Court File No. 19-00626-685-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Plaintiff (Moving Party) ("CCLA")

and

THE ATTORNEY GENERAL OF ONTARIO

Defendant (Responding Party) ("Ontario")

REPLY FACTUM OF THE MOVING PARTY, THE CCLA

June 29, 2020

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REPLY FACTUM OF THE MOVING PARTY, THE PLAINTIFF

PART I - OVERVIEW OF REPLY

1. The legislation at issue compels the display of the Sticker.[1] Of that there is no dispute. The dispute between the parties primarily concerns the purpose and content of the Sticker. Ontario contends that its purpose and content are no different from the other "legally-required postings that apply to commercial premises"[2]. The CCLA contends that the purpose and content are radically different because, unlike all other mandated postings, the Sticker was intended to and conveys Ontario's partisan political message as part of a war of words that Ontario is having with the federal government on climate change policy.

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[1] "**Sticker**" when capitalized refers to the English or French sticker prescribed by O. Reg. 275/19 under the *Federal Carbon Tax Transparency Act*, 2019, S.O. 2019, c. 7, Sched. 23. (the "**Sticker Act**").

[2] Factum of the Defendant, para 15.

2. Contrary to Ontario's primary submission, the CCLA has presented more than an adequate record to enable the Court to determine this dispute. This record clearly demonstrates that the Sticker is one of many tools Ontario is using to promulgate its partisan political opinions.

3. If this Court accepts the CCLA's submission that the Sticker conveys Ontario's partisan political message on the pumps of private citizens, then the Sticker and the legislative provisions which compel its display are unconstitutional. If, on the other hand, this Court accepts Ontario's submission that the Sticker is simply politically-neutral, economic disclosure posted at the point of sale,[3] then this motion should be decided in Ontario's favour.

PART II - RESPONSE TO ISSUES RAISED BY THE DEFENDANT

A. The CCLA's *Charter* Challenge has an Adequate Factual Foundation

No Evidence Required from Gas Station Owners

4. Ontario argues that the CCLA has not provided an adequate factual foundation primarily because the CCLA has not obtained an affidavit from a gas station owner.[4] The CCLA's position is that if the Sticker's *purpose* is partisan and political, it directly violates s.2 (b) of the *Charter*.[5] No evidence is required from gas station owners to prove the Sticker's purpose.

5. To establish purpose, the CCLA relies on the content of the Sticker and other evidence described below, much of which constitute "legislative facts" that courts recognize "help to establish the purpose and background of legislation, including the social, economic and cultural context in which the legislation was enacted."[6] As the Court of Appeal has noted, of necessity,

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[3] Factum of the Defendant, paras 51-52.
[4] Factum of the Defendant, para 14.
[5] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, at para 48 [*Irwin Toy*].
[6] *R v Levkovic*, 2010 ONCA 830, at para 30 [*Levkovic*].

legislative facts are of a more general nature, and the admissibility requirements for legislative facts are less rigorous than those that govern adjudicative facts.[7]

6. The CCLA also submits that even if an unconstitutional *purpose* is not established, no evidence is required from gas station owners to prove the only relevant *effect* of the Sticker, which is the compulsion of partisan political speech. As elaborated upon below,[8] evidence from gas station owners on identification and ability to disavow is not necessary.

7. In any event, Ontario conveniently ignores that gas station owners voiced their concerns about the Sticker to Ontario through member associations such as the Ontario Chamber of Commerce, the Canadian Federation of Independent Business, the Canadian Fuels Association and the Canadian Independent Petroleum Marketers Association ("**CIPMA**").[9] Through these associations, Ontario knew that some gas station owners considered its proposed sticker[10] to be partisan and political,[11] and wanted the Sticker to be voluntary.[12] CIPMA also complained that the penalties were too high, and recommended that the Sticker ought to place the Fuel Charge in context by depicting all the major factors that go into the price of gasoline at the pumps, even providing a sample sticker to that effect.[13]

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[7] *Levkovic*, at para 30.
[8] In paras 45-52.
[9] See para 27 of the Zwibel Affidavit, and Exhibit "7" attached thereto, and page 26 of the CCLA's Brief of Requests to Admit and Answers.
[10] Which was almost identical to the final Sticker.
[11] See CIPMA's interview with Maclean's magazine, published on August 19, 2019, attached as Exhibit "11" to the Zwibel Affidavit, and Ms. Zwibel's discussions with CIPMA, referred to in para 30 of the Zwibel Affidavit.
[12] See submission on the *Sticker Act* by the Canadian Federation of Independent Businesses, at page 32 of the CCLA's Brief of Requests to Admit and Answers.
[13] See CIPMA Response to the *Sticker Act*, at page 26 of the CCLA's Brief of Requests to Admit and Answers. The CIPMA's proposed sticker is attached as Appendix "B" to the CCLA's Moving Factum. CIPMA provided the draft sticker to Ontario by email on December 6, 2018. See pages 36, 57, and 58 of the CCLA's Brief of Requests to Admit and Answers.

Some Charter Challenges Require Less of a Factual Foundation than Others

8. While many authorities state the importance of having a sufficient factual record in *Charter* challenges, they also note that the level and type of facts which are sufficient varies from case to case.

9. For instance, in *MacKay*, cited by Ontario, the Supreme Court was careful to point out that there remain some challenges for which little or no factual background is necessary.[14] In that case, the Court called out the lack of evidence on the "effects" of the legislation being challenged, precisely because the challenge was premised on the alleged "effects", as opposed to the "purpose", of the legislation.[15]

10. In *R v Levkovic,* the Court of Appeal recognized that the general rule concerning a factual foundation is not inflexible or intolerant of exception in individual cases.[16] It held that the grounds for not requiring a full factual foundation in that case included, among other things, that the constitutional challenge had been directed principally at the language of the offence-creating provisions, and that additional evidence may not have advanced the inquiry into the constitutional question.[17]

11. Moreover, courts have made clear that there are truly exceptional cases in which a constitutional challenge based on the *Charter* can be determined without any factual foundation having been established.[18] In *Metropolitan Stores Ltd. v Manitoba Food & Commercial Workers*, Beetz J. held that "There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge."[19] The

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[14] *MacKay v Manitoba*, [1989] 2 S.C.R. 357 (SCC), at para 22 [*MacKay*].
[15] *MacKay,* at para 20.
[16] *Levkovic*, at paras 27-35 and 38-43.
[17] *Levkovic*, at paras 40-43.
[18] *Levkovic*, at para 43.See *Mississauga (City) v 1094388 Ontario Ltd*., 2014 ONCJ 674, para 55.
[19] *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (SCC), at para 49.

CCLA submits that just as a law mandating a state religion (the example used by Beetz J.) is on its face unconstitutional, so is a law mandating private citizens to display the partisan political messages of the government in power.

12. Here, the words that are on (and not on) the Sticker in English and French[20] may be enough on their own to demonstrate its partisan political nature. When the Sticker's content is: (a) compared to the language used and the message conveyed in Ontario's "One Little Nickel" campaign,[21] (b) considered in conjunction with the partisan information about the Carbon "Tax" on the Ontario website to which the Sticker directs the reader, and (c) contrasted to the politically-neutral but informative sticker proposed by CIPMA, the demonstration is irrefutable. Even more so, when combined with the backdrop of the federal election, and the war of words between the federal government and Ontario on how best to reduce carbon emissions.

Hansard Transcripts

13. As part of the factual matrix, the CCLA relies on the publication of the legislative debates in Hansard including the fact that the legislation imposing the Sticker is found under the heading of Government Advertising.[22] The Hansard excerpts support the conclusion that the Sticker is just another part of the political war of words between Ontario and the federal government on how best to deal with climate control.[23]

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[20] The French version of the Sticker is included at Appendix "A", and reads: "LA TAXE CARBONE FÉDÉRALE va vous coûter cher".

[21] See Appendix "A", which includes a chart setting out the words of one of the "One Little Nickel" campaign advertisement next to the Sticker. While the Sticker references the website Ontario.ca/carbontax, information on the other components of the price of gas cannot be found at this website but can only be found on a different website noted therein, www.ontario.ca/page/motor-fuel-prices.

[22] The Ontario Court of Justice has recognized that headings are persuasive aids to interpretation: *R v Yapput*, [2002] OJ No. 2382, at para 13.

[23] The relevant Hansard extracts are attached as Exhibit "A" to the Zwibel Reply and as Exhibit "1" to the Zwibel Affidavit.

14. Ontario acknowledges that Hansard excerpts are admissible.[24] Indeed, the modern approach to statutory interpretation is that they are admissible to assist the Court in determining purpose, and they may be considered sufficiently reliable to serve as direct or indirect evidence of legislative purpose, particularly when such statements are made by Ministers introducing or defending legislation.[25] Here, Hansard reports that the Minister responsible for the *Sticker Act* stated: "We're going to stick it to the Liberals and remind the people of Ontario how much this job-killing, regressive carbon tax costs."[26]

Statements Made to the Media Outside the Legislature

15. Ontario argues that statements made outside the Assembly by government officials are inadmissible to establish legislative intent. However, there is authority that such statements are admissible for establishing background and context.[27]

16. In this regard, one of the admitted statements speaks to why Ontario's advertising against the Fuel Charge did not disclose information on the Federal Rebate,[28] and another relates to the expected impact of the federal election on Ontario's challenge of the federal legislation that

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[24] Factum of the Defendant, para 21.

[25] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th Ed., (Toronto: Lexis Nexis, 2014) [*Sullivan*], at 9.48, 23.81, and 23.83.

[26] Minister Rickford's statement was made in the Legislature on April 16, 2019, attached as Exhibit "A" to the Zwibel Reply.

[27] *Levkovic*, at para 30. See also *Sullivan* at 22.1: "The meaning of legislation must be gathered from reading the words in context, and this includes the external context. The external context of a provision is the setting in which the provision was enacted, its historical background, and the setting in which it operates from time to time. In the case law of the Supreme Court of Canada, external context is sometimes referred to as "social context". It encompasses any facts that are judged to be relevant to the conception and operation of legislation, whether social, political, economic, cultural, historical or institutional. It also encompasses a wide range of social and cultural understandings. This includes the assumptions and norms relied on by courts in understanding the meaning of language, in drawing inferences about legislative purpose and, general, in deciding what is logical or plausible or "simple common sense".

[28] Ontario admitted the authenticity of the videotaped statement made by Minister Phillips, a transcript of which is attached to the CCLA's Brief of Requests to Admit and Answers.

imposed the carbon charge.[29] Neither of those statements is precluded by the jurisprudence cited by Ontario. They are both relevant to the factual background and context.

17. More importantly, the CCLA relies on the out-of-court statements Ontario admits were made by Ministers and the Premier, as evidence of what they were telling the public – which the CCLA submits is convincing evidence of the partisan, political war of words of which the CCLA asks the Court to find the Sticker is a part.

Evidence of Dr. Zycher

18. Ontario attempts to make much of the fact that the CCLA did not cross-examine Dr. Zycher. This lack of cross-examination does not mean that the CCLA has accepted Dr. Zycher's evidence, nor does it oblige the Court to accept what Dr. Zycher says as true.[30]

19. Dr. Zycher's evidence primarily supports Ontario's position that the Carbon "tax" is bad public policy, which both parties agree is irrelevant to this motion. Dr. Zycher's evidence supports the CCLA's position when he essentially opines that the Sticker will assist voters' choice between climate change policies offered by Ontario and the federal government.[31] The CCLA had no reason to cross-examine Dr. Zycher on irrelevant issues, or in respect of issues about which the parties appear to be in substantial agreement.

20. The CCLA's decision to not cross-examine Dr. Zycher does not preclude the CCLA from demonstrating that some of his opinions are without merit. For example, Dr. Zycher surmises why the Sticker does not mention the Federal Rebate. There is no factual evidence from Ontario on this point. However, the CCLA has adduced indirect evidence on this point, in public statements

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[29] Ontario admitted the authenticity of the videotaped statement made by Premier Ford in August 2019, a transcript of which is attached at page 10 of the CCLA's Brief of Requests to Admit and Answers.

[30] *Hainsworth v Canada (Attorney General)*, 2011 ONSC 2642 at para 17, referring to paras 52-53 of *Canada (Attorney General) v Hainsworth,* [2004] O.J. No. 2730.

[31] See paras 16, 24, 39-42, 62, and 73 of the Zycher Affidavit.

that Ontario admits were made by the Minister responsible for the Sticker.[32] Minister Phillips explained that the Federal Rebate, in Ontario's view, should be left to the federal government to disseminate.[33] It follows that information about the Federal Rebate was omitted from the Sticker for that same reason.

21. As another example, Dr. Zycher's unsupported opinion as to why the Sticker might not mention other taxes is negated by the sticker proposed by CIPMA.[34] CIPMA's sticker demonstrates how simple it would have been for Ontario to design a truly informational sticker. The mere comparison of the two stickers leads to the conclusion that Ontario did not want full transparency concerning the price of gasoline, and the relatively minor role the Fuel Charge plays when compared to other factors that contribute to that price.

22. Ontario has not put an affiant forward with information on how the Sticker was derived and as to why it should not be seen as a partisan political message. Dr. Zycher could not do that. He did not even try.

Conclusion on Sufficiency of Factual Record

23. The ultimate question on this motion is whether the Sticker is Ontario's partisan political message. The materials before the Court provide more than an adequate factual record to enable the Court to answer that question.

B. The CCLA should be Granted Public Interest Standing to bring this Action

24. The parties agree that the courts weigh three factors in exercising their discretion with respect to public interest standing. Ontario is prepared to assume that this challenge presents a

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[32] Ontario admitted the authenticity of the videotaped statement made by Minister Phillips, a transcript of which is attached at page 9 of the CCLA's Brief of Requests to Admit and Answers.

[33] Minister Phillips stated: "We are going to let [the federal government] communicate their message…"

[34] CIPMA provided the draft sticker to Ontario by email on December 6, 2018. See pages 36 and 57 of the CCLA's Brief of Requests to Admit and Answers. Dr. Zycher's Affidavit was sworn on November 22, 2019.

serious justiciable issue, the first of those factors. Ontario argues that the other two factors have not been met, but they clearly are.

The CCLA has a Genuine Interest in the Outcome of this Litigation

25. As Ontario states, the CCLA does not purport to be an organization devoted to the interests of gas retailers. Its raison d'être is the advancement of civil liberties in Canada, often through participation in court challenges.

26. The CCLA's interest in the outcome of this litigation is at least as genuine as Mr. Alford's interest in the constitutionality of the *National Security and Intelligence Committee of Parliamentarians Act*.[35] Ontario's position that *Alford v Canada* was not a *Charter* case is irrelevant to satisfying this factor.

27. The real issue in determining whether a prospective plaintiff ought to be granted public interest standing is whether the plaintiff is engaged enough with the issues in order to ensure that the case is competently litigated".[36] In *Canadian Civil Liberties Assn. v Canada*, cited by Ontario, the Court of Appeal noted the appropriateness of the lower Court's finding that the CCLA had a genuine interest in the validity of the legislation being challenged.[37] For the same reasons the CCLA was found to have a genuine interest in that case,[38] the CCLA's genuine interest should be accepted here: it was involved with this issue before the Sticker was adopted; it made submissions about this issue in the legislature and by commenting on the regulation; it spoke with gas station

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[35] *Alford v Canada (Attorney General)*, 2019 ONCA 657.
[36] *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, at paras 43 and 49 [*Downtown Eastside*].
[37] *Canadian Civil Liberties Assn. v Canada (Attorney General)*, [1998] O.J. No. 2856 (ONCA), leave denied in [1998] SCCA No. 487, at paras 35-36 [*CCLA ONCA*].
[38] *Canadian Civil Liberties Assn. v Canada (Attorney General)*, [1990] O.J. No. 1481 (ON HCJ), at paras 12-13 [*CCLA HCJ*].

owners and various associations about this issue. This history coupled with its own longtime involvement in constitutional matters makes it much more than a "mere busybody" in this matter.[39]

This Case is a Reasonable and Effective Means to Bring the Issue to Court

28. Ontario argues that the CCLA should be denied public interest standing because of the insufficiency of its factual record. While the more than adequate record is dealt with above, the CCLA submits that the "reasonable and effective means" factor involves consideration of more than the evidentiary record.

29. Ontario states that the Court of Appeal denied the CCLA public interest standing in *Canadian Civil Liberties Assn. v Canada (Attorney General)*[40] because, based on the insufficiency of its factual record, the case was not a reasonable and effective means to bring the issue to court[41] and that the same result should follow here. That is not correct.

30. First, when that decision was released, the third factor was worded in the more restrictive way ("*the most* reasonable and effective means"), which was subsequently expanded by the Supreme Court's decision in *Downtown Eastside* ("*a* reasonable and effective means"). Second, the majority of the Court of Appeal found that the merits of the action were relevant with respect to both the first and third factors for public interest standing, and that the absence of a factual record impacted the merits. The dissent in that case, by Abella J., as she then was, disagreed with the majority's decision to deny standing to the CCLA.[42] Abella J. criticized the majority's

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[39] *Landau v Ontario (Attorney General)*, 2013 ONSC 6152, at para 22. Shortly after the *Sticker Act* was first announced in Ontario's 2019 Budget, the CCLA delivered a demand letter to Ontario; on May 7, 2019, the CCLA's Executive Director attended in the Ontario Legislature to provide it with the CCLA's position that the *Sticker Act* contravened the *Charter*; and, the CCLA provided written comments to Ontario on the Sticker, as set out in paras 23-28 of the Zwibel Affidavit, and Exhibits 3, 6, and 8 attached thereto.

[40] *CCLA ONCA*.

[41] Factum of the Defendant, paras 31-32.

[42] *CCLA ONCA*, at para 94.

preliminary conclusion about the merits when considering the threshold issue of standing.[43] Her dissent in this regard appears to be more consistent with recent jurisprudence.[44]

31. Third, and most importantly, the majority of the Court of Appeal found that the public interest action was not the *most* reasonable and effective way to bring the issue before the Court, because the litigation was duplicative of separate litigation brought by a private litigant.[45] The separate litigation brought by a private interest litigant dealt with live issues, while the CCLA's application did not; it lacked a factual basis that was available elsewhere. Here, there is no duplicative litigation.

32. Ontario also relies on *Campisi v Ontario*,[46] in which the Ontario Superior Court rejected a claim for public interest standing on the basis that Campisi failed to meet both the second and third factors. While the lower Court did note that the factual matrix was missing, it also held that given the many plaintiffs who could bring actions in the future, denying Campisi standing to pursue the challenge would not risk immunizing the legislation at issue from judicial scrutiny. Such is not the case here.

33. The CCLA attempted to find a gas retailer to act as co-plaintiff in this challenge, but no retailer was willing to engage in litigation. The stated reasons for the unwillingness varied, but Ms. Zwibel's evidence that they declined to join is unchallenged.[47] Ms. Zwibel's evidence that some gas station owners did oppose the Sticker but were not willing to litigate is supported by Ontario's own admission that the Ontario Chamber of Commerce and others, voiced their members'

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[43] *CCLA ONCA*, at paras 97- 102, and 109.
[44] See for example, *Downtown Eastside*, at para 42: "The claim must be "far from frivolous", although courts should not examine the merits of the case in other than a preliminary manner", and at para 56: "Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles."
[45] *CCLA ONCA*, at para 90.
[46] *Campisi v Ontario*, 2017 ONSC 2884.
[47] Zwibel Affidavit, para 30.

opposition to the legislation, but did not pursue any legal action. While the CCLA could have compelled gas station owners to provide their evidence to the Court, this compulsion would have yielded evidence that is not needed to resolve the issues before the court . Compelling gas station owners would also be highly ironic given that this action has been brought to challenge government's ability to compel speech from those very people.

34. The CCLA's unfruitful efforts to find a co-plaintiff shows that it is unlikely that the individuals whose rights are most directly violated[48] will bring a challenge to court. To repeat the words of Cory J. in *Canadian Council of Churches*, "The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant".[49]

35. Unless the CCLA is granted standing to challenge the constitutional validity of the *Sticker Act*, the Sticker will likely remain unchallenged despite being radically different in kind from those other postings relied on by Ontario, and the issue of whether Ontario can compel partisan political speech will not come before the Court.

C. The Impugned Provisions of the *Sticker Act* Infringe s. 2(b) of the *Charter*

36. Ontario responds to the CCLA's submission on this issue by citing the Court of Appeal's decision in *Ontario Restaurant Hotel & Motel Association v Toronto (City)* ("*Ontario Restaurant*"), which upheld the Divisional Court's decision that the by-law requiring restaurant owners to post inspection notices did not restrict restaurant-owners' freedom of expression.[50] Ontario states that this authority is a complete answer to the CCLA's *Charter* claim. Ontario also compares the

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[48] Moreover, as noted by the Supreme Court in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at pp. 1339-1340, freedom of expression protects both speakers and listeners. In the case of compelled political speech, it is arguably the rights of both the compelled speaker and all those who may be influenced by the compelled speech that are infringed.

[49] *Canadian Council of Churches v R.*, [1992] 1 S.C.R. 236 (SCC), at para 36.

[50] *Ontario Restaurant Hotel & Motel Assn. v Toronto (City)*, [2005] OJ No. 4268 (ONCA) [*Ontario Restaurant ONCA*].

Sticker to other mandatory postings that have been found constitutional by the courts, or which have been unchallenged.[51] Ontario also submits that there is no violation of s. 2(b) because the Sticker cannot be seen as coming out of the mouths of gas station owners, and that the owners are free to disavow the message on the Sticker. We address each in turn.

Ontario Restaurant Decision

37. In *Ontario Restaurant*, the Court of Appeal expressly declined to decide whether the legislation violated 2(b) because it required restaurant owners to post notices they did not wish to post.[52] Instead, the Court of Appeal held that the posted notice was valid because it was "founded on significant public health and consumer protection imperatives."[53] While this statement was made within the Court's discussion of s. 1, the Divisional Court's decision on s. 2(b) with respect to the purpose of the notice was based solely on its conclusions that the notice was aimed at such imperatives.[54]

38. *Irwin Toy* makes clear that purpose is also critical to the s. 2(b) analysis, because where the purpose of a legislative provision is to restrict or compel meaning, the provision automatically contravenes s. 2(b).[55]

39. In short, the Court of Appeal's decision supports the CCLA's proposition that the Sticker contravenes s. 2(b) unless a Court finds that the Sticker was intended to serve a valid public welfare/regulatory purpose.

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[51] Factum of the Defendant, paras 15 and 44.
[52] *Ontario Restaurant ONCA*, at para 12.
[53] *Ontario Restaurant ONCA*, at para 14.
[54] At para 53, the Divisional Court in *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2004] O.J. No. 190 [*Ontario Restaurant Div. Ct.*], that the purposes of the by-law requiring the posting of the notices included: a) protection of the public from health hazards; b) educating the public to make informed choices; c) encouraging restaurant owners to attain and maintain high standards; and d) reducing the cost of inspections by reducing the number of re-inspections caused by non-compliance with the Food Premises Regulations.
[55] *Irwin Toy,* at para 48.

Comparison to Other Notices

40. The CCLA submits that the differing purposes is the first and most important distinction between the Sticker and the mandatory government notices referred to by Ontario: namely, employment standards and occupational health and safety posters, stickers on gas pumps indicating weights and measures inspections, the required listing of HST amounts on purchases, prescribed signs for tobacco sales, calorie counts for foods offered for sale, and food safety inspection notices.[56]

41. The other notices to which Ontario refers have public welfare regulatory purposes, often related to preventing consumer deception and promoting health and safety. Other legislation exists that regulates the types of technical and safety information that is to be displayed on gas pumps, and provides a comprehensive regulatory scheme along the lines of the legally-required postings referred to by Ontario.[57] The *Sticker Act* does not form part of that regulatory scheme: it is a stand-alone piece of legislation, with no regulatory purpose, and whose only purpose is to compel political speech.

42. So what is the purpose of the Sticker? The CCLA submits that all the evidence including Dr. Zycher's supports the conclusion that the Sticker is designed to influence voters that the federal policy for dealing with climate control is a bad one.[58] It is just another part of Ontario's war of words with the federal government. As noted by the US Supreme Court In *Turner Broadcasting System, Inc. v FCC*, government action that requires the utterance of a particular message

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[56] Factum of the Defendant, paras 15 and 44.

[57] The *Technical Standards and Safety Act, 2009*, is referred to in the Zwibel Affidavit at para 13. These legally-required postings are referred to in Factum of the Defendant, paras 15, 16 and 44.

[58] See paras 16, 24, 39-42, 62, and 73 of the Zycher Affidavit.

contravenes the first amendment because there is an inherent risk in such laws that the government may be attempting to manipulate the public debate through coercion.[59]

43. The second major and related difference between the other notices cited by Ontario and the Sticker is that the former are politically neutral and convey objective information, while the Sticker contains partisan information – essentially Ontario's opinion in this controversial matter. Canadian Courts have been much more willing to find that legislatively-compelled *opinions,* as opposed to facts, contravene s. 2(b).[60] Similarly, US courts are want to find that compelled speech is constitutional unless the notice provides factual and uncontroversial information.[61]

44. Accordingly, the CCLA submits that neither the Court of Appeal's decision in *Ontario Restaurant* nor Ontario's reference to other mandatory notices changes the conclusion that if the Court finds that the purpose of the Sticker is to convey a partisan political message, then compelling gas stations to post it contravenes s. 2(b).

Identification/Ability to Disavow

45. Ontario asserts that the Sticker is clearly Ontario's message, and that there is nothing to prevent the owners from disavowing the message.

46. In its main factum, the CCLA submitted that these factors are only considered when the Court determines that it is the effect of a challenged provision (as opposed to its purpose) which compels speech.[62]

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[59] *Turner Broadcasting v. Federal Communications Commission*, 512 U.S. 622, p. 641.

[60] In *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038, Dickson and Lamer JJ. distinguish between stating objective facts and opinion. In *Slaight*, the forced expression was justified because there was no real conflict about its contents, whereas in *National Bank of Canada v R.C.I.U.*, [1984] 1 SCR 269, the forced expression was so egregious because the employer was forced to "utter an opinion that was not his own" (para 12).

[61] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, p. 651.

[62] Moving Factum of the Plaintiff, para 58. See *Ontario Restaurant Div Ct.*, at para 44.

47. In addition, on the issue of identification the CCLA still maintains that logic strongly suggests that there is a real risk that the typical hurried consumer, as described by the Supreme Court of Canada, may well conclude that the Sticker is that of the gas stations.[63]

48. For purpose of reply, however, the CCLA responds that at least in the case of the compelled display of political messages, the compulsion is unconstitutional even where it is clear that the compelled speech is that of the government, and even if the one compelled has the ability to disavow.

49. Because the CCLA did not identify any current Canadian legislation which compels partisan political speech as does the Sticker, it created in its factum a hypothetical statute that compelled citizens to post political signs in their backyard. Ontario called the CCLA's suggestion that the *Sticker Act* is analogous to the hypothetical statute "fanciful and inapt"[64] but it did not deny that the hypothetical statute would contravene s. 2(b), even if the message was clearly identified with the government and even if the backyard owners could post other signs disavowing Ontario's message.[65]

50. A 1938 statute in Alberta also provides another useful illustration for why identification and inability to disavow should not be required for a finding of constitutional invalidity. The statute in *Reference Re Alberta Statutes*[66] required newspapers to print the provincial government's statements responding to certain issues. The Supreme Court characterized the law as confiscating private space to display the (political) message of the legislating government, and found that the government's requirement of a newspaper to communicate its message, subject to

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[63] The Supreme Court in *Richard v Time Inc.*, 2012 SCC 8, at para 67 noted that the courts have assumed that "ordinary hurried purchasers" take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement, and that the courts must not conduct their analysis from the perspective of a careful and diligent consumer.

[64] Factum of the Defendant, para 51.

[65] As described in the CCLA's Moving Factum, para 58.

[66] *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100, [*Reference re Alberta Statutes*].

penalty, was anathema to freedom of discussion in a democratic State.[67] The CCLA submits that such a law would violate s. 2(b), even if the display was clearly that of the provincial government, and even if the newspaper could otherwise disavow the display.

51. Finally, in *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City),*[68] the City was not ordered to post a pro-life group's advertisement on public transit, even though the advertisement would not be identified as the City's and the City could disavow its content. The Court's decision in part recognizes the City's right not to be used in the debate on this controversial topic.[69] Ontario apparently believes that gas station owners have no such similar right not to be coerced into propagating Ontario's position on a controversial issue.

52. Accordingly, the CCLA submits that even if Ontario is correct that the Sticker's message is merely on the backs of gas station owners and not in their mouths, and that the owners can disavow the Sticker's message, compelling them to display the Sticker contravenes s. 2(b).

D. This Infringement is not Justified under s. 1 of the *Charter*

53. An infringement related to political speech is the hardest infringement of speech to save under s. 1.[70] In the case of purposeful compelled political speech, it might be incapable of justification.[71]

54. Ontario chose to ignore the political nature of the Sticker and chose to defend it as if it was a typical public welfare notice. Even in this it failed.

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[67] *Reference Re Alberta Statutes,* at pp. 145-146.

[68] *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154 [*Grande Prairie*].

[69] *Grande Prairie*, at para 87.

[70] *R v Keegstra*, [1990] 3 SCR 697, at para 94; *Harper v Canada (Attorney General)*, 2004 SCC 33, at para 11; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, at para 91.

[71] In *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, the Supreme Court held that the Lord's Day Act, which was a federal Sunday-closing law, infringed the guarantee of freedom of religion. Its purpose, the majority of the Court held, was "to compel the observance of the Christian sabbath" (para 137). That was a purpose that was directly contradictory of the *Charter* right, and could not be a purpose that justified limiting the right.

55. If the objective was merely accurate cost transparency,[72] it would not be sufficiently important to justify infringing the *Charter*. It is noteworthy that it does not appear that Ontario conducted any research on consumer awareness of the increased cost before compelling the Sticker, especially after its One Little Nickel Campaign.[73]

56. For the reasons stated in the CCLA's previous factum, the Sticker is not rationally connected even to Ontario's alleged objective.[74]

57. As to minimal impairment, the CCLA relies on its previous submissions but also responds to Ontario's reliance on Dr. Zycher, who opined that the Sticker is more effective than advertising to communicate the cost at issue[75] and according to Ontario, minimal impairment does not require use of a less effective means of communication.[76] If Dr. Zycher's view is that the Sticker is the best way to communicate the information[77] one can only wonder why Ontario spent $4 million on its media campaign with the same message.

58. With respect to the final criteria under s. 1, Ontario once again relies on Dr. Zycher for the alleged benefits that may result from the Sticker. While a fair and accurate sticker could well provide informational benefits in promoting the truth, an unfair or inaccurate one, which only tells one side of the war of words between two governments, simply does not achieve benefits sufficient to justify *Charter* infringement.

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[72] *R v Morgentaler*, [1993] 3 SCR 463 (SCC), at para 80: "If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose."

[73] CCLA's Brief of Requests to Admit and Answers, page 20: "In response to request for production #2 above, we can advise that the Government of Ontario did not conduct any research or surveys regarding "stickers on pumps"…"

[74] Moving Factum of the Plaintiff, para 73.

[75] Zycher Affidavit, at para 89.

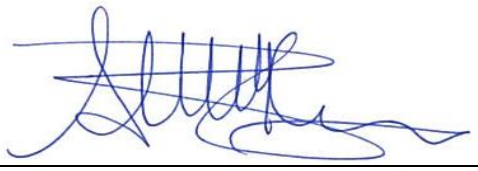
[76] Factum of the Defendant, para 62.

[77] Factum of the Defendant, para 9(l).

E. Response on Remedy

59. Ontario's factum highlighted that the *Sticker Act* itself did not mandate the political nature of the Sticker by insisting that certain political words be used or relevant information be omitted.[78] The CCLA submits that the *Sticker Act* is the compulsion mechanism for Ontario's political campaign. The Sticker with all of the other evidence reveals the true purpose of the statute and thus the impugned provisions of the statute should be declared constitutional. The CCLA recognizes, however, that it is open to the Court to only find the Sticker created through regulation to be declared invalid.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of June, 2020.



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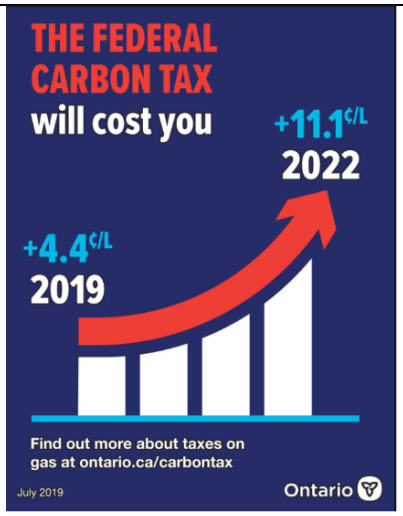
[78] Factum of the Defendant, paras 7 and 50.

Appendix "A"

One Little Nickel campaign (see Premier Doug Ford's Twitter feed) television advertisement:	The Sticker	Ontario.ca/carbontax
The television ad starts with footage of woman at a gas station. The voice over says: "The Federal government is charging you a carbon tax. You are paying a nickel more per litre. Then, your heating bills are a few nickels higher. And food's up a nickel or two. **This will cost the average Ontario family, $648.00 per year.** Ontario has a better way, holding the biggest polluters accountable, reducing trash, and keeping our lakes clean. A carbon tax isn't the only way to fight climate change. Learn more about our plan."	 	"Protecting our environment. A carbon tax is not the only way to fight climate change. Ontario has a better way. Read about our plan." The website touts the "significant action" Ontario is taking to fight climate change, and the results of those efforts. The website then describes how the carbon tax impacts families, claiming that in total, in **2019-2020, it cost families $258/year with that amount rising to $648/year by 2022-23.** The website provides a hyperlink to "Learn more about Motor Fuel Prices in Ontario, which directs the reader to the website https://www.ontario.ca/page/motor-fuel-prices, which sets out the components of the price of gasoline.

SCHEDULE A

1. *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927,
2. *R v Levkovic*, 2010 ONCA 830,
3. *MacKay v Manitoba*, [1989] 2 S.C.R. 357
4. *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110
5. *Hainsworth v Canada (Attorney General)*, 2011 ONSC 2642
6. *Alford v Canada (Attorney General)*, 2019 ONCA 657
7. *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45
8. *Canadian Civil Liberties Assn. v Canada (Attorney General)*, [1998] O.J. No. 2856 (ONCA)
9. *Canadian Civil Liberties Assn. v Canada (Attorney General)*, [1990] O.J. No. 1481 (ON HCJ)
10. *Landau v Ontario (Attorney General)*, 2013 ONSC 6152,
11. *Campisi v Ontario*, 2017 ONSC 2884
12. *Edmonton Journal v. Alberta (Attorney General),* [1989] 2 S.C.R. 1326
13. *Canadian Council of Churches v R*., [1992] 1 S.C.R. 236
14. *Ontario Restaurant Hotel & Motel Assn. v Toronto (City)*, [2005] OJ No. 4268 (ONCA)
15. *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)*, [2004] O.J. No. 190 (Div. Ct.)
16. *Slaight Communications Inc. v Davidson*, [1989] 1 SCR 1038
17. *National Bank of Canada v R.C.I.U*., [1984] 1 SCR 269
18. *Richard v Time Inc.*, 2012 SCC 8
19. *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100
20. *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154
21. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295
22. *R v Morgentaler*, [1993] 3 SCR 463

SCHEDULE B

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

- (*a*) freedom of conscience and religion;
- (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (*c*) freedom of peaceful assembly; and
- (*d*) freedom of association.

Court File No. CV-19-00626-685-0000

THE CORPORATION OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION	- and -	THE ATTORNEY GENERAL OF ONTARIO
Plaintiff (Moving Party)		Defendant (Responding Party)

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

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