DISPLAY OF EMPLOYER'S SYMBOL DURING UNION DRIVE IS NOT PROTECTED SPEECH UNDER CANADA'S CONSTITUTION

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In the February and March 1997 issues of the WIPR (vol. 11, nos. 2 & 3), we reported on the recent Federal Court of Canada decision in *Compagnie Générale des Établissements Michelin - Michelin & Cie* ("Michelin") v. *National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada)* ("CAW") *and al.*, T-825-94, December 19, 1996, yet unreported (Teitelbaum, J.). This is the third and last of three articles on the decision.

During their 1994 campaign to unionize the plaintiff's Canadian affiliate's plants in Nova Scotia, the defendants distributed leaflets depicting Michelin's symbol, the "Michelin Tire Man", also known as "Bibendum". In the CAW's leaflet, a smiling, large Bibendum figure stood cross-armed, one foot raised over the head of a worker, whose companion warned him thus : "Bob you better move before he squashes you!". Bob was seen replying: "Naw, I'm going to wait and see what happens". The leaflet also bore the logo of CAW-Canada and a caption inviting workers to sign up with the union.

Michelin took action alleging trade-mark and copyright infringement. As previously discussed, the Federal Court rejected the plaintiff's submission on trade-mark infringement but concluded that CAW had infringed Michelin's copyrights in the Bibendum figure.

However, in order to defeat Michelin's claims, CAW submitted that its posters and leaflets depicting the Bibendum figure were forms of expression protected by Section 2(b) of the *Canadian Charter of Rights and Freedoms* which is an integral part of Canada's *Constitution Act, 1982*, one of the constitutional texts which govern the country's legislative landscape. Section 2(b) provides : "(e)veryone has the following fundamental freedoms : ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication".

The defendant further pleaded that if the *Copyright Act* (R.S.C. 1985, c. C-42) limited its right to produce the posters and leaflets featuring the Bibendum figure, the relevant provisions of the Act were not saved under Section 1 of the *Charter* as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Under Section 1, the *Canadian Charter of Rights and Freedoms* states that it guarantees the rights and freedoms set out in it (including the freedom of expression) subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

However, CAW was not asking the Court to invalidate the *Copyright Act* but rather inviting it to "read down" the relevant provisions of the *Copyright Act* to preserve their constitutionality. Reading down is a technique used to maintain the constitutional validity of a legislative provision by narrowly interpreting one of its term in a fashion which does not infringe any one of the freedoms guaranteed by the *Charter*.

Freedom of Expression

Did CAW's display of Michelin's Bibendum figure fall within the scope of the freedom of expression guaranteed under Section 2(b) of the *Charter*? In other words, can use of a copyright (by someone other than its owner or a licencee) be called a form of protected expression? Michelin argued that using another persons private property (such as copyright) is a prohibited form of expression; Mr. Justice Teitelbaum agreed, stating that the defendants were not permitted to appropriate the plaintiff's private property - the Bibendum "copyright" - as a vehicle for conveying their anti-Michelin message.

In rendering his decision, Mr. Justice Teitelbaum took note of the novel issue before him and of the fact that the Supreme Court of Canada has never given guidance on how the Courts should evaluate the use of a copyright in determining the scope of protection under Section 2(b) of the *Charter*. However, the Court relied on the Supreme Court 's decision in *Committee for the Commonwealth of Canada* v. *Government of Canada*, (1991) 77 D.L.R. (4th) 385 (S.C.C.). In *Commonwealth*, the Supreme Court ruled that, under certain circumstances, there is a limited right to the use of *public property* as a forum for free expression. However, the Supreme Court maintained that private property was not available as a forum for free expression, as stated by Ms. Justice McLachlin: "(i)t has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the *Charter* does not extend to private actions. It is therefore clear

that Section 2(b) confers no right to use private property as a forum for expression".

Also in *Commonwealth*, Ms. Justice L'Heureux-Dubé recognized the distinct regime applicable for public property as opposed to private property: "(i)f the government had complete discretion to treat its property as would a private citizen, it could differentiate on the basis of content, or choose between particular viewpoints and grant access to sidewalks, streets, parks, the courthouse lawn, and even to Parliament Hill only to those whose message accorded with the government's preferences".

Use of Another's Private Property

Analogy with the *Commonwealth* case however had its limits since property was not the vehicle for the defendant's message in that case but, simply its forum. Despite these differences (use of public property as a forum for expression versus use of another's property as a vehicle for expression), it nonetheless helped the Court to distinguish the nature of the parties' interests in the case (as had been done in *Commonwealth*); Mr. Justice Teitelbaum concluded that use of someone else's private property (the Bibendum "copyright") was not consistent with the value of expression enhancing participation in social and political decision making.

Thus, Mr. Justice Teitelbaum stated: "(t)he defendants have used private property not as a forum but as a means of conveying a message. However, despite these differences, I reason by analogy to *Commonwealth* that I am permitted to consider the parties' interests even before the Section 1 stage of the analysis in order to examine the scope of the Defendants' freedom of expression under Section 2(b) and determine if the expression is in a prohibited form. I hold that it is reasonable to equate doing something on private property as a forum for expression with using the property - the copyright - to convey expression. (...) In *Commonwealth*, (it was) held that in instances of use of public property, expression is protected only if it is compatible with the primary function of the property. Thus, no one has a right to set up a peace camp in the middle of a public library because such obstreperous demonstrations would be incompatible with silent study, the prime function of the library".

Mr. Justice Teitelbaum went on to hold that a person using the private property, such as copyright, of another must demonstrate that his or her use of the property is compatible with the function of the property before the Court can deem the use a protected form of expression under the *Charter*. In this particular instance, mocking the Bibendum figure was not considered

compatible with the function of the copyright which is to provide protection for an author's creative work.

Finally, in finding that CAW's expression was not protected under Section 2(b) of the *Charter*, the Court took note that the *Copyright Act* attempted only to control the form and not the content of an expression and did not interfere with CAW's ability to convey its message otherwise. The defendant's thus failed to convince the Court that using plaintiff's private property was within the scope of protected freedom of expression.

Mr. Justice Teitelbaum concluded that even if he were wrong in his findings on Section 2(b) of the *Charter* he would nonetheless have held that the relevant provisions of the *Copyright Act* were "reasonable limits prescribed by law ... demonstrably justified in a free and democratic society" under Section 1 of the *Charter* since the protection of authors and the result of their creative initiatives were legitimate objectives in a democratic society. Finally, the "reading down" technique was also rejected since it would have forced the Court to rewrite certain provisions of the *Copyright Act*, a role reserved to Parliament.

Conclusion

After *Michelin,* one finds a *Copyright Act* which has successfully overcome a constitutional challenge (much to the relief of many IP practitioners and various creators!). *Michelin* reminds us that freedom of expression is not an absolute value (see also *Hill* v. *Church of Scientology of Toronto*, (1995) 2 S.C.R. 1130 (S.C.C.)) and that Canada's *Copyright Act* is drafted with a concern for the protection of freedom of expression (albeit not a stated concern) with its list of exceptions at Sections 27(2) and (3).

CAW has launched an appeal against Mr. Teitelbaum's decision.

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