment in *Rust* provides an interesting comparison to the case at bar (albeit with reversed government priorities). The U.S. Supreme Court emphasized that recipients of family planning funding could still advocate for abortion services, provided they did so in a way that was completely separate from the federally funded program. In the present case, the BCCLA submits that applicants for CSJ grants should be allowed to hold opinions and beliefs concerning access to abortion that is in variance with the Government of Canada, provided the student job duties actually subsidized by the CSJ grant do not involve activities that attempt to block access to reproductive rights.

22. The Canada Summer Jobs condition of an "attestation" in support of certain "values" including "sexual and reproductive rights – and the right to access safe and legal abortions"[17] appears to be a form of compelled speech that is not directly connected to the purpose of the grant. As the U.S. Supreme Court stated in *Alliance for Open Society International,*

> By demanding that funding recipients adopt — as their own — the Government's view on an issue of public concern, the condition by its very nature affects "protected conduct outside the scope of the federally funded program."

23. The question for this Court should be whether the CSJ attestation attaches a condition to the views or opinions held by the organization, rather than the job that is

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[16] *United States Agency for International Development v. Alliance for Open Society International, Inc*. 570 U.S. 205 (2013), at p. 8 [BCCLA Book of Authorities, Tab 7]
[17] CSJ 2018, Applicant's Guide [AAR, pp. 49-50]

to benefit from the grant. If is the former, the BCCLA submits that this would be an unconstitutional condition to the funding as it violates the right to freedom of thought, belief, opinion or expression as protected by s. 2(b) of the *Charter*.

24. Finally, it must be noted that there may be some ambiguity in the attestation. The text in the Guide states that both the "job" and the "core mandate" of the hiring organization must "respect" certain rights, which the Guide describes as including reproductive rights and access to abortion. Again, consistent with the right of a government to choose to fund or not fund certain activities, it would be permissible for the Respondent to attach conditions to the subsidized "job" itself. But the attestation concerning "core mandate" is far less clear, and could easily be viewed as requiring an organization to attest to or pledge that it supports reproductive rights and access to abortion. The BCCLA submits that this would be unconstitutional. The "Supplementary Information" later published on the ESDC website attempts some form of clarification. It provides the following definitions:

> **Core mandate:** This is the primary activities undertaken by the organization that reflect the organization's ongoing services provided to the community. It is not the beliefs of the organization, and it is not the values of the organization.[18]

25. This clarification demonstrates that the Respondent fully recognized that the attestation was constitutionally problematic, and could be infringing on applicants' s. 2(b) *Charter* rights. Still, these clarifications do not state that an organization is free to express its opinions, even if that expression includes advocating for regulation, avoidance or prohibition of abortion. To that extent, the BCCLA submits that the attestation is an "unconstitutional condition" because it seeks to leverage the job grant to penalize an organization for its expressive activities, even where the activities are unrelated to the summer job.

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[18] Supplementary Information, ESDC website [RR, p. R779]

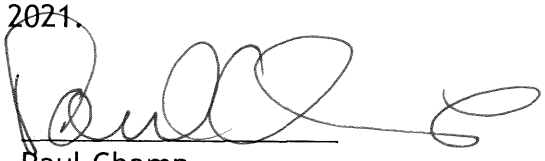
Conclusion

26. The U.S. constitutional protection for freedom of speech is over two hundred years old and, as the Supreme Court of Canada has observed, U.S. Courts have the benefit of immense practical and theoretical experience interpreting this fundamental freedom.[19] While U.S. jurisprudence should not be adopted in Canada without critical analysis, "This wealth of experience may offer guidance to the judiciary in this country."[20]

27. Those who support the CSJ attestation should consider other circumstances in which public funding could be conditioned on holding, expressing or attesting to certain views or opinions. Another government may come to power that does not value reproductive rights and access to abortion. For constitutional reasons, such a government may refrain from prohibiting access to abortion services. But it may wish to undermine those rights in other ways - such as, perhaps, attaching conditions to summer jobs grants that require applicants' to attest they will not encourage women to consider abortion as a reproductive health procedure.

28. Such conditions should be found to be unconstitutional under section 2(b) of the *Charter* to the extent that they restrict, limit or penalize expression for reasons unrelated to the purpose of the program or benefit funded by the government.

Dated at Ottawa, Ontario, this 5th day of February, 2021.



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[19] *R. v. Simmons,* [1988] 2 SCR 495 at para. 26 [BCCLA Book of Authorities, Tab 5]; and *R. v. Keegstra,* [1990] 3 SCR 697 at para. 51 [BCCLA Book of Authorities, Tab 4]
[20] *R. v. Simmons, supra,* at para. 26 [BCCLA Book of Authorities, Tab 5]

PART V – LIST OF AUTHORITIES

Baier v. Alberta, [2007] 2 SCR 673

Native Women's Assn. of Canada v. Canada, [1994] 3 SCR 627

Perry v. Sindermann, 408 U.S. 593 (1972)

R. v. Keegstra, [1990] 3 SCR 697

R. v. Simmons, [1988] 2 SCR 495

Rust v. Sullivan, 500 U.S. 173 (1991)

United States Agency for International Development v. Alliance for Open Society International, Inc. 570 U.S. 205 (2013),