

CI 19-01 21883

File no.

**THE QUEEN'S BENCH
WINNIPEG CENTRE**

BETWEEN:

BRUCE SPENCE

Applicant

- and -

MANITOBA PUBLIC INSURANCE CORPORATION

Respondent

NOTICE OF APPLICATION

HEARING DATE: Wednesday, July 31, 2019 at 10 am

JAMES KITCHEN AND JAY CAMERON
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
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Calgary, Alberta T2V 1K2
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JUL - 4 2019

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TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant.
The claim being made by the Applicant is as shown below.

THIS APPLICATION will come on for a hearing before a judge, on *Wednesday,*
July 31, 2019 at 10 am at the Winnipeg Court of Queen's Bench, 408 York Ave.,
Winnipeg, Manitoba R3C ~~0P4~~ **9**

IF YOU WISH TO OPPOSE THIS APPLICATION, you or a Manitoba
lawyer acting for you must appear at the hearing.

IF YOU WISH TO PRESENT AN AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the Application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE WITHOUT FURTHER NOTICE TO YOU.

Issued

L. RANVILLE
DEPUTY REGISTRAR
COURT OF QUEEN'S BENCH
FOR MANITOBA

Date

JUL - 4 2019

Deputy Registrar

To: Manitoba Public Insurance Corporation
Box 6300
Winnipeg, MB R3C 4A4

APPLICATION

The Applicant makes application for:

1. Orders pursuant to Rule 68.01 of the Court of Queen's Bench Rules and section 24(1) of the *Charter of Rights and Freedoms* (the “**Charter**”):
 - (a) quashing the Respondent’s decision to revoke the Applicant’s personalized license plate “NDN CAR” (the “**Plate**”);
 - (b) in the nature of *mandamus* requiring the Respondent to reissue the Plate to the Applicant and permit the Applicant to display the Plate on his vehicle;
2. A Declaration that the Respondent’s decision to revoke the Plate was effected in a procedurally unfair manner and is therefore invalid;
3. A Declaration that the Respondent unreasonably determined that the personalized licence plate slogan “NDN CAR” is or may be considered offensive;
4. A Declaration pursuant to section 24(1) of the *Charter* that the Respondent’s revocation of the Plate disproportionately and therefore unreasonably limits the Applicant’s *Charter* section 2(b) right to freedom of expression;
5. A Declaration pursuant to section 52(1) of the *Constitution Act, 1982* or, in the alternative, pursuant to section 24(1) of the *Charter*, that the Respondent’s guidelines for regulating expressive content on personalized licence plates unjustifiably infringe section 2(b) of the *Charter* and are of no force or effect;
6. Costs of this Application; and

7. Such further and other relief as this Honourable Court deems just and equitable.

The grounds for the Application are:

8. The Applicant Bruce Spence is a Cree man who lives in Winnipeg. He is a producer with Aboriginal Peoples Television Network (“**APT**N”).
9. The Respondent, Manitoba Public Insurance Corporation (“**MPI**”) is a non-profit Crown corporation that, since 2004, has been statutorily authorized and mandated to issue licence plates to registered owners of vehicles licenced in Manitoba. MPI is both controlled by government and implements specific government programs. Its decisions attract *Charter* scrutiny.
10. MPI permits and invites vehicle owners to express themselves on licence plates by purchasing a personalized licence plate and choosing a “slogan” that will appear on the personalized licence plate in place of the randomly generated numbers and letters that appear on regular licence plates.

Background

11. In or around 2012 Mr. Spence applied for and paid the fee to receive the personalized license plate “NDN CAR” (the “**Plate**”). Mr. Spence chose the slogan “NDN CAR” as a short form of the phrase “Indian car”, a reference to the well known song, “Indian Cars”, by Indigenous musician, Keith Secola. Mr. Spence not only wanted the Plate to honour his Cree heritage, but also to make a witty reference to a popular song.
12. Mr. Spence has received significant positive feedback in response to the Plate from fellow travellers across Canada and the United States. The Plate

is a “conversation starter” and many people have asked to have their picture taken with it.

13. The Plate was renewed by MPI for six consecutive years without question or concern.

Revocation of the Plate

14. On May 10, 2018 Mr. Spence received a phone call from MPI staff, who informed him that MPI had received a complaint regarding the Plate. No details were provided to Mr. Spence regarding the alleged complaint. Mr. Spence reminded MPI that he has used the Plate for six years with MPI’s authorization. He informed them that his Plate refers to the popular song “Indian Cars”, and that he is an Indigenous person.
15. Mr. Spence was not contacted by MPI again regarding the Plate until February 7, 2019, when he received a letter from MPI (the “**February 7 Letter**”), communicating MPI’s decision to revoke the Plate (the “**Decision**”) and instructing Mr. Spence to “surrender” the Plate to MPI. The February 7 Letter stated in part:

“We are reviewing all slogans to make sure all active personalized plates fall within our guidelines. Your slogan “NDN CAR” has been identified in our review as phrases or innuendoes that may be considered offensive. As a result, it is now being recalled as it is prohibited, as per our guidelines.

Personalized plates cannot include: any profane, sexually suggestive, racial/ethnic slang, religious, or alcohol/drug-related words, phrases or innuendoes that may be considered offensive, suggestive or discriminatory, promote violence, or contain political messages of any description, in any language.”

16. MPI did not provide any explanation or reason as to how, after six years of legally authorized use, the Plate had become a “phrase or innuendo that may

be considered offensive”. MPI did not acknowledge that Mr. Spence’s choice of personalized plate slogan was an exercise of his freedom of expression as protected by section 2(b) of the *Charter*, nor consider the nature and severity of the infringement of that constitutional right by the revocation of the plate, nor whether such a revocation was proportionate and justified under s. 1 of the *Charter* in the circumstances. MPI did not disclose the nature of any complaints received regarding the Plate, did not give Mr. Spence an opportunity to respond to the substance of the undisclosed complaint or make any attempt to explain or justify the Decision.

17. Mr. Spence contacted MPI on February 12 to discuss why the Plate was being revoked and what, if anything, he could do to keep the Plate. The MPI staff person he spoke with told him that a complaint had been received by MPI regarding the Plate and that MPI must “listen to the public”. Mr. Spence was told there was nothing he could do as the Decision was final and there was no appeal process.
18. During the February 12 phone call, Mr. Spence asked how many complaints regarding the Plate had been received and the nature of the complaints, but MPI staff refused to provide Mr. Spence with the aforesaid information.
19. Under protest, Mr. Spence acceded to MPI’s demand to surrender the Plate.

Legal Basis for Application

Procedural Fairness and the Unlawful Fettering of Discretion

20. The Decision was procedurally unfair and is therefore void. Mr. Spence was not informed that a decision to revoke the Plate was being considered. He

was not told how many complaints there were nor the content of those complaints. He was not provided with an opportunity to respond to the complaint or to respond to MPI's concerns. He was not provided an opportunity to submit evidence, such as evidence regarding the song "Indian Cars". Finally, Mr. Spence was not told why or how the Plate contravened the relevant criteria.

21. MPI is foreclosed from delegating its discretionary decision-making authority regarding personalized licence plates to third parties, including members of the public. To do so is to unlawfully fetter its discretion. Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative decision maker binds itself to the views of others. In making decisions regarding personalized licence plates, MPI must adequately consider the specific circumstances and not focus blindly on a complaint from the public to the exclusion of other relevant factors.
22. The Decision is further procedurally unfair because MPI fettered its discretion by allowing a complaint to dictate the outcome of the exercise of its discretion regarding the Plate instead of genuinely exercising independent judgment. MPI improperly delegated its authority and thereby abused its discretion by permitting a member of the public to dictate its actions. MPI uncritically responded to a complaint regarding the Plate by claiming it must "listen to the public" and revoking the Plate. In doing so MPI acted in a procedurally unfair manner and the Decision is invalid as a result. In a free and democratic society, individual citizens are not permitted to use the apparatus of the state to censor the expression of others that they find

offensive or disagree with. MPI's actions amount to improperly granting a veto power over the Plate to a member of the public.

23. Considering the Plate had been renewed six times and that Mr. Spence's freedom of expression is engaged, he had a legitimate expectation that MPI would properly exercise its discretion and adhere to a fair process that would allow him to know the concerns regarding the Plate, provide submissions in response and be provided reasons in support of the Decision.

The Decision is Unreasonable

24. Freedom of expression as protected by section 2(b) of the *Charter* is a "fundamental freedom" in Canada's liberal democracy and cannot be infringed absent demonstrable justification by MPI. Government censorship is not justified simply to avoid controversy.
25. MPI implemented the personalized plate program specifically as a means for the diverse public to express itself. MPI permits (and collects a fee for) the display of personalized expression on licence plates, creating both constitutional and contractual obligations. By determining to allow vehicle owners to obtain personalized license plates, MPI concedes that license plates are an appropriate forum for personal expression, and the government cannot regulate the content of that expression absent demonstrable justification.
26. By choosing the expression that would appear on his personalized licence plate and displaying it on his vehicle, Mr. Spence engaged in one of the core values underlying freedom of expression, namely self-fulfilment. Mr. Spence complied with all requirements to obtain the Plate. The expression,

“NDN CAR”, was reviewed and authorized by MPI, and it was subsequently renewed six consecutive times. The subsequent censoring of Mr. Spence’s *Charter* rights occasioned by the Decision evidences an arbitrariness and capriciousness incompatible with the rule of law. MPI has provided no explanation for the reversal of authorization of the expression on the Plate apart from vague allusions to anonymous public sentiment.

27. Administrative decisions that impair *Charter* rights and freedoms will be upheld by reviewing courts only 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, including freedom of expression, given the particular statutory mandate.
28. The Decision is unreasonable. First, because there was no consideration of the applicable *Charter* 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 Decision is further unreasonable because the outcome of the Decision disproportionately limits the *Charter* protections for freedom of expression that are engaged.

The Personalized Licence Plate Guidelines are Unconstitutional

29. MPI regulates personalized licence plates through the personalized licence plate program (“**PLP Program**”). As part of the PLP Program, MPI has produced “guidelines” that indicate what slogans MPI will not permit to be displayed on personalized licence plate (the “**PLP Guidelines**”). The PLP

Guidelines appear on an MPI webpage that provides details regarding the PLP Program and in the personalized licence plates brochure.

30. The PLP Guidelines serve as the sole, publicly accessible policy document regarding MPI's criteria for what expression is permissible on personalized licence plates. No other statutory provision, regulation or publicly accessible policy addresses personalized licence plate slogans or the scope of MPI's authority and discretion regarding expressive content on personalized licence plates.

31. The PLP Guidelines state (emphasis added):

“Your application will not be accepted if the slogan you apply for has already been issued or **if it is considered offensive, suggestive or not in good taste**, in any language.

Slogans will also be denied if they are considered:

- **profane or derogatory**
- sexually suggestive
- alcohol or drug related
- racial or ethnic slang
- discriminatory
- **religious**
- speed related
- promoting risky driving behaviour
- **political messages of any description**
- **phrases or innuendoes that may be considered offensive**
- violent or related to criminal activity
- abusive or obscene
- political figures, dignitaries or law enforcement officials

Licence plates are the property of the Crown and The Registrar of Motor Vehicles reserves the right to recall personalized licence plates.”

32. The PLP Guidelines prohibit personalized plate slogans that are “religious”, “political messages of any description” and “phrases or innuendoes that may be considered offensive”. These categories are so vague and unnecessarily broad as to lack any defined parameters. The PLP Guidelines therefore

improperly grant unlimited discretion to the Registrar of Motor Vehicles to arbitrarily and unjustifiably censor lawful expression and therefore unjustifiably infringe the section 2(b) *Charter* rights of vehicle owners.

33. The case herein is an example of the PLP Guidelines being used to censor constitutionally protected, lawful speech by arbitrarily and conveniently labelling the Plate as a “phrase or innuendo that may be considered offensive.” Almost any expression “may be considered offensive” by somebody, somewhere. Such a broad and vague restriction on expressive content is neither intelligible nor constitutional.

Conclusion

34. The Plate is protected expression under the *Charter*. As a government body, MPI is under a *Charter* obligation to uphold Mr. Spence’s freedom of expression. The revocation of the Plate is arbitrary, unreasonable and disproportionately limits freedom of expression. Mr. Spence applies to this Honourable Court to remedy the infringement of his constitutional rights.

Authorities Relied On:

35. Rules 14.05(2) and 16.08 of the *Court of Queen's Bench Rules*;
36. Section 2(b) and 24(1) of the *Canadian Charter of Rights and Freedoms*;
37. Section 52(1) of the *Constitution Act, 1982*; and
38. *The Drivers and Vehicles Act*, CCSM c D104 of Manitoba.

The following documentary evidence will be used at the hearing of the application:

39. The Affidavit of Bruce Spence, to be filed; and
40. Such further and other material as counsel may advise and this Honourable Court will permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14 day of June 2019.

**JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
Counsel for the Applicant, BRUCE SPENCE**

Per:



JAMES KITCHEN

June 14, 2019



JAY CAMERON