



FORM 61 (RULE 53 (7))

No. S078309  
VANCOUVER REGISTRY

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

BETWEEN:

CANWEST MEDIAWORKS PUBLICATIONS INC.

PLAINTIFF

AND:

HORIZON PUBLICATIONS LTD., GARTH LEDDY, MORDECAI BRIEMBERG,  
GORDON MURRAY, CAREL MOSEIWITSCH, JOHN DOE #2, JOHN DOE #3, JANE  
DOE #2 AND JANE DOE #3

DEFENDANTS

**NOTICE OF APPEAL FROM A MASTER**

WHEREAS on the 24<sup>th</sup> day of November, 2008, Master Donaldson made the following order:

1. That paragraphs 2, 3, 4 and 11 of the Amended Statement of Defence of Gordon Murray should be struck;
2. That the application of the defendant, Gordon Murray, for production by the plaintiff of the following documents be dismissed:
  - a. Documents dealing with the plaintiff's pro-Israel/anti-Palestine bias, including any documents dealing with spiked stories, minutes of editorial board meetings, memoranda circulated to employees of the plaintiff, censorship of pro-Palestinian positions, blacklisting of journalists, and editing or altering Reuters newswire stories to conform with a Canwest policy to label certain groups as terrorist, as referred to in paragraph 3 of the Statement of Defence of Gordon Murray;

- b. Documents dealing with the plaintiff's centralized editorial policy, including documents dealing with the national editorial policy, byline strikes, dismissals or threats to dismiss employees, reprimands and suspensions of employees, memoranda circulated within the plaintiff corporation, and content review by head office in Winnipeg, as referred to in paragraph 4 of the Statement of Defence of Gordon Murray; and
  - c. All communications between the plaintiff and its principal shareholders dealing with the parody and this lawsuit, which communications reflect the plaintiff's motivations for bringing this lawsuit as set out in paragraph 11 of the Statement of Defence of Gordon Murray; and
- 3. Costs as against the Defendant, Gordon Murray, with respect to the motion to strike.

TAKE NOTICE that the Defendant Gordon Murray appeals from that order on the following grounds:

## Outline

- A Errors on Appeal
- B Statement of Facts
- C Argument
  - C.1 Relevance of the Contents of the Parody and Vancouver Sun
    - C.1.a Trademarks "Confusion"
    - C.1.b Consideration of Free Expression Values in IP Litigation
    - C.1.c Invalidity of Trademarks Act and Copyright Act
  - C.2 The Plaintiff's Motivations
- D Relief Sought

## **A. Errors on Appeal**

1. The appellant respectfully appeals from the following errors:
  - a. The learned Master erred in concluding that the content of the Parody and the original Vancouver Sun are irrelevant to this litigation, and by striking paragraphs 2, 3 and 4 of the Statement of Defence when it was not plain and obvious that the defences related to those paragraphs could succeed. This error followed from three underlying errors of law:
    - i. The learned Master erred in concluding that the content of the Parody and the original are not relevant to the issue of trademarks "confusion";
    - ii. The learned Master erred in concluding that, in determining whether the plaintiff has established a trademarks violation, the Court is not required to consider whether the expressive content of the Parody is of a type that is accorded protection under s.2(b) of the Charter of Rights and Freedoms;
    - iii. The learned Master erred in concluding that the content of the Parody and the original are irrelevant to a s.1 constitutional analysis of whether any infringement of s.2(b) of the Charter by the Trademarks Act can be justified in a free and democratic society; and
  - b. The learned Master erred in striking paragraph 11 of the Statement of Defence, which permitted the learned Master to conclude that communications between the plaintiff and third parties to this litigation are irrelevant.

## **B. Statement of Facts**

2. The appellant, Gordon Murray, published a parody of the Vancouver Sun that satirized the Sun's bias and editorial policies (the "Parody"). The Statement of Claim asserts that the Parody was a trademarks and copyright violation.
3. The appellant asserts that the content of the Parody could never be confused with the content of the original Vancouver Sun. The Statement of Defence argues that that content of the Parody is within the core of protected speech and that his right to free expression should be taken into account when determining whether a trademarks or copyright violation has been proven by the plaintiff. The Statement of Defence argues in the alternative that if any provisions of the Trademarks Act or Copyright Act prohibit him from publishing the Parody, those provisions infringe s.2(b) of the Charter of Rights and Freedoms and are of no force and effect.
4. The Statement of Defence also seeks an order for special costs of a punitive and exhortatory nature to reflect the fact that the plaintiff's lawsuit is a Strategic Lawsuit against Public Participation aimed at restricting publication and circulation of the Parody and at suppressing criticism of the plaintiff and its editorial bias and editorial policies.

## **C Argument**

### **C.1 Relevance of the Contents of the Vancouver Sun**

5. On October 28, 2008 the appellant brought an application for documents dealing with the plaintiff's editorial bias and editorial policies. The appellant says that the requested documents are relevant to factual questions that arise in the following areas of dispute:
  - a. Trademarks "confusion". The appellant says that the Parody cannot be confused for the Vancouver Sun because the content of the Parody differs markedly from the content of the Vancouver Sun, which is dictated by the plaintiff's editorial policies.
  - b. Statutory Interpretation/Application. The appellant says that the Court must consider Charter values, including the right to free expression, in determining whether there is a trademarks violation. The authorities support this contention. Among the free expression values the appellant wishes this Court to consider is the heightened importance given to speech that reflects the truth about our society, its institutions and its norms.
  - c. Invalidity of Legislation. If the Trademarks Act or the Copyright Act are found to violate freedom of expression, the Court must engage in a proportionality analysis that will appraise the value of the Parody's message on the basis of the extent to which it is consonant with the 'core values' of free expression, one of which is truth. If the truth of the Parody affords it greater Charter protection, then the appellant should be entitled to demonstrate that the Parody is true.
6. The learned Master erred by striking paragraphs 2, 3 and 4 of the Statement of Defence in a context where it was not "plain and obvious" that the defences could not succeed.

Hunt v. Carey Canada, [1990] 2 S.C.R. 959

Hildebrand v. Fox, 2008 BCCA 434 at paras.16-17

### C.1.a Trademarks Confusion

7. The appellant says that the content of the Parody and the plaintiff's editorial bias and editorial policies are relevant to the issue of trademarks "confusion" and passing-off "confusion".
8. To demonstrate a violation of the Trademarks Act or the tort of passing off, a plaintiff bears the burden of establishing the following: (1) the existence of goodwill; (2) a misrepresentation of the public in the course of trade, which causes confusion; and (3) damage to the plaintiff, either actual damage or in the case of a quia timet action for potential damage.
9. One of the key elements is that of confusion in the minds of the public "by reason of the sale, or proffering for sale, by the defendant of a product not that of the plaintiff's making, under the guise or implication that it was the plaintiff's product or the equivalent".

*Ciba-Geigy Canada Ltd. v. Apotex Inc.*, [1992] 3 S.C.R. 120 (SCC), paras. 31-33

10. "Confusion" is defined under s.6 of the Trademarks Act as follows:

6. (1) For the purposes of this Act, a trade-mark or trade-name is confusing with another trade-mark or trade-name if the use of the first mentioned trade-mark or trade-name would cause confusion with the last mentioned trade-mark or trade-name in the manner and circumstances described in this section.

(2) The use of a trade-mark causes confusion with another trade-mark if the use of both trade-marks in the same area would be likely to lead to the inference that the wares or services associated with those trade-marks are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(3) The use of a trade-mark causes confusion with a trade-name if the use of both the trade-mark and trade-name in the same area would be likely to lead to the inference that the wares or services associated with the trade-mark and those associated with the business carried on under the trade-name are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(4) The use of a trade-name causes confusion with a trade-mark if the use of both the trade-name and trade-mark in the same area would be likely to lead to the inference that the wares or services associated with the business carried on under the trade-name and those associated with the trade-mark are manufactured, sold, leased, hired or performed by the same person, whether or not the wares or services are of the same general class.

(5) In determining whether trade-marks or trade-names are confusing, the court or the Registrar, as the case may be, shall have regard to all the surrounding circumstances including

- (a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
- (b) the length of time the trade-marks or trade-names have been in use;
- (c) the nature of the wares, services or business;
- (d) the nature of the trade; and
- (e) the degree of resemblance between the trade-marks or trade-names in appearance or sound or in the ideas suggested by them.

11. The appellant says that a comparison at trial of the contents of the Parody with the contents of the original Vancouver Sun is required by s.6(5)(c) of the *Trademarks Act*. Section 6(5)(c) states that “in determining whether trade-marks or trade-names are confusing, the court... shall have regard to all the surrounding circumstances including... the nature of the wares, services or business”. Similarly, s.6(2), 6(3) and 6(4) require the Court to undertake an analysis on a case-by-case basis of the reasonable inferences to be drawn about the source of the wares distributed by the plaintiff and the defendant.
12. The situation is identical in respect of the plaintiff’s common law claim for passing off. At paragraph 19 of the Further Amended Writ of Summons and Statement of Claim, the plaintiff says that the defendant, “in publishing the fake newspaper, and republishing the content thereof on the [www.vancouversun.7p.com](http://www.vancouversun.7p.com) website and on various other websites, constitute a misrepresentation and passing off of the fake newspaper as that of the plaintiff, leading the public to believe there was an association between the plaintiff and the fake newspaper”. The plaintiff expressly pleads that the public believed the plaintiff to be the source of the Parody.
13. The appellant wishes to argue at trial that there is no “confusion” in this case. The appellant says that the content of the Parody differs so radically from the contents of the original Vancouver Sun that no reasonable person could conclude that Canwest was the source of the Parody. The appellant relies on a comparison of the contents of the Parody and the content of the Vancouver Sun to make this point. The appellant says that the plaintiff’s editorial bias and editorial policies restrict the Vancouver Sun from ever publishing a paper that could be confused with the Parody. Canwest could never be the source of the Parody because its editorial policies would not allow for it.

14. The appellant says that its argument about the editorial bias and editorial policies of the plaintiff apply equally to the Trademarks Act and the common law tort of passing off. Paragraphs 3 and 4 of the Statement of Defence refer to the plaintiff's editorial bias and editorial policies to call attention to the obvious differences between the plaintiff's publications and the defendant's publication.

15. This Court addressed a similar situation in *BCAA v. Office and Professional Employees' International Union, Local 378*, in which a workers' union registered domain names, used metatags and created web pages that copied elements of their employer's website design. After comparing the contents of each website, the Court found as follows:

[121] I find that the current Union website does not constitute a passing-off. I have concluded that there is no misrepresentation that the Union site is a site of the plaintiff, or a site that is endorsed by, affiliated with or connected to the plaintiff. I think there is no actionable passing-off because there is no confusion or possibility of confusion in the minds of an internet web user that the site is associated with or the property of the BC Automobile Association. The fact that the current internet website is not associated with the British Columbia Automobile Association is quickly apparent from looking at the site.

*BCAA v. Office and Professional Employees' International Union, Local 378*, [2001] B.C.J. No.151 (B.C.S.C.)

16. In contrast to the *BCAA* case, the learned Master gives the following reasons with respect to the issue of confusion:

[16] The defendant further alleges that there was no confusion in this case in part because of the differing editorial content and bias of the fake *Sun* and the actual *Vancouver Sun*. However, when determining whether there is likely confusion, the content of the fake *Sun* is not relevant.

17. It is respectfully submitted that the defendant should have an opportunity to argue at trial that there is no confusion because the content of the Parody differentiates it from any newspaper that the plaintiff would ever publish. To do so, the defendant wishes to make reference to the plaintiff's editorial bias and editorial policies that would prevent the plaintiff from ever publishing the Parody.

18. The appellant respectfully requests that the decision of the learned Master to strike paragraphs 3 and 4 of the Statement of Defence, which state the plaintiff's editorial bias and editorial policies, was erroneous. It is far from "plain and obvious" that the defendant's arguments could not succeed. The appellant



submits that documents dealing with the plaintiff's editorial bias and editorial policies are relevant to these proceedings and should be produced.

*Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959

#### **C.1.b Consideration of Free Expression Values in Applying Trademarks Law**

19. The appellant says that the Canadian Charter of Rights and Freedoms has a role to play in the interpretation of statute and the development and application of the common law. The appellant's Statement of Defence puts the issue as follows:

9. There is nothing false, misleading or dishonest about the Parody. It contains true facts and honestly held opinion regarding the editorial policies of Canwest and the Vancouver Sun, as well as valid opinion regarding Israel and its treatment of the Palestinian people. The defendant says that the common law and statutory torts relied on by the plaintiff do not abridge his right to publish the Parody or to give interviews, and must be interpreted to comport with his right to free expression as guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms.

20. It is a basic rule of statutory interpretation that legislation be interpreted to comport with the Charter:

Where a statute is open to more than one interpretation, one of which is constitutional and the other of which is not, the interpretation which is consistent with the constitution should be adopted...

*R. v. Bernshaw*, [1995] 1 S.C.R. 254 at 275

21. Similarly, the values and interests protected by the Charter affect the development and elaboration of the common law:

18 The second preliminary issue is how the *Charter* may affect the development of the common law. Here again the answer seems clear. The *Charter* constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. *Charter* rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The *Charter* must thus be viewed as one of the guiding instruments in the development of Canadian law.

*R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,  
[2002] 1 S.C.R. 156

22. The influence of the right of free expression in the context of a passing-off suit was recognized by Sigurdson, J. in *BCAA v. Office and Professional Employees' International Union, Local 378*, particularly where the defendant's expression is not commercial competitive with the plaintiff's business:

130 I agree with the defendant's argument that the common law should be interpreted in a manner consistent with the Charter. When a website is used for expression in a labour relations dispute, as opposed to commercial competition, there is, I think, a reasonable balance that must be struck between the legitimate protection of a party's intellectual property and a citizen's or a Union's right of expression. I think that the principles in *Kmart* require such a balance and the common law should not be interpreted in a way to unreasonably infringe a person's freedom of expression. In connection with this claim for passing-off, that balance favours the Union.

*British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378*, [2001] B.C.J. No.151 (B.C.S.C.) at paras.107, 128 and 130

23. Free expression is preeminent among the human activities protected by the Canadian constitution. The principles and values underlying the vigilant protection of free expression in a society were summarized as follows in *Irwin Toy*:

- a) Seeking and attaining the truth is an inherently good activity;
- b) Participation in social and political decision-making is to be fostered and encouraged; and
- c) The diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated.

*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para.53

24. McLachlin, J., (as she then was), expounded these principles for the majority in *R. v. Zundel*, [1992] 2 S.C.R. 731:

This Court has held that s. 2(b) is to be given a broad, purposive interpretation: *Irwin Toy*, supra. Even prior to the Charter, this Court recognized the fundamental importance of freedom of expression to the Canadian democracy; see *Reference re Alberta Statutes*, 1938 CanLII 1 (S.C.C.), [1938] S.C.R. 100; *Switzman v.*

Elbling, 1957 CanLII 2 (S.C.C.), [1957] S.C.R. 285. I can do no better than to quote the words of my colleague Cory J., writing in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (S.C.C.), [1989] 2 S.C.R. 1326, at p. 1336:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances.

The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, supra, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression.

25. McLachlin, C.J.C., put it thus in *R. v. Sharpe* [2001] 1 S.C.R. 45 at para. 21

21 Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only “good” and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.

26. She continued in the *Sharpe* case at para. 23:

23 The values underlying the right to free expression include individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy: *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (S.C.C.), [1988] 2 S.C.R. 712, at p. 765. While some types of expression, like political expression, lie closer to the core of the guarantee than others, all are vital to a free and democratic society. As stated in *Irwin Toy*, *supra*, at p. 968, the guarantee “ensure[s] that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection”, the Court continued, “is . . . ‘fundamental’ because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual”. As stated by Cardozo J. in *Palko v. Connecticut*, 302 U.S. 319 (1937), free expression is “the matrix, the indispensable condition, of nearly every other form of freedom” (p. 327).

27. These and other authorities clearly demonstrate that we are to give full meaning to the Charter guarantee of freedom of expression, particularly where its use involves “core” values of political debate and discourse, including the “core” value of “seeking and attaining truth”.

28. The appellant says that his Parody embodied the type of expression that falls within the core values of free expression. Paragraph 6 of the Statement of Defence sets out this assertion:

The Parody was intended to criticize and satirize the Vancouver Sun and the entire Canwest media group, raise awareness about the Canwest bias, and foster debate about Canada's role in the Middle East. The Parody calls attention to the hypocrisy of the Canwest media group, which uses courts and media to vigorously promote its right to freedom of the press, while using its ownership rights to limit public debate and chill its reporters into silent submission.

29. The Parody critically satirizes the plaintiff's editorial bias and the plaintiff's editorial policies. One example is the article entitled "Study Shows Truth Biased Against Israel", purportedly written by "Cyn Sorsheep". The article sets out the reaction of the plaintiff's CEO to a fictional study by the Asper School of Business Information:

Leonard Asper, CEO of CanWest/Global said he was not personally surprised at the findings. "This confirms my suspicions that the Truth is fanatically anti-Israel, and vindicates our vigilance in managing the Truth about Israel's activities in all our converged media assets," he said.

*Affidavit of Megan Vis-Dunbar, sworn September 26, 2008, Ex.A*

30. In addition to satire, the Parody presents critical analysis of Canwest's bias and editorial policies, including non-fictional direct quotes from senior executives of Canwest that acknowledge pro-Israel positions and policies. The Parody makes mention of specific examples of threats to and termination of employees for breaches of the Canwest's centralized editorial policy and references to Canwest's substitution of the word "terrorist" for the word "insurgent" into Reuters newswire copy.

31. The Parody also criticizes the degree of media concentration in Vancouver and British Columbia as follows in an article entitled "The Media is the Message":

Vancouver is a one news town. Both the daily paid-circulation-newspapers, most of the weekly papers, the market-leading television newscast, as well as major internet portals are all owned by the one company, CanWestGlobal. For good measure, they also own 30% of the free daily Metro and the widely distributed *National Post*. Canadian Press estimates CanWest's control of the Vancouver new market at 70%.

*Affidavit of Megan Vis-Dunbar, sworn September 26, 2008, Ex.A*

32. The appellant says that the issues raised by the Parody -- media concentration, Canada's foreign policy, the editorial bias and editorial policies of a daily newspaper -- are matters that fall within the core values of the right to free expression of Canada.

33. The appellant places special emphasis and reliance on the core expressive value of "seeking and attaining the truth" and "promoting the truth". The appellant maintains that it is true that the plaintiff has an editorial bias favouring Israel and maintains editorial policies regarding Israel. The appellant says that the truth of the Parody ought to be given special recognition as a factor to be taken into account in the case-by-case process of striking a balance between protection of a party's intellectual property and a citizen's right of expression.

*British Columbia Automobile Assn. v. Office and Professional Employees' International Union, Local 378*, [2001] B.C.J. No.151 (B.C.S.C.) at para.130

34. The appellant does not say, as suggested by the learned Master, that there exists a "defence of free expression" or a "parody defence" or "truth of the content as a defence". The appellant says that core Charter values must factor into the balance between intellectual property and free expression, and that the content of the Parody, the meaning of the Parody, and the truth of the Parody are relevant at the trial of this matter.

35. The appellant says that incorporating truth into the balancing between intellectual property rights and the right of free expression would go some distance in discouraging lawsuits that use intellectual property rights to undermine the public contest for the truth. Attributing value to truth would have a prophylactic effect on suits such as this one, where the plaintiff has not suffered any actual economic harm. The effect would be comparable to the effect of the defence of truth in defamation suits. As Robert Martin notes in "Media Law", "commentators on libel law often note that the defence of truth is seldom raised in actual libel actions. This is correct -- and for a very good reason. If the story is true, no one is going to sue."

Robert Martin, Media Law, (Irwin Law, 1997), p.141

36. It is respectfully submitted that the truth and validity of the criticisms set out in the Parody will be relevant in the trial of this matter. It follows that paragraphs 2, 3 and 4 of the Statement of Defence should not be struck, and that the plaintiff

should be required to produce documents relevant to the factual issues set out in those paragraphs.

37. In striking what he considered to be a “parody defence” or “free expression defence” from the Statement of Defence, the learned Master exclusively relied on *Compagnie général des établissements Michelin - Michelin & Cie v. National Automobile, Aerospace, Transportation and Générale Workers Union of Canada* (1996), 124 F.T.R. 192 (F.C.T.D.). In the appellant’s respectful submission, the learned Master’s reliance on the *Michelin* case was inappropriate for the following reasons:

- a. The *British Columbia Automobile Association* case incorporated an analysis of freedom of expression interests and was binding on the learned Master;
- b. *Michelin*’s analysis of the application of the Charter to copyright is clearly factually specific (see paras.69 and 70)
- c. *Michelin*’s comments regarding the trade-marks issues are made in obiter (see paras.41 and 78).
- d. *Michelin*’s approach to s.29 of the *Copyright Act* has been overtaken by *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2002 FCA 187 CanLII, (see paras.122 to 177);
- e. *Michelin* was overturned on the parody point by the Quebec Court of Appeal in *Productions avanti cine video inc. c. Favreau*, 1999 CanLII 13258 (Q.C.A.).

38. It is respectfully submitted that the *Michelin* case cannot support the proposition that it is “plain and obvious” that the Charter values of seeking and attaining truth and of fostering public participation and public debate are of no relevance at the trial of this dispute. It follows that the content of the Parody and the truth and meaning of the content of the Parody are relevant to this litigation, and that the plaintiff should produce the documents requested by the appellant.

#### **C.1.c Invalidity of Trademarks Act and Copyright Act**

39. The appellant’s Statement of Defence makes an alternative pleading that the Trademarks Act and Copyright Act are invalid and of no force and effect. The relevant paragraphs are as follows:

10. In the alternative, the defendant says that if s.7 of the Trademarks Act operates to prohibit him from publishing the Parody, then the section is

inconsistent with his right to free expression and is of no force and effect pursuant to s.52 of the Canadian Charter of Rights and Freedoms...

13B. The defendant, Gordon Murray, denies that copyright subsists in the name "Vancouver Sun" or in its general format, denies that the name "Vancouver Sun" or its general format is a "work", denies that his conduct amounts to an infringement of any copyright, says that any subsisting copyright has expired, and relies on the "fair dealing" exception under s.29.1 of the Copyright Act and the "public interest" exception. The defendant, Gordon Murray, further says that, to the extent that the Copyright Act imposes liability on him for publishing the Parody, it is inconsistent with his right to free expression under s.2(b) of the Charter of Rights and Freedoms and is of no force and effect.

40. If the Court determines that a comparison of the content of the Parody and the content of the Vancouver Sun is not required, and determines that a Trademarks Act violation can be established without sustained confusion, the appellant will argue that the Trademarks Act should be struck down as an infringement of his right to free expression. In this case, the extent to which the Parody advances the core free expression values would be relevant to the proportionality analysis under s.1 of the Charter. Under this analysis, the content of the Parody and the truth of that content must be considered. Paragraphs 2, 3 and 4 of the Statement of Defence relate to those issues and should accordingly not be struck.
41. The learned Master erred by failing to deal with the issue of whether the contents of the Parody might be relevant to a s.1 Charter analysis. At the hearing of the application to strike, the learned Master's attention was drawn to *Pacific Press, Division of Southam Inc. v. British Columbia (Attorney General)*, [1998] B.C.J. No.2768 (B.C.C.A.). In that case, the Pacific Press challenged the constitutional validity of third party spending limits of the BC Elections Act. The Court of Appeal dismissed an appeal from the refusal of the Chambers Judge to strike out the claim:

In view of the statements made by the Supreme Court of Canada in cases such as *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4<sup>th</sup>) 385, and *R. v. Danson*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4<sup>th</sup>) 686, about the importance of there being a factual foundation for making a section 1 analysis, it is questionable whether Rule 29(24) is an appropriate vehicle for making a determination as to the constitutionality of provisions which infringe rights and freedoms guaranteed by the Charter except possibly in the rarest of cases.



*Pacific Press, Division of Southam Inc. v. British Columbia (Attorney General)*, [1998] B.C.J. No.2768 (B.C.C.A.) at para.5

42. The appellant submits that the potential for a trial court to engage in a s.1 analysis is another path of reason by way of which the purpose and meaning of the Parody become relevant. The purpose and meaning of the Parody are the context in which the appellant alleges an abridgement of his right to free expression. The learned Master's decision carries the potential to deprive the Charter analysis of its context, and the appellant submits it should be overturned.

## **C.2 The Plaintiff's Motivations**

43. The learned Master erred in striking paragraph 11 of the Statement of Defence. Paragraph 11 of the Statement of Defence is as follows:

The defendant denies that Canwest suffered any loss of circulation or revenue as a result of the Parody. The defendant says that this lawsuit is not intended to compensate Canwest for any losses. This lawsuit is intended to restrict publication and circulation of the Parody, to inflict economic and emotional harm on the defendants for the pro-Palestinian activities listed in paragraphs 10, 11 and 12 of the Statement of Claim, and to generally deter publication of the opinions expressed in the Parody. The purpose and effect of this lawsuit are inimical to the common law and to the Charter of Rights and Freedoms. This lawsuit represents a perversion of civil justice and an abuse of process and is contrary to Rule 19(24) of the Supreme Court Rules.

44. Paragraphs 10, 11 and 12 of the plaintiff's Statement of Claim dated December 7, 2007 and Amended Statement of Claim dated July 17, 2008 state the following:

10. Each of the defendants is involved, directly or indirectly, in anti-Israeli and pro-Palestinian media activities. Further, the defendants, or some of them, harbor antagonistic views towards the plaintiff, its principal shareholders and the reporting and editorial opinions expressed in the plaintiff's publications, including in the Vancouver Sun.

11. Each of the defendants, has been involved, directly or indirectly, in the past in the authoring and publication of books, articles and the provision of interviews harshly critical of the State of Israel and of the plaintiff and anyone who publishes articles or views which the defendants perceive to be contrary to their views.

12. Each of the defendants is involved, directly or indirectly, in publishing articles, on the internet and otherwise, which are pro-Palestinian and anti-Israeli and which articles, among other things, are directed at the plaintiff and its principal shareholders and other individuals or corporations who, in the opinion of the defendants, express support for the State of Israel.

45. After the appellant filed his Statement of Defence on August 14, 2008 and requested production of communications between the plaintiff and its principal shareholders dealing with the Parody and this lawsuit, the plaintiff filed a Further Amended Statement of Claim dated September 12, 2008. The Further Amended Statement of Claim deleted paragraphs 10, 11 and 12.

46. The appellant says that the plaintiff's motivations for bringing this lawsuit remain relevant. Deleting paragraphs from a Statement of Claim does not change the plaintiff's motivations for bringing the lawsuit. The deleted paragraphs continue to be an indication of the predominant purpose of this trademarks litigation. In any event, the appellant incorporated paragraphs 10, 11 and 12 by reference into his Statement of Defence.

47. The learned Master's reasons for striking paragraph 11 of the Statement of Defence consist of the following:

"Paragraph 11 of the statement of defence should be struck as it is in reference to paragraphs 10, 11 and 12 of an earlier version of the statement of claim which has since been amended to delete those paragraphs.

48. With respect, the Master's reasons are inadequate. Deleted or not, it is at least arguable that paragraphs 10, 11 and 12 of the Amended Statement of Claim set out the facts that animated this lawsuit. Moreover, the appellant's reference to paragraphs 10, 11 and 12 of the Statement of Claim was only one of three statements of the plaintiff's motivation for bringing this lawsuit. Even on the Master's reasoning, the other two motivations remain relevant even if paragraphs 10, 11 and 12 are not. Further, paragraph 11 of the Statement of Defence deals with issues other than the plaintiff's motivations, including the fact that the plaintiff has suffered no actual loss as a result of the appellant's activities. The appellant submits that the learned Master's decision to strike paragraph 11 of the Statement of Defence should be set aside.

49. Notwithstanding the Master's reasons, the plaintiff's motivations for bringing this lawsuit are relevant to this lawsuit. In particular, they are relevant to the appellant's claim for special costs of a punitive and exhortatory nature. The appellant maintains that the plaintiff's lawsuit is not intended to protect any

economic interest and is a colourable attempt to restrain and take retribution for the appellant's exercise of his right to free expression. That issue should be litigated.

50. The appellant asks that the plaintiff be ordered to produce any correspondence between the plaintiff and its principal shareholders that deal with the Parody or this lawsuit.

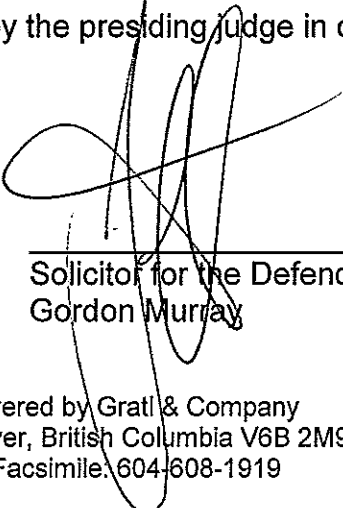
#### **D Relief Sought**

51. The appellant seeks the following orders:

- a. An order setting aside the order to strike paragraphs 2, 3, 4 and 11 of the amended statement of defence;
- b. An order for the production of:
  - i. Documents dealing with the plaintiff's pro-Israel/anti-Palestine bias, including any documents dealing with spiked stories, minutes of editorial board meetings, memoranda circulated to employees of the plaintiff, censorship of pro-Palestinian positions, blacklisting of journalists, and editing or altering Reuters newswire stories to conform with a Canwest policy to label certain groups as terrorist, as referred to in paragraph 3 of the Statement of Defence of Gordon Murray;
  - ii. Documents dealing with the plaintiff's centralized editorial policy, including documents dealing with the national editorial policy, byline strikes, dismissals or threats to dismiss employees, reprimands and suspensions of employees, memoranda circulated within the plaintiff corporation, and content review by head office in Winnipeg, as referred to in paragraph 4 of the Statement of Defence of Gordon Murray; and
  - iii. All communications between the plaintiff and its principal shareholders dealing with the Parody and this lawsuit, which communications reflect the plaintiff's motivations for bringing this lawsuit as set out in paragraph 11 of the Statement of Defence of Gordon Murray; and
- c. Costs of this application.

This appeal will be heard on a date and at a time to be set at the courthouse at 800  
Smithe Street, Vancouver, British Columbia by the presiding judge in chambers.

Dated: December 5, 2008



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Solicitor for the Defendant  
Gordon Murray

This Notice of Appeal is delivered by Gratl & Company  
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