Divisional Court File No. DC-22-128
Superior Court File No. CV-22-00000166-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

(DIVISIONAL COURT)

B E T W E E N:

BROOKE DIETRICH, JOHN DOE, JANE DOE and PERSONS UNKNOWN

Appellant
(Defendants)

- and –

40 DAYS FOR LIFE

Respondent
(Plaintiff)

FACTUM OF THE INTERVENOR, THE CANADIAN CIVIL LIBERTIES ASSOCIATION

October 6, 2022

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PART I - OVERVIEW

1. This case is about when and to what degree a court should restrict online expression, including protest. Given the importance of this issue, the Canadian Civil Liberties Association (the "CCLA") has been granted leave to intervene to address the appropriate scope of injunctions restraining online protest and other speech.

2. As set out in the parties' material, the respondent, 40 Days For Life ("**40 Days**") alleges that the appellant, Brooke Dietrich ("**Dietrich**"), was engaging in tortious activity by posting videos on TikTok.[1] Conversely, Dietrich emphasizes that she was engaging in expressive activities and, in particular, that she was engaging in a pro-choice counterprotest in response to 40 Days' anti-abortion activities.[2] This appeal stems from an injunction requiring Dietrich and persons unknown to remove the TikTok videos and restraining her and others from further speech.

3. The CCLA will propose an approach to motions to enjoin online expression, beginning from first principles that recognize the rights of individuals to protest, and that a plurality of voices enhances democratic discourse. As recently stated by the Supreme Court of Canada, "freedom of expression is a fundamental right and value; the ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society."[3]

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1 See Responding Appeal Factum of 40 Days for Life dated September 16, 2022 (the "**Respondent's Factum**"), para 110.

2 See Appeal Factum of Brooke Dietrich dated July 27, 2022 (the "**Appeal Factum**"), para 13.

3 *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 1, per Côté J.

4. While the speech in this case is online rather than more traditional forms of protest, there is no principled basis for distinguishing between online expression and in-person expression. The CCLA submits that online speech – especially democratic debate on matters of public importance – attracts the same protection as similar expressions made in other media.

5. Consequently, given the value placed on free expression, any restraint of expression should be approached in a fair, predictable, and clear way, to ensure that any limitation on speech is as narrowly tailored as possible. As set out in more detail herein, the CCLA proposes the following analysis to determine whether an injunction restricting online speech is truly justified and carefully crafted to minimize limits on freedom of expression.

(a) Is the activity complained of expressive?

(b) On what basis is the expression sought to be restrained?

(i) If it is alleged to be defamatory, apply the test for defamation;

(ii) If it is alleged to be otherwise tortious, apply the test for injunctive relief as informed by the underlying importance of protecting expression;

(c) How narrowly can any restraint be tailored?

6. The CCLA takes no position on the outcome of the appeal. However, the motion judge in this case did not approach the issue of whether to grant an injunction in a manner that recognizes the fundamental importance of freedom of expression and the need for a high threshold and narrowly tailored relief when restricting expressive activity. The CCLA submits that the decision to grant the injunction should be revisited with the appropriate legal framework in hand.

PART II - STATEMENT OF ISSUES, LAW & AUTHORITIES

7. The CCLA will address two issues in its written submissions:

(a) Is there a valid legal distinction between online speech and speech in other contexts?

(b) What is the proper legal framework for a motion seeking to restrain online speech?

1. The legal protections for free speech and protest apply to online speech

8. Canadian law provides broad, principled protection for freedom of speech and the right to engage in peaceful protest. Indeed, strong protections for freedom of expression are essential to meaningful and informed political debate and discussion. Traditional protests are often intended to cause disruption, and can take numerous forms to achieve that end.

9. The simplest form of expressive protest may be through the verbal or written dissemination of information about a subject. For example, distributing leaflets or shouting messages through a megaphone are well known and widely accepted forms of expression protected by both common law and (in the public context) the *Charter of Rights and Freedoms*.[4]

10. Another archetypal form of a disruptive protest is a consumer boycott.[5] The speech employed by those engaging in consumer boycotts contains strong and direct economic content – it invites consumers to participate in a debate on an issue by refusing to purchase the target of the

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[4] See, for example, *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 (CanLII), at paras 8-10 and 25; *R v. Guignard*, 2002 SCC 14; and *Ramsden v. Peterborough (City)*, 1993 2 SCR 1084

[5] See, for example, *Daishowa Inc. v. Friends of the Lubicon* (1998), 1998 CanLII 14828 (ON SC), 39 O.R. (3d) 620 (Ont. Ct. (Gen. Div.).

boycott's products. Despite the economic impact of consumer boycotts, the common law has not restrained consumer boycotts if the purpose and effect of the expression "is to persuade the listener to use his or her economic power to challenge a corporation's position on an important economic and public policy issue."[6]

11. Equally, there is strong protection for engaging in protest by picketing or otherwise physically expressing a view. "In the labour context it runs the gamut from workers walking peacefully back and forth on a sidewalk carrying placards and handing out leaflets to passers by, to rowdy crowds shaking fists, shouting slogans, and blocking the entrances of buildings. Beyond the traditional labour context, picketing extends to consumer boycotts and political demonstrations. A picket line may signal labour strife. But it may equally serve as a physical demonstration of individual or group dissatisfaction on an issue."[7] The right to protest by picketing is well established in Canadian jurisprudence.

12. There is no principled difference between the traditional forms of protest recognized at common law and online expressions which drive at the same expressive goals. From a legal perspective, posting statements or video recordings on a topic online serves the same democratic goals – and attracts the same protection – as standing outside with a megaphone. While there are some practical differences – online speech may reach a broader audience with a greater geographic spread – that should not fundamentally alter the legal approach to those statements.

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6 *Daishowa Inc. v. Friends of the Lubicon* (1998), 1998 CanLII 14828 (ON SC), 39 O.R. (3d) 620 (Ont. Ct. (Gen. Div.)), at para. 82

7 *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at para 30

13. In the context of this case, the content of the impugned videos involved quintessentially political messages, delivered in a manner that is akin to more traditional forms of protest. The underlying issue in the applicant's videos is access to abortions and abortion rights in Canada. Access to abortion has consistently engendered vigorous political debate by individuals on all sides of the issue. It is precisely the type of issue that generates widespread public discussion, and where expressive activity should be vigorously protected.

14. Equally, online statements encouraging others – either online or in more traditional contexts – to engage in activities such as boycotts or picketing are the type of speech which should be protected by the jurisprudence enshrining the right to protest. In this case, the appellant's videos encouraged people to register online for the respondent's prayer vigils and then not attend the planned vigils (the "**Vigil Disruption Counterprotest**") and to "check out" 40 Days For Life's online merchandise, but not complete the purchase transactions (the "**Merchandise Counterprotest**"). Those activities are not fundamentally different from consumer boycotts or picketing, and should be treated as such.

15. It is critical to extend protections from in-person expressive activities to their functional equivalent online, in order to allow all segments of society to continue to participate in the discourse around important issues. The way that people assemble in today's society has significantly changed as a result of new media of communication and the COVID-19 pandemic. Over the past few years, people have been forced to exist in an online environment and gather virtually. A natural corollary of the shift to interacting online is that much expressive activity and acts of political protest have also moved online, creating a need for clear protection of online activism. Protest activity today is rarely confined to action "in the streets" and is much more likely

to have an online component or even take place exclusively using online tools. New digital tools – from social media platforms to remote meeting technology – are allowing communities that have historically faced barriers to participating fully in public discourse to come together, organize, and make their voices heard.

16. The CCLA submits that the kind of expressive activity in which the appellant was engaged is a form of online protest which is generally deserving of the same protection as in-person protest. In light of the democratic importance and constitutional protection of freedom of expression, limits or restrictions on protest activity must be reasonable and narrowly tailored, as set out in more detail below.

17. Given the burgeoning area of digital activism and expressive activity in the virtual environment, the CCLA submits that this is an appropriate opportunity and case for the Divisional Court to provide guidance on the test(s) that ought to be applied when courts are asked to restrain online expressive content that is alleged to be tortious, defamatory, or both. In these submissions, the CCLA proposes a principled framework, which it asks that this Court adopt, to determine: (a) the scope and appropriateness of an interlocutory injunction in the context of online speech in a defamation action; and (b) the scope and appropriateness of an interlocutory injunction in the context of an online protest or counterprotest.

The CCLA's Proposed Framework

Step 1 - Is the Content or Activity Complained of An Expression?

18. In the digital environment, just like in the non-virtual environment, there is a continuum of expressive activity. Persons may protest or picket by establishing a website or a blog

on a topic of public interest, creating online petitions, disseminating information over email or social media, donating money or joining online communities; they may shout slogans through the use of hashtags, images or graphics on social media; or they may engage in a "physical" demonstration by assembling their avatars in virtual spaces, overwhelming a website or servers with a high volume of traffic thereby forcing it offline, creating software or applications to crowdsource information, funding, resources, or to criticize the status quo, registering for an event with no intention of attending, or engaging with a website's features to slow or impede their use. Whether the content or activity complained of falls within the ambit of expressive activity, and whether it deserves protection from interference or restraint, are two distinct questions which require distinct analytical processes

19. At this first step in the analysis, the question is whether the content or activity attempts to convey meaning.[8] If the content or activity conveys meaning and is therefore an expression, the analysis must start with the same proposition as for all other expressive activity: online expression is to be protected, unless its curtailment is justified.[9]

Step 2 - Is the Expressive Activity Independently Tortious or Criminal in Nature?

20. In any motion seeking to constrain online expression, the motion judge should consider each expressive activity independently. For each, the question must be: is there a legal basis to limit that expression?

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8 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 969.

9 *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, at paras 67 and 72

21. An injunction "is not a cause of action, in the sense of containing its own authorizing force."[10] An injunction is a remedy. Accordingly, there must be a justiciable substantive cause of action clearly articulated by the moving party before any relief can be ordered. Put another way, the burden should be on the moving party to identify what tort applies in respect of each impugned expression.

A.If the expression is allegedly defamatory, the motion judge should apply the test from Bagwalla

22. The law in respect of defamation is relatively settled: Canadian courts have long accepted that defamation injunctions are only to be granted in the clearest of cases. If the moving party claims a statement is defamatory, in order to grant an injunction, the motion judge must have evidence on which to conclude, on a balance of probabilities, that the expression is clearly defamatory and that there can be no valid defence to the claim for defamation, so that at trial, any reasonable trier of fact would have to grant judgment to the plaintiff on the merits.[11] If the expressive activity is alleged to be defamatory, the court ought to apply the test for injunctive relief that was set out by the Divisional Court in *Bagwalla v Ronin et al, and Ronin v Ronin et al*, namely:[12]

(a) the publication complained of must be clearly defamatory;

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[10] *R v Canadian Broadcasting Corp*, 2018 SCC 5, at para 25

[11] *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261 at paras. 2-3 (Ont. Div. Ct.), *per* Stark J.; *Beidas v. Pichler*, [2008] O.J. No. 2135 at paras. 14-16, per Murray J. (Div. Ct.); *Palen v. Dagenais*, 2012 SKQB 383 at paras. 17-19 (Sask. Q.B.), *per* Danyliuk J. ("the plaintiff must show that the case he can present at trial is virtually iron clad"); *Bonnard v. Perryman*, [1891] 2 Ch 269 at 284-285 (C.A.), *per* Lord Coleridge C.J.; *ZAM v. CFW*, [2013] EWHC 662 at para. 19 (Q.B.), *per* Tegundhat J.

[12] *Bagwalla v Ronin et al, and Ronin v Ronin et al*, 2017 ONSC 6693, at para 19

(b) if the defendant states an intention to justify or to rely on fair comment, the injunction must be refused unless it is clear that any such defence will inevitably fail; and

(c) the plaintiff must establish irreparable harm if the injunction is refused

(collectively, the "**Defamation Injunction Test**").

B.If the expression is alleged to be otherwise tortious, the motion judge should apply the RJR *test*

23. Even in cases where the alleged tort is not purely defamation, as is the case here, the reasoning of the Supreme Court in *Liberty Net* supports CCLA's position that a rigid application of the RJR Test (as defined below) is not appropriate. CCLA submits that any application of the RJR Test to cases involving expression should provide at least as much protection for free expression as would be provided by the Defamation Injunction Test.[13] In order to ensure that motion judges take the correct approach to motions seeking to restrain expression, the entire analysis should be informed by the critical value that free speech has in democratic society.

24. By way of brief background, the RJR test is set out by the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)*[14] and *R v Canadian Broadcasting Corp.*[15], namely:[16]

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13 *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626.

14 [1994] 1 S.C.R. 311.

15 *R v Canadian Broadcasting Corp.*, 2018 SCC 5, at para. 12

16 *R v Canadian Broadcasting Corp.*, 2018 SCC 5, at para. 12

(a) the applicant must demonstrate either:

(i) in the case of a prohibitive injunction (requiring a person to refrain from doing something), that there is a serious question to be tried in the sense that the application is neither frivolous nor vexatious,[17] or

(ii) in the case of a mandatory injunction (requiring a person to take a positive action), that there is a strong *prima facie* case;[18]

(b) the applicant must demonstrate that irreparable harm will result if the relief is not granted;[19] and

(c) the court must engage in an assessment of the balance of inconvenience to the parties, taking into account the public interest, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits,[20]

(collectively, the "**RJR Test**").

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17 *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, pp. 334-335

18 *R v Canadian Broadcasting Corp.*, 2018 SCC 5, at paras 15 and 16

19 Irreparable harm refers to the nature of the harm suffered, rather than its magnitude. It is harm that cannot be quantified or cannot be adequately remedied by an award of damages. Recognized examples of such irreparable harm include circumstances where the defendant's actions, if not enjoined, will result in the destruction of the plaintiff's business, a permanent loss of market share or an adverse impact upon the plaintiff's business reputation. See *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, pp. 334 and 348.

20 That is, if the applicant establishes irreparable harm if the responding party's conduct is not enjoined pending trial, the court must determine if the evidence establishes that the responding party would suffer even greater harm if the injunction is granted.

(i) The importance of protecting speech should inform the entire analysis

25. Of course, the overarching consideration of the RJR Test is the interests of justice, and the court must adopt a holistic approach, rather than treating the three elements of the test as watertight compartments. Accordingly, strength on one element of the test may outweigh weakness on another, and the motion seeking an injunction should be considered as a whole.[21]

26. When applying the *RJR* test in the context of an injunction seeking to restrain expressive activity, the overall importance of protecting expressive activity must be considered at every stage of the analysis. Any restraint on expression must be justified not only as it relates to the issue between the parties, but should be very sparingly granted (in only the rarest and clearest of cases) given the fundamental right it seeks to limit. As set out above, freedom of expression is a public value and should be protected wherever possible. In every case involving restraint on expressive activity, the social values served by free expression need to be considered.

(ii) Burden on the moving party

27. In the context of an injunction where the relief sought is both to remove existing expression from the online context, and also to restrain future online speech, then it is likely that the relief sought is both mandatory (insofar as the removal of posted information is a positive action) and prohibitive (in seeking to restrain future action).

28. In either case, given the importance of protecting expressive activity, the motion judge should apply a rigorous analysis to the tort(s) claimed; for each, the court should consider

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[21] *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134, at para. 29; *Eisen v. 2293398 Ontario Inc.*, 2021 ONCA 537, at para. 9; *Zafar v. Saiyid*, 2017 ONCA 919, at para. 18; *Hume v. 11534599 Canada Corp.*, 2021 ONCA 549, at paras. 11-13; *Farrell v. Kavanagh*, 2021 ONCA 213, at para. 9

each element of the tort and determine whether there is sufficient evidence on the injunction motion record to meet the standard. Where the moving party is seeking to remove an existing online expression, as the expression has already been published, the moving party should be able to adduce compelling evidence on each element of the tort(s) alleged. Before moving to the next step of the *RJR* analysis, the motion judge should consider each alleged tort individually, and assess whether there is a *prima facie* case.

29. In a case where the moving party is seeking to proactively restrain future expression, the motion judge should approach that relief with caution. It is only in the rarest of cases that it would be appropriate to pre-emptively restrain speech; while this may be a prohibitive injunction such that the *RJR* test is whether there is a serious issue to be tried, the reality is that any attempt to restrain future conduct will, by definition, be speculative in respect of the likelihood that the conduct would be engaged in, and the nature of the conduct itself. Restraint on future speech should not be ordered unless a court is satisfied that there is a serious likelihood that a defendant is going to post tortious expressions online; even in that case, any injunction should be narrowly tailored to capture only those expressions that are both likely to be posted and likely tortious.

C.If both defamation and other torts are alleged, both tests should be used

30. If the expressive activity is alleged to be wrongful on the basis that it is both defamatory and a nominate tort other than defamation, then the court ought to apply both the Defamation Injunction Test *and* the RJR Test. If an injunction is an appropriate remedy under either test, then the injunction ought to be granted and it is unnecessary for the court to engage in the analysis under the second test.

Step 3 - If an injunction is required, how narrowly can it be tailored?

31. If an injunction is an appropriate remedy, then the court must balance the right of freedom of expression with the legal right to protection from either defamatory publications or irreparable harm. The court ought to craft a limited and narrowly tailored injunction which preserves the freedom of expression and minimizes the limits on that right to the greatest extent possible.[22]

PART III - ORDER REQUESTED

32. The CCLA takes no position on the ultimate disposition of this appeal. The CCLA seeks no costs and requests that none be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of October, 2022.

Zohar R. Levy

Rachel Laurion

[22] See, for example, *Bagwalla v Ronin et al, and Ronin v Ronin et al*, 2017 ONSC 6693, at para 33 and *Beidas v. Pichler*, [2008] O.J. No. 2135, at paras. 14-16, per Murray J. and paras. 73-74, per Molloy J. (Div. Ct.)

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22
2. *Bracken v. Fort Erie (Town)*, 2017 ONCA 668 (CanLII)
3. *R v. Guignard, 2002 SCC 14*
4. *Ramsden v. Peterborough (City)*, 1993 2 SCR 1084
5. *Daishowa Inc. v. Friends of the Lubicon* (1998), 1998 CanLII 14828 (ON SC), 39 O.R. (3d) 620 (Ont. Ct. (Gen. Div.)
6. *RWDSU Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8
7. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927
8. *R v Canadian Broadcasting Corp*, 2018 SCC 5
9. *Canada Metal Co. Ltd. v. Canadian Broadcasting Corp.* (1975), 7 O.R. (2d) 261 (Ont. Div. Ct.),
10. *Beidas v. Pichler*, [2008] O.J. No. 2135 (Div. Ct.)
11. *Palen v. Dagenais*, 2012 SKQB 383 (Sask. Q.B.)
12. *Bonnard v. Perryman*, [1891] 2 Ch 269 (C.A.)
13. *ZAM v. CFW*, [2013] EWHC 662 (Q.B.)
14. *Bagwalla v Ronin et al, and Ronin v Ronin et al*, 2017 ONSC 6693
15. *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 SCR 626
16. *RJR MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311
17. *M & M Homes Inc. v. 2088556 Ontario Inc.*, 2020 ONCA 134
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19. *Zafar v. Saiyid*, 2017 ONCA 919
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