Court of Appeal File No: CA47899

COURT OF APPEAL

BETWEEN:

CITY OF PRINCE GEORGE

Appellant
(Petitioner)

AND:

SHELDON STEWART, CRYSTAL ARNDT, BRANDON DEEG,
JANE DOE, JOHN DOE and OTHER UNKNOWN PERSONS

Respondents
(Respondents)

MEMORANDUM OF ARGUMENT ON AN APPLICATION FOR LEAVE TO INTERVENE

British Columbia Civil Liberties Association

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PART I: OVERVIEW

1. This is an application by the British Columbia Civil Liberties Association (the "**BCCLA**") for leave to intervene in this appeal pursuant to Rule 36.[1] The BCCLA is a non-profit organization with over 50 years' experience in the field of *Charter* rights, litigation, and advocacy.

2. This appeal concerns a government's entitlement to a court order with questionably constitutional effects. In *Prince George (City) v. Stewart*, 2021 BCSC 2089, a municipality sought to prohibit people experiencing homelessness from erecting shelters to survive outdoors. The injunction pursued would have, if granted, impacted the life, liberty, and security of the respondents—particularly in the unique circumstances of this case, where the by-law before the court was remarkably similar to those declared unconstitutional in *Victoria (City) v. Adams*[2] and *Abbotsford (City) v. Shantz*.[3] Despite taking no issue with the finding that the respondents lacked access to indoor space,[4] Prince George on appeal argues, in effect, that on a correct application of the law, an injunction should have been granted, regardless of the law's constitutionality.[5]

3. Since the recognition in *Adams* that erecting shelter while homeless is protected under s. 7, this Court has not considered a government's attempt to displace by injunction people who are homeless. This case is an important opportunity to provide needed clarity and to ensure society's most vulnerable are not subject to unjustified threats to their liberty, security, and ultimately, survival as a result of a court injunction.

4. The BCCLA seeks leave to intervene as it has a public interest in the public law issues raised by this appeal. If granted leave, the BCCLA will provide the court with useful and unique submissions on the appropriate test to be applied on an application for an injunction in circumstances where such an order may impermissibly violate *Charter* rights. More specifically, the BCCLA's submissions will focus on how the law should consider the possibility that an injunction will unjustifiably violate *Charter* rights as a circumstance in which injunctive relief should be refused.

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[1] *Court of Appeal Rules*, B.C. Reg. 297/2001.
[2] 2008 BCSC 1363, aff'd 2009 BCCA 563.
[3] 2015 BCSC 1909.
[4] *Prince George (City) v. Stewart*, 2021 BCSC 2089 at para. 96.
[5] Appellant's factum filed 11 February 2022.

PART II: THE BCCLA SHOULD BE GRANTED LEAVE TO INTERVENE

5. The BCCLA seeks intervenor status as an entity with a public interest in the public law issue in question.[6]

6. As a public interest intervenor, the BCCLA brings this application on the basis that its submissions will assist the court in amplifying "the comprehensiveness of the resources available to it on the appeal".[7] The presence of a public interest intervenor in such circumstances can assist the court by providing submissions "beyond those that the parties can effectively make" and "ensur[ing] that important points of view are not overlooked".[8]

7. In cases involving novel *Charter* arguments, courts take a "generous"[9] approach where intervenors are "welcomed, as they are more likely to be of assistance to the court".[10]

A. All four criteria for granting leave to intervene weigh in the BCCLA's favour

8. In exercising the authority to grant leave to such a body under Rule 36, the criteria guiding a justice's exercise discretion have been summarized in four parts:[11]

   a. Does the proposed intervenor have a broad representative base?

   b. Does the case legitimately engage the proposed intervenor's interests in the public law issue raised on appeal?

   c. Does the proposed intervenor have a unique and different perspective that will assist the Court in the resolution of the issues?

   d. Does the proposed intervenor seek to expand the scope of the appeal by raising issues not raised by the parties?

9. In this case:

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[6] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 (Marchand J.A. in chambers) at para. 10; *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCCA 282 (Garson J.A. in chambers) at para. 14.
[7] *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 (Groberman J.A. in chambers) at para. 8.
[8] *Equustek Solutions Inc. v. Google Inc.*, 2014 BCCA 448 (Groberman J.A. in chambers) at para. 8.
[9] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 (Marchand J.A. in chambers) at para. 11.
[10] *Dickson v. Vuntut Gwitchin First Nation*, 2021 YKCA 3 (Fenlon J.A. in chambers) at para. 10.
[11] *Beaudoin v. British Columbia (Attorney General)*, 2022 BCCA 66 (Marchand J.A. in chambers) at para. 11.

a. The BCCLA has a broad representative base: it is one of Canada's leading human rights organizations, with a long history of litigation, policy reform work, and public education related to *Charter* rights and freedoms. It has hundreds of members and donors from across the country.[12]

b. The BCCLA has a legitimate interest in the issues on appeal: its interest stems from its long-standing work advocating for the protection of fundamental rights and freedoms, including those of persons experiencing homelessness. The BCCLA acted as an intervenor in *Victoria (City) v. Adams*,[13] *Victoria (City) v. Adams*,[14] and *Abbotsford (City) v. Shantz*,[15] the only British Columbia cases in which bylaws limiting the ability of persons experiencing homelessness to set up shelter were subject to constitutional challenge. The BCCLA regularly makes submissions to government about the rights of those experiencing homelessness and has significant expertise in the scrutiny of rights-limiting government actions, such as a court application for an injunction.[16]

c. The BCCLA has a unique and different perspective on the issues on appeal: As spelled out further below, the BCCLA intends to draw on its "demonstrated expertise in complex *Charter* litigation, particularly s 7 claims"[17] to make submissions on how the court should, within the limits of the injunction context, ensure its authority will not be invoked to unjustifiably infringe constitutional rights and freedoms.[18]

d. The BCCLA does not and will not seek to expand the scope of the appeal by raising issues that are not raised by the parties.[19]

B. The BCCLA's proposed submissions

10. The BCCLA's proposed submissions will address (1) the appropriate interpretation of the existing discretion to grant injunctive relief in a circumstance such as this, where serious

[12] Affidavit #1 of J. Magonet at paras. 3–8.
[13] 2008 BCSC 1363.
[14] 2009 BCCA 563.
[15] 2015 BCSC 1909.
[16] Affidavit #1 of J. Magonet at paras. 9–11.
[17] *AC and JF v. Alberta*, 2020 ABCA 309 (Pentelechuk J.A. in chambers) at para. 24.
[18] Affidavit #1 of J. Magonet at paras. 12–13.
[19] Affidavit #1 of J. Magonet at paras. 12–13, 16.

questions are raised with respect to the impact of enforcing a law on the *Charter* rights of highly vulnerable people; and (2) an appropriate reformulation of the law to take into account the *Charter* scrutiny a government action to enforce a law should receive.

i. Even under the current test for a final, statutory injunction, a Charter-*violating order should not be granted*

11. The law of statutory injunctions should not, properly interpreted, give municipalities a rubber stamp to obtain an injunction to enforce any law that may be breached.

12. The line of jurisprudence from *Vancouver (City) v. Maurice*, 2005 BCCA 37 and *Maple Ridge (District of) v. Thornhill Aggregates Ltd.*, 1998 CanLII 6446, 162 D.L.R. (4th) 203 (B.C. C.A.) holds that, even in the context of a final injunction brought pursuant to a statute, the court retains a narrow discretion to deny an injunction in exceptional circumstances. The list of exceptional circumstances addressed in the jurisprudence does not, however, provide for any assessment of the injunction's effects or the underlying law's constitutionality:

> instances where there was a right that pre-existed the enactment contravened, where there is a clear and unequivocal expression that the unlawful conduct will not continue, where there is such uncertainty that it can be said that the breach is not being flouted, or where the events do not give rise to the mischief the enactment was intended to preclude.[20]

13. In the BCCLA's submission, where granting injunctive relief will impermissibly limit the *Charter* rights of the persons subject to the order, this should be considered an exceptional circumstance.

14. However, "exceptional circumstances" have not, to this point, been explicitly framed to account for the possibility of a government moving to enforce an unconstitutional law by court order. The BCCLA will submit that this aspect of the law should be clarified. The BCCLA will argue lack of certainty in the existing law is exemplified by recent cases in which the courts have diverged on how to treat final, statutory injunctions that will have the effect of displacing people sheltering outdoors out of necessity. For example:

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[20] *Vancouver (City) v. Maurice*, 2002 BCSC 1421 at para. 20, quoting *British Columbia (Minister of the Environment, Lands & Parks) v. Alpha Manufacturing Inc. et al* (1997), 1997 CanLII 4598, 150 D.L.R. (4th) 193 at para. 32 (B.C.C.A.).

a. In *Nanaimo (City) v. Courtoreille*, 2018 BCSC 1629, the court concluded that the presence of constitutional issues in the petition for a final injunction made it such that the issues on the petition could not be determined on a summary basis. The court instead referred the matter to the trial list and considered the petition as an interlocutory application, applying the *RJR-MacDonald*[21] test.

b. In *Bamberger v. Vancouver (Board of Parks and Recreation)*, 2022 BCSC 49, the court concluded that, while there were constitutional concerns raised with respect to the by-law being enforced such that referral to the trial list could be appropriate, the petition should instead be adjourned.

c. In this case, *Prince George (City) v. Stewart*, 2021 BCSC 2089, the court considered the constitutional issues raised in the petition and dismissed it in its entirety.

15. The BCCLA will argue that the lack of clarity on what, precisely, constitutes exceptional circumstances leaves ample room for courts to grant an injunction to enforce a blatantly unconstitutional law. This does not fulfill the courts' function as "guardians of the constitution",[22] nor does it serve the public interest.

ii. Any reformulated test for a government action to obtain an injunction should require the order issued to be Charter-compliant

16. The BCCLA will submit that, on an appropriate test, an injunction should not be granted if the court on a summary basis cannot be satisfied any *Charter* infringements caused by its order are justified under s. 1. The BCCLA will submit that such an assessment is amply supported on the existing law of *Charter* review, for three reasons.

17. First, such an assessment would be well in line with the court's flexible practice of assessing constitutionality in a manner proportionate to the circumstances. Courts are well-practiced at assessing the constitutionality of a specific action on a summary basis—this is precisely what the process set out in *Doré v. Barreau du Québec*[23] requires. Courts should not shy away from considering the *Charter* on a limited record where what is being asked

[21] 1994 CanLII 117, [1994] 1 S.C.R. 311.
[22] *Hunter v. Southam Inc.*, 1984 CanLII 33, [1984] 2 S.C.R. 145 at 169.
[23] 2012 SCC 12.

of them is not to strike down a law under s. 52 of the Constitution, but rather something much more limited—in this case, dismissing a petition.

18. Second, requiring that persons who may be subject to an injunction instead bring an action to challenge the law would be unworkable and deeply unfair. As the BCCLA is well-aware, bringing a claim to strike down a law is a far-from-summary procedure.[24] Refusing to consider the constitutionality of an injunctive order on a proceeding to obtain an injunction would amount to an expectation that all persons are able to bring large-scale *Charter* claims at a moment's notice, regardless of their access to financing, legal counsel, internet, telephones, or the sheer time and emotional energy required to sustain a claim. For persons experiencing homelessness, whose barriers to accessing the courts are particularly acute, the likelihood of laws impermissibly infringing their *Charter* rights remaining in force, or being passed without challenge, is particularly high: injunctive orders to enforce these laws cannot be automatic.

19. Third, bringing a petition or an action to request an injunction from a court is a form of government action. Properly understood, it should be subject to constitutional scrutiny just as any other decision by the executive or legislature could be.[25] Unlike an order made in a private dispute,[26] it is entirely appropriate to require an order made at the government's request to be *Charter*-compliant.

20. Concomitant with its role in assisting the court, the BCCLA's participation will not expand the scope of the appeal. The BCCLA's proposed submission will squarely address the question before the court of what test properly applies when granting an injunction such as the one that was refused in the Supreme Court here. Further, if granted leave, the BCCLA will work with the parties and any other intervenors to ensure its submissions are not duplicative of those made by any other entity.

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[24] See e.g. the timelines and trial dates in *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62, aff'd 2019 BCCA 228 and *Carter v. Canada (Attorney General)*, 2012 BCSC 886, aff'd 2015 SCC 5.
[25] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at 37.2(f)–(g).
[26] See e.g. *Young v. Young*, 1993 CanLII 34, [1993] 4 S.C.R. 3; *A.B. v. C.D.*, 2020 BCCA 11.

PART III: CONCLUSION

21. Accordingly, the BCCLA submits that it should be granted intervenor status on the terms set out in its notice of motion.

DATED: February 25, 2022

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THIS MEMORANDUM OF ARGUMENT is filed by Julia W. Riddle of the firm of Nathanson, Schachter & Thompson LLP, Barristers and Solicitors, whose place of business and address for service is Suite 750 – 900 Howe Street, Vancouver, B.C. V6Z 2M4 and whose email address for service is jriddle@nst.ca.