



CASE COMMENT

***Vancouver (City) v. Zhang*, 2009 BCSC 84 (CanLII)**

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On January 29, 2009, the BC Supreme Court (“BCSC”) released its reasons in *Vancouver (City) v. Zhang*. This decision involves the City of Vancouver (the “City”) and its request for an injunction requiring the Falun Gong to remove certain permanent structures (namely, a hut and a billboard) that had been erected on the City’s street in front of the Chinese Consulate in the 3300 Block of Granville Street in contravention of section 71 of the City’s Street and Traffic By-Law (the “Bylaw”).

At trial, the BCSC considered whether there were exceptional circumstances that disentitled the City to an injunction; whether section 71 of the Bylaw was constitutionally valid; and whether the City used its powers under the Bylaw for an improper purpose.

With respect to the City’s request for injunctive relief, the BCSC concluded that the public had a direct and substantial interest in the enforcement of the Bylaw and that open defiance of the Bylaw constituted irreparable harm to the public interest. While the BCSC had the discretion to refuse an injunction to enforce public rights in exceptional circumstances, the BCSC did not find that such “exceptional circumstances” existed in this case.

The respondents then argued that they had a right to maintain the structures in contravention of the Bylaw because the structures enjoyed the protection of section 2(b) of the *Canadian Charter of Rights and Freedoms* (the “Charter”). Briefly, the BCSC concluded that the structures did have expressive content bringing them with the section 2(b) protection because the protest vigil, including the structures, was an integral component of the expressive content of the Falun Gong’s message. The vigil had been in place, in one form or another, for seven years and as such, manifested “the protestors’ commitment to the cause” and hence, the message of the Falun Gong. However, the respondents ultimately failed on this ground because the City was able to successfully argue that even if the structures had expressive content, their form contravened the function of a public street, thus removing them from the section 2(b) protection.

In reaching its decision on this issue, the BCSC relied on the Supreme Court of Canada’s reasoning in *Montreal (City) and Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, where the SCC stated (at pages 156-157) that section 2(b) of the *Charter* does not protect “expression” itself, but freedom of expression and that one’s freedom of expression is intrinsically limited by the function of a public place.

Following the SCC's reasoning in the *Montreal* case, the BCSC, in this decision, concluded that although the City's streets are areas of public concourse, where a variety of expressions are accepted, the particular expression at issue, namely the erection of permanent structures, was incompatible with the fundamental purpose of the street. At paragraphs 52 and 53 the BCSC stated:

"In my view, s. 2(b) protects the ability of the respondents to convey their message on the public street outside the Chinese Consulate using methods of expression that are compatible with the function of the street. Some of those methods may include the carrying of signs and placards, and peaceful meditation. The construction of permanent structures at that location to facilitate their expressive activity, however, falls outside the protected sphere of s. 2(b).

I conclude that the method of the respondents' expression, insofar as it involves the structures, is excluded from the protection of section 2(b). I emphasize that I am referring here only to the billboard and the hut; the other methods of expression employed by the respondents in their protest vigil are not excluded from the ambit of s. 2(b)."

Thus, the BCSC concluded that the Bylaw did not infringe the *Charter* because it did not prohibit the respondents from expressing themselves by a means that did not involve the structures.

The BCSC went on to note that if it was wrong in its conclusion, then the Bylaw was reasonably justified pursuant to section 1 of the *Charter*.

With respect to the final issue, the respondents argued the City used its power under the Bylaw for an improper purpose, namely targeting the Falun Gong to appease the Chinese government because the Falun Gong's message was an irritant to trade relations and tourism. After a review of the facts, the BCSC concluded that there was no evidence to suggest that the City's conduct had either been inconsistent with its usual practice or motivated by an improper purpose.

While this decision is under appeal, it serves to highlight an important principle for local governments, namely that individuals will only be free to communicate in a public place if the form of expression he or she uses is compatible with the principal function or intended purpose of such place. Further, the section 2(b) *Charter* protection may not be extended to all publicly owned property, particularly where the use of public property is essentially private.