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COURT OF APPEAL
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Supreme Court File No. S161497
Supreme Court Registry: Vancouver

COURT OF APPEAL

BETWEEN:

VANCOUVER AQUARIUM MARINE SCIENCE CENTRE

RESPONDENT
(PLAINTIFF)

AND:

GARY CHARBONNEAU, EVOTION FILMS INC.
also known as EVOTION INC.

APPELLANTS
(DEFENDANTS)

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and
ANIMAL JUSTICE

INTERVENORS

FACTUM OF THE INTERVENOR BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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OPENING STATEMENT

Freedom of expression is a cherished social, political and legal value in Canada. As a constitutional right, freedom of expression protects the interests of both speakers and listeners.

Canadian law is wary of suppressing freedom of expression through the exercise of judicial discretion. For this reason, courts apply the *Dagenais/Mentuck* test – a proportionality analysis inspired by the *Oakes* test – to determine whether certain classes of discretionary orders that restrain expression, such as publication bans and confidentiality orders, should issue.

The *Dagenais/Mentuck* test is not currently part of the law governing interlocutory injunctions in civil proceedings in British Columbia. It should be. Specifically, the second leg of the *Dagenais/Mentuck* test, which requires the weighing of the salutary and deleterious effects of the order sought, should apply in the balance of convenience in cases where expressive interests are at issue and the granting of an injunction would limit freedom of expression.

There is a fourfold rationale for the proposed approach. First, incorporation of the second leg of the *Dagenais/Mentuck* test into the balance of convenience reflects the constitutional *gravitas* of an expression-limiting injunction. Second, incorporation of the test will meaningfully address Canadian socio-political values, which are relevant to the context in which equity operates. Third, the proposed approach is consistent with the law's traditional reluctance to affect the rights of third parties by injunction. Finally, it will provide a flexible and contextually sensitive deliberative framework to address situations where the expression that is the subject of the injunction application is not necessarily "pure" speech, that is, expression without an economic aspect or motivation, but is nonetheless protected by *Charter* values.

PART 1 – STATEMENT OF FACTS

1. On the application of the Vancouver Aquarium Marine Science Centre (the "Aquarium"), Watchuk J. enjoined the appellants and others from showing the documentary video, *Vancouver Aquarium Uncovered*, in a form that includes 15 segments that the Aquarium claims are subject to copyright or were used in breach of contract, or both.[1]

2. It appears that Court weighed freedom of expression interests lightly (at best) in deciding that the injunction should issue. The Court said:

> With regard to the balance of convenience, I have considered the able submissions of both parties. I have considered the relative risks of harm to the parties from granting or withholding the interlocutory relief sought. In order to achieve the necessary balance, the order of the court is that the defendants remove the 15 contested segments from the video. Those 15 segments of the video must not be published in any manner.[2]

3. The British Columbia Civil Liberties Association (the "BCCLA") was granted leave to intervene in this appeal to make submissions on how freedom of expression interests, including those of the public, should factor into the balance of convenience where a litigant seeks an expression-limiting interlocutory injunction.[3]

PART 2 – ISSUES ON APPEAL

4. How should freedom of expression factor into the balance of convenience in an application for an interlocutory injunction that will, if granted, limit expressive activity?

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[1] Order, Appeal Record at 46 – 57; Reasons for Judgment ("Reasons") at paras. 3 and 12, Appeal Record at 50 and 52.

[2] Reasons at para. 31, Appeal Record at 57.

[3] *Vancouver Aquarium Marine Science Centre v. Charbonneau* (12 October, 2016), CA43575 (C.A. Ch.) at paras. 25 to 27.

PART 3 – ARGUMENT

A. There is a need to refine the law of interlocutory injunctions in B.C.

5. A judge hearing an interlocutory injunction application is asked to decide whether an extraordinary equitable remedy should issue before a matter is decided on its merits. The usual test, as stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, directs the court to consider: (a) whether there is a serious question to be tried; (b) whether the applicant will suffer irreparable harm if the injunction does not issue; and (c) the balance of convenience, normally stated as which of the parties would suffer greater harm from the granting or refusal of the injunction.[4]

6. Even in a private dispute that does not directly implicate the *Canadian Charter of Rights and Freedoms*,[5] judicial discretion must be exercised in accordance with *Charter* principles. They are fundamental elements of the Canadian legal order.[6]

7. Freedom of expression is a *Charter* principle. Suppression of free expression "should not be lightly countenanced".[7] Accordingly, this Court has said that the potential for harm to freedom of expression *must* be taken into account in the balance of

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[4] *RJR-MacDonald*, [1994] 1 S.C.R. 311 at 334, 342 and 348. As Watchuk J. noted, the distinctions between the three-part test set out in *RJR-MacDonald* and the two-part test set out in and *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) are "likely without practical effect"; Reasons at para. 16, Appeal Record at 53.

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

[6] *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 ("*Dagenais*") at 875; *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 ("*Pepsi-Cola*") at paras. 18 and 20; *Vancouver Sun (Re)*, 2004 SCC 43 at para. 31.

[7] *Pepsi-Cola*, note 6, at para. 69.

convenience, if an interlocutory injunction would limit expressive activity.[8] However, the Order on appeal shows that it is all too easy for protection of freedom of expression to be overshadowed in the balance of convenience.[9]

8. For this reason, the BCCLA urges the Court to "delineate and refine" injunction law in British Columbia to clarify *how* freedom of expression should factor into the balance of convenience, if an injunction threatens to restrain expressive activity.[10] The BCCLA proposes that the Court refine the balance of convenience by adopting the second leg of the *Dagenais/Mentuck* test for publication bans.[11] That is, in determining whether an interlocutory injunction that would restrain expressive activity should issue, the court should analyse whether the salutary effects of the injunction would outweigh its deleterious effects on the freedom of expression of the "speakers" and "listeners" who will be affected by the order.

B. Freedom of expression is strongly protected by Canadian law:

9. The *Charter* right to freedom of expression protects activities that attempt to convey meaning, and that are not otherwise excluded from legal protection because the method or location of the expressive activity conflicts with the values freedom of expression protects.[12] These values are self-fulfillment, participation in social and political decision-making and the communal exchange of ideas.[13] Clearly, whether the court should suppress publication of the words, sounds and images used in a

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[8] *Provincial Rental Housing Corp. v. Hall*, 2005 BCCA 36 ("*Provincial Rental Housing Corporation*") at paras. 57 – 58.

[9] *RJR-MacDonald*, note 4, at p. 342.

[10] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 9.

[11] *Dagenais*, note 6, at 878; *R. v. Mentuck*, 2001 SCC 76 at para. 32.

[12] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 ("*CBC*") at paras. 33 – 38.

[13] *Pepsi-Cola*, note 6, at para. 32; see also *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") at para. 75.

documentary video to express views on the ethics of keeping marine animals in captivity at the Aquarium engages *Charter* values.

10. Canadians expect their freedom to express ideas to be jealously and zealously guarded. Enjoyment of freedom of expression is "central to our identity as individuals and to our collective well-being as a society. Doubt about justification [of its infringement] should be resolved in its favour".[14]

C. Adopting the *Dagenais/Mentuck* test acknowledges the constitutional significance of an interlocutory injunction that restrains free expression

11. The risk that freedom of expression will not receive adequate attention and protection in the balance of convenience may be attributable to the fact that "numerous" and "varied" factors jostle for the court's attention at this stage of the injunction test. The contending factors may include factors particular to the parties or the interests of third parties, as well as factors affecting the public interest.[15]

12. However, it is essential for freedom of expression to have a more prominent place in the balance of convenience, where expressive activity may be enjoined. The courts' obligation to comply with *Charter* principles in discretionary decision-making is no less than the duty of the executive and the legislatures to comply with the *Charter*.[16] Further, the Supreme Court has made it clear that court-imposed limitations on constitutionally protected forms of expression must be exceptional. *Pepsi-Cola* held,[17]

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[14] *Little Sisters Art and Book Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 144.

[15] *RJR-MacDonald*, note 14, at 342 – 344. Notably, the American test for an interlocutory injunction gives separate consideration to the balance of convenience and whether the injunction is in the public interest: *Winter v. Natural Resources Defense Council. Inc.*, 555 U.S. 7 (2008).

[16] *Sierra Club*, note 13, at para. 48; *Vancouver Sun (Re)*, note 6, at para. 31.

[17] *Pepsi-Cola*, note 6, at para. 37; see also para. 67.

> The starting point must be freedom of expression. Limitations are permitted, but only to the extent that this is shown to be reasonable and demonstrably necessary in a free and democratic society.

13. The *Dagenais/Mentuck* test is an adaptable framework to balance freedom of expression and other important rights and interests in a variety of circumstances.[18] It has been held to apply to "*all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings".[19]

14. Adopting the second leg of the *Dagenais/Mentuck* test into the balance of convenience is a natural extension of the test into the law of interlocutory injunctions. By incorporating "the essence of s. 1 of the *Charter* and the *Oakes* test" into the balance of convenience,[20] the *Dagenais/Mentuck* test would set a high bar for an order that would impinge on freedom of expression, and ensure that this *Charter* value is not compromised, except for compelling reason and on a principled basis.

D. Adopting a proportionality test in the balance of convenience appropriately reflects Canadian social values, which are relevant to equity's operation

15. An injunction, as an equitable remedy, must be attentive to the social context in which the law operates. As Deschamps J. recognised in *Pro Swing Inc. v. Elta Golf Inc.*, "The application of equitable principles is largely dependent on the social fabric."[21]

16. It is difficult to overstate the extent to which respect for freedom of expression is woven into the Canadian social fabric. Three decades ago, McIntyre J. observed that freedom of expression is "one of the fundamental concepts that has formed the basis for

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[18] *Vancouver Sun (Re)*, note 6, at para. 28.

[19] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at para. 7; emphasis added; see also *Toronto Star Newspapers Ltd. v. Canada*, 2010 SCC 21 ("*Toronto Star* 2010") at para. 18.

[20] *R. v. Mentuck*, note 11, at para. 27; *Toronto Star* 2010, note 19, at para. 18.

[21] 2006 SCC 52 at para. 22.

the historical development of the political, social and educational institutions of western society".[22] Canadian jurisprudence has continued to affirm that freedom of expression is "the foundation of a democratic society", and a central value of contemporary Canadian society. [23] Freedom of expression is repeatedly described as a "fundamental" Canadian value.[24]

17. Canadians expect speakers to have the freedom to express themselves in the way they find meaningful on matters of public concern. They also expect that, as listeners, they will have exposure to diverse forms of expression. Incorporating the second leg of the *Dagenais/Mentuck* test into the balance of convenience respects these expectations. It would signal that equitable remedies will be granted in a way that is consistent with *Charter* values.

E. The *Dagenais/Mentuck* test is consistent with the law's traditional reluctance to affect the rights of third parties by injunction

18. It is a venerable tenet of Canadian law that courts will be reluctant to adversely affect the rights of third parties by injunction: "Where the injunction sought will injuriously affect the rights of a person or body not before the court it will not ordinarily, and without special circumstances, be granted".[25]

19. This principle resonates strongly where freedom of expression is at stake in an interlocutory injunction application. Freedom of expression protects not only the speaker of a message, but also the recipient(s).[26] This "is not a Canadian

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[22] *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 at 583.

[23] *Pepsi-Cola*, note 6, at paras. 32 and 69.

[24] *CBC*, note 12, at para. 2.

[25] *Matthew v. Guardian Assurance Co.* (1918), 58 SCR 47 at 61.

[26] *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 ("*Ford*") at 767; *Harper v. Canada*, 2004 SCC 33 at paras. 17 – 18, per McLachlin C.J.C., dissenting in part, but not on this point.

idiosyncrasy", as McLachlin C.J.C. pointed out in *Harper v. Canada.* The recipient's right to receive information is enshrined at international law, including in instruments ratified by Canada.[27]

20. In *Dagenais,* Lamer C.J.C. recognised that viewers' and listeners' freedom of expression is compromised if a topical video production is suppressed by court order. The Chief Justice acknowledged that the order in that case enjoining the broadcast of *The Boys of St. Vincent* limited "the film director's interest in expressing himself; the CBC's interest in broadcasting the film; the *public's interest* in viewing the film; and *society's interest* in having the important issue of child abuse presented to the public".[28]

21. Incorporating the *Dagenais/Mentuck* test into the balance of convenience will serve as a helpful reminder to courts and litigants of the importance of the constitutional interests of the *recipients* of expression – such as the viewers of *Vancouver Aquarium Uncovered* – who are unlikely to be represented in an injunction application. Despite their probable lack of representation in court, these interests are no less pressing than those of the speaker and "must not be taken lightly".[29]

22. Absent a legal mechanism, like the *Dagenais/Mentuck* test, to underline the significance of the interests of viewers and listeners, there is a real risk that these interests will not receive sufficient consideration. Indeed, the Reasons in the case on appeal suggest that the freedom of expression interests of viewers of the *Vancouver Aquarium Uncovered* did not receive *any* attention in the court's analysis.

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[27] *Harper v. Canada*, note 27, at paras. 17 – 18.

[28] *Dagenais*, note 6, at 880; emphasis added.

[29] *R. v. Mentuck*, note 11, at para. 38.

F. The *Dagenais/Mentuck* proportionality test is flexible and contextually sensitive to economically mixed forms of expression

23. A further benefit of adopting the *Dagenais/Mentuck* test into the balance of convenience is that it will provide a useful means to assess the constitutional appropriateness of an injunction where the expressive activity in question is not "pure" speech, *i.e.* a form of expression that is "unmixed with some other commercial purpose of activity" or where the speaker "has no tangible or measurable interest other than the expression itself".[30] The common law suggests that, as a category, "pure" speech should not be enjoined except in the "rarest and clearest of cases".[31] To date, similar protection has not been extended to mixed forms of expression.

24. The parties in this case have spilled much ink, and joined issue, on whether the *Vancouver Aquarium Uncovered* leans more towards the side of commercial speech or "pure" speech.[32] The chambers judge found the issue was a matter for trial.[33]

25. The BCCLA submits that the law's main focus should be elsewhere. Whether a form of expression is "pure" or "commercial" in nature is a distraction from the court's ultimate concern in the case at bar: whether it is justifiable in a free and democratic society to enjoin a video on a matter of public interest notwithstanding that it may raise a potentially triable contract or copyright issue. There are two reasons why the court should stay focused on this ultimate issue.

26. First, expression motivated by pecuniary interest or expression with a commercial element is not excluded from *Charter* protection.[34] There is no reason, in principle, why

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[30] *Liberty Net*, [1998] 1 S.C.R. 626 at para. 47; emphasis in original on second quotation omitted.

[31] *Liberty Net*, note 30, at para. 49.

[32] See: Appellants' reply factum at para. 15; Respondent's factum at paras. 55(2) and 93; and *Liberty Net*, note 30, at paras. 47 – 49.

[33] Reasons at paras. 21 to 24, Appeal Record at 55 – 56.

a commercial "social message" film should be more or less open to injunction than a home-made movie broadcast for free on YouTube.

27. Second, "commercial" is a mutable adjective that does not have "any particular meaning or significance in Canadian constitutional law".[35] As the case on appeal shows, inquiring into whether expression is "commercial", for the purposes of an injunction application, tends to lead down a rabbit hole of inquiries about whether the speaker has a *sufficient* financial interest in the work to provide grounds for an injunction. Was the video financed by debt, free labour, or funds provided by others? Did it generate any money when shown? Did the film maker profit? These inquiries do not assist the court to decide whether an injunction preventing broadcast of the film maker's creation is consistent with *Charter* principles.

28. *Rocket* stressed the benefits of a "sensitive, case-oriented approach" to the s. 1 inquiry in "commercial" freedom of expression cases.[36] The same is true on an application for an interlocutory injunction. It is appropriate for the court to inquire into and, where possible on proper principles, protect the expression that inheres in a film maker's selection of particular images, sounds or words. These can convey meaning. For example, in *CBC*, the Court accepted that "the message conveyed by broadcasting the official audio recordings" of court hearings "is not the same as one conveyed by another method of expression" such as the publication of written reports or transcriptions of the hearings, or the broadcast of oral reports by journalists.[37]

29. A documentary film maker may deliberately use an image created by the subject of his or her film for editorial purposes, such as casting the image in a different light

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[34] *Ford*, note 26, 766 – 767; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 ("*Rocket*") at p. 241.

[35] *Ford*, note 26, at 755.

[36] *Rocket*, note 34, at p. 246.

[37] *CBC*, note 12, at para. 52.

from the originally intended presentation. On the other hand, a video may nakedly counterfeit a protected image. The former may well warrant protection from injunction, while the latter may not.

30. The proportionality test in the second leg of the *Dagenais/Mentuck* test provides a principled framework to inquire into the qualities, motivations and effects of an expressive work and to weigh whether the values behind freedom of expression would be unjustifiably harmed by enjoining publication, notwithstanding the presence of a triable legal issue. In other words, the test helpfully shows courts faced with interlocutory injunction applications *how* to appropriately balance interests when constitutionally-protected freedom of expression is among the interests in play. It should be adopted into British Columbia law governing interlocutory injunctions.

PART 4 – NATURE OF THE ORDER SOUGHT

31. The BCCLA requests that it be permitted to make oral submissions, based on this factum, at the hearing of the appeal. The BCCLA does not seek costs against any party and requests that no costs be ordered against it, with respect to this intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of November, 2016

"M. Pongracic-Speier"

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LIST OF AUTHORITIES

Case Law	Para(s)
British Columbia (Attorney General) v. Wale (1986), 9 B.C.L.R. (2d) 333 (C.A.)	5
Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626	23, 24
Canadian Broadcasting Corp. v. Canada (Attorney General), 2011 SCC 2	9, 16, 28
Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835	6, 8, 20
Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712	19, 26, 27
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Housen v. Nikolaisen, 2002 SCC 33	8
Little Sisters Art and Book Emporium v. Canada (Minister of Justice), 2000 SCC 69	10
Matthew v. Guardian Assurance Co. (1918), 58 SCR 47	18
Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52	15
Provincial Rental Housing Corp. v. Hall, 2005 BCCA 36	7
R. v. Mentuck, 2001 SCC 76	8, 14, 21
RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311	5, 7, 11
Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232	26, 28
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Constitutional and Statutory Provisions	**Para(s)**
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Appendix A

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

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

   . . .

   (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;