THE CHALLENGES OF REGULATING MUNICIPAL PUBLIC SPACE: A DISCUSSION OF RECENT CASES AND TRENDS FROM ALBERTA

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One of the major challenges presented by the recent Occupy protests for North American municipalities has been how to balance competing claims by the public to the use of municipal public space. While many of us recognize that public parks, gardens, squares and streets serve an important function in providing venues for public protest, we also appreciate that these spaces cannot fulfill their intended purpose and function unless they remain accessible for everyone's use and enjoyment, not merely those few who choose to protest.

This paper discusses some of Alberta's recent cases involving the regulation of municipal public space and specifically, Calgary's experience with the Occupy protest movement.

I. INTRODUCTION

At first blush, the protection afforded by the *Canadian Charter of Rights and Freedoms* to expressive activity, such as peaceful protest in public spaces, seems impervious to challenge. After all, it was Justice Lamer writing for the majority of the Supreme Court of Canada in *Irwin Toy Ltd v Québec (Attorney General)*[1] who held that an activity as mundane as parking a vehicle may convey meaning and constitute an expressive activity worthy of *Charter* protection.

This is problematic for municipalities and their lawyers having to justify the constitutionality of limits and regulations which seek to restrict the public's use and access to municipal public space. It is therefore encouraging to see a continuing trend at the appellate court level which reflects a practical understanding of the problems that municipalities deal with when faced with competing claims for the use of municipal public space.[2]

In the case of *Montréal (City) v 2952-1366 Québec Inc*[3], the Supreme Court of Canada discussed an issue that had arisen nearly 15 years earlier in a case decided by that same court in *Committee for the Commonwealth of Canada v Canada*[4]. At issue was whether the location of the

[1] [1989] 1 SCR 927 at para 42, 58 DLR (4th) 577.
[2] For an interesting discussion on municipal public spaces and the challenges of balancing *Charter* rights in public parks, see Geoff Ellwand's "Fixing City Bylaws: A Fair Sharing of Urban Public Space" (Master's Thesis, University of Calgary Faculty of Law); and, "*Charter* Rights and the Competition for Public Space: Whose Park is it Anyway?" (Essay, submitted to the Environmental Law Centre (Alberta), 11 June 2010).
[3] 2005 SCC 62, [2005], 3 SCR 141 [*Montréal (City)*].
[4] [1991] 1 SCR 139, 77 DLR (4th) 385 [*Commonwealth*].

expressive activity was sufficient to exclude it from the scope of protection afforded by section 2(b) of the *Charter*.

The judgment in *Montréal (City)* makes it clear that the mere fact that expressive activity occurs on government owned property does not automatically engage the constitutional protection afforded by section 2(b).

Writing for the majority of the court in *Montréal (City)*, Chief Justice McLachlin and Justice Deschamps confirmed the majority approach taken in *Commonwealth*, which distinguished between the public and private use of government owned property. At paragraph 74, the Justices set out the following test to be applied for determining whether section 2(b) would apply to expressive activity undertaken on government owned property:

> [74] The basic question with respect to expression on government-owned property is 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-fulfillment. To answer this question, the following factors should be considered:
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> (a) the historical or actual function of the place; and
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> (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

Expressive activity carried out on government owned property to which the public is ordinarily entitled to access and use would likely engage *Charter* protection if the primary function of that space is compatible with free expression and if expressive activity in such a place serves the values underlying the free speech guarantee afforded by section 2(b). In contrast, expressive activity undertaken on government owned property which has a private use aspect to it or is a place of official business would likely not attract *Charter* protection at all because of its disruptive and negative impact on the orderly conduct of business being engaged in.

At paragraphs 75 to 77 of their judgment, Chief Justice McLachlin and Justice Deschamps discussed the historical or actual function of the place in which the expressive activity is being undertaken, one of the additional factors that should be taken into account:

> [75] The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.
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> [76] Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space — the activity going on there — compatible with open public expression? Or is

> the activity one that requires privacy and limited access? Would 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? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.
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> [77] Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

In the case of *R v Breeden*[5], the British Columbia Court of Appeal examined the limits of expressive activity. At the initial trial[6], the trial judge held at paragraphs 59 to 61 that political protest in the lobby of a courthouse, municipal hall or a fire station did not attract *Charter* protection because none of these places constituted a "public arena" suitable for such discourse and none had a historical or actual function as a forum for public expression:

> [59] The answer in this case, in my view, turns on the functions of the buildings in question. None are public forums in and of themselves. Each has a specific, albeit governmental, function. Each has areas in which the public are not permitted as of right, areas in which privacy or limited access is inherent, and imperative. Each has a public gathering area, a lobby or concourse, in which those who attend at the building to engage in the business that is conducted there may wait or linger. None of these places has what might be considered a public arena, or general forum, other than, in the case of the Municipal Hall and the courthouse, a forum that is available during set times for certain purposes.
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> [60] In my view it would be anathema to the orderly conduct of the public business that these places are assigned to discharge, to require them to submit to indiscriminate use of their public areas for free expression of political or personal views. Display of signs may be itself less disruptive than the use of a bullhorn, for instance, but even the presence of an apparently antagonistic figure with a large, antagonistic, and unavoidable placard must surely be distracting and have a negative effect on the orderly conduct of the business of the place. These were not sidewalks, airport concourses, public arenas or parks. They were, and are, places in which a public function or mandate, or

[5] 2009 BCCA 463, [2009] BCWLD 8460, 248 CCC (3d) 317; leave to appeal to SCC refused, 33488 (April 22, 2012).
[6] 2007 BCPC 79, [2007] BCWLD 3382.

constitutional function, was being performed. None had a historical, or actual, function as a forum for public expression.

[61] It is not without relevance that the defendant's mission could have been equally accomplished in each place by displaying his placards just outside the premises, without disrupting or potentially disrupting the business of the place. In fact, he was invited to do so. Arguably, the outside entrance or grounds of each place might be an historically public arena or forum. But as for the inside, each of these public entities, in my view, must have a right to limit access to that which is consistent with their mandate, and not disruptive of it. The display of signs which are critical of its functions or the manner in which they are being or have been performed is not an expression that is consistent with the purposes of section 2(b) or entailed in the historical function of these buildings. In these particular places, in my view, any display, or expression, must be subject to approval of the occupiers charged with discharging the functions of the buildings, and not to the whim of the would-be expresser.

The trial judge's decision was upheld by the summary conviction appeal judge and, ultimately by the B.C. Court of Appeal. Writing for the B.C. Court of Appeal, Justice Hall discussed the "captive audience doctrine" which applies in cases where the degree of captivity makes it impractical for an unwilling viewer to avoid exposure. At paragraph 34 of his decision, Justice Hall held that the values which underlie freedom of expression, namely democratic discourse, truth finding and self-fulfillment are undermined when observers are not given a practical choice of avoiding witnessing the expressive activity:

[34] ...a consideration of the effect extending protection to a particular location will have on the audience at that location's ability to choose whether or not to receive that message is in my view relevant in a s. 2(b) analysis as well. The *Montréal (Ville)* test requires that a court consider whether extending protection to expression in a publically owned place would undermine the values underlying free expression, namely democratic discourse, truth finding and self fulfillment. When an audience is forced to observe material at close range, this can be at odds with the interplay and competition between ideas, and as such it could tend to undermine truth seeking and democratic discourse, basic *Charter* values. Being faced with these signboards inside a relatively confined building envelope such as the foyers of the premises in this case is qualitatively different from the observation of same in a sidewalk setting or concourse area. The discomfiting of staff and members of the public going about necessary business in these places is an unwarranted interference with the proper function of these premises. The usage argued for is without historical foundation.

In the Supreme Court of Canada case of *Société Radio-Canada c Québec (Procureur general)*[7], a number of press groups challenged rules which limited their ability to take photographs and conduct interviews within certain designated areas of the court and which prohibited them from broadcasting audio recordings of court proceedings. Writing for the

[7] 2011 SCC 2, 264 CCC (3d) 1, 328 DLR (4th) 34.

Supreme Court of Canada, Justice Deschamps held that while the rules adversely affected freedom of the press, these infringements were saved by section 1 of the *Charter*. Justice Deschamps concluded that the salutary effects of the ability of witnesses, parties and lawyers to move freely inside the courtrooms without fear of being pursued by media, the protection of the privacy of courtroom participants and the fair administration of justice significantly outweigh the negative effects which might affect unlimited press reporting.

II. SOME ALBERTA CASES

The following will examine three recent case studies which have explored the limits of the extent to which section 2(b) will afford constitutional protection to expressive activity on government owned property.

i. *R v SA*[8]

In *R v SA*, The City of Edmonton issued a trespass ban pursuant to the *Trespass to Premises Act* of Alberta[9] against S.A., a minor who had been involved in several assaults while at an Edmonton Light Rail Transit station operated by the Edmonton Transit System (the "ETS"). Pursuant to section 2 of the *TPA*, the owner of a premise is authorized to serve a notice not to trespass upon a person trespassing upon their property.

At the time, the ETS had a formal policy (the "ETS Policy") which contained guidelines for issuing a ban under the *TPA*. The ETS Policy recommended that peace officers issue a trespass notice to anyone who placed the safety and security of the public and ETS employees at risk when and if after all other means to control this behaviour had been exhausted. The ETS Policy contained criteria for the length of time an individual could be banned from ETS property, which would depend on the severity and reoccurrence of the behaviour and the nature of the criminal activity being engaged in by the person sought to be banned.

S.A. was served with a notice not to trespass (the "Ban"). The peace officer who served the notice justified the Ban based on the severity and number of prior incidents of assault involving S.A. Several months following the issuance of the Ban, S.A. was again found on ETS property. S.A. was charged for being in violation of the *TPA* and was further issued a violation ticket. S.A. brought a *Charter* challenge to the *TPA* in its application to public property, the issuance of the Ban, and the ETS Policy.

In the challenge, S.A. argued that the *TPA* and the Ban infringed upon her rights to liberty as provided by section 7 of the *Charter*, that the deprivation was not in accordance with principles of fundamental justice and that the infringement was therefore not saved by section 1.

- <u>The Provincial Court Trial Decision</u>

In a judgment written by Judge Dalton of the Provincial Court of Alberta, the *TPA* and the Ban were found to be unconstitutional and of no force and effect in respect of S.A.

[8] 2012 ABQB 311, rev'g *R v A(S)*, 2011 ABPC 269, [2012] AWLD 460, 52 Alta LR (5th) 85.
[9] RSA 2000 c T-7 [*TPA*].

First, at paragraphs 61 to 91, the court noted that while it was appropriate for trespass legislation to apply to landowners that have virtually unlimited rights when controlling access to their own private property, government may only restrict access to and the use of public property for valid purposes and cannot, unlike a private property owner, have an unfettered discretion to apply trespass legislation in a way that excludes public access.

Second, the court engaged in a fascinating discussion regarding the "nature" of ETS property and ultimately held that the *TPA* infringed upon S.A.'s section 7 *Charter* right to liberty by limiting the choices she could make regarding her personal autonomy and independence.

At paragraphs 146 to 148 and 150 of the trial decision, Judge Dalton described why banning S.A. from accessing public transit services implicated her section 7 rights:

> [146] While access to public transportation is not one of those basic choices going to the core of individual dignity and independence, it is the *means* by which those basic choices can be expressed. In a city the size of Edmonton, goods and services are scattered about and not all within walking distance of home, particularly in a climate as intemperate as Edmonton's. People need transportation to go to school, to go to work, to buy groceries, to visit the doctor or hospital, to visit friends and family, to go to the library, to go to the bank, to go to concerts, to go to the swimming pool, to take their children to daycare, to go to the park, to go to church, to attend Alcoholics Anonymous meetings.
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> [147] In a city the size of Edmonton, people of all kinds choose to access public transit for a plethora of reasons. Some choose to do so as it is the environmentally conscientious thing to do. Others find it a more convenient means of going to work or of getting around. For many others with limited financial means, public transit is virtually the only way to get about the city. They don't have the resources to buy or own a vehicle, or even to take taxicabs.
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> [148] Young people experience this perhaps most acutely. They are not old enough to drive until they are sixteen; they have limited finances to either buy a car, to pay for taxis, or to purchase a bicycle. While many people would be affected by not having access to public transportation, it is the old, the young and the poor who are most affected.
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> .....
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> [150] In short, while transportation is not one of these choices *per se*, it is the bedrock which enables people to make these choices and to bring them to fruition. Is this, then, a matter that *implicates* basic choices going to the core of what it means to enjoy individual dignity and independence? My unhesitating answer is yes, access to public transportation clearly implicates these basic choices for a significant segment of our society. The freedom to make these choices is an empty one indeed when one does not have the means to reify those choices.

In respect of the *TPA*, Judge Dalton found at paragraphs 152 to 187 that it did not contain an administrative review process for appealing a ban but required the affected person to embark on a complicated Queen's Bench appeal. In addition, a ban could be issued against someone who had not been convicted of the offence giving rise justifying its issuance. Furthermore, the revocation of a ban was not required in the instance the person was later acquitted. The court also had difficulties with the fact that a ban under the *TPA* does not define geographical limits and therefore captures all transit property including transit stops and buses. Judge Dalton pointed out that a ban is not restricted in its application to serious public safety offences and could be served on a person for activities not giving rise to safety and security issues, such as nuisance-type activities (for instance loitering, drug and alcohol use or other unacceptable behaviour). Judge Dalton held at paragraph 183 that "the [*TPA*] is so broad that it captures any reason to ban – or indeed, no reason to ban."

In the end, the court found that the *TPA* (as it applied to public property) and the ETS Policy deprived S.A of her right to liberty and that the deprivation was not in accordance with the principles of fundamental justice due to their overbreadth. Ultimately, the *TPA* and the ETS Policy were deemed unconstitutional and were of no force and effect against S.A.[10]

- The Queen's Bench Decision

Judge Dalton's decision was appealed and overturned in its entirety by Justice Binder of the Alberta Court of Queen's Bench who held that merely preventing a member of the public from entering onto public property to which others were entitled access did not necessarily engage the section 7 right to liberty. It was held that courts should be careful of trivializing this right by engaging it in every instance, no matter how narrow the restriction on someone's liberty.

Justice Binder concluded at paragraphs 60 to 61 that S.A.'s section 7 *Charter* rights were not engaged:

> [60] The case law on s. 7 suggests that a restriction like an ETS ban may only engage s. 7 where it:
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> - prevents a person from having the same access to property enjoyed by other members of the public, particularly areas where the public is "free to roam", "hang around" or "idle", or where people normally conduct business or engage in social or recreational activities, *and*
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> - affects (beyond inconvenience) a person's autonomy with regard to important, fundamental, inherently personal life choices (not just lifestyle choices), going to the core of what it means to enjoy individual dignity and independence.
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> [61] In my view, it was not established in this case than an ETS ban meets these criteria. ETS property is dedicated to a system of transport and it is regulated to

[10] For a more detailed discussion on the Provincial Court decision, see Ola Malik and Shawn Swinn's "To the Unruly: Beware? The Case for Banning the Disruptive from Accessing Municipal Public Services" (2012) 5 DMPL (2d), March 2012, Issue 15.

> ensure that purpose is achieved. Patrons are required to pay to access the service. It is not space which is intended primarily for roaming, loitering, conducting business or engaging in social or recreational activities.

In any event, Justice Binder was not prepared to find on the facts of the case that the Ban deprived S.A. of her liberty rights. While S.A. continued to use the ETS following the issuance of the Ban, the evidence indicated that she had not been ticketed when using transit services for going to school, work, attending appointments or in those cases where she had a legitimate explanation for using transit. The evidence seems to have eased Justice Binder's concerns regarding the potentially draconian effects which might accrue to S.A. were the Ban to amount to an outright prohibition from using transit services.

It was further held that even if there had been a deprivation of S.A.'s liberty rights, it had occurred in accordance with principles of fundamental justice. For Justice Binder, the procedure used to ban S.A. was more administrative than judicial and, since the Ban was temporary in nature and allowed for an administrative appeal, no more than minimal procedural fairness was required. Justice Binder summarized his views at paragraphs 75 to 76:

> [75] In this case, individuals subject to a temporary ban from public transit have little or no legitimate expectation as to any particular element of procedural fairness. The decision is on the lower end of the spectrum of importance to the individual. Certainly, it does not rise to the level of a decision relating to permanent residence which the Supreme Court held warranted "more than minimal" fairness. S.A. had no legitimate expectation that a certain procedure would be followed, nor that a particular result would be reached. The process is more administrative than judicial. Greater procedural protections are required when no appeal procedure is provided within the statutes, or when the decision is determinative of the issue and further requests cannot be submitted. Here, S.A. could, and ultimately did successfully request modification of her ban,
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> [76] Finally, the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances are to be taken into account and respected. Significant weight is to be given to the choice of procedures made by the agency itself and its institutional constraints. The ETS chose a procedure of notification based on certain criteria, attendance of s supervisor at the time of issuance of a band, and a possibility of modification by someone other than the person who issued the ban, or the supervisor in attendance at the time.

Finally, Justice Binder concluded that the ETS Policy and the exercise of discretion thereunder were not overbroad. While the *TPA* could be used by government to improperly exclude a member of the public from accessing public property, this did not by itself render the application of the *TPA* to public property unconstitutional. As Justice Binder concluded at paragraph 85:

> [85] ...While there exists the potential for unconstitutional bans, the *TPA* does not create those unconstitutional bans. It is the exercise of this discretion by a government actor

which is in issue. Assuming s. 7 is engaged, the main question, therefore, is whether the exercise of discretion in issuing the ban complied with the principles of fundamental justice.

For Justice Binder, the ETS Policy was a justified limitation given the unique challenges of providing a safe transit service. His Lordship held at paragraphs 89 to 90:

> [89] In *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 at para 76, the Supreme Court recognized that the Transportation Authority's objective of providing a safe and welcoming transit system was sufficiently important to warrant some limits on *Charter* rights. The ETS system has a similarly important objective. Ensuring the safety of ETS users and staff is a pressing and substantial objective.
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> [90] The care required of a public carrier is of very high degree...Those using ETS property for its intended purpose embark on vehicles of public transportation with strangers, and find themselves in confined spaces with limited opportunities to exit in the event they are exposed to violence.

The result saw Justice Binder setting aside Judge Dalton's acquittal of S.A.

The two very different approaches in the case of S.A. highlight a number of interesting discussion points, some of which may not yet have been finally resolved.

First, the contrasting decisions of Judge Dalton and Justice Binder provide two competing perspectives of a government's ability to use trespass legislation to regulate the public's access to government owned property to which the public has access. This issue does not seem to have arisen in the various Occupy protest court decisions, where one of the grounds for removing the Occupy protesters was a continuing breach of provincial trespass legislation.[11] At the core of these differing approaches is a different philosophical view on the nature of public space and the limitations which a government can place around restrictions on public access.

Second, Judge Dalton and Justice Binder differ on the "public" nature of transit services and facilities. Judge Dalton spent much time in her decision emphasizing the importance which access to transit services plays in people's everyday lives in terms of exercising fundamental life choices. In contrast, Justice Binder characterizes transit services as a place for people to go about their business in an uninterrupted way. It seems that the division between "public" and "private" government owned property identified in *Montréal (City)*[12] is equally at play here.

Finally, Justice Binder's decision suggests that courts must grant significant deference to a municipality's permitting or policy procedure or discretionary decision making exercised thereunder. Has this lowered the extent to which a municipality must, in exercising its

[11] See *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647, [2012] BCWLD 733; and *Batty v Toronto (City)*, 2011 ONSC 6862, 90 MPLR (4th) 250.
[12] *Supra*.

discretionary powers, provide an affected party with natural justice and procedural fairness rights?

In the B.C. case of *Vancouver (City)* v. *Zhang*[13], the Falun Gong set up banners and a makeshift shelter on a grassy portion of a city street in front of the Chinese consulate. The City of Vancouver brought an application for an injunction before the B.C. Supreme Court requiring the removal of the structures because their placement had not received approval from the City's engineer. While the injunction was initially granted, this decision was reversed on appeal by the B.C. Court of Appeal which held that a blanket prohibition on an activity that infringes freedom of expression, with mere reliance on prosecutorial discretion or exemptions from the prohibition granted on an individual case-by-case basis without clear guidelines or policies for granting the exemption, cannot constitute a "minimal impairment" of the right to freedom of expression.
Part of the issue was that while Vancouver City Council had approved a policy for structures on streets for the purpose of commercial or artistic expression, structures used for political expression were subject to regulation on a case-by-case basis, without the provision of any process for those who may wish to apply for permission to erect a structure. The B.C. Court of Appeal concluded at paragraphs 67 and 69 that City Council should have established a clear policy permitting the regulated use of structures for political expression:

> [67] ...A more minimally impairing scheme would keep the blanket prohibition, set down its purpose, and provide a procedure with clear guidelines for obtaining an exemption... There is nothing to reflect considerations to govern when such approval might be granted, such as public safety, the orderly use of public property or others required for proper management of city streets.
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> .....
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> [69] ...Had the Council instituted what might be called a "Political Structure Policy", as it did policies for commercial and artistic expression, as part of its regulatory scheme, my conclusion might well be different. But they chose to maintain a complete ban and, effectively, to rely on prosecutorial discretion and Council's power to direct the use of that discretion, to ensure the right to freedom of political expression was not infringed in an individual case. In so doing... they rendered [the impugned provision] unconstitutional and of no force and effect.

When an aggrieved party challenges a municipal bylaw on the basis that they were denied some right subject to a permitting provision or discretionary decision making, the critical question which often arises is whether the party's natural justice and procedural fairness rights were satisfied. This creates a significant practical challenge for any municipality given the huge volumes of administrative decisions that are being made on a daily basis. To expect municipalities to act as if they were a judicial decision maker would set a standard which no municipality could ever hope to achieve. It will be interesting to see whether Justice Binder's judgment signals greater judicial deference to the administrative processes employed by municipalities.

[13] 2010 BCCA 450, 9 BCLR (5th) 59, rev'g 2009 BCSC 84, [2009] BCWLD 2115.

ii. *R v Pawlowski*[14]

The City of Calgary ("The City") has been involved in a number of prosecutions involving the Street Church Ministry ("Street Church"). Street Church is a Christian street ministry that conducts its ministry services in public parks, on public sidewalks, and in other public spaces. For many years, Street Church used a downtown Calgary park to carry out its ministry, which consisted of administering worship, sharing verbal testimonials, offering prayer and distributing free food. Furthermore, these services were carried out with the use of amplified sound. Commencing in 2006, The City began to receive a flood of complaints from Calgarians living in the downtown area regarding Street Church's use of amplified sound. Subsequently, The City revoked a permit previously issued to Street Church's for use of amplified sound and, with a view to accommodating Street Church, offered alternative park venues where a park permit for the use of amplified sound would be given. Street Church declined The City's offer, and, despite continued public complaints, proceeded to use amplified sound for its services. It was The City's position that by using amplified sound in conducting its services, and thereby generating hundreds of complaints from Calgarians, Street Church had exceeded any reasonable expectation of how public park space was intended to be used.

A number of provincial and municipal bylaw charges were brought against Mr. Pawlowski, leader of Street Church, in respect of his activities. This included a section 21(e) charge from the Calgary *Parks and Pathways Bylaw* (the "*Bylaw*")[15] which states as follows:

> 21. No Person, while in a Park, shall:
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> .....
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> (e) operate an amplification system;
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> .....
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> except in an area where such activity is specifically allowed by the Director.

Mr. Pawlowski entered pleas of not guilty to all charges, and, with respect to the charge brought pursuant to section 21(e) of the *Bylaw*, argued that the provision infringed on his constitutionally protected rights to freedom of expression and freedom of religion.

- The Provincial Court Trial Decision

The trial judge found that while the purpose of section 21(e) of the *Bylaw* met The City's pressing concern of making City parks accessible to all Calgarians, and that it was rationally connected to the objective of limiting noise in a park, section 21(e) constituted an infringement

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[14] 2011 ABQB 93, [2011] AWLD 2082, 41 Alta LR (5th) 293, rev'g 2009 ABPC 362, [2010] AWLD 589, 19 Alta LR (5th) 313, leave to appeal to ABCA granted, 2011 ABCA 267 (September 27, 2011). See also the online posts following this case by University of Calgary Faculty of Law Professor, Jennifer Koshan, entitled "*Charter* Freedoms and Government Duties around Street Preaching: An (Overly?) Expansive View", online (2009) ABlawg <http://ablawg.ca/2009/12/29/charter-freedoms-and-government-duties-around-street-preaching-an-overly-expansive-view/>; "Street Preaching and the *Charter*: The City of Calgary's Appeal in Pawlowski", online (2011) ABlawg <http://ablawg.ca/2011/03/15/street-preaching-and-the-charter-the-city-of-calgary%e2%80%99s-appeal-in-pawlowski/>; and "Leave to Appeal Granted in Street Preacher Case", online (2011) ABlawg <http://ablawg.ca/2011/10/04/leave-to-appeal-granted-in-street-preacher-case/>.

[15] City of Calgary, Bylaw No. 20M2003.

upon Mr. Pawlowski's rights to freedom of religion and freedom of expression and that neither infringement was saved by section 1 of the *Charter.*

With respect to the infringement on Mr. Pawlowski's right to freedom of religion, the trial judge followed the two-part test laid out in *Hutterian Brethren of Wilson Colony v Alberta*[16] and held that Mr. Pawlowski's use of amplification shared a nexus with his religion because Christ may have used a form of amplification to communicate with his followers.

In the case of *Hutterian Brethren,* the Supreme Court of Canada confirmed the proper approach when conducting an analysis into the limits pertaining to the constitutionally protected right to freedom of religion pursuant to section 2(a) of the *Charter*.[17] Chief Justice McLachlin enumerated two requirements which must be established for finding that an infringement amounts to a freedom of religion violation: (1) the claimant must prove that he or she sincerely believes in a belief or practise that has a nexus with religion; and (2) the infringement must be more than trivial or insubstantial.

The second requirement is critical because a religious adherent can argue that any restriction, no matter how slightly it might impact upon their religious practice, constitutes an unlawful infringement. Chief Justice McLachlin discussed this point at paragraphs 90 and 95 of her judgment in *Hutterian Brethren* as follows:

> [90] Because religion touches so many facets of daily life, and because a host of different religions with different rites and practices co-exist in our society, it is inevitable that some religious practices will come into conflict with laws and regulatory systems of general application…In judging the seriousness of the limit in a particular case, the perspective of the religious or conscientious claimant is important. However, this perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs. The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.
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> .....
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> [95] However, in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue. The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs

[16] 2009 SCC 37, [2009] 2 SCR 567, 310 DLR (4th) 193 [*Hutterian Brethren*].
[17] For an earlier case, see the Supreme Court of Canada's decision in *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551, 241 DLR (4th) 1.

> which society reasonably expect the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs. A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such choice.

In addition to concluding that Mr. Pawlowski's use of amplification shared a nexus with his religion, the trial judge further held that the amplification ban imposed upon Mr. Pawlowski constituted more than a trivial or insubstantial impediment to Mr. Pawlowski's religious activities.

While The City conceded that section 21(e) of the *Bylaw* infringed upon Mr. Pawlowski's right to freedom of expression, the trial judge disagreed that this infringement could be saved by section 1 of the *Charter* because of its disproportionate effect.[18]

- The Queen's Bench Decision

Justice Hall allowed The City's appeal of the trial judge's decision regarding section 21(e) of the *Bylaw*, set aside the trial judge's verdict of acquittals and found Mr. Pawlowski guilty as charged for using amplified sound in a park.

Justice Hall agreed with the trial judge's conclusions and The City's concession that section 21(e) of the *Bylaw* constituted an infringement upon Mr. Pawlowski's freedom of expression. Justice Hall noted that the provision was intended to control noise and concluded that it was rationally connected to the objective of making City parks accessible for the enjoyment of the public. As to the issue of minimal impairment and proportionality, Justice Hall cited various passages from the judgment in *Montréal (City),*[19] a case that dealt with facts very similar to the ones at issue in this appeal -- a municipal by-law which prohibited the use of amplified sound in downtown Montreal. Was it an infringement on a nightclub's right to freedom of expression to prohibit the use of amplification when the noise drew public complaints, and if so, was the infringement justified by section 1 of the *Charter*?

In *Montréal (City)*, Chief Justice McLachlin and Justice Deschamps concluded that a nightclub's use of a building-mounted amplifier emitting noise into a public street did not impede the function of city streets or fail to promote the values that underlie the free expression guarantee. It was found that the nightclub's activities attracted *Charter* protection and that the provisions infringed upon the nightclub's freedom of expression. However, Chief Justice McLachlin and Justice Deschamps found that the infringement on the nightclub's section 2(b) *Charter* right could be saved by section 1 of the *Charter*. In balancing the competing rights of the nightclub with those of the public, the Supreme Court of Canada held that residents of a city like Montreal did not need to be subjected to the abuses of excessive noise and were entitled to peaceful and quite enjoyment of their environment.

[18]See also Ola Malik and Mary Ann Bendfeld's "The Challenges of Regulating Public Municipal Space" (2011) 5 DMPL (2d), April 2011, Issue 4.
[19] *Supra*.

Ultimately, in the Street Church appeal, Justice Hall held that the section 21(e) of the *Bylaw* was saved by section 1 of the *Charter*:

> [97] ...The ban on amplification systems in parks is a practical method of controlling noise in the use of public parks; it is probably the most practical and effective way of doing so. It minimally impairs freedom of expression in parks. It does not curtail public discourse. It simply limits its volume.
>
> .....
>
> [99] Here, the Citizens of Calgary are entitled to a healthy environment, including noise control in City parks. I conclude, as did the Supreme Court of Canada, that the beneficial effect of the bylaw outweighs its prejudicial effects.
>
> .....
>
> [101] Although, I accept that fact finding and characterization of Triangle Park, it does not change my conclusions above. Complaints had been received from citizens as to the volume of amplified speech and music coming from the Park.
>
> [102] The actions of Mr. Pawlowski were taking place in a downtown area, much as was the case in *Montréal (City).* As stated in para. 99 of that decision: "This does not, however, mean that its residents must necessarily be subjected to abuses of the enjoyment of their environment." This is no less true in downtown Calgary than in downtown Montreal.

With respect to the question of the effect of section 21(e) of the *Bylaw* upon Mr. Pawlowski's right to freedom of religion, Justice Hall proceeded through the analysis laid out by Chief Justice McLachlin in *Hutterian Brethren*.

Justice Hall agreed with Mr. Pawlowski's argument that his use of amplification was a necessary part of his religious outreach activities and that amplified sound shared a nexus with his religious beliefs. However, in dealing with the impact of the amplification ban upon Mr. Pawlowski's activities, Justice Hall cited from Chief McLachlin's judgment in *Hutterian Brethren* and concluded at paragraph 89 that the prohibition against the use of amplified sound was no more than a trivial or insubstantial burden upon Mr. Pawlowski:

> [89] I consider that the prohibition against the use of an amplification system is a trivial or insubstantial burden upon Mr. Pawlowski. It does not threaten his religious beliefs. While it impairs the practice that he *wishes* to follow, it does not impair his right to conduct the practice of preaching to the homeless. Rather, amplification is a pragmatic tool used to allow his preaching to be more effective. Neither his belief, nor his practice of preaching to the homeless is threatened by the bylaw provision prohibiting the use of an amplification system without a permit.

Justice Hall concluded that section 21(e) of the *Bylaw* did not infringe upon Mr. Pawlowski's right to freedom of religion, and, as a result, did not carry out a section 1 analysis. In the end, Justice Hall set aside the verdicts of acquittal entered by the trial judge and found Mr. Pawlowski guilty as charged.

iii. *The Occupy Calgary Protests*

Beginning in early October 2011, The City of Calgary was made aware of the intention to establish an Occupy Calgary camp based on the Occupy Wall Street movement in New York City. While two encampments were ultimately established on The City's park space, the enduring occupation occurred in Olympic Plaza, a public park located directly across from The City's municipal complex (City Hall). The Occupy protesters claimed that their encampment was protected by the *Charter* as a "peaceful" protest.[20] As the Occupy movement evolved, The City embarked on a strategy of working towards a peaceful conclusion and utilized measured enforcement as required to manage problem behaviours at the site. As it became apparent that a voluntary withdrawal of Occupy protesters was not at hand, The City sought redress through the Courts and was successful in obtaining an injunction to end the occupancy on December 9, 2011.

Prior to the injunction application, it was thought by The City that while the encampment at Olympic Plaza contravened the *Bylaw*[21], forcibly removing Occupy protesters was legally questionable and a disproportionate response and could result in violence. The City concluded that all efforts should be directed towards reaching a peaceful resolution. Consequently, early steps were not focused on enforcing the *Bylaw*, but rather on addressing violations such as liquor offences, smoking, littering and the execution of arrest warrants.

The decision to withhold enforcement of sections of the *Bylaw* was based on obtaining clarity on the argument that these activities were part of the expression of protest and were protected under the *Charter*[22]. Through this period, ongoing efforts were underway to negotiate with the Occupy protestors to peacefully surrender the park space and remove protest materials. Having not made significant progress with respect to these efforts, a decision was made to escalate enforcement to address the setting up of tents, camping and remaining in the park after closing.

On November 14, 2011, The City posted public notices at Olympic Plaza which provided the protesters with 24 hours notice to comply with the *Bylaw* and to remove all unattended materials and tents. Several of the occupiers voluntarily left Olympic Plaza in compliance with the posted and served notices. On November 21, 2011, The City removed approximately 75 percent of the tents and materials from Olympic Plaza, all of which were unoccupied. Subsequently, a second notice was served to the occupiers advising that The City would seek a court injunction to ensure compliance with City bylaws.

Over the course of the protest, The City pursued various mediation and negotiation strategies to address the Olympic Plaza encampment issue. Based on dialogue with representatives of Occupy Calgary, The City believed the goal of the group was to raise public awareness of social and economic inequities. With a belief that this was the case, The City offered that in exchange for disbanding their camp The City would assist the protesters in finding venues and opportunities to conduct public forums on the issue. The City's offer was subsequently declined.

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[20] See the online post by University of Calgary Faculty of Law Professor, Jennifer Koshan, entitled "Should They Stay or Should They Go? Occupy, The City and The *Charter*", online (2011) ABlawg <http://ablawg.ca/2012/02/27/i-fought-the-law-civil-disobedience-and-the-law-in-canada/#more-1238>.

[21] *Supra*, section 2(a) and 9(a).

[22] The City of Calgary took an early view that the encampments constituted an expressive activity, as per the decision in *Weisfeld v R*, [1995] 1 FC 68, 116 DLR (4th) 232.

With the refusal of The City's offer to provide alternate venues, it became clear that a court order would be required to bring the protest to a close. On November 23, 2011, The City filed an injunction seeking the removal of the Occupy protesters from the City's park space. Prior to the injunction, The City restated its offer to provide the protesters with a venue to conduct a public forum on their concerns. This offer was once again declined by the protesters who publicly stated they had no intention of leaving Olympic Plaza and instead requested that The City provide them with power, heat and accommodation. This request was not granted as The City believed that complying with this request was contrary to The City's goal of ending the occupancy.

On December 6, 2011, Chief Justice Wittmann of the Court of Queen's Bench granted The City an injunction order which required the Occupy protesters to remove their encampment from Olympic Plaza by December 9, 2011.[23] Chief Justice Wittmann's injunction order was complied with, and on December 9, 2011, the protesters peacefully removed their encampment and all of their materials from Olympic Plaza.

The City's measured approach in dealing with the Occupy Calgary protest was recognized by Chief Justice Wittmann. In his decision, the Chief Justice commended the City on the restraint which it had shown in dealing with the Occupy protesters and for utilizing the appropriate remedies available though the court system[24]. Chief Justice Wittmann concluded that, with respect to the injunction application before him, the *Bylaw* was constitutionally valid and that there was no reason in law for the court to deny the injunction application.

Throughout the Occupy protest, The City worked in a respectful manner with protesters to ensure that the health and public safety of Calgarians was not compromised. The City was committed to respecting the right to freedom of political expression while recognizing this right is not absolute in law but must be balanced with other considerations including the rights of all Calgarians to enjoy parks and pathways, public safety, impact on the environment or infrastructure and ensuring the continuation of The City's day-to-day operations.

The coordinated response between The City and partner agencies resulted in a peaceful resolution which did not result in arrests or the use of force. The City's methodology in dealing with the Occupy protesters stands in contrast with some of the other Canadian cities which involved the forcible eviction of protesters, numerous arrests and allegations of police brutality.

Overall, The City's approach in dealing with the protesters was driven by several key considerations. First, The City respects that the right to political protest is constitutionally protected. Second, The City did not want to resort to the use of force based on the experiences of other municipalities where that action tended to precipitate violence and cause damage to City property, including parks and pathways. Rather, The City focused on addressing the immediate issues relating to public health and safety and access to the park by all Calgarians, while also utilizing all of the remedies available though the court before escalating to physical intervention.[25]

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[23] See *Calgary (City) v Bullock*, 2011 ABQB 764, 2011 CarswellAlta 2503.
[24] *Ibid*, at para 51.
[25] See the Community Services & Protective Services Department Report to Council: City of Calgary, *C2012-19 - Responding to Demonstrations in Parks and Public Spaces*, (19 March 2012) online: <http://agendaminutes.calgary.ca/sirepub/mtgviewer.aspx?meetid=492&doctype=MINUTES>.

III. CONCLUSIONS

The demands on municipal public space are becoming greater as cities grow. Increasing pressures are being brought to bear on the vexing question of how to share municipal public space and how to accommodate an increasingly diverse public use of space. The limits municipalities impose must be reasonable, while at the same time aimed at maintaining an environment that can be shared by many people with diverse needs and interests. These challenges promise to keep municipalities directing their attentions and energies to these issues for the foreseeable future.