No. L023374
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

City of Vancouver

PLAINTIFF

AND:

Claude Maurice, Kerry Pakarinen, Anton Pilippa, Craig Ballantyne, Jim Leyden, Jane Doe, John Doe and Other Persons Unknown, erecting, maintaining, or occupying tents, structures and other objects on City of Vancouver Streets in the 100 block West Hastings Street, Vancouver, British Columbia

DEFENDANTS

AND:

British Columbia Civil Liberties Association

INTERVENOR

MEMORANDUM OF ARGUMENT OF THE INTERVENOR, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Charter values and freedom of expression

1. The British Columbia Civil Liberties Association ("the BCCLA") makes a single argument. It is that the discretion given to this Court by the language in Section 571 of the *Vancouver Charter* ought to be exercised in a manner that is consistent with charter values. While there are a number of charter values argued by counsel for the Defendants in this case, the BCCLA directs its argument to the freedom of expression:

> "Everyone has the following fundamental freedoms: ....
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications."

2. In its argument, the City seeks injunctive relief pursuant to Section 571 of the *Vancouver Charter* (pages 5-11). That argument is the subject of elaboration from pages 5 to 11 of the City's written argument. At the heart of its argument is the proposition that the usual equitable considerations, such as balance of convenience and irreparable harm, are of little relevance (page 5, paragraph 21). However, none of the cases it relies on, including the decision of our Court of Appeal in the *Maple Ridge* case at Tab 13, involves an interpretation of the language the City relies upon for its remedy in this case.

3. The language of Section 571 is found at the last page of Tab 20 of the City's Brief of

Authorities. It states:

> "Any bylaw passed hereunder may be *enforced* and the contravention of any regulation therein restrained *by the Supreme Court* upon action brought by the City. ...." (emphasis added)

4. It is the respectful submission of the BCCLA that that language is unique amongst the cases relied upon by the City. A plain construction of that language – and particularly the highlighted passages above – suggest that indeed the Court does have its usual discretion.

5. The City asserted in argument yesterday morning, in response to one of the Court's questions, that the discretion referred to in the language may be in force was the discretion of the City. But that is contrary to a plain reading of that language. There is nothing to suggest otherwise than the enforcement of the bylaw "may be .... restrained by the Supreme Court". The discretion referred to is the Court's discretion.

6. It would take clear language to deprive the Court of its traditional inherent discretionary power to issue an order, or not, or to issue an order on terms.

7. The sum of this argument simply is that the discretion of the Supreme Court in making this order is broader than that proposed by the Plaintiff in this case. What also flows from that conclusion is that the Court is able to give greater weight to the *Charter* values being asserted by the Defendants.

8. It is the BCCLA's alternative argument, however, that even if the Court's discretion is limited, as the Plaintiff says, to exceptional circumstances, there are such circumstances here. We say that the Court ought to follow "Charter values" in determining whether or not there are exceptional circumstances in this case.

9. We rely on *Driedger on the Construction of Statutes* (Tab 1, BCCLA's Brief of Authorities), where McLachlin J. (as she then was) is quoted from *R.* v. *Zundel*:

> The point made by the court here, and in numerous other judgments, is that constitutional documents like the Charter set out the principles and norms that are most highly valued in legal culture. They embody the primary, the most legitimate values. For this reason, quite apart from questions of validity or showing deference to the legislature, it is appropriate for courts to prefer interpretations that tend to promote those principles and values over interpretations that do not. For this reason, the presumption of compliance with constitutional values may be relied on even though the validity of the legislation has not been challenged. (page 325)

10. Thus the BCCLA says that Section 571 of the *Vancouver Charter* ought to be interpreted in a way that reflects charter values.

Public property and public interest

11. The Plaintiff's argument proceeds on two fundamental premises, both of which the BCCLA respectfully submits are erroneous.

12. The first is that the City is the owner in fee simple of the sidewalks in question (page 4, paragraph 16 of its written argument).

13. The second is that the Plaintiff, and only the Plaintiff, represents the public interest in these proceedings (page 6, paragraphs 21 and 22). That public interest is exhaustively defined as involving unimpeded access through the streets in an uncluttered, inoffensive environment.

14. The BCCLA says that the property in question is public property, and that what flows from that, in terms of the Defendants' constitutional rights, is fundamentally different than if the Plaintiff was a true private property owner. This is made clear in many of the cases involving freedom of expression involving public property.

15. In the leading text on constitutional law, *Constitutional Law of Canada*, by Prof. Peter Hogg (Tab 2, BCCLA's Brief of Authorities), the author comments on this issue, at page 40-37). In this passage, the learned author examines the decision of the Supreme Court of Canada in one of the leading cases on freedom of expression, *Committee for the Commonwealth of Canada* v. *Canada (1991)*. The case involved the use of public property at the Dorval Airport in Montréal to distribute political leaflets. While members of the Court wrote three separate judgments, the Court was unanimous in finding that Section 2(b) – the right to freedom of expression – conferred a right to use public property for expression purposes. As Prof. Hogg notes:

> "....the government did not possess the absolute right of a private owner to control access to and use of public property."

16. The Plaintiff's claim to be the sole and exclusive representative in these proceedings of the public interest is, with respect, simply not well-founded in law. The true public interest in this case, given the *Charter* value of freedom of expression, is not merely that the public have unimpeded passage for other residents or users of the area. Rather, it is to balance that right with the rights of the Defendants to be able to engage their *Charter* right of freedom of expression to assert their right to have basic accommodation.

The use of chattels as expression

17. The Plaintiff has fashioned its case in a way that appears to respect *Charter* values. It makes no claim to limit the right to protest, to picket, to assemble, and so on. Rather, it seeks only the removal of the Defendants' chattels. That is set out on page 12, paragraph 45.1, of the Plaintiff's written argument. The language seeks the removal of all structures and objects. The application even goes so far as to define structures and objects. It includes tents, sofas, chairs, mattresses, and

tables, amongst others.

18. It is the BCCLA's respectful submission that that order does infringe the Defendants' freedom of expression. We say that the Plaintiff cannot finesse the Defendants' right of freedom of expression by focusing its attack on the Defendants' chattels, rather than on their persons.

19. The BCCLA's proposition can be supported by examining the law, and in particular the law from the Supreme Court of Canada in the three recent leading cases on freedom of expression: *Guignard*, *Ramsden*, and *Kmart*.

20. If we begin with a summary of the right, again from Prof. Hogg's text, *Constitutional Law in Canada* (Tab 2, BCCLA's Brief of Authorities), Prof. Hogg states:

> The Supreme Court of Canada has defined "expression" in these terms: "Activity is expressive if it attempts to convey meaning". This broad definition has been supported by a willing acceptance of the broadest rationale for the protection of expression – the realization of individual self-fulfilment – as well as the Court's view that the Charter should be given a generous interpretation.
>
> Is there any activity that is *not* expression under the Court's definition? The answer is not much, because "most human activity combines expressive and physical elements"; what is excluded is that which is "purely physical and does not convey or attempt to convey meaning". .... Indeed, the Court has acknowledged that parking a car would be an expressive activity, and therefore protected under s. 2(b), if it were done with an expressive purpose – and a protest against the parking regulations would be a sufficiently expressive purpose! (page 40-10)

21. In *Ramsden* v. *Peterborough (City)* (Tab 3, BCCLA's Brief of Authorities), the Supreme Court of Canada was required to interpret freedom of expression in the context of the municipal bylaw banning postering. The facts are set out at page 3 of the decision. Ramsden was a member of a rock band who used extensive postering throughout the city of Peterborough on public property as a way of advertising and announcing gigs, or engagements, for the rock band. The Court reviewed and considered the three separate judgments in the leading case of *The Committee for the Commonwealth of Canada* leading to a unanimous opinion, at page 8 and following. Then at page 11, paragraph 34, the Court stated:

> "....it is clear that postering on public property, including utility poles, fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(b)."

The Court then proceeded to a very important point. That was to comment on the distinction that had been raised by the Ontario Court of Appeal between conduct at a public forum and the use of a public forum as an instrument of expression. The Supreme Court of Canada in *Ramsden* rejected that distinction and confirmed that members of the public were entitled to use public property to convey their message, in the same way as Ramsden was using the utility poles to convey his (page

12, paragraph 36). In conclusion, the Court stated, at paragraph 37:

> "Postering on some public property, including the public property at issue in the present case, is protected under s. 2(b)."

The Court proceeded to find that the City in that case had not met the justification test under Section 1 of the *Charter* (page 14, paragraph 47).

22. Many of these conclusions were also reflected in the next case on freedom of expression: *United Food and Commercial Workers, Local 1518* v. *Kmart Canada Ltd.* (Tab 5, BCCLA's Brief of Authorities). In that case, the Court found that consumer leafleting in public places was a protected form of free speech.

23. Then, last month, on October 3, 2002, a third major decision was issued by the Supreme Court of Canada involving freedom of expression: *R.* v. *Guignard* (Tab 4, BCCLA's Brief of Authorities). In that case, the Court found that a municipal bylaw regulating the use of signs violated the accused's freedom of expression. The accused had erected a sign on one of his buildings protesting the quality of services provided by an insurance company with whom he had been dealing (page 3). The Court made these comments about the importance of municipal governments:

> This court has often reiterated the social and political importance of local governments. It has stressed that their powers must be given a generous interpretation because their closeness to the members of the public who live or work on their territory make them more sensitive to the problems experienced by those individuals. .... (page 7)

However, the Court continued in the same passage to make this very important comment:

> Apart from the legislative framework and the general principles of administrative law that apply to them, municipal powers must be exercised in accordance with the principles of the Charter, as must all government powers. (page 7)

In that case, the Court found that the bylaw directly impaired the freedom of expression. It suspended its declaration of invalidity for a period of six months to give the opportunity to revise its bylaw (page 11, paragraph 32).

24. The BCCLA submits that one cannot separate these physical structures, and these physical chattels, from a person's freedom of expression, anymore than one can separate the sign from the person in *Guignard*, the poster from the person in *Ramsden*, of the leaflet from the person in *Kmart*. If you remove these chattels in the case before Your Lordship, you remove the content of their expression. The content of their expression is precisely the household items.

The message these items deliver, the content of the expression that these ordinary household items

carry, is: "I have no home. That is why the objects you have in your bedroom, or that you have in your kitchen in my case, are here on the public sidewalk. Please do something; please assist me in doing something about this."

25. These objects are their equivalence of a poster, a billboard, or a leaflet.

Prospective rulings and transition periods

26. In recent years, the Courts have made extensive uses of prospective rulings and transition periods. This is dealt with in the leading textbook by Prof. Kent Roach, *Constitutional Remedies in Canada* (Tab 6, BCCLA's Brief of Authorities), pages 14-96 to 14-102. The learned author catalogues recent cases in which the Courts have issued either prospective rulings or order transition periods. There are many such cases.

27. In *Eldridge* v. *British Columbia (Attorney General)*, the Supreme Court suspended its ruling for six months in order to enable the government to explore its options and formulate an appropriate response. A similar approach was taken in the *Ramsden* case referred to above.

28. If various levels of government can be accorded time by the Courts to bring themselves into compliance with the law (that is, the *Charter*), we respectfully suggest the Defendants should be accorded comparable treatment.

29. The BCCLA is not in a position as intervenor to propose a particular period of time as more reasonable than others for a transition period. However, the Court may wish to consider a period of several weeks to several months. It may also wish to consider the imposition of conditions that were to prevail during such times. These conditions might include:

(a) that the Defendants guarantee the provision of a passage-way along the sidewalk, at least 4 feet wide, at all times;

(b) that the Defendants must not obstruct that passage-way in any way with objects or persons;

(c) that the Plaintiff may return to the Court in the event of any violation of the order on 24 hours' notice to the Defendants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, British Columbia, this 20th day of November, 2002.

LEO McGRADY Q.C.
Solicitor for the Intervenor,
British Columbia Civil Liberties
Association