File no. CI 17-01-09352

THE QUEEN'S BENCH
WINNIPEG

BETWEEN:

NICHOLAS TROLLER

Applicant

-and-

MANITOBA PUBLIC INSURANCE CORPORATION

Respondent

BRIEF OF THE APPLICANT

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TABLE OF CONTENTS

PART I: OVERVIEW

1. This case concerns the arbitrary censorship of expression by government on the ground that it is "considered offensive" without the requisite consideration of the fundamental value of freedom of expression and its broad constitutional protection.

2. The Province of Manitoba has statutorily authorized and publicly invited individuals to express themselves through personalized license plates issued by the Province through Manitoba Public Insurance ("MPI"). As a Crown corporation, MPI is "government" for the purposes of the *Charter*.

3. In 2015, the Applicant, Mr. Troller applied and paid for a personalized licence plate with the characters "ASIMIL8", read as "assimilate" (the "Plate"). The Plate was approved by MPI and issued to Mr. Troller. The Plate is a reference to a well-known phrase uttered by an alien species from the *Start Trek* franchise called the "Borg": "We are the Borg. You will be assimilated. Resistance is futile". By displaying the Plate on his vehicle, Mr. Troller was engaging in one of the core values underlying freedom of expression, namely, self-fulfillment.

4. The word "assimilate" is not objectively offensive. It is not hate speech. It is used societally in many broad and varied contexts, including medicine, commerce, science and law. It is entirely permissible in common parlance and should not be censored on a personalized licence plate.

5. In April 2017, MPI revoked the Plate, telling Mr. Troller the Plate was "considered offensive". The decision to revoke the Plate is disproportionate and unreasonable. It

was made without consideration of the *Charter* value of freedom of expression and without identifying any statutory mandate that would support censoring the Plate.

6. Mr. Troller's free expression rights were limited by the revocation of the Plate. Vaguely labelling the word "assimilate" as "offensive" and revoking a personalized licence plate on this basis alone is a disproportionate and therefore unreasonable infringement of the freedom of expression.

PART II: FACTS

The Parties

7. The Applicant, Mr. Troller is a resident of Winnipeg. He is a *Start Trek* enthusiast, being particularly interested in the narrative involving the alien species known as the "Borg".

8. The Respondent, Manitoba Public Insurance ("MPI") is a non-profit Crown Corporation that provides automobile insurance in Manitoba and, since 2004, has been responsible for the issuance of licence plates to registered owners of vehicles licenced in Manitoba.[1] MPI is both controlled by government and implements specific government programs.[2] MPI is therefore "government" for the purposes of section 32 of the *Charter* and its decisions attract *Charter* scrutiny.

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[1] Transcript of the cross examination of Ward Keith, April 18, 2018 ["Keith Transcript"], page 8, lines 14-24.

[2] See subsections 2(1), (3), and (8); 6(1)(c.1); and 14(1) and (3); and section 14.1 of *The Manitoba Public Insurance Corporation Act*, CCSM c-P215. **(TAB 23)**

Personalized Licence Plates

9. For a fee of $100, vehicle owners in Manitoba can obtain a personalized licence plate ("PLP") from MPI through the personalized licence plate program, which has been in place since before 2004.[3]

10. At all material times, MPI publicly invited Manitoba license plate holders to express themselves through the purchase of a PLP. It specifically invited plate holders to express themselves on PLPs regarding their "favourite hobbies" and "interests", and to express themselves in a manner that was "just for fun".[4]

Approval of the PLP Slogan "ASIMIL8"

11. In July 2015, in response to MPI's invitation to express his hobbies and interests, specifically, *Start Trek* and the Borg, Mr. Troller applied for the PLP "slogan" "ASIMIL8" (read as "assimilate").

12. MPI had a process for reviewing and either approving or denying applications for PLP slogans. Each week, PLP slogan applications were compiled into a list by an MPI clerk. The clerk then conducted internet searches on "Google" and a website called "Urban Dictionary" to check each slogan. Depending on the results of the searches, the clerk then highlighted slogans applied for that were "in question" and placed those slogans on a separate list. The list containing all the slogans that were not "in question" was referred to as the "approval list". Both the approval list and a list containing highlighted, "in question" slogans, if there were any slogans in question

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[3] Keith Transcript, page 8, lines 14-24; Affidavit of Ward Keith, Exhibit "A"; *Charges for Licences, Registrations, Permits and Other Services Regulation*, Man Reg 42/2006, section 38(1) and 39(1). **(TAB 22)**

[4] Affidavit of Ward Keith, Exhibits "A" and "B"; Keith Transcript, page 8, line 25 - page 9, line 11.

that week, were then sent to a supervisor and a committee to be reviewed (the "PLP Review Committee").[5]

13. The PLP slogan Mr. Troller applied for, "ASIMIL8", was placed on the approval list for the week of June 29 – July 3, 2015. It was not highlighted as being "in question".[6] For the week of June 29 – July 3, 2015, there was no "in question" list, only an approval list.[7] The PLP Review Committee that reviewed the approval list containing the PLP slogan "ASIMIL8", consisting of MPI staff from various departments, did not object to the "ASIMIL8" slogan.[8]

14. The PLP slogan "ASIMIL8" was approved and MPI issued the Plate to Mr. Troller in July 2015.[9]

Use of the Plate

15. Mr. Troller installed the Plate on his vehicle upon receiving it from MPI. He also installed a licence plate border that surrounded the Plate. The border read "WE ARE THE BORG" on the top and "RESISTANCE IS FUTILE" on the bottom (the "Plate Border").[10] Both the Plate and the Plate Border are a reference to the famous phrase

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[5] Affidavit of Ward Keith, paras 8, 10-11, Exhibit "C"; Keith Transcript, page 10, line 13 - page 11, line 1.

[6] MPI claims that when MPI staff checked the "ASIMIL8" slogan, no "inappropriate or offensive" definitions were found because the search was conducted using the word "asimilate", spelt with only one 's', instead of the proper spelling of the word, "assimilate", spelt with two 's's. No documentary evidence or business record to support these claims has been provided, nor testimony from the individual(s) who conducted the searches. See Affidavit of Ward Keith, paras 13-14.

[7] Affidavit of Ward Keith, para 14; Affidavit of Megan Priestman, Exhibit "A": Answers to Undertakings of the Respondent from the Examination for Discovery of Ward Keith [Answers to Undertakings], answer to undertaking no. 2; Affidavit of Michelle Gusdal, Exhibit "B": Schedule "B" to the Answers to Undertakings.

[8] Affidavit of Ward Keith, para 18.

[9] Affidavit of Ward Keith, para 19.

[10] Affidavit of Nicholas Troller, para 5, Exhibit "B".

often used by the Borg: "We are the Borg. You will be assimilated. Resistance is futile".

16. Mr. Troller displayed the Plate on his vehicle for nearly two years, during which time not one person expressed concerns about the Plate to Mr. Troller. Many people, however, commented positively to Mr. Troller regarding the Plate, some even asking him to have their picture taken with it.[11]

17. MPI renewed the Plate without incident in 2016.[12]

The Decision to Revoke the Plate

18. On April 22, 2017, an individual by the name of MaryAnn Wilhelm, who is a resident of Ontario, not Manitoba, posted on Facebook regarding the Plate (the "Facebook Post").[13] Ms. Wilhelm also linked to the Facebook Post through various other social media platforms.[14] The Facebook Post consisted of the following text, along with a picture of the back of Mr. Troller's vehicle wherein the Plate with the Plate Border were visible:

> I am MaryAnn Wilhelm, while I am the Outreach Director for the NDP Aboriginal Commission, I am calling on behalf of myself, and of those who've been shocked and offended by what is being driven around in Winnipeg Manitoba.
>
> First, I want to mention that I am aware that a man lost his vanity plate in the east coast of Canada, his vanity plate said GRABHER. While I question the pulling of [*sic*] ones own name, I understand the issues around that plate. I have no questions however when it comes this vanity plate roaming the streets of a highly populated indigenous city with the ID of ASIMIL8.
>
> In an era of TRC, where we, Canadians, and Indigenous are working to reset relations, I found this vanity plate to be appalling to this country.

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[11] Affidavit of Nicholas Troller, paras 6 and 8.

[12] Affidavit of Nicholas Troller, para 7.

[13] Affidavit of Megan Priestman, para 5, Exhibit "E".

[14] Affidavit of Megan Priestman, paras 6-7, Exhibits "F" and "G".

> How did this even manage to pass the desk of those who analyze and approve plates is beyond my imagination unless they simply thought that it was acceptable to do so.
>
> If that was the case, then departments who approve these plates should be required to take Indigenous cultural training to ensure offensive plates like ASILIM8 don't end up on Canadian roads.
>
> I am requesting an investigation and an apology over the issuance of the plates, and request training take place at these agencies that process vanity plates.[15]

19. MPI first became aware of the Facebook Post on the morning of April 24, 2017.[16]

20. MPI management, including Ward Keith and the Registrar of Motor Vehicles, Carla Hocken discussed the Facebook Post and the Plate via email on the evening of April 24. The email discussion centred on the process under which the Plate was approved and how to respond to the Facebook Post. There was no discussion of freedom of expression or any statutory mandate that would support revoking the Plate.[17]

21. For Mr. Keith, it was a foregone conclusion that the Plate would be revoked. He concluded in an email sent at 7:28 PM on April 24 to Carla Hocken that "we can and will recall this plate."[18]

22. The decision to revoke the Plate (the "Decision") was effectively made on the evening of April 24 by Mr. Keith. All MPI staff involved in the PLP Program ultimately report to Mr. Keith as Vice President of Business Development and Communications and Chief Administrative Officer.[19] The final authority to revoke a PLP rests with Mr.

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[15] Affidavit of Megan Priestman, para 5, Exhibit "E".

[16] See email from Brian Smiley to Ward Keith sent at 11:26 AM on April 24, 2017, subject "Facebook Comment": Affidavit of Michelle Gusdal, Exhibit "D", page 304.

[17] Affidavit of Michelle Gusdal, Exhibit "D", pages 229, 290, 292, 296-298 and 302.

[18] Affidavit of Michelle Gusdal, Exhibit "D", pages 296-297.

[19] Keith Transcript, page 2, lines 9 – page 6, line 15.

Keith.[20] The following statements communicated by email by MPI management on April 25 confirm that the Decision was already in effect:

a. "The plate in question has been reviewed, should not have been issued, and is being recalled": email sent by Ward Keith at 3:21 PM;[21]

b. "The plate is being recalled as we speak": email sent by Ward Keith at 4:38 PM;[22]

c. "Just FYI, we are in the process of recalling the plate": email sent by David Burns at 4:51 PM;[23]

d. "We can't wait the week. Please contact the customer tomorrow and ensure the plate is returned immediately": email sent by David Burns at 5:30 PM;[24]

e. "Carla and I are going to talk tomorrow. She doesn't want to wait for the customer to attend a broker and wants the plate off the road immediately": email sent by David Burns at 5:46 PM.[25]

23. In the scores of emails following April 24 among MPI staff, the revocation of the Plate was never questioned. MPI's sole apparent concern was how fast the Plate could be physically recovered.[26] Freedom of expression was not referred to generally, nor its specific application to the Plate. No statutory mandate that would support revoking the Plate was ever discussed. That the Plate must be revoked and recovered as soon as possible was never questioned.

Following the Decision

24. At 12:39 PM on April 25, 2017, MPI received a formal complaint regarding the Plate (the "Complaint") from MaryAnn Wilhelm, the same individual who authored the

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[20] Keith Transcript, page 40, lines 3 – 24.

[21] Affidavit of Michelle Gusdal, Exhibit "D", pages 302-303.

[22] Affidavit of Michelle Gusdal, Exhibit "D", page 286.

[23] Affidavit of Michelle Gusdal, Exhibit "D", page 317.

[24] Affidavit of Michelle Gusdal, Exhibit "D", pages 336-337.

[25] Affidavit of Michelle Gusdal, Exhibit "D", page 336.

[26] Affidavit of Michelle Gusdal, Exhibit "D", pages 317, 325, 336 and 338.

Facebook post.[27] The Complaint was almost identical in content to the Facebook Post. Ms. Wilhelm is a politically active resident of Ontario who has a history of making complaints to MPI.[28]

25. Local media contacted MPI regarding the Plate on the afternoon of April 25.[29]

26. The subsequent email discussions among MPI management and staff on April 25 through to April 27 were focused on how to respond to the media, how to respond to Ms. Wilhelm, and how to recover the Plate as fast as possible.[30]

27. MPI staff phoned Mr. Troller twice, on April 25 and again on April 26, to inform him of the Decision and to demand that he return the Plate.[31]

28. On April 26, MPI sent a letter via process server to Mr. Troller (the "April 26 Letter"), in which MPI demanded Mr. Troller "surrender" the Plate "immediately".[32] MPI stated in the April 26 Letter that the Plate was "considered offensive" and that MPI had "deemed" the Plate to be "inappropriate".[33] No other reasons were provided.

29. Mr. Troller complied with MPI's demand to surrender the Plate.[34]

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[27] Affidavit of Megan Priestman, paras 3-4, Exhibit "B"; Email from Ward Keith sent to Brian Smiley and Carla Hocken on April 25, 2017 at 4:38 PM: Affidavit of Michelle Gusdal, Exhibit "D", page 286.

[28] Affidavit of Megan Priestman at paras 3-4 and 10, Exhibits "J" and "K".

[29] Email from Brian Smiley sent to Ward Keith and Carla Hocken on April 25 at 2:56 PM: Affidavit of Michelle Gusdal, Exhibit "D", page 303.

[30] Affidavit of Michelle Gusdal, Exhibit "D", pages 270, 286-287, 302-303, 317, 325, 328, 336 and 338.

[31] Affidavit of Michelle Gusdal, Exhibit "D", pages 340, 313 and 258.

[32] Affidavit of Michelle Gusdal, Exhibit "D", page 313.

[33] Affidavit of Nicholas Troller, Exhibit "C".

[34] Affidavit of Nicholas Troller, para 11.

30. On May 29, 2017, counsel for Mr. Troller wrote to MPI requesting the Plate be re-issued to Mr. Troller.[35] On July 7, 2017, counsel for MPI wrote to counsel for Mr. Troller refusing to re-issue the Plate.[36]

PART III: LAW AND ARGUMENT

Freedom of Expression

31. The fundamental Canadian value of freedom of expression is celebrated and constitutionally protected in section 2(b) of the *Canadian Charter of Rights and Freedoms*, which states:

> Everyone has the following fundamental freedoms:
>
> freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

32. Freedom of expression "has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years."[37] As the Supreme Court of Canada has found, "[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression."[38] Indeed, "[f]reedom in thought and speech… are the essence of our life."[39] To summarize the jurisprudence, "[t]he vital importance of freedom of expression cannot be overemphasized."[40]

33. Due to its importance as a "fundamental value in our society", any limitation of freedom of expression "must be subjected to the most careful scrutiny."[41] The

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[35] Affidavit of Nicholas Troller, Exhibit "D".

[36] Affidavit of Ward Keith, Exhibit "G".

[37] *CHP v City of Hamilton*, 2018 ONSC 3690 at para 39. **(TAB 4)**

[38] *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 (Cory J.) at para. 78. **(TAB 8)**

[39] *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139 [*Committee for the Commonwealth*] at para 79, quoting *Boucher v The King*, [1951] S.C.R. 265, at p 288. **(TAB 5)**

[40] *Committee for the Commonwealth* at para 95, quoting *R. v Kopyto* (1987), 24 O.A.C. 81, at pp 90-91. **(TAB 5)**

[41] *R v Keegstra*, [1990] 3 S.C.R. 697 at para 196 **(TAB 15)**; *R v Sharpe*, 2001 SCC 2 at para 22. **(TAB 17)**

Supreme Court has stated that freedom of expression ensures that, "without fear of censure", all individuals are able to "manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."[42] Government censorship is not justified by "mere ill-will as a product of controversy."[43] As the Supreme Court recently reiterated, individuals "are expected to put up with some controversy in a free and democratic society."[44]

The Seriousness of the Limitation

34. The expressive activity of displaying a PLP with the slogan "ASIMIL8" goes to the heart of one of the three "core values" underlying freedom of expression, that of self-fulfillment. As the Supreme Court has ruled, the closer speech is to one of the core values, "the harder it will be to justify a s. 2(b) infringement of that speech."[45]

35. The Supreme Court has found that the value of self-fulfilment in a free and democratic society is no less important than the values of truth-seeking and democratic participation because "in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual."[46] As the NB court of Appeal has stated, no matter how trivial the expression on a personalized licence plate may appear to others, such plates have "substantial personal value" for their holders.[47] According to the Ontario Divisional

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[42] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [*Irwin Toy*] at paras 42-43. **(TAB 9)**

[43] *Committee for the Commonwealth* at para 79, quoting *Boucher v The King*, [1951] S.C.R. 265, at p 288. **(TAB 5)**

[44] *Canadian Federation of Students v Greater Vancouver Transportation Authority*, 2009 SCC 31 [*Greater Vancouver*] at para 77. **(TAB 3)**

[45] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 [*Sierra* Club] at para 75.**(TAB 20)**

[46] *Sierra Club* at para 75 **(TAB 20)**; *Irwin Toy* at para 42. [Emphasis added] **(TAB 9)**

[47] *New Brunswick (Registrar of Motor Vehicles) v Maxwell*, 2016 NBCA 37 [*Maxwell*] at para 40. **(TAB 12)**

Court, a decision the effect of which will be censorship is not "trifling, ephemeral or marginal in importance", but rather "of profound significance."[48]

36. The limitation on Mr. Troller's *Charter* rights is no trivial matter in a free and democratic society as it undermines a core value underlying freedom of expression and amounts to the complete censorship of his creative expression in a location which the government specifically invited him and all plate holders for that very purpose.

The Test for Determining if Freedom of Expression has been Infringed

37. The Supreme Court of Canada has adopted a three-part test to determine whether freedom of expression has been infringed:

    i. Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of the section 2(b) protection?

    ii. Is the activity excluded from that protection as a result of either the location or the method of expression?

    iii. If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action?[49]

The First and Third Parts of the Test

38. The first branch of the test is met: the Plate has expressive content. It conveys meaning, as demonstrated by the reasons why Mr. Troller chose the slogan "ASIMIL8" and what it means to him.[50] Indeed, the purpose of displaying a PLP on

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[48] *CHP v City of Hamilton*, at para 53. **(TAB 4)**

[49] *Société Radio-Canada c Québec (Procureur général)*, 2011 SCC 2 [*CBC Radio Canada v Quebec*] at para 38. **(TAB 21)**

[50] See *Irwin Toy* at para 42:" if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee." **(TAB 9)**

one's vehicle is to express oneself, as evidenced by MPI's invitation to plate holders to purchase a PLP.

39. The Plate is not excluded from constitutional protection by means of the method of expression. The Plate does not constitute criminal hate speech, it does not advocate violence and it is not obscene or indecent as to cause harm incompatible with society's proper functioning.[51]

40. The third branch of the test is also met: both the purpose and the effect of the Decision, namely, the censorship of the PLP slogan "ASIMIL8" through the revocation of the Plate, is to limit Mr. Troller's right to freedom of expression.

The Second Part of the Test: Location

41. The location of an expressive activity can only remove it from the protection of section 2(b) of the *Charter* if permitting expressive activity in that location conflicts with or undermines the values protected by freedom of expression.[52] Permitting expression on licence plates does not undermine the values underlying freedom of expression. On the contrary, it furthers those values by enabling individuals to fulfill themselves through creative expression, self-fulfilment being one of the "core values" underlying freedom of expression.[53]

42. The Supreme Court of Canada has ruled that expression on the sides of public buses is protected by section 2(b) of the *Charter* due to the historic use of that medium for advertising, and because advertising on the sides of buses neither impairs the normal

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[51] *R v Labaye*, 2005 SCC 80 at paras 21-23. **(TAB 16)**

[52] *CBC Radio Canada v Quebec* at para 37. **(TAB 21)**

[53] *Sierra Club* at para 75. **(TAB 20)**

use of a bus to navigate the roads and carry passengers, nor does it "undermine the values underlying freedom of expression."[54]

43. As in *Greater Vancouver*, where the municipality determined to permit citizen expression on government property (the sides of buses), MPI has determined to create an avenue for members of the public to express themselves on licence plates. It created the PLP Program for the purpose of turning a piece of public property, licence plates, into a personal canvass for the creative expression of individuals to be displayed on their motor vehicles. Contrary to the assertion of MPI, citizen expression on PLPs does not become government expression merely because government owns the licence plates.[55] Like the sides of buses, the primary purpose of a licence plate is not expression, but past practice shows that MPI has not only permitted citizen expression on PLPs, it has actively encouraged it. Having done so, MPI's actions concerning PLPs must conform to the *Charter*'s guarantee of freedom of expression.[56]

Conclusion on the Infringement of Mr. Troller's Freedom of Expression

44. The test for determining if the *Charter* value of freedom of expression has been limited is met. By displaying the Plate on his vehicle, Mr. Troller was engaged in an expressive activity that furthered one of the core values of freedom of expression (self-fulfilment) on a location which the government has specifically made accessible for expressive purposes and even invited the public to express themselves on. The

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[54] *Greater Vancouver* at paras 39-43. **(TAB 3)**

[55] See Keith Transcript, page 61, line 9 – page 65, line 20 where Ward Keith, on behalf of MPI (page 1, lines 20 – 22), states that expression on PLPs is government expression.

[56] *Greater Vancouver* at para 44. **(TAB 3)**

very purpose of personalized plates is for citizens to express themselves in a way which is unique to the citizen. Due to the Decision, Mr. Troller is no longer able to express himself by displaying the Plate.

The Decision to Revoke the Plate is Unreasonable

45. As a discretionary administrative decision, the standard of review that should be applied by a reviewing court to the Decision is reasonableness.

46. An administrative decision is only considered reasonable, and therefore upheld by a reviewing court, if it proportionately balances the *Charter* protections engaged by the decision with the statutory objectives ostensibly furthered by the decision.[57] *Charter* protections, such as the protection of freedom of expression, can only be limited "if the government can justify those limitations as proportionate."[58] Administrative decisions will only be upheld by reviewing courts if the government can, first, identify a relevant statutory objective that is fulfilled by the decision, and, second, demonstrate that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate."[59]

47. The Applicant submits that the Decision is unreasonable in two ways. First, the Decision is unreasonable because there was no consideration of the applicable *Charter* values or of a relevant statutory mandate, if there is one. No effort to balance freedom of expression was attempted or could have been properly attempted in light of a complete lack of consideration given to freedom of expression. Second, the

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[57] *Doré c Québec (Tribunal des professions)*, 2012 SCC 12 [*Doré*] at paras 55-57 **(TAB 6)**; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [Loyola] at paras 37-39. **(TAB 10)**

[58] *Loyola* at para 38. **(TAB 10)**

[59] *Doré* at para 55 **(TAB 6)**; *Loyola* at para 39. **(TAB 10)**

Decision is further unreasonable because it disproportionately limits the *Charter* protections engaged by the Decision, that of freedom of expression.

The Effect of not Considering the *Charter* Values Engaged by the Decision and of not Identifying a Relevant Statutory Mandate

48. In a series of recent cases involving administrative decisions that have limited freedom of expression, courts have reversed the decisions as unreasonable because the government decision-makers did not properly identify a relevant statutory objective, did not consider, or even acknowledge the *Charter* value of free expression and did not affect, or even attempt to engage in, a proportionate balancing.[60]

49. In 2015, the Canadian Centre for Bio-Ethical Reform ("CCBR") submitted an advertisement to the South Coast British Columbia Transportation Authority ("TransLink"), which permits the sides of its buses to be used for expressive purposes such as advertisements. Without acknowledging CCBR's freedom of expression, TransLink refused to display CCBR's proposed advertisement, stating that the proposed advertisement contravened TransLink's policy against displaying any advertisement that is considered "offensive".[61]

50. TransLink provided CCBR with a brief "summary" as to why it made the decision it did, but this provided little explanation for the decision and the BC Court of Appeal found it to be nothing more than a "conclusion" that "provided no insight" into why TransLink rejected CCBR's advertisement.[62] The Court of Appeal ruled that the

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[60] See *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation* Authority, 2018 BCCA 344 **(TAB 2)**, *CHP v City of Hamilton*, 2018 ONSC 3690 **(TAB 4)** and *New Brunswick (Registrar of Motor Vehicles) v Maxwell*, 2016 NBCA 37. **(TAB 12)**

[61] *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation* Authority, 2018 BCCA 344 [*CCBR v TransLink*] at paras 2, 12. **(TAB 2)**

[62] *CCBR v TransLink* at para 50. **(TAB 2)**

"scant" reasons provided by TransLink "provide[d] no basis upon which… to determine whether [the decision] is within the range of acceptable outcomes."[63] Ultimately, the Court of Appeal found that no "meaningfully reviewable reasons" were provided by the administrative decision-maker and, therefore, the decision could not be upheld as reasonable.[64]

51. In 2016, in a similar situation in Ontario, the Christian Heritage Party ("CHP") paid for an advertisement to be displayed on bus shelters in the City of Hamilton.[65] A number of days after the advertisements were displayed, the City was contacted by the media regarding the advertisements. The very same day, without considering CHP's *Charter* right to freedom of expression, the City's Director of Communications made the decision to remove the advertisements.[66]

52. Regarding the decision made by the City of Hamilton, the Divisional Court stated:

> The CHP, the party that had paid to post the Advertisements, was not consulted prior to the decision being made. It was not told that there was a decision being considered about the Advertisements. It was not provided with any opportunity to submit evidence or to advance arguments concerning the Decision. The Decision was made in response to a CBC inquiry in order to protect the City's image without any acknowledgment or reference to the constitutional right of the CHP to engage in political speech. It is difficult to classify the City's decision-making as any kind of "process" as that term is understood in administrative law. There was certainly nothing robust about it.[67] [Emphasis added]

53. Similar to the BC Court of Appeal in *CCBR v. TransLink*, the Divisional Court found that there was an "inadequate record" to permit the Court to engage in the analysis

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[63] *CCBR v TransLink* at paras 51, 53. **(TAB 2)**
[64] *CCBR v TransLink* at para 60. **(TAB 2)**
[65] *CHP v City of Hamilton* at paras 1-2. **(TAB 4)**
[66] *CHP v City of Hamilton* at paras 21-25. **(TAB 4)**
[67] *CHP v City of Hamilton* at para 50. **(TAB 4)**

prescribed in *Doré* and *Loyola*.[68] The Divisional Court stated that "[f]ailure to balance… will, by definition, render a decision unreasonable."[69] The City's decision to remove the advertisements was quashed.[70]

54. In a recent New Brunswick case reminiscent of the case at bar, the Registrar of Motor Vehicles decided to revoke a personalized licence plate only one day after receiving a complaint regarding the plate, and without providing the plate-holder an opportunity to respond to the complaint.[71] The decision was found by the NB Court of Appeal to be unreasonable, in part, because "the Registrar did not offer any arguments or reasons in support of his decision."[72]

55. The Decision suffers from the same defects as the decisions recently made by TransLink, the City of Hamilton, and the NB Registrar of Motor Vehicles that were found to be unreasonable. The Applicant submits the following features of the Decision render it incapable of being reasonable:

    a. MPI did not consider the *Charter* value of freedom or expression or acknowledge Mr. Troller's *Charter* right to express himself on a PLP;
    b. MPI did not identify any relevant statutory mandate that supports the revocation of the Plate or which was somehow fulfilled by the Decision;
    c. MPI did not even attempt to balance the *Charter* protections engaged with a statutory mandate;

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[68] *CHP v City of Hamilton* at para 63. **(TAB 4)**
[69] *CHP v City of Hamilton* at para 57. **(TAB 4)**
[70] *CHP v City of Hamilton* at para 68. **(TAB 4)**
[71] *Maxwell* at paras 9, 47, 50. **(TAB 12)**
[72] *Maxwell* at para 36. **(TAB 12)**

d. MPI provided no meaningfully reviewable reasons, only a conclusion that the Plate was "considered offensive";

e. MPI did not inform Mr. Troller that it was considering revoking the Plate or why it was considering doing so prior to revoking the Plate; and

f. MPI did not provide Mr. Troller with an opportunity to make submissions or provide evidence regarding the potential revocation of the Plate or the concerns that MPI had regarding the Plate prior to revoking the Plate.

56. No decision that engages the protections of the *Charter* can be upheld if the decision-maker did not acknowledge the applicable constitutional obligations, did not identify any relevant statutory mandates that support the decision and failed to balance the *Charter* values engaged.

The Limitation of Freedom of Expression is Disproportionate

57. MPI failed to proportionately balance the limitation on freedom of expression occasioned by the censorship of the PLP slogan "ASIMIL8" and the associated revocation of the Plate. The Decision is therefore unreasonable for this reason as well.

58. There is no statutory mandate, implied or otherwise, that requires or is fulfilled by censoring PLP slogans merely because some people can imagine scenarios where such a slogan would be offensive to them personally No limitation of a *Charter* right can be justified in the absence of a relevant statutory mandate. MPI does not possess "untrammelled discretion" to arbitrarily label expression as "potentially offensive" and censor such expression on that basis alone.[73] The rule of law requires that, without

[73] *Roncarelli v Duplessis*, [1959] S.C.R. 121 at para. 41: "In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can

justification based on a relevant statutory mandate and meaningfully reviewable reasons, MPI is not permitted to censor PLP slogans except in accordance with the hate speech provisions contained in section 319 of the *Criminal Code* or if the expression is so obscene or indecent as to cause harm incompatible with society's proper functioning.[74]

59. Further, it is unreasonable to label the word "assimilate" as "offensive" in any objective way. It is used broadly without controversy in various fields such as business, science and law, is not hate speech, and is not otherwise unlawful. MPI has acknowledged that "assimilate" is regularly used in ways that are not offensive.[75]

60. The website "Biology Online", for example, ascribes the following meanings to the word "assimilate": "to absorb or be incorporated into the biological tissue," and "to convert food or nutriment into a biological tissue."[76] The website "Investopedia" states that when "assimilate" is used regarding investments it is referring to "the absorption of a new or secondary stock issuance by the public after it has been purchased by the underwriter."[77] An American company that offer mortgage services is called "Assimilate Solutions".[78] Various federal and Manitoba courts have used the

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be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute." **(TAB 18)**

[74] *Labaye* at paras 21-23. **(TAB 16)**

[75] Keith Transcript at page 26, lines 20-23.

[76] https://www.biology-online.org/dictionary/Assimilate (accessed December 17, 2018).

[77] https://www.investopedia.com/terms/a/assimilation.asp (accessed December 17, 2018).

[78] https://www.assimilatesolutions.com (accessed December 17, 2018).

word "assimilate" as a neutral, descriptive term to describe biological processes in the body, the process of learning and the process of maturing into an adult.[79]

61. Many words *could* be offensive to *some* people. That this is so does not permit government to limit individuals' constitutional right to freedom of expression without justification. It is not lawful to censor the use of a word simply because someone, somewhere, may find that word offensive. Such a standard would stifle free speech and expression in Canada and chill public discourse. The standard adopted by MPI is not the law.

Conclusion

62. As courts across the country have recently ruled, when government decision-makers limit the free expression rights of citizens without balancing those rights against a statutory mandate and without providing meaningfully reviewable reasons, as MPI has done regarding Mr. Troller, their decisions will not be upheld. Government must not be permitted to arbitrarily limit free expression by vaguely referring to it as "potentially offensive".

63. There are serious implications arising from a statutory decision-maker's decision to impair *Charter* values. If *Charter*-protected freedoms may be limited without attempting to balance those freedoms with legitimate statutory mandates or without providing sufficient reasons, then government decisions limiting constitutional rights will go underground, beyond supervision of the courts.

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[79] *R v C.F.*, 2011 MBPC 77 at para 40 **(TAB 13)**; *Sandhu v Canada (Minister of Citizenship & Immigration)*, 2002 FCA 79 at paras 2, 20 and 23 **(TAB 19)**; *Mahon v Canadian Pacific Ltd*, [1988] 1 FCR 209 at para 5. **(TAB 11)**

PART IV: RELIEF SOUGHT

64. This Honourable Court has broad discretion to craft a suitable remedy, under section 24(1) of the *Charter*, to rectify the infringement of Mr. Troller's constitutional rights occasioned by the Decision.[80] As the Supreme Court of Canada has stated:

> Section 24(1) of the *Charter* requires that courts issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms. … A superior court may craft any remedy that it considers appropriate and just in the circumstances.[81]

65. The Applicant seeks an Order pursuant to section 24(1) of the *Charter* and Rule 68.01 of the Court of Queen's Bench Rules quashing MPI's decision to revoke the Plate.

66. The Applicant seeks a further Order, also pursuant to section 24(1) of the *Charter*, permitting the use by Mr. Troller of the PLP slogan "ASIMIL8" and ordering MPI to reissue the Plate to Mr. Troller. An effective remedy for the Applicant is one that allows him to resume engaging in the expressive activity that the actions of MPI have preventing him from doing.

67. Finally, the Applicant seeks a Declaration pursuant to section 24(1) of the *Charter* that his freedom of expression, as protected in section 2(b) of the *Charter*, was unjustifiably violated by the Decision.[82]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 19th day of December 2018:

James Kitchen
Counsel for the Applicant

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[80] *R v Ferguson*, 2008 SCC 6 at para 35. **(TAB 14)**

[81] *Doucet-Boudreau v Nova Scotia (Department of Education)*, 2003 SCC 62 at para 87. **(TAB 7)**

[82] See *B. v Children's Aid Society of Hamilton*, 2018 ONSC 1487 at paras 200-202 for a recent example of a superior court granting such a declaration. **(TAB 1)**