



THE *CHARTER* CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Spring 2013

MICHELLE RAINFOOT and DAVID MORRISON

v.

THUNDER BAY (CITY)

Ontario Superior Court of Justice**Date: 20130308****Court File No: 19767-13****BETWEEN:****MICHELLE RAINFOOT AND DAVID MORRISON****Applicants****and****THE CITY OF THUNDER BAY****Respondent****REASONS FOR DECISION****D. HARCOURT J.****FACTS**

1. Michelle Rainfoot and David Morrison seek an injunction against the City of Thunder Bay, which has issued Notices of Eviction under the *Trespass to Property Act*, RSO 1990, c T.21 to them and to other protesters who have occupied Prince Arthur's Landing at Marina Park in Thunder Bay, as part of an ongoing protest in connection with the Idle No More movement.
2. The Applicants and the other protesters have been gathering at Prince Arthur's Landing on a weekly basis since December 2012. They have been speaking out against Bill C-45 and the approach of the Federal government to the protection of Aboriginal lands and the environment. They are concerned about changes to the protection of Canada's waterways and about legislation that makes it easier for First Nations reserve lands to be sold to developers.

3. The Applicants are members of the Nishnawbe Aski First Nation, which is a party to James Bay Treaty No. 9 and the Ontario portions of Treaty No. 5. Ms. Rainfoot and Mr. Morrison each live in Thunder Bay and they are deeply connected to their First Nations community and their heritage.
4. They have chosen to protest at Prince Arthur's Landing because of the lake-side location, which as Ms. Rainfoot says in her affidavit, "acts as a reminder of our shared environmental heritage, and the need to preserve that heritage for future generations." The site lies in direct view of the peninsular rock formation known in English as "The Sleeping Giant". This formation is identified in Ojibwe legend as the body of Nanabijou, a supernatural being who figures prominently in the traditional stories and beliefs of local Ojibwe people. I accept Ms. Rainfoot's evidence that this amplifies the significance of Prince Arthur's Landing as a site for the protest.
5. The Applicants and other First Nations protesters are joined by a number of other social and environmental groups that are similarly concerned about legislative changes that are designed to make it easier for natural resources developers to invest in the North. Although the protesters say that they support greater economic development in the North, including natural resources extraction projects, they believe that these legislative changes allow for irresponsible development. They call on the federal government to repeal these legislative changes and to consult with First Nations to ensure that development projects are environmentally and socially sustainable.
6. Initially, the Applicants and other protesters gathered at Prince Arthur's Landing on an occasional basis. They held protests on Saturday afternoons at which they held placards and distributed leaflets to passers-by outlining their concerns with Bill C-45. They also expressed support for Attiwapiskat Chief Theresa Spence who was engaged in a hunger strike on Victoria Island in the Ottawa River, and was demanding a meeting with the Prime Minister and a representative of the Crown about Canada's treaty relationship with First Nations.

7. After Chief Spence ended her hunger strike, the protesters felt that there needed to be a continued presence that reflected the ongoing urgency of the issues regarding Bill C-45 and development on Aboriginal lands. Inspired by the Occupy Movement, they felt that a continuous encampment would illustrate the seriousness of their concerns, and provide a permanent space to allow the voices of First Nations and other concerned individuals to be heard through the media. The Applicants and fellow protesters have been occupying Prince Arthur's Landing since January 24, 2013.
8. Their camp is composed of approximately 55 tents, as well as 3 yurts, which are used as community spaces. One yurt is used as a kitchen, and contains a number of propane camping stoves and other facilities that are used by the protesters to prepare meals for campers and visitors. Another yurt contains a library of resources. The third yurt is a speaker's lodge where the protesters hold discussions about approaches to sustainable development as well as media strategies and community governance issues.
9. The protesters have hosted a number of experts and academics who study Aboriginal governance, land claims processes and best practices for environmental assessments. The protesters have also held meetings with community outreach teams from mining companies operating in the North to discuss their concerns with current approaches to natural resource extraction.
10. The protesters and the broader Idle No More movement have not developed an action plan that articulates their view of best practices for Aboriginal economic development and environmental sustainability. Based on the material before me, I would summarise the movement's main messages as the need for greater consultation with First Nations, greater environmental protections, and the repeal of Bill C-45.
11. The Applicants say that the camp is fundamental to their protest and the messages that they are trying to convey. In her affidavit, Ms. Rainfoot stated that "the physical encampment is itself a demonstration of our commitment to these issues and a message that we will not relent until change occurs." Mr. Morison stated:

- The camp is integral to the messages that I am trying to convey. The camp is a demonstration of the living conditions facing many First Nations people on a permanent basis – many of our people live in shelters that are not much more advanced than the ways we are living in the park. The camp also provides the space and time to discuss the issues of Aboriginal economies, environmental sustainability and environmental sustainability, to come up with solutions, and to continually put pressure on decision-makers to make responsible decisions.
12. The City of Thunder Bay says that it is concerned about the health and welfare of the protesters. They state that there is a serious risk of fire in the camp, because of the use of generators, propane stoves and nightly campfires. The City is also concerned about the effects of the cold on the protesters. Two people were treated in hospital for severe frostbite in the week before the City decided to issue the Trespass Notices.
 13. The City says it is also concerned about damage to the park. In the summer months, Prince Arthur's Landing is a community hub which hosts a weekly farmer's market and summer concert series, including the Thunder Bay Blues Festival. Prince Arthur's Landing is also a regular destination for families for picnics and afternoons by the lake. The City says that the camp is causing damage to the tarmac and grass areas in the park that will cost thousands of dollars to fix, and that if the protesters are not removed soon, the City will not have enough time to repair the park before the high-use summer season.
 14. Finally, the City says that the presence of the camp has disrupted the ability of local residents to enjoy the park. In the winter months, Prince Arthur's Landing is a destination for families who go skating in the rink overlooking the lake. Since the protest camp was first erected, the City says that attendance at the skating rink has decreased by 70% when compared to attendance in the month of February over the previous 5 years.
 15. On March 1, 2013, at or around 10:00am, the City of Thunder Bay issued Trespass Notices to everyone who was present in the park, and posted these notices on unoccupied tents. The Trespass Notices state:

You are hereby given notice that you are prohibited from engaging in the following activities at Prince Arthur's Landing and in any other City of Thunder Bay park:

- (1) Installing, erecting or maintaining a tent, shelter or other structure;
- (2) Using, entering or gathering in the park between the hours of 12:01 a.m. and 5:30 a.m.

ANALYSIS

16. The protesters seek an injunction prohibiting the City from enforcing the Trespass Notices. They argue that the Trespass Notices and any government action taken to enforce those notices violate their *Charter* rights, specifically, their rights to freedom of expression and freedom of peaceful assembly.

Section 2(b) – Does the Trespass Notice Infringe the Freedom of Expression?

17. Section 2(b) of the *Charter* states:

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;

18. The Applicants argue that their protest gathering is a protected form of expression. They highlight that the freedom to express political ideas and opposition to government is at the core of what it means to live in a free and democratic society. They call upon the court to provide them with the highest level of protection, which they say is necessary to preserve the ability of all Canadians to participate in the democratic process.
19. The Applicants argue that the camp itself is also a protected form of expression, since is integral to the message they are trying to present. As they stated in their evidence, the Applicants believe that the protest camp conveys the urgency of these issues and the fact that they are not willing to relent or remain idle while the Federal government pushes forward on a development plan that they oppose. In addition, they say, the conditions in the camp bring into public view the conditions in which many Aboriginal people are required to live on a permanent basis. In short, they say, the medium of the camp is symbolic in itself: not merely a stage for, but a critical part of, the message.

20. The Constitution protects both the form and content of expression, which can often be inextricably connected. If an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the s. 2(b) guarantee. Activities that convey meaning will not be protected by the *Charter* only where the form of the expression provides a reason for excluding it from the sphere of protected activity, such as, for example, violent expression: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
21. As the Applicants point out, the Courts have recognised that protest camps are a protected form of expression in a number of cases. In *Weisfeld v. Canada* (1994), 116 D.L.R. (4th) 232 (F.C.A.), [1995] 1 FC 68 (CanLii), the Federal Court of Appeal dealt with a “peace camp” and a set of tables erected on Parliament Hill to protest the use of cruise missiles in Canada. The Federal Court of Appeal recognised the protection granted to different forms of expression at para. 30:
- In my view, expression goes beyond words. People may choose to amplify or dramatize their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or to assist one in conveying a message more effectively. These "props" are part and parcel of the manner in which one chooses to express oneself and are as deserving of protection as the words used to convey the meaning. The Peace Camp structures and the tables used are, therefore, included in the concept of expression.
22. Similar reasoning was adopted in *Vancouver (City) v. Zhang* (2010), 325 D.L.R (4th) 313 (B.C.C.A.), a case in which Falun Gong protesters set up a round-the-clock vigil across from the Chinese embassy that included a large billboard and a meditation hut, which encroached slightly onto the nearby street.
23. More recently, Courts across the country recognised that the camps erected by the Occupy Movement were themselves a form of protected expression, even though they impeded other members of the community from using the public spaces in which they were erected: *Batty v. City of Toronto*, 2011 ONSC 6862, *Calgary (City) v. Bullock (Occupy Calgary)*, 2011 ABQB 764, and *Corporation of the City of Vancouver v. Thompson*, 2011 BCSC 1810.

24. The City argues that what the protesters are asking for is positive action by the government to facilitate their speech. The City says that it is under no obligation to dedicate public resources, including a public park, to support the Idle No More movement or any other public protest. They argue that this case is analogous to *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627, in which the Supreme Court of Canada held that s. 2(b) of the *Charter* did not require the government to provide funding for a women's organization to participate in constitutional reform discussions which eventually led to the Charlottetown Accord.
25. The City also draws an analogy to *Baier v. Alberta*, [2007] 2 S.C.R. 673, 2007 SCC 31, in which the Court held that the government of Alberta was not required to provide the claimants with a "statutory platform" to express themselves during school trustee elections.
26. In short, the City argues that the protesters are free to express themselves on their own property but that the *Charter* does not require the City to provide them with a space that they can use as they wish, without regard to the regular uses of the park.
27. Having considered these arguments, I find that the Trespass Notices infringe the Applicants' s. 2(b) rights to free expression. Through their camp, they are attempting to convey political messages, which have historically been protected by the courts. Their situation is much more analogous to the peace camps, meditation tents and to the Occupy movement than to the situations raised in the *Native Women's Assn. of Canada* or *Baier*.
28. Furthermore, I reject the argument that the use of public space is a privilege, subsidy or statutory platform as discussed in those cases. The freedom of expression would have little meaning for most people if they did not have access to public spaces in which to express themselves. Indeed, Canadian Courts have recognised that the public square has become by tradition a place of protected expression: *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 11 at para. 61.
29. I find that the Trespass Notice and any government action taken to enforce it is a breach of s. 2(b) of the *Charter*.

Section 2(c) – Does the Trespass Notice Infringe Freedom of Peaceful Assembly?

30. Section 2(c) protects everyone's right to "freedom of peaceful assembly". The Applicants argue that the Trespass Notice and any action taken by the City to evict them from the park infringes their right to assemble peacefully. As Ms. Rainfoot stated in her affidavit, "the camp at Prince Arthur's Landing is site and form of our assembly." The Applicants state that ejecting them from Prince Arthur's Landing disrupts a peaceful gathering.
31. The Applicants ask this court to adopt the reasoning of Tarnopolsky and Beaudoin in *The Canadian Charter of Right and Freedoms (1982)* at pp. 138, 142-43, where the authors state:
- If we do indeed have a right to speak, and to be heard, the right to assemble may be the only way of ensuring the advocacy of the right to speak... Groups without the money to advertise often find it necessary to demonstrate. If their right to demonstrate is denied, the group must languish in a communicative vacuum. Demonstrations guarantee medial exposure and in Western society access to the media is essential to the communication of a point of view, and to the fulfillment of group interests.
32. The City says that the Trespass Order does not prohibit demonstrations, since it only restricts the timing and manner of those demonstrations. The City says that the Applicants and the other protesters are free to assemble and demonstrate during the daytime hours, so long as they do not erect structures on public property.
33. With respect, I find that the City's argument unpersuasive. Freedom of assembly is protected in the same manner as freedom of expression, since those rights are deeply intertwined: *Corporation of the Canadian Civil Liberties Association v. Canada (Attorney General)* (1992), 8. O.R. (3d) 289. As with the protection afforded to freedom of expression, any infringement of the freedom to assemble, however limited, must be justified under s. 1 of the *Charter*.

Section 1 – Is the Trespass Notice Demonstrably Justified?

34. Our *Charter* does not give absolute protection to our fundamental freedoms. It recognises that in some circumstances, individuals' rights must be limited in order to preserve the rights of other members of the community and to maintain a free and democratic society.
35. Section 1 of the *Charter* states:
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
36. The onus is on the City to prove that the Trespass Notice is justified under s. 1 of the *Charter*, and that it meets the four criteria set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 and *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567:
- (i) that the Trespass Notice furthers a pressing and substantial public objective;
 - (ii) that the Trespass Notice is rationally connected to that objective, meaning that there is a causal connection between the Trespass Notice and the government's objective;
 - (iii) that the Trespass Notice impairs the Applicants' rights as little as reasonably possible to achieve the City's objective; and
 - (iv) that the positive effects of the infringement – in this case the Trespass Notice – outweigh its negative effects.

Pressing and Substantial Objective

37. The City says that the Trespass Notice was issued in order to achieve the following objectives:
- (a) to protect the health and welfare of the protesters, which is endangered by the conditions at the camp;

- (b) to protect the park against damage, including damage by fire, destruction of the grass and damage to the tarmac; and
 - (c) to balance, in a fair way, the different uses of the public park so that everyone in the community is able to enjoy them.
38. The City says that evicting the protesters will ensure that the park is not damaged by tents and heavy traffic which harm the grass, or by camp fires and vandalism.
39. The City laid great emphasis on its concern for the health and welfare of the protesters. This concern was heightened when two protesters who had stood outside for 8 hours straight to hold candles during a vigil were hospitalised with extreme frostbite. Indeed, the hospitalization of these protesters was one of the main impetuses for the City's action.
40. Finally, the City notes that attendance at the skating rink, which is popular with many families as a beautiful place to enjoy outdoor winter activities, has decreased by 70% this year compared with the previous 5 years. It says that the continued presence of the camp is preventing families from enjoying the park.
41. The Applicants argue that there is no substance to the City's concerns. They say that they are not damaging the park, that they are operating their stoves and fires in a safe manner and that they are working with the fire department to ensure that the camp is fire-safe. Furthermore, the Applicants state that the City's concerns for their safety are overblown and that the reckless actions of two individuals who have refused to take precautions to protect themselves against the cold should not be a basis to restrict all of the protesters' rights to freedom of expression and assembly.
42. Finally, the Applicants state that the camp exists as a way to begin a discussion with the mainstream community and that there is no need to evict Idle No More to ensure that everyone is able to enjoy the park. They have presented evidence that the camp has provided an opportunity for discussions with experts and with members of the business community to come up with strategies. Moreover, they point out that they are not restricting access to the skating rink.

43. On the question of pressing and substantial objective, I do not need to consider whether the Trespass Notice is necessary, only whether the City's purported objectives are genuine and are not trivial or discordant with principles that are integral to a free and democratic society.
44. Based on the evidence before me, I find that the City's action was genuinely motivated by these important public concerns and that the City has met the first branch of the *Oakes* test.

Rational Connection

45. The rational connection threshold is low, but important. This threshold protects against arbitrary or unfair government action that is based on irrelevant considerations. The question I must ask at this stage is whether there is "a causal connection" between the Trespass Notice and the objectives of protecting the health and safety of protesters, protecting the park and facilitating other uses of the park. I find that it is reasonable to suppose that evicting the protesters from Prince Arthur's Landing will further the government's objectives.

Minimal Impairment

46. In order to justify the infringement on the Applicants' rights, the City must prove that the Trespass Notice infringes these rights as little as reasonably possible in order to meet the City's objective. The question is whether there are less harmful means of achieving the legislative goal.
47. The Applicants argue that the Trespass Notice goes further than is necessary to ensure that their health and safety is protected, that the park is not damaged, and that other members of the community can use the park for recreational purposes. They state that lesser measures such as limiting the number of people who are allowed to camp overnight at any time will achieve the City's objective, while still allowing the protesters to show the

seriousness of their concerns by maintaining a permanent and continuous presence at the park. The protesters also state that if the City were truly concerned about the protester's health and safety, the City could consult and work with the protesters to ensure that proper supplies are in place to ensure that no one's safety is harmed.

48. The City says that it is not required to accept any alternative that requires it to compromise on its objectives. The City argues that the Trespass Notice has been carefully tailored to allow the protesters to continue their demonstration in a way that doesn't harm the park, themselves or other members of the public. The protesters are free to speak out during the daytime hours, as they did early on in their protest when they held weekly demonstrations on Saturday afternoons.
49. In my view, both the City and the Applicants' have failed to understand that the minimal impairment test is designed to ensure that there is an appropriate balance between important social goals and individual rights. The parties have failed to look at creative solutions that allow for a compromise.
50. I agree with the City that overnight camping is incompatible with its goals of protecting the health and safety of the protesters and preventing damage to the park. The damage that results from the protesters using the park as their regular dwelling is considerable. The grass is trampled and damaged by tents. Furthermore, there is no alternative to the use of generators, cooking stoves and campfires for heat and light, and this creates a safety hazard, regardless of the number of tents in the park.
51. However, in my view, the Trespass Notice is not minimally impairing insofar as it prohibits any structures to be maintained in the park. The two yurts that are used by the protesters for a library and speaker's lodge are not causing significant damage to the park, nor do they pose a fire hazard. Using these two structures during the daylight hours does not pose a health risk. Nor do I think the presence of two yurts will have a significant impact on the ability of other members of the community to use the park. Indeed, the evidence indicates that the speaker's lodge has facilitated discussions with a broader segment of the public.

52. Having concluded, via the Oakes Test, that the Trespass Notice does not minimally impair the rights in question and is overbroad with in relation to the library and the speaker's lodge, I will now turn to the question of what remedy is appropriate.

Remedy

53. Because I have found that the Trespass Notice is only overbroad with respect to the removal of the library yurt and the speakers' lodge, the appropriate remedy is to grant partial injunctive relief.
54. Under s. 24(1) of the *Charter*, the Court is authorised to issue any remedy it considers appropriate and just in the circumstances.
55. It is therefore up to me to decide what is appropriate and just in these circumstances. I have been asked to order an injunction against the City for enforcing the eviction notice. On any injunction, the options are to grant the injunction, deny the injunction or grant a partial order. Other questions of damages or other remedies are not appropriate to this case. As in all cases requesting an injunction, it is not for me to decide the merits of the case at trial. I am only asked to decide if the case meets the test set out below, warranting the order of an injunction.
56. The test for ordering an injunction was set out in *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. It established a three-part test for granting an injunction:
1. Is there a serious issue to be tried? and
 2. Will the applicant suffer irreparable harm if the injunction is not granted? and
 3. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on merits (often called "balance of convenience")?
57. There is no question that *Charter* violations are serious matters that meet the first branch of the test for injunctive relief. Having found that there are *Charter* infringements, this

matter is one of importance and meets this threshold. Next I must consider whether the matter will result in irreparable harm.

58. In my view, the loss of an opportunity to exercise one's *Charter* right to freedom of expression and, in particular, the freedom of political expression cannot be repaired through other means, such as by giving the Applicants a sum of money as damages. The rights to expression and assembly are about allowing everyone to attempt to persuade others of their views and, in the context of political speech, to change policy and legislation. The loss of this right cannot be quantified in a sum of money.
59. Turning to the third branch of the test, I will consider the impact on the City if I choose to grant the injunction and allow all or part of the encampment to remain in the park.
60. The damages alleged by the City include damage to grass, landscaping and facilities, which clearly can be addressed through an award of damages, should this matter be decided differently at trial.
61. The City also alleges a decrease in the usage of the skating rink. While I find that this loss of enjoyment or popularity cannot easily be quantified, I find that these interests are not as serious as the interests of the Applicants and thus do not outweigh the harm to the Applicants' *Charter* rights.
62. This leaves me with the final and most difficult categories of harm raised by the City – the potential for injury or loss of life. Certainly this type of harm is very serious and cannot be compensated with money. However, I find the chances of serious injury or death to be very low. To refuse to order the injunction on the basis of this far-fetched and hypothetical outcome would be to trivialize the Applicants' *Charter* rights.
63. I find that, on the third branch of the test, the balance of convenience favours granting an injunction in part.

CONCLUSION

64. For the reasons stated above, I order the City not to enforce the Trespass Notice insofar as it requires the Applicants and other protesters to dismantle the library yurt and the speakers' lodge.

HARCOURT, J.