Subject: City of Hamilton Procedural Bylaw and Charter Weighting
From: Joey Coleman
Date: 2018-06-21 11:08 AM
To: "Auty, Nicole" <nicole.auty@hamilton.ca>
CC: "Murray, Chris" <chris.murray@hamilton.ca>, "Pilon, Janet" <Janet.Pilon@hamilton.ca>

Ms. Auty,

Reviewing the proposed Procedural Bylaw there are numerous instances where the City of Hamilton proposes to restrict expressive activities.

As such, I'm requesting the minutes of staff decision making in regards to changes and non-changes to the Procedural Bylaw as it relates to the required weighting of Section 2(b) rights of the Charter against the various restrictions proposed.

Can you please produce these minutes prior to 12noon on Monday to allow for myself and other members of the public to review them prior to submitting comment to the Governance Committee in regards to the staff recommendations.

Please note that as the Procedure Bylaw does propose to restrict expression engaged by Section 2(b) of the Charter, I may exercise my right to potentially challenge this By-Law at the Divisional Court.

Thank you,

Joey Coleman
Independent Journalist
Publisher, The Public Record
www.thepublicrecord.ca
@JoeyColeman

Subject: Re: Delegation Request - Governance Committee - June 26 2018
From: "Joey Coleman, The Public Record"
Date: 2018-06-25 12:10 PM
To: "Auty, Nicole" <Nicole.Auty@hamilton.ca>, Joey Coleman , "Pilon, Janet" <Janet.Pilon@hamilton.ca>
CC: "Murray, Chris" <Chris.Murray@hamilton.ca>, "Zegarac, Mike" <Mike.Zegarac@hamilton.ca>

The fact that City staff are not releasing why they believe the proposed Charter infringements meet the Oakes Test means that I will have to make a longer submission to the Committee than what would be needed if I knew why the City Manager's Office believes the proposed infringements are necessary.

I believe this is an unreasonable decision, and am left wondering what, if any, decision making process was undertaken by the government officials involved in these recommendations. The City Manager's Office could be using a proverbial Magic 8-Ball for all that is known of the decision making.

Joey Coleman
Resident, City of Hamilton

On 2018-06-25 12:01 PM, Auty, Nicole wrote:

> Mr. Coleman,
>
> I understand you have made a delegation request to attend and make submissions to the Governance sub-committee. Any concerns you have regarding the by-law or provisions therein can be raised at that time. Staff will be present at the Governance Review sub-committee meeting and can provide the committee members with any information in response to any concerns that that committee may request.
>
> You may request any documents under FOI, however, there may be exemptions that apply to the release of any documents.
>
> Nicole Auty
> City Solicitor
> Legal Services, City of Hamilton
> (905) 546-2424 Ext.4636
>
> MOVE NOTIFICATION: Effective Monday, July 9, 2018, Legal and Risk Management Services will be located at 50 Main St. East, Hamilton, ON L8N 1E9.
>
> The contents of this message are privileged and confidential, intended only for the recipients named above, and are subject to solicitor and client privilege. This message may not be copied, reproduced or used in any manner without the express written permission of the sender. If you have received this e-mail and are not the intended recipient, please delete it and call 905 546 4520, collect if calling long distance. Thank you.
>
> -----Original Message-----
> From: Joey Coleman
> Sent: June-22-18 11:50 AM
> To: Pilon, Janet
> Cc: Murray, Chris; Auty, Nicole

Subject: Delegation Request - Governance Committee - June 26 2018

Ms. Pilon,

I formally request to delegate to the Committee during Tuesday's meeting in regards to the proposed Charter infringements contained within the Procedural Bylaw.

I will take the time necessary to explain why provisions of the Bylaw will not withstand the Oakes Test in a Divisional Court, and why the Bylaw as proposed by staff is unreasonable and cannot stand.

I've requested the minutes of staff decision making, as staff are required to conduct a weighting test whenever they propose to restrict Section 2(b) Charter Rights. I will be using these minutes as part of my delegation.

Thank you,

Joey Coleman
Resident

COURT OF APPEAL FOR ONTARIO

CITATION: Bracken v. Fort Erie (Town), 2017 ONCA 668

DATE: 20170825

Feldman, Lauwers and Miller JJ.A.

BETWEEN

Fredrick Bracken, Applicant (Appellant)

and

The Town of Fort Erie, Respondent (Respondent)

Fredrick Bracken, acting in person

Christine Carter and Michael Krygier-Baum, for the respondent

Heard: November 17, 2016

On appeal from the judgment of Justice T. Maddalena of the Superior Court of Justice, dated February 12, 2016, with reasons reported at 2016 ONSC 1122 (CanLII).

B.W. Miller J.A.:

Overview

[1] The appellant, Mr. Bracken, describes himself as a citizen journalist. When he disagrees with government decisions, he states his opinions, demands answers, and makes use of traditional means of protest, such as marching in the town square. He also video records his protests and interactions, sometimes aggressively questioning people at a proximity they find uncomfortable. He can be confrontational, loud, agitated, and excitable. He is a large man and some people find him intimidating.

[2] The respondent, the Town of Fort Erie, is like all employers, required to take steps to protect the safety of its employees. It has a Workplace Violence Prevention Policy, and a Workplace Violence Committee and Officer. When Mr. Bracken protested outside the Town Hall on June 16, 2014, an employee inside Town Hall who had never seen a protest before was alarmed. She placed the Town Hall under lockdown, and advised the interim Chief Administrative Officer of her fears for her safety and the safety of others.

[3] The CAO gave instructions to call the police, issue a trespass notice, and direct Mr. Bracken to leave. The police attended and directed Mr. Bracken to leave. He refused. He was arrested, handcuffed, and held in the back of a police cruiser for 15 minutes. He was then issued a trespass notice banning him from all Town property for one year, as well as given a provincial offences ticket for failing to leave. He tore up the trespass notice and left the premises without further incident.

[4] As I explain below, the Town's response to Mr. Bracken's protest, in expelling him from the premises and issuing the trespass notice, was a violation of his rights under the *Canadian Charter of Rights and Freedoms*. I would quash the trespass notice.

[5] In what follows, I will set out the events of June 16, 2014, which must be placed in the context of an on-going dispute between Mr. Bracken and the Town of Fort Erie, particularly with its former interim CAO, Richard Brady. I will then address the errors in the reasons of the application judge, which led her to conclude, mistakenly, that Mr. Bracken's acts of protest were not protected by s. 2(b) of the *Charter*. This will require an analysis of both s. 2(b)

and s. 1 of the *Charter*. I will not address Mr. Bracken's claim under s. 7 of the *Charter*, because it is not necessary for the resolution of this appeal.

Background to the protest

[6] Mr. Bracken was angered by the Town's decision to introduce a by-law permitting a medical marijuana facility to be built across the street from his home. The by-law was on the agenda for a Council meeting on June 16, 2014. He believed that he had been misled by Mr. Brady, when the latter had been interim CAO, about the content of the proposed by-law. Mr. Bracken had attended previous Town Council meetings and had made a video recording on at least one occasion. He had also attended at the front desk of Town Hall some weeks prior to June 16, pounded his fist on the counter, and angrily demanded to meet with Mr. Brady. He had a video recorder with him. His aggressive behaviour was frightening to the Town employee working at the counter on that day. Mr. Brady came, reprimanded Mr. Bracken for his aggressive behaviour towards the staff member, and then proceeded to a closed door meeting with him about the marijuana facility and the proposed by-law. No further action was taken against Mr. Bracken on that day.

[7] Subsequently, several of the employees working at Town Hall discussed Mr. Bracken's outburst among themselves, and watched some of Mr. Bracken's videos that he had uploaded to Youtube. The videos themselves were not in the record before the Court, and the only description was that they were video recordings made by Mr. Bracken as he ran up to people and questioned them. Although the evidence from some employees is that watching these videos was a principal source of their concern about Mr. Bracken, there is nothing in the record to explain why this was the case, other than Mr. Brady's complaint that Mr. Bracken filmed too close to people's faces.

2. The protest at Town Hall – June 16, 2014

[8] On June 16, 2014, Mr. Bracken attended at Town Hall to protest the scheduled vote on the by-law permitting the marijuana facility to operate across the road from his home. The meeting was scheduled to begin at 6 p.m. He arrived around 5 p.m., entered the unlocked Council chamber and placed a note on each councillor's desk, as well as the media desk. The notes expressed his objection to Council's expected decision regarding the marijuana facility:

Congratulations on being the ONLY COUNCIL AND STAFF IN CANADA to go under the 70m setback recommended by Health Canada and the provincial D-6 guidelines. You crooks must be proud[.]

[9] He then left the Council chamber and set up his protest outside. On his evidence, he wanted to ensure that his megaphone would not be audible inside the Council chamber. He did not want to disrupt the meeting. To check the volume of the megaphone, he turned on its siren, set it on the ground outside, and ran back into the empty Council chamber. He shut the doors behind him and listened for the sound of the siren. When he was content that it could not be heard, he ran back outside through the Town Hall to turn it off again. He moved quickly, he explained, because he was concerned that someone from the nearby skateboard park would steal the megaphone while he was gone.

[10] He began his protest, shouting "kill the bill" while walking from the parking lot to the front doors of the Town Hall, where his presence activated the motion sensor that opened the doors. He shouted other things, including calling Mr. Brady a liar and a communist, and demanding that Mr. Brady be fired.

[11] Although Mr. Bracken did not encounter anyone either time that he ran in and out of the Council chamber, he was observed by Victoria Schultz, the Town employee who had originally felt threatened by Mr. Bracken's aggressive behaviour at the counter some weeks earlier. And his siren was also audible to some other employees inside Town Hall, particularly when the automatic doors opened. Signe Hansen, the Manager of Parks and Open Space Development, heard the siren from within her office located at the rear of the second floor of the building. She came out to investigate, and found some of her co-workers gathered on the second floor balcony, watching Mr. Bracken's protest below. She watched "from a safe distance" as Mr. Bracken walked back and forth and shouted into his megaphone. Several of the staff members with her on the balcony "expressed fear for their safety". She deposed that she also

became concerned that Mr. Bracken's "erratic behaviour" would intimidate persons coming to the Council meeting, which was scheduled to begin an hour later.

[12] Ms. Hansen moved downstairs to alert the current interim CAO, Tom Kuchyt. She was informed that he was in a closed meeting with the mayor, the councillors, and all of the senior staff (including Mr. Brady). They had not heard Mr. Bracken and were unaware of the commotion. Ms. Hansen was sufficiently alarmed to interrupt the meeting, which she and Mr. Kuchyt both stressed was an unprecedented act, in order to get directions. She appeared to Mr. Kuchyt to be flustered and upset, and advised him that Mr. Bracken was present and pacing outside the front entrance with a megaphone, that he had run into the building towards Council chambers, that he appeared agitated, and that the staff were fearful for their safety.

[13] As interim CAO, Mr. Kuchyt is responsible for the administration of Town property. He also has duties under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, particularly with respect to the obligation to maintain a workplace free of violence and harassment. On the basis of the information he received from Ms. Hansen, Mr. Kuchyt consulted with Mr. Brady and they determined that they "had had enough of [Mr. Bracken's] intimidating behaviour". Mr. Kuchyt directed Beverley Bradnam, his Executive Assistant, to prepare a trespass notice and to call the police. Once the notice was ready, Mr. Brady was to go outside and tell Mr. Bracken to leave the premises. If Mr. Bracken refused to leave, Mr. Brady was to hand him the trespass notice.

[14] Mr. Brady then watched Mr. Bracken for a few minutes from inside the Town Hall. No one from the Town confronted him. A police officer arrived and advised Mr. Bracken that a trespass notice had been issued by the Town, and directed Mr. Bracken to leave the premises. Mr. Bracken refused and was arrested and placed in handcuffs. He was then placed in the back of a police cruiser and held for 15 minutes. After Mr. Bracken had been arrested, Mr. Brady went outside, gave the police officer the trespass notice and a covering letter to give to Mr. Bracken. After Mr. Bracken was released, the police officer provided him with the trespass notice and letter, which he tore up, as well as the provincial offences ticket.

[15] The letter stated "this extraordinary action has been taken as a result of your persistent and escalating confrontational behaviour with Town staff." The trespass notice provided that Mr. Bracken was not to enter three Town properties for a period of one year: Town Hall, the Municipal Campus, and the Public Works Yard. On cross-examination, Mr. Kuchyt explained that these three locations were chosen because they were all the Town properties where Town employees worked.

[16] Exceptions were made in the trespass notice for Mr. Bracken to make an appointment in advance with the CAO to attend at Town Hall on Town business. He was also permitted to use the drop box in the public parking area to pay his property taxes.

[17] The provincial offences ticket was later withdrawn. Mr. Bracken brought this application challenging the constitutionality of the trespass notice under s. 2(b) and s. 7 of the *Charter*.

The reasons of the application judge

[18] The application judge dismissed Mr. Bracken's application on the basis that he "crossed the line of peaceful assembly and protest", was engaged in acts of violence, and that his expression therefore "cannot be protected under section 2(b) of the *Charter*.": at para. 98. She rejected Mr. Bracken's argument that he was protesting peacefully: "Given the overwhelming evidence to the contrary, which I accept, I'm not persuaded that he was, under the circumstances of that day, protesting peacefully. On the contrary, I accept that his language was shouting, incomprehensible, and his behaviour was erratic and intimidating.": at para. 95. She concluded that "this was a legitimate use of a trespass notice to protect public and staff, so there has been no 2(b) violation of the *Charter of Rights and Freedoms*.": at para. 101.

[19] Because she concluded that Mr. Bracken had no right under s. 2(b) to protest in the manner that he did, the application judge found that his rights had not been limited by government action, and it was therefore not necessary to

proceed to an analysis under s. 1 to determine whether any limits placed on his rights could be justified. She also determined that the absence of a s. 2(b) infringement made it unnecessary to consider Mr. Bracken's further claim under s. 7 of the *Charter*.

[20] The application judge dismissed the application.

Analysis

[21] The application judge made an error of law in concluding that Mr. Bracken's protest did not come within the ambit of s. 2(b) of the *Charter*. Consequently, she did not conduct the subsequent analysis to determine whether the expulsion and trespass notice limited Mr. Bracken's s. 2(b) rights, or whether such limitation was nevertheless justified under s. 1 of the *Charter*. She further erred in concluding that her finding on the s. 2(b) claim was also dispositive of Mr. Bracken's s. 7 claim. Additionally, there were palpable and overriding factual errors concerning Mr. Bracken's conduct on June 16, 2014.

[22] I will set out below the principles of s. 2(b) jurisprudence, before conducting the s. 2(b) and s. 1 analyses that ought to have been performed. I begin by addressing some of the procedural irregularities of this application.

The Procedural Irregularities

[23] First, the application was moot at the time it was heard, as the trespass notice had already expired. The application judge exercised her discretion to hear it, deciding that the issue was of some importance, particularly since the conflict was likely to recur given the relationship between the parties. I agree.

[24] Second, the form in which the application proceeded raises some difficulties. Mr. Bracken, who has been self-represented throughout, applied for a declaration that his *Charter* rights had been infringed. There was, however, a preliminary question that was never addressed: whether the Town's expulsion of Mr. Bracken from the premises and the issuance of the trespass notice was lawful in the circumstances. The application ought to have been framed, in the first instance, as an application for judicial review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, rather than a declaration of Mr. Bracken's *Charter* rights. This may have obviated the need for a *Charter* analysis, and would have brought to the fore the issue of the implied limits on the common law authority of government actors to exclude persons from public property.

The analytical framework – s. 2(b) analysis

[25] Freedom of expression has received broad protection in Canadian law, not only through the *Charter*, but also through legislation and the common law. As Rand J. noted in *Saumur v. City of Quebec*, 1953 CanLII 3 (SCC), [1953] 2 S.C.R. 299, at p. 329: "Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Section 2(b) further entrenches the limits on government action in order to safeguard the ability of persons to express themselves to others. As expressed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 968-969:

Freedom of expression was entrenched in our Constitution and is guaranteed ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p.

306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

. . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[26] In its early s. 2(b) jurisprudence, the Supreme Court drew on the academic literature developed in the context of the First Amendment of the US Constitution to identify a set of human goods thought to be advanced by a constitutional protection of freedom of expression: *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712. These goods have been expressed variously in different decisions over the years. In *Irwin Toy*, they were summarized as: (1) enabling democratic discourse, (2) facilitating truth seeking, and (3) contributing to personal fulfillment. In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8 (CanLII), [2002] 1 S.C.R. 156, at para. 32, they were rendered as: "self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas." Freedom of expression is thus not only inherently valuable to the self-constituting person, but courts have long recognized that it is also instrumental to the functioning of a healthy political community, particularly by facilitating the open criticism of government: *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084.

[27] Although the right is broad, the Supreme Court has identified several limits that are inherent in the right itself.

[28] Of particular significance to this appeal, acts of physical violence or threats of violence do not come within the scope of s. 2(b): *Irwin Toy*, at pp. 969-70; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Montréal (City) v. 2592-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141. Violence, the Supreme Court of Canada held in *Montréal (City)*, at para. 60, "is not excluded because of the message it conveys (no matter how hateful) but because the method by which the message is conveyed in not consonant with *Charter* protection." Violence and force are predicated on the denial that persons are equal in dignity, negating the reciprocity necessary for communication and genuine dialogue: violence "prevents dialogue rather than fostering it.": *Montréal (City)*, at para. 72.

[29] The exclusion of acts of violence is one of the few limits on the protection of expression that is internal to s. 2(b), rather than operating as one reason among many in determining whether a limit placed on expression is justified under s.1. The rule against violence is thus an exclusionary rule: it excludes by kind and not by weight: Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009), at p. 22. As such, once it is determined that an act is an act of violence, deliberation is at an end: there is no further information, no other reasons, that can be relevant to the determination of whether a claim of right under s. 2(b) can succeed. Acts of violence do not receive the *prima facie*, defeasible protection that puts government to the task of establishing under s. 1 that the limits imposed on the claimant are reasonable and demonstrably justified in a society such as ours: the society of a free people, democratically constituted.

[30] Although some might find it difficult to understand the rationale for excluding violence categorically at the s. 2(b) stage rather than dealing with it in the s. 1 analysis, to give acts of violence even defeasible protection under s. 2(b) would give them an unacceptable legitimacy: Grégoire Webber, *The Negotiable Constitution: on the limitation of rights* (Cambridge: Cambridge University Press, 2009), at p. 122. It would be tantamount to declaring that Canadian constitutional morality is open to the proposition that an individual's self-expression through acts of violence could, in some conceivable circumstances, take priority over the public good of protecting persons by restraining acts of violence.

[31] The scope of the "violence" exception has not received much attention. In *Keegstra*, the exception was clearly limited to acts of physical violence. Dickson C.J. considered, and rejected, the proposition that threats of violence could also be categorically excluded from the protection of s. 2(b). This was not to say that restrictions on threats of violence would therefore be unconstitutional, only that such restrictions would have to be assessed at the s. 1

stage of analysis. In *R. v. Khawaja*, 2012 SCC 69 (CanLII), [2012] 3 S.C.R. 555, at para. 70, however, McLachlin C.J. expressly enlarged the category of internal limits to include *threats* of physical violence, on the basis that a person who threatens violence takes away free choice and undermines freedom of action in the same manner as if the person actually committed the threatened act of violence.

[32] A second exclusionary rule, internal to s. 2(b) reasoning, relates to the physical *location* where the expression takes place. Freedom of expression does not extend to the same degree in every public location: *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139. It does not, for example, extend to publicly owned spaces that are used as private offices. As L'Heureux-Dubé J. noted in *Commonwealth*, at pp. 199-200:

[T]he *Charter*'s framers did not intend internal government offices, air traffic control towers, prison cells and Judge's Chambers to be made available for leafletting or demonstrations. It is evident that the right to freedom of expression under s. 2(b) of the *Charter* does not provide a right of access to all property whether public or private.

[33] The question, as posed in *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295, at para. 42, is "whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression." The public square is, paradigmatically, a place traditionally used to express public dissent is: *Montréal (City)*, at para. 61.

[34] Having concluded that the claimant has engaged in expression and the protection of s. 2(b) is not negated because of an inherent limit such as method or location, the next step in the s. 2(b) analysis set out in *Irwin Toy* is to ask whether the government action in question restricts expression in purpose or effect: *Montréal (City)*, at para. 82. If the government action in question does not purposefully limit the expression in question, but limits it only as a side-effect of pursuing some other purpose, the claimant is put to the additional burden of establishing that the expression in issue promotes one of the three purposes of freedom of expression articulated in *Irwin Toy*, at p. 976: enabling democratic discourse, facilitating truth seeking, and contributing to personal fulfilment: *Montréal (City)*, at para. 83.

Application – s. 2(b) analysis

[35] The application judge, as I stated above, found that Mr. Bracken was engaged in violence, and his actions therefore did not come within the protection of s. 2(b). This conclusion was an error.

The s. 2(b) claim was wrongly dismissed based on erroneous findings that Mr. Bracken engaged in violence and interfered with others

[36] What was the basis of the application judge's conclusion that Mr. Bracken was engaged in violence and that his expression was therefore excluded from s. 2(b) protection?

[37] The application judge relied principally on the evidence of Town employees, all of whom expressed fear for their physical safety. When considering this evidence, it is important to bear in mind that only one employee, Mr. Brady, had any face to face interaction with Mr. Bracken on the day in question, and that was after Mr. Bracken was already handcuffed and under arrest. All of the employees who witnessed Mr. Bracken's protest on that day observed him "from a safe distance."

[38] None of their allegations about Mr. Bracken's behavior, in my view, survived Mr. Bracken's amateur cross-examination of them.

[39] The three Town employees who observed Mr. Bracken's protest and provided evidence were Mr. Brady, Ms. Schultz, and Ms. Hansen. Ms. Schultz provided a four paragraph affidavit. Like all of the affidavits filed on behalf of the Town, it is short on details of what actually transpired, and instead provides conclusory statements about the affiant's subjective response to Mr. Bracken: "Mr. Bracken is loud, overbearing and very intimidating. I did not approach him on my own and would not do so because I am not sure how he will react. I am very afraid of him."

[40] This affidavit does not explain what Mr. Bracken did on that day or any other that caused Ms. Schultz to be fearful. On cross-examination, she admitted that he had never threatened her and had never acted violently towards her. The basis of her fear, she said, "I think it's just your whole demeanour and your voice and just your body language in general that's a little intimidating." When questioned, she also mentioned his interaction with her at the service counter on a previous day in which he was "getting very loud", and her discussions with colleagues about his Youtube videos.

[41] Ms. Hansen's affidavit was 10 paragraphs. In it she states that she was concerned that Mr. Bracken's "erratic behaviour would intimidate those trying to get into the meeting" that was scheduled to begin an hour later. She was concerned "to make sure staff on the first floor were safe and secure" and instituted a lockdown procedure to ensure the safety of the staff. (On the evidence in the record, the "lockdown" consisted of locking an internal door between the Council chamber and the administrative offices.) She stated that she remains concerned about her safety and the safety of others around Mr. Bracken.

[42] As with Ms. Schultz's affidavit, Ms. Hansen's affidavit chronicles no acts of violence or threatened violence during Mr. Bracken's protest, or of Mr. Bracken preventing or attempting to prevent anyone from entering Town Hall.

[43] Ms. Hansen's attitude to public protest, and the fragility of her safety concerns, emerged on cross-examination:

171. Q: You're not aware if protesting is allowed on Town property?

A: I'm not.

172. Q: Have you ever seen a protest on Town property?

A: No.

...

179. Q: have I ever been verbally violent or physically violent with you, ma'am?

A: I've never had a conversation with you before.

...

251. Q: is it normal for someone who has never had a conversation with somebody - has never spoken a word with somebody, who's never interacted with somebody, who's never been threatened by anybody who is - to be so concerned for their safety that they require police presence at a cross-examination? Does that make sense to you, ma'am?

A: it does when I observe the behaviour that you demonstrated on that day.

252. Q: we already said that was just pacing back and forth with the megaphone.

A: Yeah.

[44] Ms. Bradnam, the Executive Assistant to the CAO and member of the Workplace Violence Committee, swore a 10 paragraph affidavit. She did not observe Mr. Bracken on the day in question. At the direction of Mr. Kuchyt, Ms. Bradnam prepared the trespass notice and phoned the police. She was told by Ms. Hansen that Mr. Bracken was "acting in a very intimidating way". She attested that Ms. Hansen was very upset and concerned for the safety of staff and other members of the public. Ms. Bradnam also expressed her fear for her safety if Mr. Bracken returns to Town Hall. Like Ms. Hansen, she admitted on cross-examination, that Mr. Bracken had never been violent with her, threatened her, or even met her.

[45] The third witness to the protest, Mr. Brady, was the only affiant to state that he observed Mr. Bracken physically preventing people from attending the meeting at Town Hall. If true, this could constitute an act of violence. However, the totality of the evidence, including Mr. Brady's evidence on cross-examination, renders not credible the

evidence in his affidavit. He only observed Mr. Bracken for five minutes, compared with Ms. Hansen, who observed him for nearly the entirety of his protest, which she stated was approximately 20 minutes, and who did not observe Mr. Bracken physically obstruct anyone. Mr. Bracken himself vehemently denied obstructing anyone. There were no affidavits from any member of the public claiming that Mr. Bracken had obstructed them. And on cross-examination, Mr. Brady was unable to provide a single detail to back up his assertion that Mr. Bracken had obstructed anyone. Indeed, it would have been odd for Mr. Bracken to prevent anyone from attending the meeting. He wanted people to attend. He wanted an audience. He wanted to publically expose Town Council. His protest was of an entirely different nature than those who seek to obstruct government or to deny others a platform on which to speak.

[46] Indeed, the thrust of Mr. Brady's evidence was not that Mr. Bracken was preventing people from entry, but that he was creating an "unsafe" environment for Town staff: employees were frightened because of Mr. Bracken "bullying them". The employees were indeed frightened, but the evidence does not disclose any reasonable basis for their fear. The bullying claim is impossible to square with the evidence. Mr. Bracken had no interaction with any Town employee in the Town Hall that day, including Mr. Brady, prior to his arrest. And the only employee with whom he had ever engaged, aside from Mr. Brady and Mr. Kuchyt, was Ms. Schultz, in the single incident at the service counter, weeks earlier.

[47] There was other evidence relied on by the application judge to determine that Mr. Bracken was violent on June 16. Some of it was irrelevant, such as Mr. Bracken's conduct a year later when he had a disagreement with a Town works crew at a fire hydrant. Some of it was both irrelevant and hearsay, such as unsworn police statements about Mr. Bracken's conduct after arrest. The application judge's inference is that Mr. Bracken's aggressive conduct post arrest, while handcuffed and confined in the back of a police car, is some evidence that he must have engaged in acts of violence while protesting. It is tantamount to concluding, as counsel for the Town urged us to conclude, that Mr. Bracken is a violent man and therefore must have engaged in violent acts. It is not a sound inference.

[48] This, then, is the totality of the evidence that Mr. Bracken's protest was violent and not meriting *Charter* protection. The application judge described it as overwhelming. With respect, it is not.

[49] Violence is not the mere absence of civility. The application judge extended the concept of violence to include actions and words associated with a traditional form of political protest, on the basis that some Town employees claimed they felt "unsafe". This goes much too far. A person's subjective feelings of disquiet, unease, and even fear, are not in themselves capable of ousting expression categorically from the protection of s. 2(b).

[50] The consequences of characterizing an act as violence or a threat of violence are extreme: it conclusively defeats the *Charter* claim without consideration of any other factor. Accordingly, courts must be vigilant in determining whether the evidence supports the characterization, and in not inadvertently expanding the category of what constitutes violence or threats of violence.

[51] The Town's logic, accepted by the application judge, appears to be this: (1) Mr. Bracken was agitated, loud, and angry; (2) his protest was therefore not peaceful; (3) all non-peaceful protest is violent; and (4) violence is not protected by s. 2(b). The error is readily apparent. A protest does not cease to be peaceful simply because protestors are loud and angry. Political protesters can be subject to restrictions to prevent them from disrupting others, but they are not required to limit their upset in order to engage their constitutional right to engage in protest.

[52] A finding that a person's expression is an act of violence or a threat of violence is, as explained above, determinative that their expression is not protected by the *Charter*. Once it is determined that an act is violent or a threat of violence, deliberation is at an end and the claim of a s. 2(b) *Charter* violation is defeated. Courts should therefore not be quick to conclude that a person's actions are violent without clear evidence. Here, there is no evidence that Mr. Bracken's protest was violent or a threat of violence, and the finding that it was constitutes a palpable and overriding error.

[53] With respect to location, the second internal limit to s. 2(b), the application judge did not make a direct finding that Mr. Bracken's protest was at a location where s. 2(b) protection does not exist, or that his use of the space

was inconsistent with its function. She did, however, find that "he… interfered with the public's use of space at the Town". Again, this finding is unsupported. There is no evidence whatsoever that he physically obstructed anyone, or otherwise impaired anyone's ability to use public space. He paced back and forth with a megaphone. These are not idiosyncratic actions, notwithstanding the Town's characterization of them as "erratic". They have a clear meaning within the long tradition of civic protest. The purpose of such actions is not to occupy that space to the exclusion of anyone else. One person, alone in front of Town Hall with a megaphone and a camcorder, is not, of itself, an interference with public space that displaces the protection of s. 2(b).

[54] There can be no question that the area in front of a Town Hall is a place where free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society. The literal town square is paradigmatically the place for expression of public dissent.

Were s. 2(b) rights limited by the trespass notice?

[55] The next question in the constitutional analysis is whether the expulsion of Mr. Bracken and the issuance of the trespass notice by the Town limited Mr. Bracken's s. 2(b) rights, and whether the limit was by purpose or only by effect. The application judge did not address these questions.

[56] Taking the evidence of Mr. Kuchyt and Mr. Brady, it would be possible to conclude that the Town's decision to revoke Mr. Bracken's permission to be present on the premises, and to issue the trespass notice encompassing all Town property where employees work, with a one year duration, was not done with the purpose of preventing Mr. Bracken from conveying his message, but was rather done to protect the safety of staff and ensure the orderly proceeding of the Council meeting. Nothing much turns on this point, as I conclude that even if the silencing of Mr. Bracken was only a side-effect of the ultimate purpose to ensure the safety of employees and visitors, he is able to establish that the effect on him is to impair his participation in each of the three goods advanced by the guarantee of freedom of expression articulated in *Irwin Toy*, namely enabling democratic discourse, facilitating truth seeking, and contributing to personal fulfilment.

[57] I acknowledge that several of the affiants attested that Mr. Bracken's speech was incomprehensible, and that the application judge made that finding. But again, the finding was unsupportable. Some affiants, up on the balcony or elsewhere on the second floor, might not have heard him distinctly. Others, who distinctly heard him saying "kill the bill" might not have had sufficient context to understand the message. That did not make his speech "incomprehensible", with the insinuation – made in various places in the Town's affidavits – that Mr. Bracken was raving. To the contrary, Mr. Brady, watching from the atrium and well-acquainted with Mr. Bracken's grievances, heard Mr. Bracken and clearly understood what he was saying. He didn't like it.

[58] Mr. Bracken's speech, that day, was directed towards protesting the expected adoption of a by-law that he understood to be promoting the interests of a marijuana facility across from his home. He wanted the by-law defeated. He also criticized the members of Town Council. No doubt, they did not like being called liars and communists. Mr. Brady did not like Mr. Bracken calling for him to be fired. On cross-examination, he stated that Mr. Bracken had no right to say so. He viewed it as a threat to his livelihood. The language was neither polite nor restrained. But as this Court pointed out in *Cusson v. Quan*, 2007 ONCA 771 (CanLII), 87 O.R. (3d) 241, rev'd 2009 SCC 62 (CanLII), [2009] 3 S.C.R. 712, at para 125: "(d)emocracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those … who exercise power and authority in our society… Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy."

[59] Whether the issuance of the trespass notice is viewed as a means to silencing Mr. Bracken or simply as a means of protecting others, it had the effect of preventing him from conveying his message to his intended audience, not only on June 16, but for an entire year thereafter. This was unquestionably a limit on his s. 2(b) rights.

Section 1: the analytical framework

[60] Where, as here, a person's *Charter* right has been limited by the action of a government actor, in this case the Town, the actor can seek to justify its action under s. 1 of the *Charter*, which provides:

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.

[61] In establishing the framework for *Charter* analysis, the Supreme Court determined early on that the finding of a *Charter* rights violation would be a two-step inquiry. The preliminary finding that a right such as freedom of expression has been limited by government action is thus an intermediate conclusion, and not itself a finding of a violation of a *Charter* right: "(i)t is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*": *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, per Lamer J. (in dissent but not on this point). It is only after determining that the limitation placed by legislation or government action on the exercise of the right is invalid that we can say that the right has been violated: Aharon Barak, *Proportionality: constitutional rights and their limitations* (Cambridge: Cambridge University Press, 2012), at pp. 101-03. The violation of a *Charter* right is thus established at the conclusion of the s. 1 analysis, after taking into account the reasons for the limit imposed by government, responding to the needs and circumstances of others living in community in a free and democratic society: Régimbald and Newman, *The Law of the Canadian Constitution*, 2nd ed. (Markham: LexisNexis Canada, 2017), at p. 546-47; see also Webber, *The Negotiable Constitution*.

[62] The framework for determining whether a *legislative* limit on the exercise of a *Charter* right is justified in accordance with the principles of a free and democratic society was set out in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. The proportionality test at the heart of the *Oakes* analysis was recently summarized by Karakatsanis J. in *R. v. K.R.J.*, 2016 SCC 31 (CanLII), [2016] 1 S.C.R. 906, at para. 58:

A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law… The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups" (*Oakes*, at p. 139).

[63] Where, as here, there is no challenge to the constitutionality of legislation, the analytical framework changes, although the nature of the justification remains the same. In *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, the Supreme Court explained that the application of the s. 1 test set out in *Oakes* needed to be adapted for the review of administrative actions: see also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 S.C.R. 613, at para. 40. In doing so, the Court did not lay down a rigid formula, but stressed that flexibility is needed in order to adapt the analysis to the great variety of administrative decisions that come for judicial review: "while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality.": at para. 5. The reasonableness of a decision is "contingent on its context": at para. 7. The ultimate question, whether the context is legislative or a matter of government action, is whether, in all the circumstances, a limit that has been placed by government on the exercise of a *Charter* right is reasonable in a free and democratic society.

Section 1: application

[64] Although the appropriate analysis for determining whether the rights limitation was reasonable and satisfies the requirements of s.1 is guided by *Oakes* and *Doré*, it must be adapted to this specific context.

Prescribed by law

[65] Section 1 establishes that limits to *Charter* rights must be reasonable and must be "prescribed by law". In the context of governmental action, such as expelling a person from government owned property and issuing a trespass notice, this means that the action must be grounded in law. That is, the action must have been an exercise of a sufficiently defined legal power, guided by legal norms: *Slaight*; *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606. A "law" need not be a statute to satisfy the "prescribed by law" requirement. "Law" in this context includes regulations and the common law, and it is sufficient that "the limit simply result by necessary implication from either the terms or the operating requirements of the "law".": *Greater Vancouver*, at para. 52.

[66] Accordingly, in offering a justification for the limit it has imposed on Mr. Bracken's expression, s. 1 requires the Town to first establish that the limit is one that is "prescribed by law".

[67] Although Mr. Bracken does not challenge the Town's authority to expel a person from Town property or issue a trespass notice, it is nevertheless important to be clear about the source of this authority in assessing the constitutionality of the Town's actions.

[68] Although neither the trespass notice nor its cover letter reference the legal authority for expelling Mr. Bracken or issuing the notice, the Town's position is that the CAO, who made the decision to issue the trespass notice, draws authority from two sources: (1) s. 229 of The *Municipal Act, 2001*, S.O. 2001, c. 25, which grants the CAO authority for "exercising general control and management of the affairs of the municipality", and (2) the *Occupational Health and Safety Act*, s. 25(2)(h), which requires an employer to "take every precaution reasonable in the circumstances for the protection of a worker". The Town also references a Workplace Violence Prevention Policy which is posted in public areas of the Town Hall, and lists four "customer behaviours that we do not tolerate": threatening, verbal abuse, crossing physical barriers, and physical contact. In terms of sanction, it states that "any customer who engages in this conduct may be refused service and/or removed from the premises."

[69] I do not agree with the Town's characterization of the source of its authority. Although the *OHSA* imposes a duty on the Town to take reasonable precautions to protect workers, it does not confer any powers on the Town regarding the activities of someone who is not a co-worker: *Rainy River (Town) v Olsen*, 2017 ONCA 605 (CanLII). And although s. 229 of the *Municipal Act* grants authority to the CAO to exercise certain powers of the Town, it does not resolve the question of what powers the Town has.

[70] Neither does the authority to exclude others from property come from the *Trespass to Property Act*, R.S.O. 1990, c. T.21, which does not set out the preconditions for its use. The authority to invoke the Act must come from other legal sources, such as the right to exclude others that is inherent in the status of an occupier in the common law of property. That is, the Act does not create any substantive property rights, but functions as an enforcement mechanism for rights that come from other sources: see *Batty v. Toronto (City)*, 2011 ONSC 6862 (CanLII), 108 O.R. (3d) 571, at paras. 81-82; *R. v. S.A.*, 2014 ABCA 191 (CanLII), 312 C.C.C. (3d) 383, at para. 277-278.

[71] In *Commonwealth*, McLachlin J. noted that under the common law, "the Crown as property owner is entitled to withdraw permission from an invitee to be present on its property, subject always to the *Charter*." At common law, an occupier of a property has the power to expel others, and has the power to invoke the remedies supplied by the *Trespass to Property Act*. In my view, the authority to revoke Mr. Bracken's licence to be present on the premises and issue the trespass notice, and thus the "law" that is the source of the limit on Mr. Bracken's rights, is the common law.

[72] The *Trespass to Property Act* has also long been used by government as a mechanism to exercise this common law power to exclude persons from public property: see, for example, *Batty*; *Smiley v. Ottawa (City)*, 2012 ONCJ 479 (CanLII), 100 M.P.L.R. (4th) 306; *R. v. Semple*, 2004 ONCJ 55 (CanLII), 119 C.R.R. (2d) 295; *Gammie v. Town of South Bruce Peninsula*, 2014 ONSC 6209 (CanLII), 322 C.R.R. (2d) 22. Unlike other municipalities, the Town has no by-law regulating its use of trespass notices, or even a trespass policy. I observe that the risk of arbitrary action

is higher in the absence of a well-crafted by-law, and there are greater opportunities for uncertainty as to what sorts of actions will be permitted.

[73] I am nonetheless satisfied that in relying on the common law power of an occupier, the Town was imposing a limit on *Charter* rights that it can seek to justify under s. 1 of the Charter. The expulsion of Mr. Bracken and the trespass notice must be assessed by means of the proportionality test.

Proportionality test

[74] It is not appropriate, in the context of the decision to expel Mr. Bracken and issue the trespass notice, to engage in a full blown *Oakes* analysis into all of the inquiries that come under the umbrella of the proportionality test. As I explain below, the proportionality analysis can be resolved on the basis of the preliminary issue that the Town could not, on the facts of this appeal, establish that it was acting for a sufficiently important purpose. But even if it were able to succeed on this basis, it would nevertheless fail on the grounds of minimal impairment and proportionality between the deleterious and salutary effects of the expulsion and trespass notice.

[75] I observe that where a government issues a trespass notice relying on the common law power to expel persons from property, it is exercising a power that is subject to implied limits. It cannot be issued capriciously; that is, it cannot be issued, in the circumstances of a public protest in the town square, without a valid public purpose. What constitutes a valid public purpose need not be fully canvassed here, but it would include, for example: the prevention of unlawful activity, securing the safety of persons, preventing the appropriation of public space for exclusive private use, and preventing the obstructing of the operation of government and the provision of government services. These implied limits are echoed in the proportionality analysis.

[76] The Town sought to secure the physical safety of its employees and visitors by means of the immediate expulsion of Mr. Bracken, and the issuance of the trespass notice banning him from all Town property for a year. Its stated justification was that he had engaged in an escalating pattern of abuse of Town staff, and that there was a reasoned apprehension that he posed a threat to employees, wherever they worked. As noted earlier, the factual basis on which Mr. Kuchyt issued the trespass notice was largely erroneous. Mr. Bracken was not engaged in any violent activity. He was not blocking anyone. He was not preventing anyone from accessing the building. His behaviour was neither intimidating, in any relevant sense of the word, nor erratic. The Town employees, both junior and senior, were alarmed, but they were alarmed too easily. At its highest, the evidence is that several employees said they felt unsafe. The basis for that fear appears to be (1) one prior interaction in which Mr. Bracken was loud and "intimidating", but in which he was never violent or threatening; (2) Mr. Bracken's videotaping of a Council meeting; (3) Mr. Bracken's videos posted to Youtube, in which he is said to chase people down and question them; (4) his actions on the day of his protest. If anyone felt intimidated by him, other than Town employees who had never before witnessed a protest and doubted that protests in front of Town Hall were lawful, it was not because he was threatening anyone.

[77] Accordingly, the Town's actions, both in (1) requiring Mr. Bracken to leave the premises that day, and (2) issuing a prospective trespass notice, were premised on factual errors. These errors constituted a fundamental misapprehension of the nature of Mr. Bracken's actions and the threat they posed to the safety of other persons and the decorum and operation of the meeting of Town Council. On these facts, it cannot be said that the Town was acting for a purpose that could satisfy its burden of justification under s.1.

[78] That is sufficient to dispose of the appeal. I will, however, address some of the additional branches of the proportionality test.

[79] Even if it had had a sufficiently important purpose, the Town's actions were not minimally impairing. There were many options that the Town could have chosen short of expulsion that could have achieved the same purpose: for example, actually talking with Mr. Bracken and cautioning him not to use the megaphone in the building, asking him to lower the volume if it was disruptive to those working inside, and asking him to keep a respectful distance from people

entering Town Hall. It should be recalled that the first person to address Mr. Bracken after he began his protest was a police officer, instructing him that a trespass notice had been issued and that he was required to leave the premises.

[80] With respect to the terms of the trespass notice, recall that the trespass notice and covering letter were hurriedly drafted by Ms. Bradnam at the direction of Mr. Kuchyt, as Mr. Bracken was outside denouncing Mr. Kuchyt and Mr. Brady. The trespass notice took on a punitive nature, banning Mr. Bracken from all Town property for a full year, terms which were far in excess of whatever immediate threat, real or imagined, the notice was intended to ameliorate. In a free and democratic society, it is no small matter to exclude a person from public property. To do so for a full year is extraordinary and must be amply justified. Here it was not. Even if the facts had been as alleged by the Town, it would not have justified the leap to a one year exclusion.

[81] With respect to the geographic reach of the notice, that too was overbroad. Mr. Bracken was banned for one year from attending every Town property where Town employees worked. The overbreadth is evident from the fact that there was no suggestion that he had ever set foot in two of the three properties, let alone caused any problems there.

[82] Finally, on a comparative analysis of the salutary and deleterious effects of the Town's actions, the effects on Mr. Bracken were disproportionate to any benefit that was achieved, given the finding that the expulsion of Mr. Bracken did not in any way advance the common good. The statutory obligation to promote workplace safety, and the "safe space" policies enacted pursuant to them, cannot be used to swallow whole *Charter* rights. In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.

[83] The conclusion must be that "the deleterious effects are out of proportion to the public good achieved by the infringing measure": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, at para. 78.

[84] The limits placed on Mr. Bracken's s. 2(b) rights by the Town were not justified under s. 1 of the *Charter*.

Disposition

[85] I would allow the appeal, quash the trespass notice, and issue a declaration that the issuance of the trespass notice by the Town constituted a violation of the appellant's rights under s. 2(b) of the *Charter*.

[86] I would award costs of the appeal to Mr. Bracken, in the amount of $4,000 inclusive of disbursements and taxes. Mr. Bracken is also entitled to his costs of the application below. I would encourage the parties to consult and come to a resolution on quantum. If they are unable to do, the court will accept brief written submissions on costs from each party, no more than two pages in length, within 15 days of the date of the release of these reasons.

Released: "KF" AUG 25 2017

"B.W. Miller J.A."

"I agree. K. Feldman J.A."

"I agree. P. Lauwers J.A."

COURT OF APPEAL FOR ONTARIO

CITATION: Bracken v. Niagara Parks Police, 2018 ONCA 261

DATE: 20180319

Doherty, LaForme and Miller JJ.A.

Heard: September 20, 2017

On appeal from the decision of Justice James A. Ramsay of the Superior Court of Justice, dated September 9, 2016, with reasons reported at 2016 ONSC 5615 (CanLII).

B.W. Miller J.A.:

OVERVIEW

[1] On August 2, 2016, in the run-up to the U.S. presidential election, the appellant, Mr. Bracken, stood in Grand View Plaza in Niagara Parks, holding a sign reading, "Trump is right. Fuck China. Fuck Mexico."

[2] Parks staff informed the Niagara Parks Police (the "NPP") that they had received a complaint about a man standing on the sidewalk holding a sign. The NPP attended and concluded the sign was offensive and disturbing to visitors. They informed Mr. Bracken that he was not permitted to display the sign, and asked him to leave. Mr. Bracken refused. He argued that he had a constitutionally protected right to display the sign, which he characterized as a statement about economic and trade policy. The NPP officers did not see things the same way. Mr. Bracken became increasingly animated, calling one of the officers "a fucking piece of shit" and "a power tripping fucking idiot", among other things. Eventually, one of the officers issued Mr. Bracken a summons under the *Provincial Offenses Act*, R.S.O. 1990, c. P.33 for two offences contrary to s. 2(9)(a) of O. Reg. 829 made under the *Niagara Parks Act*, R.S.O. 1990, c. N. 3 (the "Regulations"): (1) disturbing other persons and (2) using abusive or insulting language.

[3] On August 4, Mr. Bracken went to the NPP's headquarters to discuss the summonses and clarify whether he could display his sign in the Parks. Mr. Bracken was told that he could not, and if he were to return with the sign he would be removed pursuant to the *Trespass to Property Act*, R.S.O. 1990, c. T.21.

[4] Mr. Bracken sought relief before the Superior Court on multiple grounds. The only grounds relevant to this appeal are declarations that: (1) s. 2(9)(a) of the Regulations violates s. 2(b) of the *Charter*; and (2) the oral trespass notice served on him at the NPP headquarters similarly violates s. 2(b).

[5] The application judge dismissed the application. He held that s. 2(9)(a) did not limit Mr. Bracken's s. 2(b) *Charter* rights, because the constitutional guarantee of freedom of expression does not apply to shouting insulting or abusive language in the Parks. He declined to determine whether the oral trespass notice infringed s. 2(b), as he was not satisfied that a trespass notice had in fact been issued.

[6] Mr. Bracken appeals both aspects of the judgment.

[7] For the reasons that follow, I would allow the appeal in part. The application judge made a palpable and overriding error in finding that a trespass notice had not been issued, and further erred in not granting a declaration quashing the notice. Although the application judge erred in concluding that s. 2(9)(a) does not limit rights under s. 2(b) of the *Charter*, I would hold that the limits are justified under s. 1 of the *Charter*. I would therefore dismiss the constitutional challenge to s. 2(9)(a).

[8] As explained further below, the two offences with which Mr. Bracken was charged were adjudicated before the Ontario Court of Justice and are not before this court. Nor do we have before us the evidential record from those proceedings describing Mr. Bracken's interactions with other users of the Parks that day. Although the interpretation of s. 2(9)(a) set out below may be relevant for the adjudication of Mr. Bracken's offence conviction appeal, nothing in

these reasons addresses the question of whether the trial judge erred, on the facts before him, in finding that Mr. Bracken committed the offence of using abusive or insulting language contrary to s. 2(9)(a).

BACKGROUND AND PROCEDURAL HISTORY

[9] The Commission is a provincial Crown agency created in 1887 and given jurisdiction over the Parks by the *Niagara Parks Act*. Section 22(1)(a) of the *Act* gives the Commission the power to make regulations "regulating and governing the use by the public of the Parks", under which authority it passed s. 2(9)(a).

[10] This appeal has an irregular history. Mr. Bracken's application began as a motion for an interlocutory injunction prohibiting the Commission and NPP from enforcing the oral trespass notice, and was subsequently expanded to include constitutional remedies. It does not appear that an originating process was ever issued. Nevertheless, the matter was argued as an application before Ramsay J., on the basis of a thin evidentiary record that included a brief affidavit from Mr. Bracken (appending a DVD recording of his protest and some of his interactions with the NPP) and a responding affidavit by Paul Forcier of the NPP, partially comprised of hearsay of what he was told by the officers who engaged with Mr. Bracken on August 2, 2016. There was no cross-examination on the affidavits.

[11] Subsequent to the application before Ramsay J., Mr. Bracken was convicted of one of the charges under s. 2(9)(a) by Justice of the Peace Lancaster in separate proceedings in the OCJ. As noted above, Mr. Bracken's appeal of that conviction is not presently before this Court. We denied Mr. Bracken's oral motion to file fresh evidence from those proceedings on the basis that the motion was brought late – on the morning of the hearing before us – and granting it would have been unfair to the respondent, which had prepared the appeal on a different record. This appeal is therefore to be determined on the record as it stood before Ramsay J.

ISSUES

[12] Although there are numerous grounds of appeal set down in the Notice of Appeal, at oral argument they reduced to two main issues. These are whether the application judge erred:

1. in not finding that s. 2(9)(a) of the Regulations infringes s. 2(b) of the *Charter*;

2. in not granting a declaration quashing the oral trespass notice.

[13] Mr. Bracken also claimed an infringement of his rights under s. 7 of the *Charter*. As this argument was raised for the first time on appeal and at best bears tangentially on the matters in dispute, it would not be in the interests of justice, in my view, to consider it at this stage in the proceedings.

ANALYSIS

[14] I will first consider the constitutional challenge to s. 2(9)(a) before addressing the constitutionality of the oral trespass notice.

[15] A defining feature of a free society is the right to speak openly and publicly without fear of government censure. Freedom of expression is deeply ingrained in democratic, egalitarian cultures, and reinforces all of the other fundamental freedoms. In Canada it receives legal protection through common law, statute, and s. 2(b) of the *Charter*. Its countermajoritarian nature was stressed by the Supreme Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 968-969:

Freedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.

The Supreme Court cautioned against restricting protection to only those ideas that are warmly received by the public, citing the European Court of Human Rights:

[freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[16] Freedom of expression is not boundless, however, and a properly functioning society must limit many types of expression for the common good. Discerning the line between reasonable and unreasonable limits on expression is, however, a perpetual challenge, taken up initially by legislators, and secondarily by courts on judicial review.

[17] In this appeal, this court is required to assess the constitutionality of one such limit established by the Commission to govern conduct at the Niagara Parks: s. 2(9)(a).

(1) Statutory interpretation

[18] The first step in assessing the constitutionality of a regulation is interpretation.

[19] Section 2(9)(a) provides:

(9) … no person shall, within the Parks,

(a) use abusive or insulting language, or conduct himself or herself in the Parks in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons;

[20] This is a regulation, drafted by the Commission and approved by Order in Council. It is not a statute and therefore there was no legislative debate and no legislative record to aid in its interpretation. And although the respondent provided several written histories surrounding the creation of the Commission and the Parks, none of these address issues that would assist in the interpretation of s. 2(9)(a).

[21] The general context of the Regulations is provided by s. 22(1)(a) of the *Niagara Parks Act*, which authorizes the Commission to make regulations "regulating and governing the use by the public of the Parks". The Regulations impose significant restrictions on the types of recreational and commercial activities that may be carried out in the Parks, as well as on the more general behaviour of the Parks' users. The Regulations further provide, at ss. 2(11) and 2(13), that anyone who contravenes s. 2(9)(a) may be removed from the Parks by an officer, and shall not re-enter the parks within 72 hours without permission from the Commission.

[22] Whether a user of the Parks has contravened s. 2(9)(a) is determined in the first instance by the NPP, whose decision can result not only in immediate expulsion, but also prohibition on re-entry for up to three days, reviewable by the Commission.

[23] In reading s. 2(9)(a), the application judge concluded that the provision captures only "language that is so extremely offensive or insulting that it could interfere with the peaceful use and enjoyment of the parks by other persons." On this reading, the class of speech the Commission intended to capture with the term "abusive or insulting language" is significantly narrower than the ordinary meaning of that phrase.

[24] Mr. Bracken objects to this interpretation which, he submits, fails grammatically and amounts to a legal error. In oral argument, he argued that the application judge ignored the disjunctive "or" in s. 2(9)(a) and effectively read it as stating:

no person shall, within the Parks, use abusive or insulting language … in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons.

[25] On Mr. Bracken's reading, "abusive or insulting language" is not restricted to language that unnecessarily interferes with the use and enjoyment of the Parks by others, but encompasses the widest meaning of the words. He objects that the application judge "read down" s. 2(9)(a), choosing an artificially narrow meaning in order to uphold the constitutionality of the provision. I disagree. As I explain below, the application judge appropriately interpreted the provision by ascertaining the intentions of the Commission as expressed through the words it used.

[26] The thrust of Mr. Bracken's argument is that s. 2(9)(a) consists of two independent prohibitions: (1) of the use of "abusive and insulting language" in the Parks, and (2) of conduct "that unnecessarily interferes with the use and enjoyment of the Parks by other persons", and these must be kept analytically separate. Mr. Bracken's grammatical argument is that the phrase, "in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons," directly applies only to the preceding words, that is, "conduct himself or herself in the Parks," and does not apply to the prohibition on using "abusive or insulting language." I agree, but this argument does not assist him.

[27] In statutory interpretation, context is critically important. Even though the restriction "in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons" does not apply *directly* to the prohibition on using "abusive or insulting language", its inclusion in the same provision sheds light on the meaning of that phrase. It suggests that, as a whole, s. 2(9)(a) addresses restrictions thought necessary in order for a member of the public to use the Parks without interfering with other patrons.

[28] Further (confirmatory) context is provided by use of the phrase "abusive or insulting language" in criminal law, reaching back in English law at least to the *Metropolitan Police Act 1839*, ch. 47, s. 54(13). Although statutory prohibitions against abusive or insulting language take different forms in different jurisdictions, Commonwealth courts have consistently held that such prohibitions do not capture *all* abusive or insulting language. Rather, they are typically limited to those instances likely to interfere with public order in some way: see *Coleman v. Power*, [2004] HCA 39, at paras. 193, 257-258; *Harvey v. Director of Public Prosecutions*, [2011] EWHC 3992 (Admin), 2011 W.L. 5105637, at paras. 12-15.

[29] In domestic criminal law, shouting "insulting or obscene" language is insufficient to constitute a disturbance under s. 175(1)(a)(i) of the *Criminal Code*, which requires "an interference with the ordinary and customary use by the public of the place in question": *R. v. Lohnes*, 1992 CanLII 112 (SCC), [1992] 1 S.C.R. 167, at 177 (emphasis added); *R. v. Swinkels*, 2010 ONCA 742 (CanLII), 103 O.R. (3d) 736, at para. 32.

[30] It is therefore unsurprising that in the context of regulating the use of a public park, a prohibition on "insulting or abusive language" would require something akin to a restriction on interference with the "ordinary and customary use of the place in question".

[31] Whether conduct interferes with the peaceful use and enjoyment of the Parks must be established on an objective basis. A court should assess the type and intensity of the language and behaviour in question against the conditions that ought to prevail in the specific location of the Parks at the specific time, as is the case in the criminal context of causing a disturbance by using insulting or obscene language: *Lohnes*, at p. 180; *Swinkels*, at para. 19. The inquiry presumes that members of the public have some resilience, particularly concerning political speech, and are required to tolerate public expression of a wide range of views on matters of public life, including those views that are inconsistent with their own beliefs, choices, and commitments. Mere offence at a message, particularly a message advocating for some vision for the better advancement of the public good, is not enough. The public is not required to endure personalized invective, but nothing in the sign's message could be characterized in this way. As the application judge below noted, the contents of Mr. Bracken's sign, even with its profanity, came nowhere near close to the line. The officer's concern that citizens of Mexico or China who happened upon the sign might be offended by it, was well wide of the mark. The sign, which effectively stated that the national interests of other countries should be subordinate to domestic interests, disparaged no one. Even if Mexican or Chinese nationals took offence, or others took offence on their behalf, such offence could not bring the sign within the meaning of "abusive or insulting language".

[32] In summary, on my interpretation of s. 2(9)(a), the prohibition of the use of "abusive or insulting language" extends no further than to proscribe the use of personal invective, interfering with a patron's use of the Parks.

(2) Section 2(b) *Charter* analysis

[33] It remains to be determined whether s. 2(9)(a) violates s. 2(b) of the *Charter*. It is necessary to bear in mind the two-stage structure of *Charter* adjudication. The inquiry at the first stage focuses on whether a person's purported

exercise of a *Charter* right has been limited by state action. The second stage is concerned with whether the limit is justified in a society that is free and democratic. A positive determination at the first stage – a conclusion that a claimant's exercise of right has been limited – is *not* a determination that the claimant's *Charter* rights have been violated. Although it was once common to describe s. 1 analysis as a matter of "saving" violations of *Charter* rights, this language is misleading – s. 1 analysis is not a matter of excusing rights violations, but of establishing the reasonable limits on rights: Guy Régimbald and Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed. (Markham: LexisNexis Canada, 2017), at p. 546-47; see also Grégoire Webber, *The Negotiable Constitution: on the limitation of rights* (Cambridge: Cambridge University Press, 2009), at p. 122.

[34] The first stage inquiry into whether s. 2(b) rights have been limited proceeds by way of three questions: (1) does the activity in question have expressive content? (2) if so, does either the method or location of the expression disentitle it to s. 2(b) protection? and (3) if the expression is protected, does the impugned government action limit the expression either in purpose or effect? *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141, at para. 56.

Question 1: Expressive content

[35] Does "abusive or insulting language", as interpreted by the application judge and earlier in these reasons, have expressive content? I conclude that it does. Expression has been given wide meaning by the Supreme Court. Expression is never excluded from s. 2(b) because of the content of the message it conveys: *Irwin Toy*, at p. 969; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 729; *City of Montréal*, at para. 58. Subject only to certain exclusionary rules described below, s. 2(b) extends protection to any activity that "conveys or attempts to convey a meaning": *Irwin Toy*, at p. 969. This includes abusive or insulting language captured by s. 2(9)(a), as such language can convey or attempt to convey meaning – albeit in an "extremely offensive" manner. That such expression potentially "interfere[s] with the peaceful use and enjoyment of the parks by other persons" does not preclude the intermediate conclusion that the prohibition of the use of such language limits expressive content.

Question 2: Excluded expression

[36] Some methods of expression are categorically excluded from the scope of s. 2(b) – specifically, violence and threats of violence. This limit is internal to s. 2(b); once it is established that the method of expression is, for example, an act of violence, the constitutional inquiry is at an end and the state is not required to justify any limit on the expression.

[37] State actors are not required to justify limits on expression that is violent or threatens violence because, according to longstanding doctrine, there are no competing interests capable of justifying it. As this court explained in *Fort Erie*, at para. 30: "to give acts of violence even defeasible protection under s. 2(b) would give them an unacceptable legitimacy.... It would be tantamount to declaring ... that an individual's self-expression through acts of violence could, in some conceivable circumstances, take priority over the public good of protecting persons by restraining acts of violence." That said, because the consequences of characterizing expression as violent are extreme – the characterization conclusively defeats the *Charter* claim without canvassing whether there are any competing considerations – this court cautioned at para. 50 against expanding the category of what constitutes violence or threats of violence. The violence exception to the scope of freedom of expression remains sharply limited.

[38] In its written submissions, the respondent proposed an expansion to the violence exception to encompass "emotionally violent" expression. This submission was expressly rejected by this court in *Fort Erie*, at para. 49. Put simply, the emotional impact of expression on a third party has no bearing on the question of whether that expression was conveyed through a violent act. Thus, the Supreme Court has held that even hate speech is not inherently violent, despite the risk that such expression will have an emotionally damaging impact on its targets: *Keegstra*, at pp. 731-732.

[39] A second exclusionary rule relates to the physical location where the expression takes place. Freedom of expression does not encompass the right to non-interference with expression in *every* locale, public or private. It does

not even extend to all government-owned property: *City of Montréal*, at paras. 60-61; Régimbald and Newman, at p. 631ff.

[40] In *City of Montréal*, at para. 74, the Supreme Court articulated a test for the determining whether s. 2(b) protection applied in any given public location: "whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding, and (3) self-fulfilment." The Court specified two factors that should be considered in answering that question: "(a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression."

[41] With respect to the first factor, the Court drew a subtle but important distinction between historical use and actual function of a place. Historical use, as developed in that judgment, is determined by a factual inquiry into community practices. What use has the community made of the place, apart from whatever governmental function it may also serve? An established community practice of free expression in a location is some evidence of a social convention that the location ought to be available for free expression. The case law identifies examples such as sidewalks (*City of Montreal*, at paras. 67-68), airports (*Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139, at pp. 158-159), parks (*Commonwealth*, at pp. 152-153; *R. v. Batty*, 2011 ONSC 6862 (CanLII), 108 O.R. (3d) 571, at paras. 70-72), utility poles (*Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084, at pp. 1100-1102), and the town square (*Fort Erie*, at para. 54).

[42] The inquiry into the actual function of a place has a different focus. Actual function concerns the primary, governmental function of the place, rather than the community's secondary use of it as a public forum: *City of Montréal*, at para. 76. The question is whether the governmental activity that goes on at the place is compatible with the use of the place as a public forum; in other words,"[w]ould an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity?": *City of Montréal*, at para 76. The exercise of freedom of expression would hamper governmental functions, including the provision of public services, if a right of access were allowed in essentially private places that require privacy. Section 2(b) does not extend protection to expression in such locations.

[43] Ultimately, *City of Montréal* characterizes historical use and actual function as "markers" of constitutionality, on-going patterns of property use that reflect both formal governmental choices and informal social conventions. These practices, the Supreme Court says, are a ready guide to what is likely reasonable in a free and democratic society. But historical use and actual function must still be critically evaluated to determine whether they in fact align with what is reasonable. The underlying question is "whether a practice of free expression in the place in question would undermine the purposes of the [s. 2(b)] guarantee", which includes the practices of democracy and efficient governance: *City of Montréal*, at paras. 76-77; *R. v. Banks*, 2007 ONCA 19 (CanLII), 84 O.R. (3d) 1, at para. 119.

[44] The respondent argues that the history of the Parks does not reveal any use of it as a public forum, and that the actual function is incompatible with the exercise of freedom of expression. I disagree with both submissions. Although the record does not provide any compelling evidence of the historical use or non-use of the Parks as a public forum for expression, as in *Greater Vancouver*, at para. 43, the "very fact that the general public has access" to the Parks "is an indication that members of the public would expect constitutional protection of their expression" in that space. An aspect of freedom of expression is the ability to address people in places where crowds are known to congregate.

[45] With respect to the actual, governmental, function of the Parks, the respondent seeks to distinguish the function of the Parks from that of a municipal park or town square or other outdoor public location. The reason for the establishment of the Parks, on the respondent's evidence, was to remedy commercial exploitation that impaired the ability of visitors to experience the natural landscape, and to preserve the Niagara Falls as a global asset. Grandview Plaza is a place of public recreation: it serves as a venue to view Niagara Falls and facilitates the various commercial enterprises sanctioned by the Parks.

[46] The respondent further argues that the Parks are intended to function as a haven or refuge from public debate, assembly, or protest, and a place to experience natural beauty without the distraction of potentially divisive expression. In the respondent's view, some forms of expression, such as abusive or insulting speech, are incompatible with this function of the Parks and therefore do not come within the scope of s. 2(b) protection.

[47] Here the respondent miscasts the nature of the location-based exclusion under s. 2(b), and strays into considerations properly addressed in the reasonable limits analysis under s. 1 of the *Charter*. The location-based analysis is a preliminary screen only, to weed out claims of entitlement to platforms that are clearly unsuitable for public address given their governmental function. The question is not whether insulting or abusive language is compatible with the Parks' function, but whether public expression in general is compatible with it.

[48] Additionally, given the sheer size of the Parks, the location-based analysis must be more finely grained than what the respondent suggests, and must focus on the part of the Parks where the events occurred. Grandview Plaza is a large, open space where Parks-sanctioned commercial enterprises are located. Indeed, the initial complaint about Mr. Bracken did not come from a visitor whose experience of the Parks was frustrated by either his sign or his behaviour, but from a vendor who objected to Mr. Bracken occupying the space where the vendor wanted to set up his ice-cream cart. It is capable of accommodating hundreds if not thousands of people. According to the evidence of Officer Forcier, it is one of the busiest places in the Parks, and nearly 17,000 people passed through it on August 2. At the time of Mr. Bracken's demonstration, hundreds of people had just disembarked from tour buses and were queuing to buy tickets for the Wildplay Zipline attraction and Hornblower boat tours.

[49] In my view, the evidence does not establish that the function of either the Parks as a whole or Grandview Plaza specifically would be impaired by constitutional protection of expression within the Parks. Grandview Plaza is a place where people congregate and must expect to interact with others. That is precisely what made it an attractive destination for Mr. Bracken. Nothing that happens there requires quiet or an absence of distraction. Indeed, neither quiet nor the absence of distraction is even possible there. As in *Greater Vancouver,*

> [u]nlike the activities which occur in certain government buildings or offices, those which occur [in the Parks] do not require privacy and limited access … Like a city street, [the Parks are] a public place where individuals can openly interact with each other and their surroundings (*Greater Vancouver*, at para. 43, emphasis added).

[50] Nor am I persuaded that there is anything else about the Parks that suggests that the exercise of freedom of expression within it would undermine the purposes for constitutional protection of that freedom. Although there could be places within the Parks where the constitutional protection of freedom of expression does not extend (private offices, for example), Grandview Plaza is not one of them.

[51] Of course, the mere fact that freedom of expression is protected within a particular location does not mean that no limits on expression in that location are permissible. But any such limits fall to be considered under s.1 analysis.

Question 3: does s. 2(9)(a) of the Regulations limit 2(b) of the Charter in purpose or effect?

[52] The third step of the s. 2(b) inquiry is to ask whether the limits imposed by s. 2(9)(a) on free expression flow from the provision's purpose, or whether they are better understood as incidental effects.

[53] If it is determined that s. 2(9)(a) has as its *purpose* the limitation of expression, that is sufficient to establish a s. 2(b) limit on expression and the government must defend the limit under s.1 of the *Charter*. But if the provision limits expression as a side-effect of the pursuit of some other purpose, then the claimant faces the additional hurdle of establishing that the expression subject to the limitation furthers one of the underlying goods advanced by the protection of expression: (1) enabling democratic discourse; (2) facilitating truth seeking; or (3) contributing to integral self-fulfillment: *Irwin Toy*, at p. 976.

[54] The respondent argues that s. 2(9)(a) does not have as its purpose the limitation of expression: any message whatsoever can be delivered as long as the form of expression does not "attack the physical or psychological integrity

of the audience." The provision is said not to target the communication of any particular set of ideas, only the method used to convey ideas.

[55] I do not accept this submission for two reasons.

[56] First, insofar as it applies to "psychological integrity", the argument is simply an iteration of the argument rejected above, urging an expansion of the violence exception to include "emotional violence".

[57] Second, just because *some* means of expression (predominantly physical violence) can be readily identified and excluded from the ambit of freedom of expression, does not mean that such a neat division between content of expression and the means of communication is always possible: *Ford v. Quebec (A.G.)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 748-750. Over some range of cases at least, the medium is the message. Tone of voice, volume, facial expressions, and body language all convey meaning that cannot necessarily be conveyed effectively in words. The exercise of free expression is diminished by restrictions on the means that make it effective. So it is no answer for the respondent to say there is no limit on one's exercise of freedom of expression – that everyone is free to convey whatever ideas they want – provided they use appropriately temperate language. To take a familiar example from US First Amendment case law, the meaning conveyed by shouting "fuck the draft" does not translate, without significant loss of meaning, to the quiet declaration, "I am implacably opposed to the draft": *Cohen v. California* (1971), 403 U.S. 15.

[58] For these reasons, I conclude that the application judge erred in determining that s. 2(9)(a) did not limit freedom of expression under s. 2(b). The Commission is required to demonstrate, in s. 1 analysis, that the limit placed on expression can be justified.

(3) Section 1

[59] Where the exercise of a *Charter* right has been limited by a statute or regulation, the party seeking to uphold the statute or regulation may justify the limitation. This is because the scope of non-absolute rights such as freedom of expression cannot be determined without an assessment of the reasonable limits necessary for maintaining the conditions conducive to a healthy society, including those limits needed "to protect public safety, order, health, or morals or the fundamental rights and freedoms of others": *R. v. Big M Drug Mart*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 337.

[60] The framework for determining whether a legislative limit on rights is reasonable and justified was set out in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 138-139. Although aspects of the *Oakes* test, set out below, are expressed in technical terms such as "balancing" and "minimal impairment", the test is at root an evaluation of the extent to which limits are reasonable in a free and democratic society: *R. v. K.R.J.*, 2016 SCC 31 (CanLII), [2016] 1 S.C.R. 906, at para. 58; see also Francisco J. Urbina, *A Critique of Proportionality and Balancing*, (Cambridge: Cambridge University Press, 2017), at pp. 4-9.

(a) Prescribed by law

[61] Section 1 of the *Charter* authorizes only such limits as are "prescribed by law". This requirement is satisfied by a regulation promulgated by the Commission pursuant to the exercise of its statutory power.

[62] Mr. Bracken, however, objects to s. 2(9)(a) on the basis of its vagueness. He argues that the uncertain boundaries of the words "abusive or insulting" mean the provision provides no guidance either to a person like himself who wants to know what he can and cannot lawfully do in the Parks, or to a police constable tasked with enforcing it. The result, he argues, is the antithesis of the rule of law: instead of being subject to a clear rule capable of guiding behaviour, he is subject to a vague standard whose meaning depends on the whims of the NPP officer applying it.

[63] In support of his argument, Mr. Bracken points to the history of his engagement with the NPP. On August 2, 2016, he was told that he was not permitted to display his sign in the Parks. Two days later, when he attended at the station and sought clarification, he was told again, by a different officer, that the sign was not permitted, and that if he

attended again with the sign he would be removed from the premises. Significantly, the respondent now concedes that the display of the sign in the Parks does not infringe s. 2(9)(a) and that the oral trespass notice cannot be maintained. This series of events, Mr. Bracken argues, demonstrates that s. 2(9)(a) is unconstitutionally vague.

[64] I would reject this submission.

[65] The concern about vagueness in legal standards, the discretion it gives to those who interpret and implement them, and the challenge it poses to the Rule of Law has long been a preoccupation of jurists: see Timothy A.O. Endicott, *Vagueness in Law* (Oxford: Oxford University Press, 2001). In Canadian law, the leading treatment of vagueness remains *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606, which holds that it is an impossible demand that the legislature, and those exercising delegated rule-making powers like the Commission, address in advance every conceivable contingency in a law's application. Although the law can identify clear areas of permissible and impermissible behaviour where there is no room for doubt about one's obligations, "it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk": *Nova Scotia Pharmaceutical Society*, at p. 639.

[66] An appropriately specific law gives fair notice of the type of behaviour that enters the "risk zone" of non-permissible conduct. That requirement of fair notice is satisfied where the law "sufficiently delineate(s) an area of risk" and provides the criteria to be used by those applying the law to particular circumstances. It is unrealistic to demand that the law do more: *Nova Scotia Pharmaceutical Society*, at pp. 638-39. The fair notice requirement can also be satisfied in part where the prohibited conduct coincides with the "substratum" of common morality in society; that is, when independent of the law, everyone knows that the proscribed act is wrongful: *Nova Scotia Pharmaceutical Society*, at pp. 634-635.

[67] Section 2(9)(a) is sufficiently detailed to provide an adequate basis for reasoned analysis applying legal criteria, as demonstrated in the discussion above about the provision's interpretation. It provides fair notice to the public and appropriately limits enforcement discretion. Furthermore, even members of the public who are unaware of s. 2(9)(a) would know that it is wrong to interfere with other persons in their use of public recreational space. That s. 2(9)(a) is, like any law, capable of being misinterpreted (and was misinterpreted by the NPP with respect to the display of the sign) is beside the point. The remedy for unreasonable exercise of enforcement discretion is, in the ordinary course, an appeal (if provided) or judicial review; it is not the invalidation of the relevant law.

(b) Proportionality test

[68] To establish that the limit s. 2(9)(a) places on freedom of expression is reasonable and demonstrably justified, the respondent must show that the provision has a sufficiently important objective to warrant limiting the right and that the means chosen are proportionate to that achieving that objective.

[69] The test for proportionality adopted in *Oakes* has three components. As summarized recently in *K.R.J.*, at para. 58:

A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law.... The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by "balanc[ing] the interests of society with those of individuals and groups".

Does s. 2(9)(a) have a sufficiently important purpose?

[70] This step of the analysis is not onerous. Its most frequent analytical function is not so much to screen out unimportant legislative purposes (of which we can assume there will be few) as it is to provide a preliminary assessment of the impugned provision for use in the minimal impairment and overall proportionality steps that follow.

[71] The importance of s. 2(9)(a) is obvious. Communities have an interest in maintaining the public character of shared spaces, which requires the use of legislation and regulation to prevent individuals and groups from using public space in a way that renders it unfit for the reasonable use of others. The guidance provided by regulations such as s. 2(9)(a), helps to preserve the Parks as a place of public recreation and a global tourist attraction. As Brown J. (as he then was) observed in *Batty*, at para. 91, without rules governing what people can and cannot do in parks, they would be at risk of descending into "battlegrounds of competing uses … or places where the stronger, by use of occupation and intimidation, could exclude the weaker or those who are not prepared to resort to confrontation".

[72] I conclude that s. 2(9)(a) has a sufficiently important purpose: safeguarding the reasonable use of the Parks by the public, by prohibiting others from unreasonably interfering with that use.

Rational Connection

[73] The rational connection branch of the test is satisfied if the impugned provision contributes in some way to advancing its objective. Again, the requirement is easily satisfied here. The specific means adopted by s. 2(9)(a) – a prohibition on abusive and insulting language or other conduct that unnecessarily interferes with the use of the Parks by other persons – clearly advances its objective of maintaining the public character of the Parks.

Minimal impairment

[74] Section 2(9)(a) will fail the minimal impairment test only if there are alternative schemes, less restrictive of freedom of expression, that achieve the provision's objective "in a real and substantial manner": *K.R.J*, at para. 70; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 S.C.R. 567, at para. 55. The Commission, which promulgated the regulation, is owed a "measure of latitude" in this inquiry; the question is whether the means it chose is within an acceptable range of alternatives, not whether it is the least restrictive means imaginable: *City of Montréal*, at para. 94; *R. v. Edwards Books and Arts Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 772; *Gordon v. Canada (Attorney General)*, 2016 ONCA 625 (CanLII), 404 D.L.R. (4th) 590, at paras. 258-261.

[75] Section 2(9)(a) does not cast a wide net over expressive activity in the Parks. As noted above, the provision does not curtail expression that society expects a reasonable person to be able to tolerate. It does not restrict expression that is annoying, or even infuriating. People using public spaces are required to tolerate exposure to ideas with which they intensely disagree – ideas that may be inimical to their own deeply cherished commitments and choices.

[76] The record before us discloses no alternative scheme to s. 2(9)(a) that would be less impairing of freedom of expression and capable of substantially achieving the provision's objectives. I conclude that s. 2(9)(a) is minimally impairing of s. 2(b).

Overall proportionality

[77] The final question is whether there is proportionality between the salutary effects of s. 2(9)(a) and its deleterious effects on the right to freedom of expression.

[78] Unfortunately, the court does not have the benefit of submissions from Mr. Bracken on the deleterious effects of s. 2(9)(a). He objects to what he calls the "reading down" of the provision and insists that it be interpreted as proscribing all speech that is merely insulting or abusive, without more. I have rejected this submission as an unsupportable interpretation of s. 2(9)(a).

[79] I will therefore proceed under the assumption that section 2(9)(a) has two negative effects on freedom of expression. First, persons who wish to express themselves in a manner that infringes the provision will be unable to do so. This is an undeniable loss of freedom. Second, is the "chilling effect"; some persons may unnecessarily self-censor, either because they wrongly conclude their expression contravenes s. 2(9)(a) and keep silent, or because they are concerned that officials tasked with enforcing s. 2(9)(a) will misapply it and curtail lawful expression. As McLachlin J. (as she then was) noted in dissent in *Keegstra* at p. 850, "in weighing the intrusiveness of a limitation on freedom of expression our consideration cannot be confined to those who may ultimately be convicted under the limit, but must

extend to those who may be deterred from legitimate expression by uncertainty as to whether they might be convicted."

[80] Neither concern, in my view, is significant in this appeal.

[81] First, although s. 2(9)(a) undoubtedly restricts freedom of expression within the Parks, the type of expression it prohibits carries little weight in the s. 1 analysis, as it does not meaningfully advance any of the genuine human goods associated with freedom of expression: *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11 (CanLII), [2013] 1 S.C.R. 467, at para. 112. As described above, s. 2(9)(a) does not prohibit the expression of contentious or controversial ideas. It does not prohibit or curtail robust contributions to public debate. It does not prohibit incivility, profanity, or vulgarity. In proscribing the use of abusive or insulting language, it merely prohibits personal invective.

[82] Turning to the second concern, I make two observations about the possible "chilling effect" created by s. 2(9)(a).

[83] First, one aspect of a chilling effect presupposes over-enforcement of s. 2(9)(a) by the NPP. This is a reasonable concern. This concern, however, does not provide grounds for finding the provision unconstitutional. Enforcement problems, should they occur, are to be addressed through the oversight of administrative law. The Commission is entitled to promulgate regulations under the assumption that they will be applied constitutionally by the NPP: *Little Sisters Book & Art Emporium v. Canada (Commissioner of Customs & Revenue Agency)*, 2007 SCC 2 (CanLII), [2007] 1 S.C.R. 38, at para. 71. As this court held in *R. v. Khawaja*, 2010 ONCA 862 (CanLII), 103 O.R. (3d) 321, at para. 134:

Nor can improper conduct by the state actors charged with enforcing legislation render what is otherwise constitutional legislation unconstitutional. Where the problem lies with the enforcement of a constitutionally valid statute, the solution is to remedy that improper enforcement, not to declare the statute unconstitutional.

[84] Second, these proceedings mark the first time that s. 2(9)(a) has been judicially interpreted. Following this decision, and any future decisions that apply s. 2(9(a) to individual cases, "greater certainty may be expected, further reducing the law's chilling effect": *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at para. 104. This increased certainty will benefit both members of the public and NPP officers tasked with enforcing the Regulations.

[85] Set against these concerns are significant benefits for users of the Parks in knowing their reasonable use of the Parks will not be frustrated by abuse directed towards them. The narrow limit on expression placed on all users of the Parks is, in my view, proportionate to the benefit to be achieved in maintaining the character of the Parks as a place of public resort.

[86] On the basis of the foregoing analysis, I conclude that the limits on freedom of expression established by s. 2(9)(a) are fully justified. The regulation does not violate the *Charter*. I would dismiss this ground of appeal.

[87] There remains the *Charter* challenge to the oral trespass notice.

[88] Both parties take the position that when Mr. Bracken attended at NPP headquarters on August 4, an NPP officer, Mr. Forcier, delivered an oral trespass notice to Mr. Bracken: he was not to return to the Parks with his sign. If he did, he would be arrested and removed from the premises. Mr. Bracken sought a declaration that he was lawfully permitted to attend with his sign on the sidewalk. The application judge declined to grant the declaration, noting that he had already "expressed the opinion that doing no more than returning with the sign in question would not breach s. 2(9)(a)", and stating that he did not know "just what the police would do if [Mr. Bracken] returned to the park with the sign". It appears that the application judge thought it would be sufficient to draw the NPP's misapplication of s. 2(9)(a) to the parties' attention, and that would be sufficient to resolve the matter of the trespass notice. It was not.

[89] It was only at the hearing of this appeal, more than a year after the decision of the application judge was released, that the respondent conceded that the on-going trespass notice was invalid. Up to that point, the respondent took the position that the trespass notice was valid and subsisting. The respondent further argued that Mr. Bracken's

challenge to the trespass notice was moot because the NPP could have removed Mr. Bracken from the Parks pursuant to the *Trespass to Property Act*, given his violation of s. 2(9)(a)(the constitutionality of which had been upheld), and alternatively, because the notice was authorized by s. 2(11) of the Regulations (which Mr. Bracken has not challenged).

[90] The respondent's conclusion is a *non sequitur*. The mere fact that provisions of the *Trespass to Property Act* and s. 2(11) of the Regulations may authorize the NPP to issue trespass notices or otherwise exclude persons from the Parks says nothing about whether the exercise of that power in this particular case was lawful or constituted a violation of a *Charter* right.

[91] Mr. Bracken attended at the station on August 4 specifically to clarify whether, on the NPP's understanding of the law, he was permitted to display his sign. Inspector Forcier told him that he was not and that he would be arrested and removed if he did so. This disagreement about his legal rights was the impetus for Mr. Bracken to bring this proceeding in the first place, challenging the trespass notice as an infringement of his *Charter* rights. To be fair to the respondent, it was not always clear what remedy Mr. Bracken was seeking or on what grounds. And to be fair to Mr. Bracken, it is not always a simple matter to determine whether the proper course of action is to challenge a decision, the legislation authorizing the decision, or both. In the circumstances of this multi-pronged and on-going dispute between the parties, it was an error for the application judge not to bring some clarity by issuing a declaration quashing the trespass notice.

[92] In summary, based on the above analysis on the scope and constitutionality of s. 2(9)(a), and in the absence of any submission by the respondent to justify the trespass notice, I conclude that the trespass notice constituted an unconstitutional curtailment of freedom of expression in an open public venue.

[93] Unlike the protesters in *Batty*, who essentially converted a public park to their exclusive use, this was an instance of a single person, standing on a sidewalk at the edge of a public, semi-commercial plaza within a park, holding a sign displaying a political message. Political messages are always provocative. They imply that others are wrong, perhaps through ignorance, mistake, negligence, or even moral failure. They frequently risk offending those with contrary views. But in a free society individuals are permitted to use open public spaces to address the people assembled there – to challenge each other and to call government to account. The idea that the Parks are somehow different – that they are categorically a "safe space" where people are to be protected from exposure to political messages – is antithetical to a free and democratic society and would set a dangerous precedent. Again, this does not mean that there cannot be any limitation on expression in the Parks based on time of day, appropriate limits on noise, or the nature of any interference with the specific activities going on in the specific location within the Parks. The analysis must always be contextual. But in this instance, it is conceded that there were no circumstances that would justify the removal of a single protester with a sign from a busy plaza, and that the display of the sign, despite its profanity, did not constitute the use of insulting or abusive language within the meaning of s.2(9)(a).

[94] Although the trespass notice has now been withdrawn and the issue is moot, in my view it is nevertheless in the interests of justice to issue a declaration stating there was no basis in law to issue the trespass notice enjoining the display of the appellant's sign and quashing the trespass notice.

Disposition

[95] I would allow the appeal in part. I would allow the appeal with respect to the trespass notice of August 4, 2016, and issue a declaration quashing the notice as set out above. I would dismiss the appeal with respect to the constitutional challenge to s. 2(9)(a).

[96] As success is divided, there is no order as to costs.

Released: March 19, 2018

"B.W. Miller J.A." "I agree Doherty J.A." "I agree H.S. LaForme J.A."

CITATION: Gammie v. Town of South Bruce Peninsula, 2014 ONSC 6209

DATE: 2014-10-29

ONTARIO SUPERIOR COURT OF JUSTICE

Price J.

Reasons For Order

NATURE OF PROCEEDING

[1] Following the 2010 election for Town Council of the Town of South Bruce Peninsula, Craig Gammie, an unsuccessful candidate for councillor in that election, engaged in periodic litigation with the Town and, on one occasion, left an audio recording device running in the Council chamber after Council went into a closed session at which the Town's litigation with Mr. Gammie could have been discussed. Upon discovering the device, Council passed Resolution R-793-2012 on November 20, 2012 ("the 2012 Resolution"), banning Mr. Gammie from entering onto Town property, including the Council Chamber.

[2] Mr. Gammie applied to the court pursuant to the *Municipal Act, 2001*, for an order quashing the 2012 on the ground that he had not been given notice of Council's intention to consider it, or an opportunity to respond. He later settled his proceeding, at the suggestion of the presiding judge, by withdrawing it upon Town Council agreeing to reconsider the resolution and to give Mr. Gammie an opportunity to respond.

[3] Mr. Gammie continued to engage in what the Town Council regarded as disruptive activities. On August 20, 2013, the Town Council passed a further Resolution R-423-2013, prohibiting Mr. Gammie from entering onto Town property ("the 2013 Resolution"). Mr. Gammie again applied to the court pursuant to section 273 of the *Municipal Act, 2001*, this time for an order quashing both the 2012 and the 2013 Resolutions, on the grounds of illegality as well as on the ground of constitutional invalidity. The Town raised an initial objection that Mr. Gammie's challenge to the 2012 Resolution had been settled and that he should not be permitted to re-litigate the legality of that Resolution on grounds that were raised or that should have been raised in his first application.

[4] On June 3, 2014, Town Council passed a further resolution ("the 2014 Resolution") in which it repealed the 2012 and 2013 Resolutions in their entirety, and substituted a more limited one. The 2014 Resolution directed that Town staff, with the exception of the Town's Administrator, would not be required to communicate or otherwise interact with Mr. Gammie, and that should Mr. Gammie submit nomination papers for the 2014 municipal election, the Town Clerk would be permitted to contact Mr. Gammie via mail or e-mail, as required, and only in relation to election matters, and that, if permitted by the Town Clerk, Mr. Gammie could attend at the Clerk's office, provided the Administrator or another staff person was also in attendance.

[5] Notwithstanding the repeal of the 2012 and 2013 Resolutions, Mr. Gammie requested a determination as to the merits of his application, and his costs. After hearing submissions as to costs, I reserved judgment. These are my reasons, then, for the disposition made as to the costs of the application.

BACKGROUND FACTS

[6] Mr. Gammie is a 64 year old retired engineer/ business professional with an engineering degree from the University of Waterloo and an MBA from the Schulich School of Business at York University. He has no criminal record.

[7] In 2010, Mr. Gammie ran unsuccessfully for the position of Ward 3 Councillor in the South Bruce Peninsula municipal election. He says that he lost by a narrow margin, and that he received more votes than two other currently sitting councillors, representing wards of similar sizes. He is running again in the 2014 election.

[8] Mr. Gammie has a cottage in the Town of South Bruce Peninsula, but says that he spends much of his time at his home in Mississauga. He states that some residents of South Bruce Peninsula consider him a "seasonal" resident, and that

he therefore considers it vital to be actively involved in Town politics in order to become known locally and overcome the disadvantage of not being a full-time resident.

[9] Mr. Gammie has attended many council and public meetings, all of which are held on municipal property. He has presented at many of the meetings, and writes a newsletter on municipal issues. He says that he bases his newsletter articles, in part, on information he obtains at Council meetings and on discussions he has with other politically active people at the meetings.

[10] Mr. Gammie has engaged in repeated litigation with the Town and its Councillors and staff. In particular,

(i) He issued several conflict of interest challenges against councillors, in which he alleged "a pattern of sloppiness" in adhering to the obligations under *Municipal Conflict of Interest Act*, R.S.O. 1990. All but one of the matters settled on a without-costs basis. He claims that the "sloppiness" has diminished.

(ii) He challenged the Town's Economic Development Committee when he believed that it was overstepping its mandate. He notes that the Town Council eventually discontinued the Committee.

(iii) He challenged the way in which the Town's Chief Administrative Officer was promoted and then performed her job. The Town, he says, later terminated her employment.

(iv) The Chief Administrative Officer sued Mr. Gammie and others for slander, and the Town initially paid her legal fees. Mr. Gammie challenged the Town's authority to do so. The Town eventually ceased paying her legal fees, and her lawsuit against Mr. Gammie was eventually settled with a dismissal without costs.

[11] According to Mr. Gammie, some councillors and staff have complained that he is against all development, and that he indiscriminately opposes Council's actions. According to Mr. Gammie, they have called him a "thorn in our sides", who "must be stopped," and have referred to him and others as "a plague on the town," and "criminals".

[12] Mr. Gammie says that he has attended over 100 council and other public municipal meetings, and has presented at many of them. He denies that he ever:

(i) spoke at a meeting without permission from the Chair;

(ii) was asked to leave a meeting;

(iii) was warned that if he did not discontinue some activity, he would be asked to leave;

(iv) was warned that he could be banned from any, let alone all, municipal meetings.

c) *The 2012 Resolution*

[13] On March 7, 2011, the Town held a meeting of the Committee of the Whole, which Mr. Gammie attended. At some point, the Committee went into closed session to discuss matters of a private nature, including litigation, or potential litigation, and the public was asked to leave. Mr. Gammie left an audio recording device running in Council chambers. The device was discovered during the closed session, and Mr. Gammie was warned not to leave such a device running in Council Chambers again during closed sessions. The Town staff turned the device over to the Ontario Provincial Police (the "OPP").

[14] On November 20, 2012, the Town Council passed Resolution R-793-2012, prohibiting Mr. Gammie from entering onto the Town's property ("the 2012 Resolution"). This resolution provided:

That Mr. Gammie be prohibited from entering any Town of South Bruce Peninsula Council Chambers, committee meetings and Town Hall facilities until all litigation is completed.

[15] At the time the 2012 Resolution was passed, Mr. Gammie had made five court applications against the Town, its Councillors, and volunteer members of the Wiarton Business Improvement Area Board of Management. Council discussed

these Applications in closed session, as they involved solicitor-client litigation advice, which was privileged. The 2012 Resolution included the following background:

Mr. Gammie has pending litigation against the Town of South Bruce Peninsula, was warned not to leave the tape recorder in Council Chambers, yet it happened again November 20, 2012.

[16] Mr. Gammie says that he was not given notice, before the November 20th meeting, that Council would be discussing a resolution to ban him from municipal meetings on the ground that he had left a recording device running at a closed meeting of Council. He says that he had used the device to record "open meetings" due to the poor quality of the official municipal recordings. He further states that municipal staff themselves had sometimes left recording devices operating at closed meetings themselves, although he offered no details of such incidents.

[17] Mr. Gammie obeyed the 2012 Resolution. He applied to the court pursuant to section 273 of the *Municipal Act, 2001*,[1] to rescind the ban against him, but re-attended Council meetings only when the ban was temporarily rescinded. There was no complaint about his conduct at any of the meetings he attended during the temporary rescission of the ban.

[18] On August 20, 2013, Council varied the 2012 Resolution by approving Resolution R-423-2013 ("the 2013 Resolution"). That resolution provided:

That Craig Gammie be hereafter prohibited from entering Council Chambers and all other portions of Town Hall located at 315 George Street in Wiarton;

And further that Craig Gammie be hereafter prohibited from attending:

1. Any Town Council Meeting;

2. Any meetings of:

(a) A Committee of Council;

(b) The Town of South Bruce Peninsula Police Services Board;

(c) The Wiarton Business Improvement Area Board of Management; and

(d) The Wiarton/Keppel International Airport Joint Municipal Service Board; and

(e) Any public meeting held by the Town, including any public meetings held in accordance with a statutory requirement.

And further that Craig Gammie be hereafter prohibited from contacting or interacting, in any way, with Town staff, with the exception of the Town's Administrator.

And further that, notwithstanding the foregoing, should Craig Gammie submit nomination papers for the 2014 municipal election for the Town, Mr. Gammie would be permitted to contact the Town Clerk via mail or e-mail (only in relation to municipal election matters); and if permitted by the Town Clerk, Mr. Gammie could attend at Clerk's office, provided that the Administrator or another staff person is also in attendance.

[19] All of Mr. Gammie's legal actions were resolved before August 20, 2013. He says that the reasons for the 2013 Resolution, banning him from municipal property, were prepared by the Town's lawyers, and were not shown to councillors before or at the meetings where the ban was considered. In his application to quash the 2013 Resolution, he asserted that the 2013 Resolution was handed to him within minutes of the end of the closed meeting of Council. Council refused to tell him when the resolution was prepared, or whether any presentation was made concerning it before it was prepared.

[20] Mr. Gammie pointed out that the 2013 Resolution was based on incidents that occurred before the 2012 Resolution was passed, but that those incidents were not given as reasons for 2013 Resolution, namely:

(i) The McMillan Parking Lot incident;

(ii) The Sign at a Meeting Incident;

(iii) The Wunderlich Sign Incident; and

(iv) The McMillan at reorganization Meeting Incident.

[21] The Town responded to Mr. Gammie's application, asserting that he was a threat to the safety of public officials, staff or members of the public. It offered evidence of four incidents that prompted it to pass the resolutions, as follows.

(i) *The McMillan Parking Lot Incident*

[22] In November 2011, Michael McMillan, who was Chair of the Town's Economic Development Committee ("EDC"), chaired an EDC meeting in the Town's Council Chambers. After the meeting adjourned, Mr. Gammie, who had attended the meeting, followed Mr. McMillan outside and into the parking lot. Mr. Gammie wanted to discuss an issue with Mr. McMillan, but Mr. McMillan told him that he did not want to discuss it with him.

[23] Mr. Gammie acknowledges that he spoke with Mr. McMillan after the meeting, and that he walked beside him to Mr. McMillan's car, which was parked beside Mr. Gammie's car. He further admits that when Mr. McMillan entered his own car, he [Mr. Gammie] knocked (Mr. McMillan says "banged") on the window of Mr. McMillan's car with his hand. Mr. McMillan drove away.

(ii) *The Sign that Mr. Gammie was ordered to remove*

[24] Mr. Gammie brought two signs to a special budget meeting of Council on February 10, 2012. The Town says that on multiple occasions in the past, Mr. Gammie had brought signs into Council chambers which went beyond political protest, and accused Councillors of "theft" and "stealing," as well as accusing the former Chief Administrative Officer of the Town, Rhonda Cook, of having a "personal vendetta". The Town says that on January 24, 2012, he brought a sign "with an obvious sexual connotation about Ms. Cook" into a special meeting of Council. One of the Councillors twice raised a point of order in relation to one of the signs, indicating that it was offensive to staff, and that there was "an obvious sexual connotation to the sign." Council passed two resolutions requiring that the sign be removed immediately, and Mr. Gammie eventually removed it, indicating that he was doing so "under duress and that this was not over."

[25] At the February 10, 2012, meeting, the Deputy Chair, Jay Kirkland, asked Mr. Gammie to remove one of the signs, as "he did not want [those] signs in the workplace". Mr. Gammie refused to remove it, and a majority of Council then passed a motion to have the sign removed. Mr. Gammie again refused to remove the sign, whereupon the Ontario Provincial Police were called and removed it.

[26] Mr. Gammie says that no formal resolution was made directing him to remove the sign, although he acknowledges that the Deputy Chair, Mr. Kirkland, ordered him to remove one side, or face, of one of the signs, which stated: "Someone is suing John, Rick, Orma, Craig for $700,000.00 on your dime". Mr. Gammie asked by what authority the Deputy Chair had made the order, and because none was cited, he continued to refuse to remove the challenged face of the sign, on the ground that he was not breaching any rule. He acknowledges that police were called and removed the challenged face of the sign.

[27] Mr. Gammie made a presentation against the proposed budget, using the three remaining sides of his signs. He argued that Council lacked the authority to fund the Chief Administrative Officer's legal action against him, and other actions against him for slander.

(iii) *Mr. Gammie's sign and Mr. Wonderlich*

[28] The Town asserts that on January 31, 2012, there was a public meeting at the Sauble Community Centre concerning the Town's Strategic Plan. After the meeting was adjourned, and while people were cleaning up, Mark Wonderlich, a member of the public, removed a sign that Mr. Gammie had brought. Mr. Gammie acknowledges that he returned into the Community Centre and confronted Mr. Wonderlich about discarding his sign. Mayor Close says that he witnessed the confrontation, and that Mr. Gammie took the pointed end of the sign and shoved it into Mr. Wonderlich's stomach.

[29] Mr. Gammie denies that the post was pointed and denies striking Mr. Wonderlich with it. He notes that the Town did not offer a sworn affidavit from Mark Wonderlich in connection with the incident. The only oral evidence it offered was from Mr. Close. Mr. Gammie states that Mr. Close claims to have had a clear view, but that he was, in fact, many feet away, with many people between him and the incident.

[30] Mr. Gammie further states that a videotape of the meeting does not show that the post was pointed, or that he struck anyone with it. He submits that an affidavit of John Strachan, who was directly behind Mr. Gammie, which was used in another proceeding, states that no contact occurred.

(iv) *Altercation with Mr. McMillan at Reorganization Meeting*

[31] The Town says that on July 30, 2012, there was a public meeting at the Wiarton Arena about re-structuring the composition of Council. Following a presentation from the Town's Clerk, Angie Cathrae, the meeting was opened for public comment. Mr. Gammie raised several issues which the Town says were unrelated to the subject of the meeting. It further says that he began insulting members of the Town Council. He referred to his personal "wall of shame", consisting of a number of people, including the Mayor, who did not agree with his views. The Town says that Ms. Cathrae ruled Mr. Gammie out of order, but that he continued speaking. Finally, Mr. McMillan, former Chair of the EDC, asked Mr. Gammie to stop speaking and sit down. Mr. McMillan stated on cross-examination that Mr. Gammie charged toward him from behind in a threatening manner, and that Mr. McMillan's wife warned her husband to "look out." The Town says that after an exchange of words between the two men, Mr. Gammie said "Let's take this outside" or "I'll meet you out in the parking lot", which Mr. McMillan interpreted to mean that he wanted to fight. Ms. Cathrae intervened to prevent a physical altercation between them.

[32] Mr. Gammie acknowledges that he was interrupted by Mr. McMillan, who told him in a loud voice to sit down, and that Mr. Gammie invited him to "come outside". He notes that Mr. Close states that Mr. Gammie yelled the invitation across the room, whereas Mr. McMillan says that Mr. Gammie was standing beside him when he spoke the words. Mr. Gammie denies that he was inviting Mr. McMillan out to fight, and states that he simply wanted to speak with him outside in order not to disturb the proceedings inside the Council chamber. He acknowledges that Mr. McMillan and Mr. Close regarded the invitation as a challenge to fight.

[33] Mr. Gammie says that Mr. McMillan and Mr. Close remained in the Arena after the meeting to talk with others, and that he had no further words with them. He says that he did not see Mr. McMillan when he went outside much later, after the meeting had ended.

[34] Mr. Gammie states that there is no evidence of any investigation of the incidents, or of discussion or consideration as to whether they required any measures to be taken in response to them. There is also no evidence, he says, that any consideration was given of less restrictive means of achieving the Town's purpose.

[35] While Mr. Gammie was banned, he continued to involve himself in the policy development process through written submissions he made to Council and staff, through the Chief Administrative Officer. In particular,

(i) Mr. Gammie submitted a letter regarding the budget for the February 19, 2013, budget meeting, anticipating that it would be read into the record, in accordance with what he says is a standard procedure. It was not read, which Mr. Gammie attributes to a decision by a staff member, Tracy Neifer, apparently with the approval of Mr. Close.

(ii) On June 9, 2013, Mr. Gammie sent a letter to an Administrator, Ms. Farrow-Lawrence, who did not forward the letter to Council.

[36] On June 3, 2014, Town Council passed a third Resolution R-262-2014 ("the Third Resolution") concerning Mr. Gammie. It repealed the 2012 and 2013 Resolutions in their entirety, effective immediately. The Third Resolution further provides:

That Town staff shall not be required to communicate or otherwise interact with Craig Gammie, except for the Town's Administrator;

And further that notwithstanding the foregoing, should Craig Gammie submit nomination papers for the 2014 municipal election for the Town, the Town Clerk is hereby permitted to contact Mr. Gammie via mail or e-mail, as required, and only in relation to municipal election matters; and, if permitted by the Town Clerk, Mr. Gammie could attend at the Clerk's office, provided that the Administrator or another staff person is also in attendance.

[37] At the hearing of Mr. Gammie's application on June 25, 2014, counsel advised the court that the passage of the 2014 Resolution had obviated the need for the remedies that Mr. Gammie sought in his application. Nevertheless, Mr. Gammie requested a determination as to the merits of his application and an order respecting the costs associated with it.

THE ISSUES

[38] The Town's passage of the 2014 Resolution rendered the substantive issues in Mr. Gammie's application moot. Nevertheless, Mr. Gammie asked the court to consider the merits of his application for the purpose of determining whether either party should be required to pay the other's costs. The court must therefore consider, as a threshold issue, whether to address the substantive issues raised in the Application, notwithstanding that they are moot.

[39] The Application itself raised the following substantive issues:

POSITIONS OF THE PARTIES REGARDING THE SUBSTANTIVE ISSUES

[40] The Town asserted that Mr. Gammie was improperly seeking to re-litigate issues that he raised, or should have raised, in his earlier application to quash the 2012 Resolution. It argued that the court should refuse to hear his application because it dismissed his earlier application as abandoned, with the consent of both parties.

[41] Mr. Gammie argued that he consented to the dismissal of his earlier application because the Town conceded that it had not given him an opportunity to be heard before passing the resolution, which was the basis for his challenge in that application, and that the Town agreed, at this instance of Conlan J., to give him that opportunity. In those circumstances, he said, the dismissal of his earlier application should not preclude him from challenging both resolutions on the new ground that they were beyond the jurisdiction of the Town and were constitutionally invalid, infringing his right to free expression, as guaranteed by the Canadian Charter of Rights and Freedoms ("the Charter").

[42] The Town argued that the Town was obliged by the OHSA to pass the resolutions in order to maintain a safe workplace for its employees. Mr. Gammie argued that he had not engaged in violence or threaten violence and that his conduct had not created an unsafe workplace for the Town's employees.

[43] The Town asserted that it passed the resolutions in the exercise of its necessary jurisdiction to control its own process and to maintain order at its meetings, and that the court should defer to its exercise of jurisdiction, even if it found that it exercised that jurisdiction in an unreasonable manner. Mr. Gammie argued that the resolutions were unnecessary and that the court would be required to find circumstances of necessity in order to conclude that the Town had jurisdiction to pass the resolutions.

[44] Mr. Gammie asserted that the resolutions infringed his constitutionally guaranteed right to free expression. The Town argued that the resolutions prohibited Mr. Gammie's violent and disruptive conduct, which were expressions not protected by the Charter.

ANALYSIS AND EVIDENCE

[45] The Supreme Court of Canada set out the approach to be taken to the issue of mootness in *Borowski v. Canada (Attorney General)*. The Ontario Court of Appeal later considered *Borowski* in *Tamil Co-operative Homes Inc. v. Arulappah* and *Jane Doe v. Canada (Attorney General)*.

[46] In *Tamil*, Doherty J.A. quoted the following passage by Sopinka J. from *Borowski*, defining mootness in these terms:

Accordingly if, subsequent to the initiation of the action or proceeding,

events occur which affect the relationship of the parties so that no present

live controversy exists which affects the rights of the parties, the case is

said to be moot.

[47] In the case before him, Doherty J.A. held that the Divisional Court erred in hearing an appeal which had become moot. He stated the following:

...The parties remain adversarial only in the sense that they take different positions on the legal issues raised before the courts below. They are aptly described as opposing debaters taking affirmative and negative positions on legal propositions and not as litigants opposed in interest in an ongoing legal controversy. The appeal is moot.

[48] In the present case, the parties are adversarial on the issue of whether the 2012 and 2013 Resolutions were valid, and they have an ongoing dispute as to the costs of the application and as to the extent of the Town's power to control Mr. Gammie's right of self-expression and the way in which that power may be exercised. In *Jane Doe*, LaForme J.A. stated:

The general rule at common law is that courts should decline to decide cases that have become moot. Exceptions to the general rule may be demonstrated through a two-part test found in *Borowski*: *(i) the court must determine whether the required tangible and concrete dispute between the parties has disappeared and the issues have become academic; and (ii) if the response to the first question is affirmative, the court must decide if it should nevertheless exercise its discretion to hear the case*. [Emphasis added]

[49] LaForme J. further stated:

Borowski provides direction and sets out *three factors to be considered when deciding whether to exercise judicial discretion and hear a case that has become moot*. The three factors are:

(1) *Whether an adversarial relationship still exists between the parties*.

(2) *Whether special circumstances exist in the case so as to justify the expenditure of scarce judicial resources*.

(3) *Whether there is a need for the court to be sensitive to its role as the adjudicative branch in our political framework*. [Emphasis added]

[50] In the present case, an adversarial relationship still exists between the parties. Some elements of the 2013 Resolution were reproduced in the 2014 Resolution which continues to have effect. There is a need for the court to be sensitive to its role as the adjudicative branch in our political framework, and the court can best perform its role in the present case by adjudicating as to the costs of the application in the context of the issues that Mr. Gammie raised in his Application with respect to the 2012 and 2013 Resolutions.

[51] For the reasons that follow, I find that Mr. Gammie's application to quash the 2012 Resolution was an abuse of process which, for that reason, should not have been permitted to proceed.

[52] The doctrine of *res judicata* includes the more narrow doctrines of cause of action estoppel, issue estoppel, and collateral attack. Cause of action estoppel is a branch of *res judicata*.

[53] In *Elguindy v. Warkworth Institution*, Healey J. outlined its four requirements:

(i) There must be a final decision of a court of competent jurisdiction in the prior action;

(ii) The parties to the subsequent litigation must have been parties to, or in privity with, the parties to that action;

(iii) The cause of action in the prior action must not be separate and distinct;

(iv) The basis of the cause of action in the subsequent action must have been argued or capable of having been argued in the prior action if the parties had exercised reasonable diligence.

[54] The doctrine of *res judicata* has limited application to actions settled on consent, at least as it pertains to issue estoppel, there having been no adjudication. Justice C.L. Campbell stated in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, that:

A Consent Order may operate as a res judicata with respect to the causes of action settled by the Consent Order. Issue estoppel, however, does not apply where there has been no adjudication on the merits.

[55] Quigley J. held in *Gravelle v. Ontario*, however, that a consent dismissal of an action "may feed a finding of *res judicata*." He relied, in this regard, on Ground J.'s decision in *Reddy v. Oshawa Flying Club*, that, "a consent order which ends an action is of the same effect for purposes of the *res judicata* doctrine as a judgment issued by the court on completion of a trial or hearing".

[56] Relative to the third element, Sharpe J. stated in *Las Vegas Strip Ltd.* that "a litigant cannot establish a new and fresh cause of action by advancing a new legal theory in support of a claim based upon essentially the same facts," and the Court in *Hoque* stated that the question on the last branch is whether the issue raised in the second action should have been raised in the first. The Supreme Court provided the rationale underlying this in *Grandview*:

[W]here a given matter becomes a subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case.

The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, in which the parties, exercising reasonable diligence, might have brought forward at the time. [Emphasis added.]

[57] Unlike "cause of action estoppel", the doctrine of abuse of process is unencumbered by specific requirements. In particular, abuse of process may apply to block a claim even where the technical requirements of the *res judicata* doctrines cannot be met: *Toronto (City) v. C.U.P.E., Local 79*. In that case, Arbour J. explains that the abuse of process doctrine seeks to prevent a proceeding that would offend the principles of "judicial economy, consistency, finality, and the integrity of the administration of justice." Accordingly, where its application is being considered, the focus of the inquiry is "less on the interest of parties and more on the integrity of judicial decision-making as a branch of the administration of justice."

[58] In relation to the 2012 Resolution, Mr. Gammie relied on grounds of challenge that he could have raised in his first application. If Mr. Gammie's argument were accepted, it would allow litigants to make a succession of applications, raising one argument after another, until they find one that is successful. This would lead to a multiplicity of proceedings, and increasing the time and expense litigants must endure to obtain a just resolution of the matter on its merits. This would be an abuse of process and cannot be permitted.

[59] For the foregoing reasons, I will confine my analysis of the remaining issues to the 2013 Resolution.

[60] Sections 32.0.1 to 32.0.7 of the *OHSA* came into force in 2009. The amendments were a reaction to the growing realization that workplace violence can be a significant issue in any workplace. The amendments are intended to require parties in the workplace to raise their awareness and not ignore warnings of violence that puts employees in danger.

[61] Sections 32.0.1, 32.0.2, 32.0.3, 32.0.5 and 32.0.7 require employers to develop or maintain policies or programs and provide workers with information and instruction regarding workplace violence and harassment. Section 32.0.4 requires employers who are aware, or ought to be aware, that domestic violence could expose a worker to violence to take every reasonable precaution to protect the worker.

[62] Section 32.0.5 imposes a duty on an employer to protect workers from workplace violence. Workplace violence is defined in section 1 of the *OHSA* as follows:

(a) The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) A statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

[63] There is conflicting evidence as to whether Mr. Gammie held a post that was pointed, or poked Mr. Wonderlich with it, or intended to challenge Mr. McMillan to a fight, or banged on his car window with such force as to raise a risk of damage to the window or of force to Mr. McMillan. I am not satisfied, on a balance of probabilities, that Mr. Gammie was violent or made threats of violence that reasonably caused Town officials, staff, or members of the public to fear for their safety.

[64] Section 273(1) and (2) of the *Municipal Act* provide:

Application to quash by-law

273(1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality. 2001, c. 25, s. 273(1).

Definition

(2) In this section, "by-law" includes an order or resolution. 2001, c. 25, s. 273(2).

[65] Section 239(1) of the *Municipal Act* provides that all meetings shall be open to the public and then provides a series of exceptions, none of which apply to this case.

[66] Section 241 of the *Municipal Act* expressly permits the head of Council, or other presiding officer, to expel a person for improper conduct at a Meeting. However, it does not give the head of council or other presiding offer the right to ban a person from all municipal property or all future meetings.

[67] Where a specific power is given in a statute, other than as an instance of a more general power, it cannot be applied arbitrarily with a broader and more general effect. Despite attending multiple meetings, Mr. Gammie was never asked to leave. The 2013 Resolution, in banning Mr. Gammie from all municipal meetings and all municipal property, involved an exercise of powers beyond those granted to a municipality by s. 241. It was therefore beyond the Town's jurisdiction.

[68] Bad faith includes acting unreasonably and arbitrarily and without the degree of fairness, frankness, openness, and impartiality required of a Municipal government.[17] "Illegality" in section 273 of the *Municipal Act* includes By-laws passed in bad faith.[18]

[69] Two of the most important indicia of good faith are "frankness and impartiality."[19] Not inviting input from affected persons before passing a By-law may militate against a finding of frankness and impartiality but is not determinative.[20] Circumstances may justify not inviting input. In the present case, Counsel was justified in not inviting input from Mr. Gammie, whose disruptive conduct had precipitated the resolution, and could reasonably have been expected to be repeated if input had been invited from him.

[70] Bad faith includes arbitrary or unfair conduct and the exercise of power to serve private purposes at the expense of the public interest.[21] I do not find that Council's conduct was arbitrary or unfair to Mr. Gammie, or that it served private purposes at the expense of the public interest. The 2013 Resolutions was prompted by Mr. Gammie's unreasonable conduct, which was disruptive to Council's ability to conduct its public business. While the resolution was overbroad, the evidence does not support a finding that it was calculated to eliminate dissent, or to eliminate a political opponent who challenged Council's decisions and could have hurt the councillors' chances of re-election.

[71] There is little doubt that Council were irritated by Mr. Gammie's conduct and passed the 2013 Resolution so that they would not have to police his conduct at each of their meetings. The fact that this had the collateral effect of impairing Mr. Gammie's ability to criticize their decisions did not give rise to a conflict of interest, nor render the resolution an abuse

of public office. If this were the test, Council would be unable to take any steps to restrain dissent, even to the limited extent necessary to enable it to conduct its business.

[72] Section 1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it, subject to such reasonable limits as prescribed by law as can be demonstrated in a free and democratic society. Section 2 of the *Charter* provides:

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;

(c) freedom of peaceful assembly.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[73] The 2013 Resolution barred Mr. Gammie from all municipal property. It thus preventing him from participating in, or attending, Council meetings in the future. The issue was whether the resolution infringed his rights as guaranteed by sections 2(b) and 7 of the *Charter*.

[74] The resolution restricted Mr. Gammie's freedom to attend and participate in public Council meetings and therefore limited his freedom of assembly and expression.

(i) *Section 2(b)*

[75] The Supreme Court of Canada has prescribed a two-step inquiry to determine whether an individual's freedom of expression has been infringed. The first step involves a determination of whether the individual's activity falls within the freedom of expression. The second step is to determine whether the purpose or the effect of the impugned government action is to restrict that freedom.[23]

[76] The 2013 Resolution was enacted by the Town. It was therefore prescribed by law.[24] Municipalities are, by their nature, "government." In *Godbout v Longueil (City of)*, LaForest J., writing for a minority of the Court (the majority having dealt with the case under the *Quebec Charter*), noted a number of characteristics that make municipalities "governmental". They are democratically elected, have general taxing powers, and are empowered to make, administer and enforce laws. Most importantly, they:

> ... derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers in the functions which they would otherwise have to perform themselves. Since the Canadian Charter clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority.

[77] In determining whether Mr. Gammie's right to attend public Council Meetings is protected by the *Charter*'s guarantee of freedom of assembly, and whether his right to participate in and peacefully protest at such meetings is protected by the *Charter*'s guarantee of the freedom of expression, the court must address four questions, as explained by Justice L'Heureux-Dubé's application of *Irwin Toy Ltd. v. Quebec (Attorney-General)* in *Canada v. Commonwealth Committee*.

[78] The first question is whether there is any expressive activity. The second is whether the expression takes an unprotected form, such as violence or threats of violence. If protected expression is in issue, two questions arise. Was the purpose of 2013 Resolution to restrict the expression and, if not, did it have the effect of restricting expression?

Whether there was expression

[79] Section 2(b) guarantees freedom of expression. The purpose of the guarantee is to permit free expression to the end of promoting truth, political discussion, participation, and self-fulfilment.[28] All activities conveying, or attempting to

convey, meaning are expression for the purposes of section 2(b). Political expression is one form within the range of expression that the section protects. A person is entitled to use public property in the exercise of a right of freedom of expression unless that right seriously interferes with the use of the public property by the City or other individuals.[29]

[80] Entering the Council Chambers constituted expression. The Chambers are a centre of political life for the residents of the Town of South Bruce Peninsula. Mr. Gammie's protests related to public issues about which there can be different views.

Did the expression take an unprotected form?

[81] In *Committee for Commonwealth v. Canada*, above, the Supreme Court of Canada dealt with the issue of access to state-owned property as free expression. The seven judges divided into three approaches as described by Justice McLachlin, as she then was, who spoke for three of the seven judges.

[82] Justice L'Heureux-Dubé took the approach that all expressions on public property fall within s. 2(b) of the *Charter*, with the result that any restrictions which intend to or have the effect of limiting free expression, must be justified by the government under s. 1. Chief Justice Lamer was of the view that free expression applies only if the proposed expression does not unduly impair the function of the government property in question. Justice McLachlin defined a middle ground between the two approaches:

The test for whether s. 2(b) applies to protect expression in a particular forum depends on the class into which the restriction at issue falls. If the government's purpose is to restrict the content of expression through limiting the forums in which it can be made, then this, as Cox says, is "usually impermissible". The result, under the Canadian Charter of Rights and Freedoms, is that s.2(b) applies. If, on the other hand, the restriction is content-neutral, it may well not infringe freedom of expression at all. In this case, the jurisprudence laid down in *Irwin Toy* requires that the claimant establish that the expression in question (including its time, place and manner) promote one of the purposes underlying the guarantee of free expression. These were defined in *Irwin Toy* (at p. 976) as: (1) the seeking and obtaining of truth; (2) participation in social and political decision-making and (3) the encouragement of diversity in forms of individual self-fulfillment and human flourishing by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas. ***Only if the claimant can establish a link between the use of the forum in question for public expression and at least one of these purposes is the claimant entitled to the protection of s. 2(b) of the Charter***. [Emphasis added]

[83] Despite the six judgments and the three different approaches to s. 2(b) which they reflect, the Supreme Court's decision in *Committee for Commonwealth* supports the conclusion that the 2013 Resolution, by prohibiting Mr. Gammie from attending or participating in any Council Meetings, entitled him to the protection of s. 2(b). The act of entering the Council Chambers meets the broad interpretation which Justice L'Heureux-Dubé applied to the freedom of expression. The expression meets the middle ground articulated by Justice McLachlin, with whom two other judges agreed, because attendance in the Council Chambers, which is a focus of civic activity, including demonstrations of dissent, promotes the participation in social and political decision-making up to the point where it would become violent, disruptive and unprotected. Similarly, up to the point where it becomes violent, disruptive or unprotected, it meets the narrowest of the three tests set by Chief Justice Lamer:

In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.

[84] The Town contended that the expression which the 2013 Resolution sought to prohibit were not compatible with the principal function and intended purpose of Council Chambers. It presented two arguments, based on its complaints concerning Mr. Gammie's past conduct.

[85] Because the 2013 Resolution was in response to Mr. Gammie having engaged in unprotected expression, the Town argued that it prohibited violent activities that did not merit the protection of free speech: *Irwin Toy*, above at p.607: "While

the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection."

[86] Additionally, the Town argued that Mr. Gammie's intended conduct was not protected because it would have interfered with the rights of others, including the members of Council, to express themselves by attending Council meetings and conducting the business of the Town while Mr. Gammie demonstrated his dissent from their decisions.

[87] I will deal with each of these arguments in turn.

[88] With regard to the argument that the resolution prohibited unprotected expression because Mr. Gammie had previously engaged in unprotected expression, it must be noted that Mr. Gammie was never charged with a criminal offence in relation to his conduct at Council Meetings in the past, nor with an offence under the *Trespass to Property Act*, for refusing to leave when escorted from a Council meeting, or prohibited from remaining in attendance at such a meeting.

[89] Although violent activities are not protected under s. 2(b) of the *Charter*, there was no reference in the 2013 Resolution to violent activities, nor any exception made for non-violent activities. Once it is accepted that attendance at Council meetings specifically, as a form of protest and demonstrations of dissent is a form of expression, a total ban on attendance had the effect of restricting expression and violates s. 2(b). Whatever the intention, the 2013 Resolution prohibited both violent, disruptive expression activity and free expression that is protected.

[90] The Town's answer to the fact that the 2013 Resolution restricted protected, as well as unprotected, expression at Council meetings was that a resolution prohibiting only violent or illegal activity would not have had any effect. It would not have put Mr. Gammie in any different a position than other citizens, who may exercise their freedom of expression at Council meetings only if they do so peacefully, and can be removed if they commit a criminal offence or express themselves in a way that is inconsistent with the lawful use of the property. Such a resolution, they argued, would have left the Town with no power to preserve order at its meetings or to protect public officials, staff, and members of the public in advance.

[91] The Town further argued that the 2013 Resolution, by banning Mr. Gammie, was generous to him, having regard to the fact that there were grounds to believe that he had assaulted Committee members, staff, or members of the public, and disrupted Council meetings. If the Town is not entitled to ban disruptive individuals, in order to preserve order, it would have to arrest everyone who committed a violent or disruptive act, subjecting them to harsher criminal liability.

[92] I am not persuaded that it was only possible to prohibit violent, disruptive, expression by limiting proper expression at the same time. Example of measures that would prohibit only disruptive expression are a resolution that prohibited Mr. Gammie from having recording devices in his possession at Council Meetings, or that restricted the forms of signs that could be brought into Council Chambers to paper or cardboard without solid handles, or that limited his communication with Town staff, as the third resolution does, to one designated employee, being the Town's Administrator, or the Town Clerk. If the only way to limit unprotected expression were to limit protected expression at the same time, this argument would have to be made under s. 1 of the *Charter*. The 2013 Resolution's prohibition of Mr. Gammie from entering Council Chambers, which limited all expression, protected and unprotected, violated s. 2(b) to the extent that it limited protected expression.

[93] The Town's second argument was that Mr. Gammie's attendance at Council Meetings was not protected because it interfered with the right of others to express themselves. This argument fails based on the wording of the 2013 Resolution. If its intent had been to prohibit entry to Council Chambers in order to protect the rights of the members of Council or members of the public, it could have been worded more narrowly to achieve this objective and nothing more.

[94] The 2013 Resolution either had the effect, on its face, of restricting Mr. Gammie's freedom of expression or it did not. Having regard to its broad wording, banning all attendance, it had the effect of infringing Mr. Gammie's right to freedom of expression. It could have been qualified in such a way as to permit all protected expression, but it was not qualified at all.

The purpose of the resolution

[95] I now turn to the third question in *Irwin Toy*, the purpose of the limitation. Mr. Gammie argued that the purpose of the 2013 Resolution was to restrict his freedom of expression. I do not accept that this was its purpose. The Town's argument that it was trying to prevent Mr. Gammie from doing what he had done previously must be viewed in the context of his conduct at previous meetings. Against this background, I find that the purpose of the resolution was to prevent disruptive conduct and demonstrations, that is, an unprotected form of expression.

The effect of the resolution

[96] Once the purpose of the resolution is determined, it is still necessary to examine its effect. I find that the 2013 Resolution's effect was to limit protected expression, by prohibiting Mr. Gammie from entering Council Chambers altogether. It therefore violated Mr. Gammie's right to free expression.

Was the 2013 Resolution protected by s. 1 of the *Charter*

[97] Section 1 of the *Charter* provides:

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 demonstrated in a free and democratic society.

[98] Any limit on a *Charter* right must meet the two criteria set out in *R. v. Oakes* in order to be regarded as a reasonable limit. That is,

(1) The objective which the limit is designed to serve must be of sufficient importance to warrant overriding a constitutionally protected right; and

(2) The means chosen to attain the objective are reasonably and demonstrably justified.

[99] The Supreme Court, in *Doré v Barreau du Québec*, held, in the context of judicial review, that in assessing whether an adjudicated decision violates the *Charter*, courts should not apply the *Oakes* test integrally; rather, in applying the reasonableness standard of review, it must determine whether the decision-maker disproportionately, and therefore unreasonably, limited the *Charter* right.

[100] A government has the right to preserve order at its meetings. A government that is also a property holder also has the right to restrict the use of government property for valid purposes, including the need to preserve order at its meetings. These objectives are of sufficient importance to warrant overriding a constitutionally protected right. I find that the 2013 Resolution was passed for the purpose of preserving order at Council meetings, and therefore find that the first criterion of the *Oakes* test is satisfied.

[101] The second criterion in the *Oakes* test has three components. First, the measure must be carefully designed to achieve the objective in question, in the sense of being rationally connected to the important objective that the limitation is designed to serve. Second, the measure should impair the right or freedom in question as little as possible. Finally, there must be proportionality between the effects of the limiting measure and its objective.

[102] The 2013 Resolution was rationally connected to the objective that it was designed to serve. It cannot be said, however, that it was carefully designed to impair the right or freedom in question as little as possible. Since the Town Council was using the resolution to promote the objective of maintaining a safe public space, and its effect was to restrict Mr. Gammie's freedom of expression, it must impair his right to that freedom as little as possible, and only to the extent necessary to promote its objective effectively.

[103] The Town Council could, and should, have passed a resolution that restricted Mr. Gammie's right to enter the Council Chambers in a more limited manner. For example, a resolution could have prohibited only his attendance at Council meetings with recording devices, or with signs mounted on hard backings, or restricted his communication with members of Council to the confines of Council Chambers, and in accordance with the rulings of the Chair of such Meetings, or restricted his communication with Town staff to business hours and at Town Offices or Council Chambers or, as in the third Resolution, with designated staff. Having regard to the availability of such measures, all of which would be

less restrictive than the resolution that was passed, the Town cannot establish, on a balance of probabilities, that the limit in its resolution was the least restrictive possible. The infringement caused by the resolution therefore could not have been justified under s.1.

[104] In *R. v. Semple and Héroux*, Knazan J. held that a notice that the City of Toronto issued under the ***Trespass to Property Act*** against two protesters, members of an organization that had been disruptive and violent at a previous demonstration, which prohibited them, absolutely, from entering Nathan Philips Square where City Hall was located, was overbroad and infringed the defendant's right to free expression under s. 2 of the ***Charter*** and could not be justified under s. 1 of the ***Charter***. I find Justice Knazan's reasoning persuasive and apt in the present case.

Finding

[105] The 2013 Resolution, passed to prohibit Mr. Gammie from attending all Council Meetings, infringed his right to freedom of expression and freedom of assembly under s. 2 of the ***Charter*** and could not be justified under s. 1 of the ***Charter***.

[106] Banning an individual from a public space where the rest of the public is free to attend engages section 7 of the ***Charter*** when the individual is using the public place in a manner consistent with the public purpose for that space.

[36] The 2013 Resolution deprived Mr. Gammie of his liberty and security of his person.

CONCLUSION AND ORDER

[107] For the foregoing reasons, had the 2012 and 2013 Resolutions not been revoked by the 2014 Resolution, Mr. Gammie's application to quash the 2012 Resolution would have been dismissed, and his application to quash the 2013 Resolution would have been allowed.

[108] As success in the application would have been divided, each party shall bear his/its own costs of the application.

Price J.

Released: October 29, 2014