ADVERTISEMENTS IN THE NAME OF FREEDOM OF EXPRESSION

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In *Adbusters Media foundation v. Canadian Broadcasting Corporation,* [2009 CanLII 148 (BCCA)] the Court of Appeal for British Columbia allowed the appeal challenging the order of Justice Ehrcke of the Supreme Court of British Columbia striking out the statement of claim under Rule 19(24) of the Rules of Court (the Rules) and dismissing the action against Global Television Network Inc. and Global Communications Limited (collectively "Global"). The appellant also challenges the refusal to join the Canadian Broadcasting Corporation (hereinafter CBC) and the Canadian Radio-Television and Telecommunications Commission (CRTC) as parties to the action. Only the order regarding the joinder of CBC is now being challenged in this appeal.

Facts

The appellant asked Global and CBC to broadcast advertisements presenting various individual messages, but that had as a common theme a criticism of the influence of the media, especially the television media, on society. Global refused to run the ads and the CBC agreed to run only some of them but not at the times desired by the appellant. Adbusters claimed that the selective refusal to air the advertisements constituted a violation of its right to freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms (the *Charter*). The *Charter* guarantees certain political and civil rights against government action, whether those actions occur at the municipal, provincial or federal level. Adbusters asserted that both Global and CBC were "government bodies" for the purposes of the *Charter* when they refused to broadcast Adbuster's advertisements. The appellant argued that both the CBC and Global are subject to the *Charter* because they implement government broadcasting policy and because they control expression on the airwaves, which is a public space.

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Law

While it is well established that the *Charter* applies to all acts of government, private or otherwise, Canadian courts have also recognized that the *Charter* may apply to non-governmental entities in certain circumstances. The test to determine whether a private entity can be subjected to the *Charter* is based on that entity's conduct. It must be found that the conduct of the entity in question is governmental in nature. In attempting to classify the conduct of an entity in a given case, it is important to know, first, whether it is a governmental body, and second, whether the conduct to be subjected to *Charter* scrutiny is similar to that of a government body.

R.19 (24) provides that at any stage of the proceedings the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that it discloses no reasonable claim or defence as the case may be. At trial, Global sought an order pursuant to R.19 (24) on the basis that Adbusters' action discloses no reasonable claim because the *Charter* does not apply to private corporations such as Global. The trial court held that the test under R.19 (24) was uncontroversial. The test does not proceed on evidence, but rather on the pleadings. The trial court found that it was plain and obvious that the action is doomed to fail. The question that must always be determined with regard to R.19(24) motions is whether it is plain and obvious that the pleadings disclose no reasonable cause of action. A similar dispute was adjudicated in *Adbusters Media foundation v. Canadian Broadcasting Corp*. (1995), 13 B.C.L.R. (3d) 265 (S.C.) (Adbusters 1.).

In that case, the court dismissed the appellant's *Charter* claim on the grounds that, even though it is a Crown Corporation (i.e. a statutory creation), CBC was not under the control of the federal government and therefore the refusal to run certain ads was not government action subject to *Charter* scrutiny. The trial judge in the present case stated that he was bound by Adbusters 1 and one of the questions on appeal was whether the trial judge was, in fact, bound by that ruling. In Adbusters 1, the court based its decision solely on the criteria of the entity's control of the airwaves, but did not consider the entity's implementation of government broadcasting policy. It appears that in the present case, the trial judge thought that the entity's implementation of government policy was considered in Adbuster No. 1, and that he was thus bound by the determination in that case. The Court of Appeal held that the judged erred in treating the implementation of government policy theory as having been settled by Adbusters 1, and in considering himself bound by that decision. As such, the Court of Appeal said that the theory deserves further consideration in the course of this action, and it cannot be said to be plain and obvious that when the theory is applied to the facts asserted in the pleadings the action is bound to fail.

Moreover, Adbusters had alleged at trial that *Eldrigde v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 (Eldridge) added a new factor that must be considered when determining whether a non-governmental entity was performing an inherently governmental activity. Adbusters claimed that the Eldridge criteria is whether the private entity was implementing a specific governmental policy or program. Global submitted that these passages from Eldridge did not amount to a new test, and didn't provide a basis for distinguishing from Adbusters 1. The trial court agreed, but the Court of Appeal thought that the trial judged erred. The Court said that whether the Eldridge decision represents an evolution of the law or a simple restatement is a question upon which reasonable persons might differ, and should not be decided on a R.19 (24) application. It follows that a definitive ruling that Adbusters 1 was unaffected by Eldridge is not one that the trial judge should have made.

The Court of Appeal did not address the appellant's "public space" argument, saying that if the decision to strike is reversed those questions can be addressed in due course. The "public space" argument states that the *Charter* is applicable to broadcasters, whether private or statutory, because they have been given the power to control expression in a public space, which is control over freedom of expression in a public space.

On the issue of joinder, the Court of Appeal also set aside the trial court's refusal to join CBC as a party because the trial judge based his decision on the fact that there was no reasonable claim. An unusual circumstance in this case is that CBC had been named as defendant when the original writ of summons and statement of claim were filed. Later, there were settlement discussions between Adbusters and CBC, and Adbusters filed a notice of discontinuance. There were also discussions about a release or a covenant not to sue, but no such document was ever signed by Adbusters. The Court of Appeal found that there remained unresolved questions which affect the motion to join and that a judge in the Supreme Court will have to decide whether it is just and convenient to add CBC in light of the discontinuance, and if necessary, whether the appellant gave CBC a covenant not to sue.

Held, the appeal was granted for the above reasons.

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