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COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

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- and -	)	
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MANITOBA PUBLIC INSURANCE CORPORATION,	)	for the respondent
	)	
respondent.	)	CHARLES P.R. MURRAY
	)	for the Intervenor
	)	Attorney General of Manitoba
	)	
	)	JUDGMENT DELIVERED:
	)	October 22, 2019

LANCHBERY J.

INTRODUCTION

[1] The applicant, Nicholas Troller ("Troller"), seeks the following relief:

(a) A Declaration pursuant to section 24(1) of the *Charter of Rights and Freedoms* (the "*Charter*") that the Respondent's cancelation of the Applicant's personalized licence plate "ASIMIL8" (the "Plate") unjustifiably infringes section 2(b) of the *Charter*;

(b) An Order reinstating the Plate;

(c) Further, or in the alternative, an Order for *certiorari* pursuant to section 24(1) of the *Charter*, or Rule 68.01 of the Court of Queen's Bench

Rules, or both of the foregoing, quashing the decision to cancel the Plate by The Manitoba Insurance Corporation ("MPI");

(d) Costs of this Application; and

(e) Such further and other relief as this Honourable Court deems just and equitable. [Abbreviations or acronyms are used throughout.]

[2] Troller is a resident of Winnipeg, Manitoba. He is an enthusiast of *Star Trek*, a science fiction television and movie franchise. In 2015, Troller requested, and was granted, a personalized licence plate ("PLP") from Manitoba Public Insurance ("MPI") with the combination of letters and a number "ASIMIL8". Troller asserts that this combination of letters and a number is a reference to a *Star Trek* character, the Borg. Troller asserts that the Borg character speaks the word "assimilate" as a core part of their dialogue.

[3] Troller, upon receiving his PLP, surrounded the PLP with a licence plate holder that included the words "WE ARE THE BORG" and "RESISTANCE IS FUTILE". It is Troller's position that the words on the licence plate holder are references to a *Star Trek* character. The series of letters and a number chosen by him is so unique that "ASIMIL8" can only refer to the Borg character in *Star Trek*.

[4] Troller displayed the PLP for almost two years without incident. He claims that many people in the community commented positively about the PLP. People even asked to have their picture taken with it.

[5] On April 26 and April 27, 2017, Troller received two identical letters from MPI stating that the PLP "is considered offensive" and demanded he "surrender the [PLP] by Monday, May 1, 2017". (The April 27, 2017 letter demanded surrender of the PLP no later than May 2, 2017.)

[6] Troller complied with MPI's request.

[7] Troller served his application on the Attorney General of Manitoba as required by ***The Constitutional Questions Act***, C.C.S.M. c. C180. The Attorney General intervened and supports the position of MPI and I refer to them collectively as "MPI".

[8] The following facts are not in dispute:

- on April 24, 2017, the Registrar requested details about the approval process for the PLP, including the customer's explanation and any other relevant details. Her staff, including David Burns, Manager, Licensing Services Department, responded. The customer's explanation for the slogan on the application form was simply "assimilate";
- the Registrar requested Troller provide the rationale for the PLP. The staff advised the Registrar that the review committee did an *Urban Dictionary* check and did not come back with any concerns. The Registrar performed her own *Urban Dictionary* search which resulted in the following results:

  > [T]o fit in with the Americans around you or go the fuck back where you came from;

- Carla Hocken, Registrar of Motor Vehicles (the "Registrar"), on April 25, 2017 decided to recall and replace the PLP, but Mr. Keith's evidence was that he decided during the evening hours of April 24, 2017 to recall the PLP;
- on April 26, 2017, the assistant manager of the Licensing Services Department contacted Troller;
- it was during the April 26, 2017 call that Troller explained the significance of the PLP;

- Troller also described the licence plate frame that surrounded the PLP that provides the context for his free expression;
- MPI invites registered owners of vehicles to create a unique statement about "a profession, hobby, lifestyle or interest ... or ... just for fun";
- MPI PLP guidelines for use of a PLP do not allow "any profane, sexually suggestive, racial or alcohol/drug-related words, phrases or innuendoes that may be considered offensive or suggestive, or political messages of any description, in any language"; and
- the PLP program is not set out in an act or regulation.

[9] MPI is a Crown corporation, and MPI concurs with Troller that the ***Charter*** applies to its decisions.

[10] MPI's position is that its authority permits registered owners of motor vehicles to express themselves on a PLP. The parties agree that prior to the government authorizing the issuance of PLPs, licence plates were a series of letters and/or numbers issued and restricted to the sequential order chosen by the government.

[11] Although there is some uncertainty as to when this policy changed, MPI instituted a policy that permitted registered motor vehicles to display a plate containing personal expression subject to certain conditions.

POSITION OF TROLLER

[12] Troller asserts that by encouraging freedom of expression on PLPs, that personal expression becomes a protected self-expression under the ***Charter***. Expression is a fundamental Canadian value and is constitutionally protected by s. 2(b) of the ***Charter***,

which states:

> 2. **FUNDAMENTAL FREEDOMS -** Everyone has the following fundamental freedoms:
>
> . . .
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[13] Troller submitted that freedom of expression, might in fact, be the most fundamental value in our society. Therefore, careful scrutiny is required. Freedom of expression ensures that without fear of censure, individuals can manifest their thoughts, opinions, beliefs and expressions no matter how unpopular, distasteful or contrary to the mainstream. (See ***CHP v. City of Hamilton***, 2018 ONSC 3690 (at para. 39); ***Edmonton Journal (The) v. Alberta (Attorney General)***, [1989] 2 S.C.R. 1326 (at para. 78); ***Committee for the Commonwealth of Canada v. Canada***, [1991] 1 S.C.R. 139, quoting ***Boucher v. The King***, [1951] S.C.R. 265 at para. 288 (at para. 79); ***Committee for the Commonwealth of Canada***, quoting ***R. v. Kopyto*** (1987), 24 O.A.C. 81 at pp. 90-91 (at para. 95); ***R. v. Keegstra***, [1990] 3 S.C.R. 697; and ***R. v. Sharpe***, 2001 SCC 2 (at para. 22)).

[14] Troller submits that by displaying "ASIMIL8" on a PLP goes to one of the three core values underlying freedom of expression, being that of self-fulfillment. Troller argues that because this is a core value "it will be harder to justify a s. 2(b) infringement of that speech (***Sierra Club of Canada v. Canada (Minister of Finance)***, 2002 SCC 41 (at para. 75)).

[15] Troller submits that the three-step test in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927, to determine whether freedom of expression has been

infringed is applicable. The first step: Does the activity in question have expressive content, thereby bringing it, *prima facie*, within the scope of s. 2(b) protection? He submits that the activity is expressive content. The PLP is subject to constitutional protection by means of the method of expression. The expression is not 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 (see ***R. v. Labaye***, 2005 SCC 80, at paras. 21 - 23).

[16] The second step: Does the location of the expression bring it within the scope of s. 2(b) protection? The location of expressive activity can only be removed from s. 2(b) protection if permitting the expressive activity in that location conflicts with or undermines the values protected by freedom of expression (see ***Canadian Broadcasting Corp. v. Canada (Attorney General)***, 2011 SCC 2, at para. 37).

[17] The third step: Was the purpose or effect of the government action at issue to restrict freedom of expression? MPI's demand for the immediate return of the PLP confirms that MPI intended to limit Troller's right to freedom of expression.

[18] Troller submits that the PLP should be given the same protection as advertising displayed on a public bus as in ***Canadian Federation of Students v. Greater Vancouver Transportation Authority***, 2009 SCC 31 (***Greater Vancouver***).

[19] Troller argues that the decision to revoke the PLP is not reasonable as MPI did not consider the ***Charter*** value at stake. A reviewing court may find an administrative decision to be reasonable, and therefore upheld, if it proportionately balances the ***Charter*** protections engaged by the decision with the statutory objective ostensibly

furthered by the decision. It must demonstrate that the decision "gives effect, as fully as possible to the ***Charter*** protections at stake given the particular statutory mandate" (see ***Loyola High School v. Quebec (Attorney General)***, 2015 SCC 12, at para. 39).

[20] Troller submits that MPI's decision lacked sufficiency of reasons to determine whether it had considered the ***Charter*** protection at stake. (See ***Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority***, 2018 BCCA 344; ***CHP v. City of Hamilton***; and ***New Brunswick (Registrar of Motor Vehicles) v. Maxwell***, 2016 NBCA 37).

[21] In the absence of reasons and without the proper balance of freedom of expression, this decision cannot stand.

POSITION OF MPI

[22] MPI acknowledges that there is no statutory framework in place, but that the PLP guidelines fall within its general management power. MPI is entitled to place reasonable limits on free expression in the course of administering the PLP program if it adheres, as appropriate, to the issued guidelines and non-binding instruments (see ***Sex Party v. Canada Post Corporation***, 2008 FC 41, at paras. 38 - 42).

[23] MPI asserts that based on its internal policy, s. 2(b) of the ***Charter*** does not apply to licence plates.

[24] MPI argues that licence plates are government property and are not platforms that are subject to s. 2(b) protection. Section 2(b) does not provide an unqualified right to express oneself anywhere at any time or in any way. As stated in ***Greater Vancouver***, "governments will not be required to justify every restriction on expression" (at para. 28).

[25] MPI directs the Court to answer the three questions as set out in ***Montréal (City) v. 2952-1366 Québec Inc.***, 2005 SCC 62 (at para. 56):

> First, did the noise have *expressive content*, thereby bringing it within s. 2(b) protection? Second, if so, does the *method or location* of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law *infringe* that protection, either in purpose or effect? See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 [emphasis in original].

[26] MPI concedes the answers to the first and third questions are in the affirmative.

[27] MPI argues that the location at issue is a piece of government-issued ID that is the property of the Crown. As government property, "individuals do not have a constitutional right to express themselves on *all* government property" (***Greater Vancouver*** (at para. 28) [emphasis in original]).

[28] In ***Montréal (City)***, the Supreme Court developed a test which incorporates underlying values and contextual factors which must be considered, as well as the public versus private analysis (at para. 74):

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

[29] MPI submits that no court has found licence plates are places of free expression. However, it acknowledged the facts of ***Greater Vancouver*** have similarities to the case at bar with important differences. Particularly, the advertisements in ***Greater***

Vancouver did not carry a state purpose; are not created and owned by the state; and did not carry any state messages.

[30] The ultimate question for the Court: Is a licence plate "a location where constitutional protection for free expression would be expected?" (***Greater Vancouver***, at para. 45) MPI submits that it is not.

[31] MPI argues that licence plates are not historically places of free expression. Rather, they are ID tags that allow "the public and law enforcement officials to identify a particular vehicle and to confirm that the vehicle complied with Manitoba's motor vehicle registration requirements".

[32] MPI acknowledges that the PLP guidelines do permit some form of individual expression. It submits that a PLP is similar to a courtroom where expression is fundamental to litigation. However, expression in a courtroom remains constrained by the rules of court, tradition and discretion of a presiding judicial officer.

[33] MPI acknowledged that most provincial governments use licence plates to convey a message to the public - a motto such as "Friendly Manitoba", "Wild Rose Country", "Beautiful British Columbia", "Canada's Ocean Playground", "Yours to Discover" and "Je me souviens". These mottos are an important part of a government's communication efforts to promote itself to others as the vehicle travels on the highways and byways of this country, and others.

[34] MPI acknowledged that by permitting PLPs, the licence plate is now a shared platform for expression. The shared platform is unlike any government property considered in case law. MPI argues that as this is a shared platform, one would expect

that inconsistent messages between the motto and the personal message, a government would be justified in eliminating any offensive message.

[35] In this context, the Supreme Court of the United States found that a state specialty plate may be construed as government expression or government-endorsed expression (***Walker v. Texas Division, Sons of Confederate Veterans, Inc.***, 576 US __ (2015)).

[36] MPI also submits that PLPs are not open to members of the public to express themselves. Only registered owners of vehicles are able to express themselves on a PLP. The owning and registering of a vehicle is a privilege and not a constitutionally protected right. In this way, freedom of expression is inherently limited.

[37] A PLP must have a unique slogan. Two vehicles may not display the same slogan. MPI argues that free expression does not lend itself to permit the registrant a monopoly over the chosen phrase on a PLP. True free expression permits others to adopt the constitutionally protected speech. This personal monopoly created by restricting others from using the constitutionally protected speech on a PLP undermines the values of self-fulfillment and truth finding, if not the free expression itself.

[38] If this Honourable Court found the PLP program to be subject to s. 2(b) protection, the Crown could shutter the entire program. Therefore, any decision granting s. 2(b) protection could be made moot by administrative action.

[39] This PLP's location is distinct from other locations such as public streets, parks, airports and other government property.

[40] MPI agrees that the standard of review for the administrative decision is reasonableness. It acknowledges that the Registrar failed to account for Troller's s. 2(b)

Charter rights because she would not have been aware of the novel proposition that licence plates are constitutionally protected platforms of expression. There needs to be a realistic and practical view of what a member of the public would expect in terms of reasons and analysis from a statutory official making administrative policy decisions (see ***Doré v. Barreau du Québec***, 2012 SCC 12; ***Trinity Western University v. Law Society of Upper Canada***, 2018 SCC 33; ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32; ***Loyola High School***; ***Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)***, 2018 ABCA 154 (***Grande Prairie***)).

[41] MPI submits that in determining a slogan to be offensive, its takes into consideration a much broader context and has a much broader obligation to consider community and societal issues.

[42] MPI disagrees with Troller's assertion that ASIMIL8 or assimilate is not offensive. It argues that the Truth and Reconciliation Commission of Canada made clear that the official policy of assimilation of Aboriginal people was the policy of Canada at one time in history. The Right Honourable Stephen Harper, P.C. in the House of Commons acknowledged the harm that resulted from that official policy of Canada and that the assimilation of Indigenous people was offensive. MPI submits that the word assimilate is as offensive to Indigenous peoples that a swastika, Confederate battle flag or racial slur printed on a piece of government-issued identification would have for other members of society.

[43] MPI submits that the *Star Trek* reference confirms the offensiveness of assimilate. The Borg are an alien race who is part living, part machine. The Borgs are technologically

superior and assimilate any non-Borg creature into a Borg. According to the Borg, assimilation raises the quality of life for all species.

[44] MPI noted that academic literature about the *Star Trek* series being a "thinly disguised metaphor for colonialism". Although not everyone watches *Star Trek*, everyone who lives in Canada bears its colonial legacy.

[45] MPI, citing ***Daniels v. Canada (Indian Affairs and Northern Development)***, 2006 SCC 12, submitted that I must consider s. 35 of the ***Constitution Act, 1982***, and the grand purpose of reconciliation, being "a mutually respectful long-term relationship" (at para. 34) of Aboriginal and non-Aboriginal Canadians. Further, the Supreme Court noted that continual understanding requires "good faith policy and legislative responses" (***Daniels***, at para. 1) which serve the "overarching objective of reconciliation" (***Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)***, 2005 SCC 69, at para. 50).

[46] ***The Path to Reconciliation Act***, C.C.S.M. c. R30.5, binds MPI. This Act confirms Manitoba's process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples.

[47] In support of its position, MPI argues that I should apply the test outlined in ***R. v. Oakes***, [1986] 1 S.C.R. 103. In applying the ***Oakes*** test, the values and principles essential to a free and democratic society must guide this decision. The inherent dignity of the human person, and faith in political institutions and groups in society should be considered.

[48] MPI argues that there are two specific questions that I must consider: (1) do the restrictions/guidelines established by MPI that limit free expression violate s. 2(b) of the ***Charter***, and (2) if the restrictions/guidelines limit free expression, are the actions of MPI a reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society and protected by s. 1 of the ***Charter***?

[49] A court should not just consider ***Charter*** values. Courts should also consider the promotion of diversity and multiculturalism when considering the reasonableness of the administrative action (see ***Multani v. Commission scolaire Marguerite-Bourgeoys***, 2006 SCC 6).

[50] MPI submitted that the message assimilate is harmful to reconciliation.

[51] In ***Canadian Broadcasting Corp. v. Canada (Attorney General)***, the Supreme Court outlined the questions I must answer to determine whether the s. 2(b) protection is present (at para. 38).

ANALYSIS

[52] The Supreme Court of Canada in ***Irwin Toy*** instructed a court as to how it should address an alleged violation of s. 2(b) (at pp. 931 - 32):

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether

> the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[53] I find that AISIML8 does attempt to convey a meaning. The word itself does not attempt to convey a violent form of expression. Therefore, the expression is within the protected sphere of conduct.

[54] The second step is to determine if the method of expression or the location of the expression is entitled to s. 2(b) protection.

[55] The third step as outlined in ***Irwin Toy*** is to determine whether the purpose or effect of the government action was to restrict freedom of expression. MPI concedes its purpose was to restrict Troller's freedom of expression. In the absence of MPI's concession, I would have found that its purpose was to restrict Troller's expression.

[56] Troller asserts that his claim concerns individual self-fulfillment and human flourishing. The s. 2(b) analysis in this case turns on location of this expression. The test for location, as outlined in ***Montréal (City)*** is:

> 74 The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (a) the historical or actual function of the place; and
>
> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

> 75 The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
>
> 76 Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.
>
> 77 Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.
>
> 78 The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g., R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq*. This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

[57] Vehicle licence plates are an official form of government-issued identification of vehicles. The historical function was for the state to issue plates with a series of numbers and letters on the plate to identify the registered owner. As the mass-produced automobile was an invention of the 20th century, licence plates have evolved from four

numbers to now jurisdictions having a combination of seven letters and/or numbers to deal with the expanded number of vehicle registrations.

[58] Licence plate designs have evolved to include the "state" motto. Another evolution was for the placement of stickers to denote that the vehicle is insured.

[59] The PLP is a recent creation of governments. MPI states that the earliest record of PLPs in its possession is 2004. I take judicial notice that Manitoba-issued PLPs began as early as in the 1983-1986 design, which displayed the word FRIENDLY at the top of the licence plate, and MANITOBA on the bottom of the licence plate, both in red. My knowledge is as the owner of such a PLP which remains in my possession to this day.

[60] The history of PLPs in this province is at least 20 years longer than that suggested by MPI. In an historical context, we have at least a 35-year history of PLPs in Manitoba.

[61] The decision to issue PLPs, as admitted by MPI, was to permit forms of personal expression. This decision changed the historical function from solely registration and provincial mottos, to places where owners could create an individual message on a wide range of topics.

[62] By permitting personal expression, the licence plate is compatible with free expression. The purpose may have been more about revenue generation than permitting registrants to satisfy their personal vanity. Hence, the name "vanity plates". MPI invited individual members of the public who owned motor vehicles to express themselves in the space, and they have.

[63] The fact that the space is government-owned, the licence plate is consistent with free expression. As Justice Alito, in dissent, said in ***Walker***, that a Texas licence plate

that said, "Rather be Golfing" does not mean that the state is endorsing or encouraging people to play golf, rather than working. This would be true for many other types of activities that people have chosen to memorialize on PLPs.

[64] I also note that the location of the personalized free expression within the licence plate is the most dominate feature of the plate. It occupies the center location, and the series of letters and/or numbers are of the largest font on the PLP.

[65] In this location, the expression dominates the PLP. One would expect this to be true, as this message, in place of the series of numbers and letters of traditional licence plates, must permit law enforcement and witnesses to identify the motor vehicle by the content of the plate.

[66] MPI acknowledges that the case at bar is similar but distinct from the facts in ***Greater Vancouver***. ***Greater Vancouver*** involved political advertising displayed on a city bus. I note the Supreme Court held that the content of the message is not relevant to the function of the location. City buses have a shorter history as a place for advertising than posting handbills on utility poles or in the public square, but there is a history (at para. 42). The same is true for PLPs. The history of PLPs is shorter than advertising on buses, but there is now history in issuing PLPs in Manitoba that extends for 35 years.

[67] The presence of a PLP, like advertising on a bus, is in the public space, not a private space. By the very nature of the PLP, it cannot require privacy or limited access. By filing an application with the Registrar, the registered owner is aware that the information he/she seeks to express will be present in the public space as the vehicle travels on the highways and byways.

[68] MPI argues that the PLP is an official piece of government-issued ID. Therefore, the PLP is similar to a driver's licence or a passport. I concur that a PLP is a form of government ID, but I disagree that this form of identification equates to a driver's licence or passport. A driver's licence or passport identifies an individual. The owners of those forms of ID take great pains to keep their personal information private. Computer hackers go to great pains to attempt to obtain the information on a driver's licence or passport, such as date of birth, place of birth and/or address.

[69] The identification on a PLP is distinguishable. Whether a government-issued plate or a PLP, there is only a series of letters and numbers. The plate identifies the registered owner. However, the driver of the vehicle could be an individual authorized by the registered owner to operate the vehicle. It could also be someone who is operating the motor vehicle without authorization. An unknown number of people theoretically could operate the vehicle that displays a particular PLP. A driver's licence or a passport limits identification to a single person.

[70] MPI argues that the first person to register his/her free expression creates a personal monopoly over that expression on PLPs. That is true, but the effect of that decision is no different from the use of a copyrighted phrase. A copyrighted phrase creates a monopoly over the commercial use of the selected phrase. The copyright prevents others from profiting from the use of the phrase, but the monopoly does not extend to general use by the public.

[71] For example, the ownership group of the Winnipeg Jets hockey team, carrying on business under the name True North Sports and Entertainment, may prevent another

organization or person from using the term "True North" in a business name. This protection does not extend to preventing people from yelling the words **"TRUE NORTH"** during the singing of the Canadian national anthem before Winnipeg Jet hockey games, or Winnipeg Blue Bomber games as examples. Fans of the Winnipeg Jets shout **"TRUE NORTH"** anywhere the Canadian national anthem is sung. This includes the arenas of U.S.-based NHL teams.

[72] The registrant does not own the selected series of letters and/or numbers - it is only the means to identify their vehicle. MPI does not permit the duplication of a regular plate or a PLP slogan. To do otherwise would create chaos in the vehicle registration system. The monopoly argument advanced by MPI is not helpful to its position.

[73] MPI's position is that it could limit free expression by simply rescinding the PLP program. That would be an extraordinary step if undertaken over one PLP. The sincerity of the argument when PLPs generate revenue for the government is questionable.

[74] As stated in ***Montréal (City)*** (at para. 78):

> As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

[75] PLPs are a location where free expression is protected is an evolvement in the law, just as ***Greater Vancouver*** extended s. 2(b) protection to advertising panels on city buses.

[76] The expression on a PLP may serve a s. 2(b) purpose, namely (1) democratic discourse; (2) truth finding; and (3) self-fulfillment. In this case, Troller's position is that

it serves his self-fulfillment, being his appreciation of the Borg character from *Star Trek*. I agree.

[77] Marshall McLuhan, a graduate of the University of Manitoba, famously said, "the medium is the message". Although McLuhan was referring to media in general, in the era of social media, *You Tube* and personal blogs, the very concept of what is media has expanded. The ability to distribute your message is unlimited in today's world. A PLP, or a vanity plate, is just one more way our thoughts enter the public discourse. MPI, by permitting a registered owner of a motor vehicle, has authorized a new location where free expression is entitled to s. 2(b) protection.

[78] I find that by applying ***Irwin Toy***, ***Oakes***, ***Montréal (City)*** and ***Greater Vancouver*** to these facts, the decision of the Registrar to prevent Troller from conveying a particular message on his PLP infringed his rights under s. 2(b). However, an individual's rights under s. 2(b) are subject to reasonable limits.

ADMINISTRATIVE DECISION

Section 1

[79] ***Charter*** rights and freedoms are limited in scope. Section 1 states:

> **Rights and freedoms in Canada**
>
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[80] Section 1 of the ***Charter*** sets Canadian jurisprudence apart from American jurisprudence on free expression. The ***Walker*** decision concerned specialty plates in the State of Texas. Specialty plates are distinct from PLPs as they include a symbol promoting a specific sports team, such as the Winnipeg Jets, or membership in an activity such as

firefighting. In ***Walker***, the Supreme Court of the United States considered whether the Sons of Confederate Veterans could require the State of Texas to issue licence plates that would display the battle flag of the Confederacy, known as THE STARS AND BARS. I find the ***Walker*** arguments advanced by both parties are limited. The U.S. freedom of speech jurisprudence is distinct from the freedom of expression jurisprudence under s. 2(b) of the ***Charter***.

[81] The parties agree that the decision to revoke Troller's PLP represents a discretionary administrative act of the Registrar. Further, both sides agree that the ***Doré/Loyola*** framework governs and therefore, the standard of review is reasonableness (***Dunsmuir v. New Brunswick***, 2008 SCC 9).

[82] The Supreme Court summarized the new approach to discretionary administrative decisions that engage ***Charter*** protections in ***Trinity Western University v. Law Society of Upper Canada***, 2018 SCC 33 and ***Law Society of British Columbia v. Trinity Western University***, 2018 SCC 32. In ***Trinity Western v. Law Society of Upper Canada***, the court held:

> [30] Administrative decisions that engage the *Charter* are reviewed based on the framework set out in *Doré* and *Loyola*. The *Doré/Loyola* framework is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework.
>
> [31] Under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections — both rights and values (*Loyola*, at para. 39). If *Charter* protections are engaged, the question becomes "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play" (*Doré*, at para. 57; *Loyola*, at para. 39).

[83] Having found that ***Charter*** protections are engaged, I must now determine whether "the decision reflects a proportionate balancing of the ***Charter*** protections at play".

[84] The proportionate balancing this Court must undertake requires an understanding of the PLP program.

[85] The MPI brochure (attached as Exhibit "B" to the affidavit of Ward Keith sworn September 21, 2017) sets out the restrictions for a PLP. Those principles relevant to this decision are:

> Any profane, sexually suggestive, racial or alcohol/drug-related words, phrases or innuendoes that may be considered offensive or suggestive, or political messages of any description, in any language. Note: The Registrar of Motor Vehicles reserves the right to recall personalized licence plates that are later deemed to be inappropriate.
>
> . . .
>
> Any combination of letters and/or numbers duplicating or resembling any existing or proposed regular number plate series, or that would create an identification problem.

[86] MPI has structured a committee to review proposed PLPs. The purpose of the committee is to "eliminate the inappropriate/possibly offensive slogans".

[87] The PLP slogan approval is described as follows:

> The review process is not black and white. Reasons for denials under the current guideline either by direct reference or innuendo are i.e. political, profane, alcohol/drug related, sexual, racial, or otherwise offensive. Google search and *Urban Dictionary* are only used as reference. A judgment call on a case by case basis is required. The committee was formed to provide different perspectives and all questionable slogans we identify are sent to the Director, Insurance & Licensing Operations and the Registrar of Motor Vehicles for the final decision.

[88] The question before me, is the limit of s. 2(b) rights on PLPs for the purpose to "eliminate the inappropriate/possibly offensive slogans", reasonable.

[89] MPI issued to Troller the "ASIMIL8" PLP in 2015. He renewed the plate in 2016. On the morning of April 24, 2017, MPI became aware of a single complaint about ASIMIL8 by a *Facebook* post.

[90] The following actions were taken by MPI prior to making its decision:

- e-mail discussion took place between MPI employees responsible for the PLP;
- Mr. Keith had already decided to recall the PLP by 7:28 p.m. on April 24, 2017, in an e-mail with another staff member saying "[w]e can and will recall this plate";
- final authority rests with Mr. Keith;
- steps were taken to recall the PLP on April 25, 2017;
- MPI staff telephoned Troller on April 25 and April 26, 2017;
- in letters dated April 26 and 27, 2017 directed to Troller, the PLP was "considered offensive" and "inappropriate" and MPI demanded the return of the PLP; and
- Troller complied with MPI's demand and chose another slogan.

[91] The evidence shows that the primary concern of MPI upon receipt of the complaint was the media attention the revocation of the PLP was receiving.

[92] It is important to note that MPI is concerned with ensuring that it does not authorize inappropriate and offensive language on PLPs. MPI takes great pains to ensure that any slogan, no matter how benign on its face, shall have no other meaning such as those from the hip hop subculture.

[93] The review committee takes extensive steps to avoid unintended meanings outside of their collective knowledge. The committee considers other meanings such as those contained in secondary sources. The use of the *Urban Dictionary*, where meanings from hip hop music that may not be apparent on first examination, is one example of the extensive steps taken by the review committee to eliminate PLPs that could convey unintended meanings.

[94] I accept the submission of MPI that "ASIMIL8" was acceptable to the committee because the search term entered was "asimilate" as opposed to "assimilate". I accept MPI's position that **if** the committee reviewed "assimilate", it would have rejected the PLP at first instance.

[95] The error itself is of no import because MPI reserves the right to recall, for a myriad of reasons, a PLP. The length of time MPI took in making the decision is not crucial. MPI believed this required its immediate attention. It is whether, as stated in ***Doré*** confirming language from ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199, whether the decision "falls within a range of reasonable alternatives" (at para. 56).

[96] Troller submits that the decision cannot be considered reasonable for the following:

- MPI did not consider the ***Charter*** value of freedom of expression or acknowledge his right to express himself on a PLP;
- MPI did not identify any relevant statutory mandate that supports, or was somehow fulfilled by its decision to revoke the PLP;

- MPI did not attempt to balance the ***Charter*** protections engaged with a statutory mandate;
- MPI provided no meaningful reviewable reasons, only a conclusion that the PLP was "considered offensive"; and
- MPI did not provide him with an opportunity to make submissions or provide evidence regarding the potential revocation of the PLP or the concerns that MPI had regarding the PLP prior to revocation.

[97] Troller argued that by failing to consider his s. 2(b) rights and balancing of the ***Charter*** values, the MPI administrator's decision is not supportable. Any decision taken by MPI is therefore unreasonable and should be overturned.

[98] MPI submits that ***Grande Prairie*** directs the Court to consider a realistic and practical view of what one expects in terms of reasons and analysis from a statutory official making administrative policy decisions.

[99] In ***Grande Prairie***, the court stated (at para. 38):

> One would not expect an administrator like the respondent's transit system manager (who admittedly made the original 'decision') to provide the 'reasoning behind the decision', much less to provide a detailed *Doré* analysis. It is unrealistic to expect that all municipal administrators will be constitutional lawyers. Tribunals such as the one in *Doré*, on the other hand, might well overtly engage *Charter* issues in their reasons. That limits the submissions that the *Doré* tribunal could make on appeal or review, but those limits are not at play in this appeal.

[100] Troller argues that the administrators of MPI were required to subject its decision to the ***Doré/Loyola*** analysis before revoking the PLP.

[101] Applying the ***Doré/Loyola*** analysis, MPI submits that when its policy is contextually considered, disallowing an offensive PLP is permitted under s. 1. The

decision made by MPI to recall a PLP should never be a purely subjective standard. The measure should be one of objective scrutiny.

[102] MPI submits that its objective consideration situates the slogan in context and assessing the potential impact on segments of society. The community standards of the public and the citizenship of Manitoba changes over time based on changes in context and environment and societal issues of the day, not the complaint of a single person.

[103] MPI submits that offensiveness is a matter of community standards. As in ***Greater Vancouver***, the policy was that "[n]o advertisement will be accepted which is likely, in light of prevailing community standards, to cause offence to any person or group of persons" (at para. 4).

[104] The Supreme Court in ***Greater Vancouver*** found that policy qualifications such as "controversy" were unnecessarily broad (at para. 77).

[105] MPI's position is the word "assimilate" when considered in the context of Canadian history is on its face objectionable. The assimilation of Aboriginal people was the official policy of the Government of Canada.

[106] The Truth and Reconciliation Commission of Canada identified the policy of assimilation as a stain on the honour of the Crown (*Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*. Winnipeg: Truth and Reconciliation Commission of Canada, 2015) ("TRC Report").

[107] MPI noted that The Right Honourable Stephen Harper, P.C., on June 11, 2008, formally acknowledged the harm caused by Canada's assimilation policy. The Prime

Minister apologized on behalf of all Canadians for its implementation and ongoing effects (see Appendix 4, TRC Report).

[108] MPI submitted that there is a striking similarity to the context of assimilation in *Star Trek* to the colonization of the Indigenous peoples in Canada. Academia has devoted much time to this argument.

[109] MPI argued that its statutory mandate to administer public insurance, licensing and vehicle registration extends to ensuring a respectful and welcoming environment on Manitoba roads. Given the history of assimilate, the mere presence of AIMIL8 is contrary to a respectful and welcoming environment.

[110] Troller says that by choosing to display the PLP on his vehicle, he was not denigrating Indigenous people. I accept his position without condition. His argument is that the word assimilate cannot be considered offensive as assimilate has many definitions, not just the one argued by MPI. That argument is not helpful to my task. As the standard of review is reasonableness, I am not to substitute my opinion, or that of anyone else. I must determine if the action of the Registrar in revoking the PLP was reasonable.

[111] Applying the ***Doré/Loyola*** framework, I note the following:

- the Registrar is a statutory official making administrative policy decisions;
- prior to this decision, a PLP was not considered a location where s. 2(b) rights are engaged;

- the members reviewing the PLP applications are representatives of the public, and do not possess any special skill or training such as the expert tribunal of lawyers rendering the adjudicative decision in ***Doré***;
- the members reviewing the PLP application consider words or phrases that are offensive, but in a specific context;
- the use of the *Urban Dictionary*, an online dictionary for slang words and phrases primarily originating from hip hop music, is used to screen out violent and misogynist references disguised in code for those "in the know" to appreciate and understand;
- the target of the restrictions are those words or combination of letters and numbers which "either by direct reference or innuendo are i.e. political, profane, alcohol/drug related, sexual, racial, or otherwise offensive"; and
- the review committee makes its decision on a case by case basis.

[112] I find that ***The Path to Reconciliation Act*** played a significant part in the decision. The Act is attached hereto as Appendix "A".

[113] The policy of the assimilation of Indigenous people appears 151 times in the TRC report. Federal and provincial governments have publically recognized that the policy of assimilation is a stain on the honour of the Crown, apologies offered, and legislation aimed at reconciliation enacted. The word assimilate has taken on a new meaning within this country.

[114] I concur with Troller's position that the word assimilate has many uses. In the *Merriam-Webster* dictionary, online: <https://www.merriam-webster.com/dictionary/assimilate> is defined as follows:

> Definition of *assimilate* (Entry 1 of 2)
>
> transitive verb
>
> **1 a** : to take into the mind and thoroughly understand
>
> //*assimilate* information
>
> //Students need to *assimilate* new concepts.
>
> **b** : to take in and utilize as nourishment **:** to absorb into the system
>
> //The body *assimilates* digested food.
>
> **2 a** : to absorb into the cultural tradition of a population or group
>
> //... the belief that tolerant hosts would be able to *assimilate* immigrants of whatever creed or colour.
>
> — Brian Holmes
>
> **b** **:** to make similar
>
> //... the only faculty that seems to *assimilate* man to the immortal gods.
>
> — Joseph Conrad
>
> **c** *phonetics* **:** to alter by the process of assimilation (see ASSIMILATION sense 3)
>
> **3** **:** COMPARE, LIKEN
>
> intransitive verb
>
> **:** to be taken in or absorbed **:** to become assimilated
>
> //Food *assimilates* better if taken slowly.
>
> — Francis Cutler Marshall
>
> assimilate **noun**
>
> as·sim·i·late | \ ə-ˈsi-mə-lət , -ˌlāt\
>
> Definition of ***assimilate*** (Entry 2 of 2)
>
> : something that is assimilated

[115] An analysis of the word, whether in biology, psychology, or culturally, involves the taking of one substance (food, ideas, cultures) and elimination of the taken or weaker substance by bringing it within a stronger substance. By taking in food, the body converts

the energy from the substance effectively eliminating the substance. In ideas, the person gaining knowledge has assumed an isolated thought or idea into the larger knowledge base; or the culture of what the stronger culture believes is weaker, is assimilated by the stronger and thereby eliminated.

[116] I agree that ASIMIL8 in isolation may not be offensive. Without the necessary broader context, people may be unable to understand the meaning of word assimilate. In reaching my decision, I must consider the current meaning of assimilate in the broader context. The word assimilate has a very specific meaning outside of what the fans of the Borg and *Star Trek* believe from works of fiction.

[117] By restricting the ***Charter*** right of freedom of expression, MPI argued its administrative decision applied Manitoba's community standard in keeping with ***The Path to Reconciliation Act***. The word assimilate and its continued use in the historical context of the Indigenous experience in Manitoba could not be more apparent.

[118] I agree that MPI's decision occurred quickly, but considering the context, it is understandable. Having accepted MPI's position that if the research into the PLP ASIMIL8 occurred correctly, the initial request would have resulted in denial for the same reasons when recalled.

[119] Troller's reason for using ASIMIL8 was for self-fulfillment. I accept that his personal enjoyment of *Star Trek* and the Borg character specifically adds to his self-fulfillment.

[120] The proportionate balancing required by ***Doré/Loyola*** weighs in favour of the administrative action taken by MPI. Troller is able to support his love of the Borg

character from *Star Trek* by any number of words spoken by the Borg character. If you will, the expression of the Borg character that "RESISTANCE IS FUTILE" and "WE ARE THE BORG" remains for him to display. Troller is able to pose in front of his PLP with other Borg enthusiasts without limitation.

[121] In ***Grande Prairie***, the court held (at para. 92):

> In order to meet the *Doré* test, the rejection of the advertisement must also be proportionate, meaning that in addition to being reasonable, the *Charter* right must be minimally impaired. This appeal concerns one particular advertisement, and the options were to accept it or reject it. The respondent never took the position that it would not accept any advertising on abortion or other social and political issues. It is unfortunate that the appellant and respondent never took the next step, by following up on the appellant's suggestion that it "adjust the creative". They never explored the type of advertising that might be acceptable to the respondent, yet allow the appellant to convey its message. This appeal does not, however, involve any general challenge to the respondent's policy on advertising, but only to one specific decision.

[122] Following the surrender of the ASIMIL8 PLP, Troller chose a different word to express his love of the Borg character in *Star Trek*. He applied for, and MPI issued a new PLP. The word chosen by him, whether spoken by the Borgs or any character from any *Star Trek* series that adds to Troller's self-fulfillment, is unchallenged by MPI's decision.

[123] If MPI took the position that every word from the *Star Trek* franchise was unacceptable due to the fear of colonialism and the policy of assimilation, I would have found that this prohibition would be so broad as to bring the concerns expressed in ***Greater Vancouver*** into play.

[124] Those are not the facts before me. Although the Borg character may believe in assimilation, any restriction to eliminate anything from the Borg character, or indeed the *Star Trek* franchise, would be unacceptable in a free and just democratic society.

[125] ***Greater Vancouver*** permits administrative restrictions based on all the circumstances in a particular case. In examining all these circumstances, the actions of MPI to limit Troller's freedom of expression are a reasonable restriction in a free and democratic society.

[126] I therefore deny Troller's application.

[127] Costs, if not agreed may be spoken to.

S. Leibovich

J.

APPENDIX 'A'

C.C.S.M. c. R30.5

The Path to Reconciliation Act

RECOGNIZING that Manitoba is situated on the traditional lands and territories of Indigenous peoples;

FURTHER RECOGNIZING that Manitoba benefited and continues to benefit from the historical relationships and treaties with Indigenous peoples and nations;

FURTHER RECOGNIZING that Indigenous people within Canada have been subject to a wide variety of human rights abuses since European contact and that those abuses have caused great harm;

FURTHER RECOGNIZING that reconciliation is founded on respect for Indigenous nations and Indigenous peoples and their history, languages and cultures, and reconciliation is necessary to address colonization;

FURTHER RECOGNIZING that the Truth and Reconciliation Commission was established as part of a response to the abuses of colonization, and that the Commission has provided a path forward to reconciliation;

FURTHER RECOGNIZING that the Government of Canada also has a significant role in advancing reconciliation;

AND AFFIRMING that the Government of Manitoba is committed to reconciliation and will be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows:

Reconciliation

1(1) **"Reconciliation"** refers to the ongoing process of establishing and maintaining mutually respectful relationships between Indigenous and non-Indigenous peoples in order to build trust, affirm historical agreements, address healing and create a more equitable and inclusive society.

Indigenous peoples

1(2) **"Indigenous peoples"** includes First Nations, Inuit and Metis peoples of Manitoba.

Principles

2 To advance reconciliation, the government must have regard for the following principles:

Respect: Reconciliation is founded on respect for Indigenous nations and Indigenous peoples. Respect is based on awareness and acknowledgement of the history of Indigenous peoples and appreciation of their languages, cultures, practices and legal traditions.

Engagement: Reconciliation is founded on engagement with Indigenous nations and Indigenous peoples.

Understanding: Reconciliation is fostered by striving for a deeper understanding of the historical and current relationships between Indigenous and non-Indigenous peoples and the hopes and aspirations of Indigenous nations and Indigenous peoples.

Action: Reconciliation is furthered by concrete and constructive action that improves the present and future relationships between Indigenous and non-Indigenous peoples.

Minister

3(1) As a member of the Executive Council, the minister responsible for reconciliation must lead the government's participation in the reconciliation process, including by

(a) making recommendations to the Executive Council about measures to advance reconciliation;

(b) promoting initiatives to advance reconciliation across all sectors of society, including interdepartmental, intergovernmental, corporate and community initiatives;

(c) promoting recognition of the contributions of Indigenous peoples to the founding of Manitoba for the purpose of advancing reconciliation; and

(d) making recommendations to the government about financial priorities and resource allocation across the government in relation to reconciliation.

Members of Executive Council

3(2) Each member of the Executive Council is to promote measures to advance reconciliation through the work of the member's department and across government.

Strategy

4 The minister responsible for reconciliation must guide the development of a strategy for reconciliation that

(a) is to be guided by the calls to action of the Truth and Reconciliation Commission and the principles set out in the United Nations Declaration on the Rights of Indigenous Peoples;

(b) builds upon meaningful engagement with Indigenous nations and Indigenous peoples about the past, present and future relationships between Indigenous and non-Indigenous peoples;

(c) creates a framework for an ongoing and evolving process to advance reconciliation;

(d) establishes immediate and long-term actions that are responsive to the priorities and needs of Indigenous nations and Indigenous peoples, including those set out in the calls to action of the Truth and Reconciliation Commission;

(e) fosters the involvement of all sectors of society in the reconciliation process; and

(f) establishes transparent mechanisms to monitor and evaluate the measures taken by the government to advance reconciliation;

(g ensures that survivors of residential school abuses have a role to play in its development.

Progress report

5(1) For each fiscal year, the minister responsible for reconciliation must prepare a report about the measures taken by the government to advance reconciliation, including the measures taken to engage Indigenous nations and Indigenous peoples in the reconciliation process and the measures taken to implement the strategy.

Tabling report in Assembly and publication

5(2) Within three months after the end of the fiscal year, the minister must table a copy of the report in the Assembly and make it available to the public. The minister must also arrange for the report, or a summary of it, to be translated into the languages of Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree, and make each translation available to the public.

Translation and publication in Indigenous languages

6 Within 30 days after the coming into force of this Act, the minister responsible for reconciliation must arrange for its translation into the languages of Cree, Dakota, Dene, Inuktitut, Michif, Ojibway and Oji-Cree. Upon completion, each translation must be made available to the public.

C.C.S.M. reference

7 This Act may be referred to as chapter R30.5 of the *Continuing Consolidation of the Statutes of Manitoba*.

Coming into force

8 This Act comes into force on the day it receives royal assent.