Court of Appeal File No.: M50877

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

MADELINE WELD

Moving Party/Applicant

-and-

OTTAWA PUBLIC LIBRARY

Respondent

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**REPLY FACTUM WITH AUTHORITIES**

**(Motion for Leave to Appeal)**

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Dated: December 1, 2019

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# REPLY FACTUM OF THE MOVING PARTY/APPLICANT

**(Motion for Leave to Appeal)**

1. The Respondent argues that renting space to the public is not an exercise of statutory authority, even when it is for the purposes of disseminating and receiving expressive content as was the case here, because doing so is not part of the Library's "core mandate" and the library is under no statutory obligation to rent its rooms for use by the public.

**Factum of the Responding Party at paras 33, 39, pp. 9-11**

2. In fact, the underlying purpose for the very existence of public libraries is to preserve and promote the discovery and dissemination of information and ideas. That is the inherent and implied animating "core mandate" of a public library and what underlies the *Public Libraries Act*. The rental of rooms to the public, which inevitably involves,

as it did in this case, the dissemination of information and ideas, is necessarily an aspect of the Library's "core mandate". The lower court erred in law by holding otherwise.

3. This core mandate was stated emphatically by the Ottawa Public Library itself in a labour dispute, wherein they argued that:

> 5 …[T]he public is entitled to freedom of information and that this freedom of information is recognized in the *Canadian Charter of Rights and Freedoms, Constitution Act 1982*, as enacted by Canada Act (U.K.), 1982 c. 11. which protects freedom of thought, belief, opinion and expression and **a public library is a place people go to exercise these rights regardless of race, gender, background, political belief or economic situation.**
>
> …
> 9 …The Ottawa Public Library embraces the notion of intellectual freedom. Intellectual freedom involves access to all forms of knowledge and information **including things that some may find unconventional, unpopular or unacceptable**.
>
> 10 On the second issue the Employer stated that the principle of freedom of information did not come about with the Charter but has been around as long as there have been public libraries. **The principle is endorsed in library policies which require employees to uphold information freedom in carrying out their duties. If someone wants to work in a public library, he/she knows or ought to know that he/she will come into contact with a wide variety of materials, some of which may be offensive to someone.** It was the Employer's position that this in and of itself cannot constitute sexual discrimination or a poisoned work environment. A public library is one of the places people go to exercise intellectual freedom. **Intellectual freedom, the Employer stated, is one of the hallmarks of our society** and that even if I were to conclude that the facts of this case meet the test of sexual discrimination, then it must be a bona fide occupational requirement, for to find otherwise would mean that the Ottawa Public Library could never staff or carry out its objectives. [Emphasis added.]
>
> ***Ottawa Public Library Board v. Ottawa-Carleton Public Employees' Union, Local 503*, 2002 CarswellOnt 5254, 113 L.A.C. (4th) 29 (Baxter):** Moving Party's Reply Factum and Authorities, Tab 2

4. In any event, whether renting rooms is part of the library's "core mandate" or not is irrelevant to the analysis. In the same way that putting advertising on the side of buses is not part of the "core mandate" of a municipal transit corporation, once a public body chooses to provide space for expressive content there unavoidably attaches an obligation—a constitutional and therefore public law obligation— to not arbitrarily and unlawfully discriminate based on the *content* of expression. Since the Library is a government entity for the purposes of section 32 of the *Charter*, the *Charte*r applies to all of the Library's activities, including decisions that limit what content will be permitted to be disseminated and received in rented rooms. Accordingly, any activity that impacts *Charter* protections for freedom of expression is necessarily of a public character. The fact that there is no statutory or constitutional *obligation* to rent rooms misses the point.

> ***Canadian Federation of Students v. Greater Vancouver Transportation Authority (GVTA)*, 2009 SCC 31, at paragraphs 25 and 35:** Moving Party's Book of Authorities, Tab 7

5. The Respondent notes that Ms. Weld was ultimately able to show the film to some of those who desired to view it at a private venue in a different city and claims that "[r]enting an auditorium from the OPL is not any different than making the same sort of arrangement with an entirely private entity."

> **Factum of the Responding Party at paras 37 and 40, pp. 11-12**

6. It is respectfully submitted that this, again, misses the point and is inaccurate. The ability to express oneself on private property, if indeed the ability exists in any particular case, ought not to influence the analysis. The state must not be permitted

to shirk its constitutional obligations by pointing to instances where private parties, who have no such obligations, have voluntarily provided a forum for the expression.

7. The reason for this is obvious. One of the purposes of section 2(b) of the *Charter* is to protect minority, dissenting or unpopular expression from government censorship at the behest of a majority or an elite. As the Supreme Court of Canada has found, "the guarantee of freedom of expression serves to protect the right of the minority to express its view[.] … The view of the majority has no need of constitutional protection; it is tolerated in any event." The availability of other venues does not eliminate the requirement of a government body to uphold the *Charter*.

> ***R. v. Zundel*, [1992] 2 S.C.R. 731 at para 22**: Moving Party's Reply Factum and Authorities, Tab 3

8. Lastly, the Respondent asserts that the Moving Party is arguing in favour of a positive right to access the "platform" of Library facilities for expressive purposes. As discussed, the Moving Party's claim, like in *GVTA*, is not based on a positive obligation, but is rather rooted in a negative *Charter* right to express herself in a government-controlled space made available to all members of the public for expressive purposes without arbitrary limitations being placed on the *content* of her lawful expression.

9. The Moving Party's use of the term "deplatforming" refers to a known, disturbing phenomenon whereby private parties exert pressure upon public entities to cancel events to prevent expression they disapprove of. The Library's unreasonable limitation of the Moving Party's freedom of expression is found in its decision to

cancel the viewing of the film merely in response to “complaints” from those who disagree with views expressed in the film, not in failing to provide a venue for the showing of the film.

***GVTA* at para 35:** Moving Party’s Book of Authorities, Tab 7

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1st day of December, 2019.

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