

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Adbusters Media Foundation v.
Canadian Broadcasting Corporation,***
2009 BCCA 148

Date: 20090403
Docket: CA035914

Between:

Adbusters Media Foundation

Appellant
(Plaintiff)

And

**Canadian Broadcasting Corporation,
Global Television Network Inc., and
Global Communications Limited**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

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Place and Date of Hearing:

Vancouver, British Columbia
February 16, 2009

Place and Date of Judgment:

Vancouver, British Columbia
April 3, 2009

Written Reasons by:

The Honourable Mr. Justice Donald

VANCOUVER

Concurred in by:

The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

APR - 3 2009

**COURT OF APPEAL
REGISTRY**

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] This appeal challenges the order striking out the statement of claim under R. 19(24) of the *Rules of Court* and dismissing the action against Global Television Network Inc. and Global Communications Limited (collectively “Global”) on the finding that it was plain and obvious that the action could not succeed. The appellant’s applications to add the Canadian Broadcasting Corporation (“the CBC”) and the Canadian Radio-Television and Telecommunications Commission (“the CRTC”) as parties to the action were also refused and the order regarding the CBC is challenged. The reasons for the judgment appealed from are indexed as 2008 BCSC 71.

[2] The appellant submits that:

- (i) the chambers judge erred in holding that he was bound by a prior ruling in *Adbusters Media Foundation v. Canadian Broadcasting Corp.* (1995), 13 B.C.L.R. (3d) 265 (S.C.) (“*Adbusters No. 1*”); and
- (ii) a novel point, not articulated below and therefore not considered, has sufficient merit to overcome the R. 19(24) test.

I think the appeal should succeed on the first ground.

Facts

[3] The appellant requested Global and the CBC to broadcast advertisements critical of commercial advertising. Global refused to run the ads. The CBC agreed

to run some of them but not at the times desired by the appellant. The appellant brought the within action for *Charter* relief in the terms set out in the amended statement of claim:

The Plaintiff claims as follows:

- (a) as against the Government of Canada:
 - (i) a declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* that the Government of Canada's failure to ensure that the Media Defendants air the Adbusters Advertisements on the same terms as the Media Defendants would air other advertisements of the same duration is a violation of section 2(b) of the *Charter*;
 - (ii) a declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* that the scheme of offences and licenses established by the *Broadcasting Act*, directly and in combination with the other actions or inaction by the Government of Canada and the actions of the Media Defendants, is to the extent that it prevents or hinders the Plaintiffs from broadcasting the Adbusters Advertisements an unconstitutional infringement of the Plaintiff's freedom of expression guaranteed [by] section 2(b) of the *Charter*;
 - (iii) an Order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* that the Government of Canada must ensure that the Media Defendants air the Adbusters Advertisements on the same terms as they would air other advertisements of the same duration.
- (b) as against the Media Defendants:
 - (i) a declaration pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* that the refusal of the Media Defendants to air the Adbusters Advertisements on the same terms as they would air other advertisements of the same duration is a violation of section 2(b) of the *Charter*;
 - (ii) an Order pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* that the Media Defendants must air the Adbusters Advertisements on the same terms as they would air other advertisements of the same duration;

- (c) costs; and
- (d) such further and other relief as to this Honourable Court seems just.

[4] A similar dispute was tried before Mr. Justice Holmes in *Adbusters No. 1*. He found, in the circumstances, that the CBC had breached a contract with the appellant but awarded no damages as none were claimed. He dismissed the appellant's claim under the *Charter* on the ground that the CBC was not under the control of the Federal Government and therefore the refusal to run certain ads was not government action subject to the *Charter*.

[5] On appeal to this Court on the *Charter* aspect, it was decided that the issue became moot when Holmes J. found a breach of contract. The reasoning was that if any remedy had been available then, the judge would have granted it and that it was inappropriate to venture a *Charter* opinion in the abstract: *Adbusters Media Foundation v. Canadian Broadcasting Corp.* (1997), 154 D.L.R. (4th) 404 (B.C.C.A.).

[6] One of the questions on the appeal is the extent of Holmes J.'s *Charter* ruling.

[7] Before the chambers judge in the present case, the appellant argued that Global and the CBC, if added as a defendant, were subject to the *Charter* because they implement government broadcasting policy; and, with perhaps somewhat less clarity, the appellant further argued that Global attracted *Charter* scrutiny because it controlled expression on the airwaves, which is a public space.

[8] The appellant's point regarding the implementation of government policy was supported by reference to *Eldridge v. British Columbia (Attorney General)*, [1997]

3 S.C.R. 624, 151 D.L.R. (4th) 577, decided after *Adbusters No. 1*. There it was held that hospitals, said not to be government actors for *Charter* purposes on the question of mandatory retirement (see e.g., *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, 76 D.L.R. (4th) 700; and *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545), were obliged by the *Charter* to supply interpreters to persons with hearing disabilities because the institutions were carrying out government policy in the delivery of medical services.

[9] The appellant submitted that *Eldridge* represented an evolution of the law beyond the control test enunciated in *McKinney* and the other cases upon which the decision in *Adbusters No. 1* was based. The appellant argued that *Eldridge* formulated a second test, implementation of government policy, under which the *Charter* may be held to apply to a private entity.

[10] The judge, however, accepted Global's argument that *Eldridge* did not add anything to *McKinney*, and, since Holmes J. followed *McKinney* in deciding *Adbusters No. 1*, the decision governed the outcome of the present case.

[11] The judge disposed of the motion to add the CBC on the basis that it was not just and convenient to make it part of an action that had no merit. He said in his reasons:

[32] I agree with the Global Defendants that the Supreme Court of Canada's decision in *Eldridge* does not amount to a departure from the principles in *McKinney* and therefore does not provide a basis for distinguishing the decision of Holmes J. in *Adbusters No. 1*. In *Eldridge* Mr. Justice La Forest went out of his way to explain how his reasoning is based on what was said in *McKinney*. He specifically quoted the above-noted passage from p. 275 of *McKinney* that

mentioned the implementation of governmental policy as a relevant factor.

[33] I therefore consider myself bound to follow the decision of Holmes J. in *Adbusters No. 1*. That case clearly held the CBC's action of declining to broadcast one of Adbusters' advertisements was not subject to *Charter* scrutiny, and that the same result would apply even if the CBC were a private broadcaster.

[34] I conclude that it is plain and obvious that Adbusters' pleadings in the present case do not raise a reasonable cause of action against the Global Defendants. As against the Global Defendants, the amended statement of claim is struck out and the action is dismissed.

* * *

[48] For the reasons discussed above in relation to the Global Defendants, I have found that the present case cannot be distinguished from *Adbusters No. 1*. There, on facts very similar to the present case, Holmes J. decided that the actions of the CBC were not subject to *Charter* scrutiny.

[49] I conclude that it is not just and convenient to add the CBC as a defendant pursuant to Rule 15(5)(a). Adbusters' application is dismissed against the CBC. The CBC shall [*sic*] its costs of this motion on scale B.

[12] Since the CBC successfully resisted joinder on that ground, the judge found it unnecessary to decide the CBC's other two grounds, namely that the appellant had already discontinued against the CBC and should not be able to change its mind, and there was a settlement wherein the appellant gave a covenant not to sue. The parties do not agree on the circumstances surrounding the discontinuance. On appeal, the CBC wanted us to resolve these questions. We advised counsel that we were not prepared to decide disputed questions of fact at first instance and that the forum for that is in the trial court.

Issues

[13] I will address the issues under four headings:

- (1) The test under R. 19(24);
- (2) The decision in *Adbusters No. 1*;
- (3) The public space argument; and
- (4) The motion to add the CBC.

The test under R. 19(24)

[14] The test under R. 19(24) is uncontroversial. In *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, Mr. Justice Iacobucci, for the court, wrote:

15 An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980:

... assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff’s statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff’s statement of claim be struck out

The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether there it is “plain and obvious” that the action must fail. It is only if the statement of claim is certain to fail because it contains a “radical defect” that the plaintiff should be driven from the judgment. See also *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[Emphasis added.]

[15] With respect, I think the judge went beyond this question and embarked upon a close analysis of the effect of *Eldridge* on the law relating to the *Charter*, more appropriate at a later stage in the action. Whether *Eldridge* 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 No. 1* was unaffected by *Eldridge* is not one that the judge should have made.

The decision in *Adbusters No. 1*

[16] On the appeal of *Adbusters No. 1*, I wrote:

[4] The learned trial judge found that the respondent breached its contract with the appellant but awarded no damages as none were claimed. He noted that the real point of the case was to obtain a ruling that the respondent was subject to the *Charter*. In that regard, he upheld the argument by the respondent that on matters of broadcasting it was entirely independent of government and therefore not governed by s. 32(1) of the *Charter*. The appellant also argued that all broadcasters, public or private, were subject to the *Charter* on the basis that they controlled expression on publicly owned radio wave frequencies, relying on the authority of *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, 77 D.L.R. (4th) 385. The learned trial judge did not decide the latter point [reported [1996] 2 W.W.R. 698].

[17] Counsel for the CBC argued before us that the above passage represents too narrow a view of what Mr. Justice Holmes decided, and that on a proper reading of his decision, it will be seen that he considered both control and implementation of policy. I do not agree. The following passages from his judgment will demonstrate that he decided the case on the control factor:

[34] Although the CBC was created by Parliament, it is an agent of the Crown, and remains ultimately responsible through the Minister to Parliament, this form of "ultimate or extraordinary" control is not determinative of operational, routine or regular control.

* * *

[37] It is overall control of programming that lays at the base of the issue here.

* * *

[46] The Advocacy Advertising policy has not been shown to have either government input, influence, or its formulation interfered with in any way. It is a policy clearly appropriate and incidental to the CBC's carefully protected mandate to exercise power and enjoy freedom of expression and journalistic, creative and programming independence under the *Broadcasting Act*.

[18] I can find no reference to implementation of policy either directly or indirectly in the *Adbusters No. 1* judgment.

[19] It appears that the judge in the present case may have thought this factor was considered in *Adbusters No. 1* and he was bound by the determination in that case. If so, he was mistaken.

The public space argument

[20] One of the dangers in taking a less than strict approach to the plain and obvious test under R. 19(24) is that the merits of the case will be decided before the case has matured and all the points of argument have surfaced.

[21] Buried in the submissions below is the argument, now articulated with clarity, that the broadcasters have been given the power to control expression in a public space and, regardless whether the broadcasters are public or private, the fact that they can decide who can exercise freedom of expression in a public space makes the *Charter* applicable to them.

[22] The foundation of the argument is the *Broadcasting Act*, S.C. 1991, c. 11, declaration that radio frequencies are public property:

3. (1) It is hereby declared as the broadcasting policy for Canada that

(a) ...

(b) the Canadian broadcasting system, operating primarily in the English and French languages and comprising public, private and community elements, makes use of radio frequencies that are public property and provides, through its programming, a public service essential to the maintenance and enhancement of national identity and cultural sovereignty;

[Emphasis added.]

[23] The appellant analogizes the control of expression on this form of public property to advertising on public buses: *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, 2006 BCCA 529, 64 B.C.L.R. (4th) 29 (leave to appeal to the Supreme Court of Canada granted and judgment reserved, [2007] S.C.C.A. No. 52), and to the broadcasting of music and words by a loudspeaker from a strip club onto the streets of Montreal: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. The *Charter* right to free expression under s. 2(b) was found in each case to be implicated.

[24] We do not need to decide whether those analogies are apt or the argument as a whole is valid because if the decision to strike is reversed those questions can be addressed in due course.

[25] In summary on the R. 19(24) ruling, it is my opinion that the judge erred in treating the implementation of government policy theory as having been settled by *Adbusters No. 1*, and in considering himself bound by that decision. I think it is

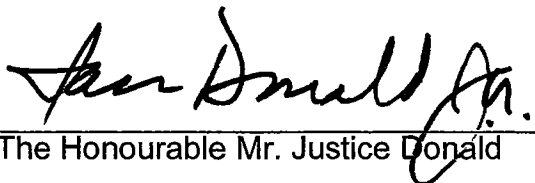
arguable that the theory is separate and distinct from the government control theory. As such, it deserves further consideration in the course of this action, and it cannot be said to be plain and obvious that when the theory is applied to the facts asserted in the pleadings the action is bound to fail.

The motion to add the CBC

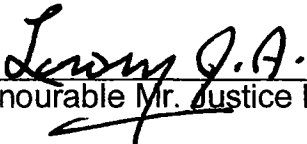
[26] Turning to the joinder of the CBC, I would set aside the refusal to add it as a party on the single ground upon which the judge acted, namely, there was no reasonable claim. As indicated, there is a reasonable claim, but that does not end the matter. There remain unresolved questions which affect the motion to add. A judge in the Supreme Court will have to decide whether it is just and convenient to add the CBC in light of the discontinuance, and if necessary, whether the appellant gave the CBC a covenant not to sue.

Conclusion

[27] I would allow the appeal for the above reasons and in the terms stated.


The Honourable Mr. Justice Donald

I agree:


The Honourable Mr. Justice Lowry

I agree:


The Honourable Madam Justice Neilson