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Transporting Liberty: A Right Not to be Deprived of Access to Public Transit?

By Jennifer Koshan

Case Considered:

R v S.A., 2012 ABQB 311, overturning 2011 ABPC 269

Section 7 of the *Charter* provides that "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." The liberty interest in section 7 has been slowly evolving since the *Charter* came into force in 1982. Debates have occurred about how broadly the right not to be deprived of liberty should be constitutionally protected, and to date a majority of the Supreme Court has not accepted a wide interpretation. In *R v S.A.*, the issue was whether banning a young person from all Edmonton Transit System (ETS) properties for a period of time violated her protected liberty interests, and if so, whether this violation was contrary to the principles of fundamental justice. At the Provincial Court level, Judge D. Dalton answered both questions in the affirmative, taking a broad approach to the interpretation of liberty (2011 ABPC 269). On appeal, Justice M.A. Binder of the Court of Queen's Bench interpreted liberty more narrowly, and found that there was no violation of section 7 (2012 ABQB 311). An application for leave to appeal that decision was filed by S.A. on June 14. This post will contrast the two decisions and argue in favour of a broad interpretation of liberty in the circumstances of this case.

Facts

In April 2008, S.A., a young person as defined under the *Youth Justice Act*, RSA 2000, c Y-1, committed an assault on ETS property. In addition to being charged and convicted criminally, she was issued a Notice Not to Trespass under section 3 of the *Trespass to Premises Act*, RSA 2000, c T-7 (*TPA*), which banned her from all ETS property for six months. In July 2008, S.A. was found at an LRT station in Edmonton and was issued a ticket for violating the ban, which she challenged on the basis that the *TPA* and *Edmonton Transit System Notice Not to Trespass Policy* infringed her section 7 rights. S.A. testified that she used the ETS to attend school, work, probation and medical appointments and family visits, and that she could not afford alternate means of transportation such as a car, bicycle or taxi service. She continued to use the ETS after she was issued a ban, but was not ticketed for trespassing when she provided a legitimate reason for using transit on a particular occasion. S.A.'s youth worker requested a modification of the ETS ban in February 2009 to allow S.A. to use ETS services for school and work, and this request was eventually granted.

Law and Policy

The *TPA* provides in section 2 that no person shall trespass on premises for which they have received a notice not to trespass, and gives the authority to owners of property (and their authorized representatives) to provide such notice either orally or in writing. Trespassers may be apprehended without warrant by peace officers (*TPA* section 5), and are liable to a fine of up to $2000 for a first offence (*TPA* section 3).

The *Edmonton Transit System Notice Not to Trespass Policy* (the Policy), issued by the "Transit Manager" in 2005, required community peace officers (CPOs) to issue bans on accessing ETS property to persons who had breached bylaws or statutes where the safety and security of employees or the public were at risk. Bans had been issued in previous instances for possession of drugs or weapons, assault, spitting, threats, robbery, and vandalism, and were made for stipulated lengths of time depending on the reasons for the ban and whether a previous ban had been breached. In spite of the Policy's mandatory language, ETS staff were encouraged to use discretion in issuing bans. The Policy said nothing about how to appeal or request an amendment of a ban, and the Notice Not to Trespass issued to S.A. was also silent on these matters (as was the *TPA*). ETS witnesses testified that bans could be modified by making a request to ETS to allow use of public transit for work, school and extra-curricular activities, and that those being issued bans were orally notified of this ability to request modifications. An adult was required to apply for a modification on a young person's behalf. Information about bans was entered onto a computer system and could be accessed by CPOs (see 2012 ABQB 311 at paras 9 to 21).

Provincial Court Decision, 2011 ABPC 269

At trial, S.A. argued that her section 7 liberty interests were engaged in three ways: (1) breach of the trespass ban could lead to imprisonment, (2) the effect of the ban was to prevent her from attending places and using services to which the public had a general right of access, and (3) access to public transit is closely linked to matters going to the core of individual dignity and independence (2011 ABPC 269 at para 95).

Imprisonment clearly engages the liberty interest in section 7 (see *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 SCR 486), but the question in this case was whether the risk of imprisonment for S.A. was too remote. Judge Dalton agreed with the Crown that it was – if S.A. failed to pay the fine for violating the trespass ban, she would have to be prosecuted under intervening legislation, the *Youth Justice Act* (*YJA*), before she would be liable for imprisonment. It was thus the *YJA* rather than the *TPA* that was the source of possible imprisonment (at para 103).

As for the second ground, Judge Dalton referred to *R. v Heywood*, [1994] 3 SCR 761, as authority for the proposition that "It is a restriction of the s. 7 liberty interest when persons are prohibited from attending public places where the rest of the public is free to attend, when those persons are using the public place in a manner which is consistent with the public purpose of that space" (at para 111). She found that ETS property was similar to that at issue in *Heywood* (a public park from which a convicted sex offender had been banned), and that S.A.'s liberty interest was engaged on this basis. It followed that the banning of persons from ETS property either under the *TPA* or the ETS Policy deprived them of their liberty interest guaranteed by section 7 (at paras 114-120). Judge Dalton rejected the Crown's argument that like private property owners, the government has an absolute right to exclude persons from its property

under the common law and the *TPA.* She stated that "An absolute right to exclude persons from public property is inimical to the very notion of public property. The trespass paradigm proposed by the Crown Respondent is, in my view, an antiquated conception that is neither borne out in the context of emerging social mores nor in the jurisprudence" (at para 91). She also rejected the Crown's argument that public transit property is more like airport property than a public park, which was the basis for distinguishing *Heywood* in another case (see *R v Asante-Mensah*, [1996] OJ No 1821 (OCJ).

The third argument that S.A.'s section 7 liberty interest was engaged was based on case law supporting the right of individuals to make decisions of fundamental importance without government interference. Judge Dalton noted that this interpretation of liberty was accepted by Justice Bertha Wilson in her concurring judgment in *R v Morgentaler,* [1988] 1 SCR 30, concerning a woman's right to choose an abortion without criminal consequences. It was also supported by a plurality of Supreme Court justices in *R.B. v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, a case involving the right of parents to make medical decisions on behalf of their children without interference, and by three justices in *Godbout v Longueuil,* [1997] 3 SCR 844, involving choice of residence. In the latter case, Justice La Forest stated that "the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence" (at para 66, cited by Dalton J at para 128). Judge Dalton held that although access to public transit was not that kind of basic choice, it was the means by which such choices could be exercised. She noted that for persons with limited resources, public transit was "virtually the only way" to get around a large city such as Edmonton, and that "it is the old, the young and the poor who are most affected" (at paras 147-148). According to Judge Dalton,

> What amounts to a ban from accessing public transportation inordinately affects those who are already marginalised, to the point where quality of life may be significantly undermined. Perhaps more concerning is that removing access to public transportation effectively removes the ladder that many who find themselves in these circumstances need in order to be able to climb out of the pit (at para 149).

She thus rejected the Crown's argument that access to public transit should be seen as akin to the privilege of driving a motor vehicle, which had been found in previous decisions to fall outside the protected scope of liberty under section 7 (at paras 132-140). In contrast, S.A.'s ban from ETS property was held to be a violation of her right to liberty under section 7 of the *Charter* (at para 151).

Judge Dalton also found that these deprivations of liberty were contrary to the principles of fundamental justice. She held that the *TPA* was overbroad in its application to public property with no means for challenging a ban. Judge Dalton asked:

> How is it possible to defend legislation that permits the banning of persons from … public places and spaces … that are … crucial to liberty as they may impede access to transportation, public educational facilities, hospitals, public recreational facilities, public squares, public libraries, City Hall, and so on? How, indeed, is it possible to defend this sweeping legislation that has no review process at all? (at para 178)

Although it may be legitimate to ban someone from public property in appropriate circumstances, such as the protection of public safety, the legislation was seen as so broad that it

captured bans that were made for no legitimate reason (at para 183). Furthermore, "it is unconscionable to effectively coerce someone to engage in civil disobedience and place herself at risk … in order to access a forum to have the merits of a ban … reviewed" (at para 170). This breach of the principles of fundamental justice also doomed the *TPA* under section 1 of the *Charter*, and the Act was held to be of no force or effect in its application to public property to which the public has a general right of access (at para 190). The ETS Policy, to which Judge Dalton found the *Charter* applied as it formed the basis for government action, was also seen as overbroad and thus contrary to the principles of fundamental justice and the section 1 justification test (at paras 199, 245). Accordingly, S.A. was found not guilty of violating the ban.

Court of Queen's Bench Decision, 2012 ABQB 311

On appeal, Justice Binder set out four issues for determination: (1) was the section 7 liberty interest engaged, (2) was there a deprivation of liberty in the circumstances of the case, (3) was any deprivation of liberty in accordance with the principles of fundamental justice, and (4) was the *TPA*, ETS Policy, or the exercise of discretion by ETS overbroad? (at para 34).

On the first issue, Justice Binder agreed with Judge Dalton that although imprisonment would engage the liberty interest, the risk of imprisonment was too remote in this case (at para 38). Beyond that, however, "the scope of the … right to liberty is not easy to discern" (at para 40). After reviewing the relevant case law, Justice Binder set out several conclusions about the proper scope of section 7 (at para 57): (1) although section 7 and the other legal rights in sections 8 to 14 of the *Charter* primarily deal with criminal matters, section 7 is not limited to the criminal context (citing *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46, which dealt with child protection); (2) section 7 does not extend to the protection of economic interests, except perhaps rarely (citing e.g. *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429, where deprivation of an adequate level of social assistance did not violate section 7); (3) liberty "falls somewhere between physical restraint and unconstrained freedom, and may be engaged in relation to [some] decisions that are of fundamental personal importance" (citing *R.B. v Children's Aid Society of Metropolitan Toronto* and *Godbout v Longueuil, supra);* (4) suspensions of driving privileges do not engage the liberty interest, as driving is not a matter of fundamental personal importance connected to dignity and independence (citing *R v Neale* (1986), 28 CCC (3d) 345, leave denied [1987] 1 SCR xi, *Yehia v Alberta (Solicitor General)* (1992), 40 MVR (2d) 57 (Alta CA), and *Buhlers v British Columbia (Superintendent of Motor Vehicles)*, 1999 BCCA 114, leave denied, reconsideration denied [1999] SCCA No 219); (5) prohibitions against attending places open to the general public (e.g. via loitering laws or peace bonds), and serious restrictions on freedom of movement (e.g. via family violence protection orders) may engage the liberty interest (citing *R v Budreo*, [2000] OJ No 72 (CA), leave denied [2000] SCCA No 542, *Heywood, supra*, and *Baril v Obelnicki*, 2007 MBCA 40), (6) choice of residence may be a protected liberty interest, although the case law is still unsettled (citing *Godbout, supra*); (7) lifestyle choices (such as smoking marijuana) are not protected liberty interests (citing *R v Malmo-Levine; R v Caine*, 2003 SCC 74).

Applying these principles to the case at hand took up a relatively small portion of the QB judgment. Justice Binder noted that the parties were agreed that a ban from public transit property fell somewhere between the driving privilege cases and the cases involving loitering on public property and protection orders. He was of the view that the ETS ban would only engage section 7 liberty interests where it:

- 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*
- 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 (at para 60, emphasis in original).

He found that the ETS ban did not meet these criteria. ETS property exists for the purpose of transport, is regulated for that purpose, and is subject to the payment of fees, rather than being a place where the public is free to roam, loiter, conduct business, or engage in social or recreational activities (as was case in *Heywood*). Furthermore, access to public transportation does not go to the core of individual dignity and independence. Although Judge Dalton found that public transit was the means by which basic choices going to the core of individual dignity and independence could be exercised, and that it was the only means to do so for some people, Justice Binder found that "the same could be said about suspension of driving privileges" for those living in areas where there was limited public transit (at para 62). The ban on public transit thus did not engage the liberty interest in section 7 of the *Charter*.

Justice Binder also held that even if the liberty interest had been engaged, it had not been breached in the circumstances of the case. This was because S.A. continued to use the ETS after being banned, and was not ticketed when she provided a legitimate explanation for doing so (at para 65). Moreover, even if her liberty was engaged and had been breached, this violation was in accordance with the principles of fundamental justice. Although the principles of fundamental justice generally require procedural fairness when a person's liberty interests are at stake, "individuals subject to a temporary ban from public transit have little or no legitimate expectation as to any particular element of procedural fairness" (at para 75). This was based on the finding that public transit bans were "on the lower end of the spectrum of importance to the individual," unlike, for example, the permanent residency status that was at stake in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (at para 75). The process for bans was administrative rather than judicial, and deference was to be given to the ETS in terms of its choice of procedures and its institutional constraints. A process existed for modifying public transit bans, and S.A. herself had successfully availed herself of this process. Justice Binder did find, however, that the absence on the Notice Not to Trespass of information on the modification request process fell below minimal requirements, particularly for minors (at para 78). He concluded that "Given my comments … on procedural fairness, the Crown may wish to reconsider whether it will take further steps to enforce the ticket" (at para 94).

The final issue considered by Justice Binder was whether the *TPA*, the ETS Policy or ETS's exercise of discretion under the Policy were overbroad. He held that even if section 7 was engaged, the trial judge had erred in finding that the *TPA* was contrary to the *Charter* and of no force or effect to the extent that it applied to property to which the public has a general right of access. According to Justice Binder, "The legislature is not required to incorporate the *Charter* into all statutes of general application, to set out exceptions with respect to the many different circumstances which may give rise to a *Charter* breach in relation to government property, nor to expressly exclude the government from application of such a statute" (at para 82). The ETS Policy was not "prescribed by law," so it was not considered to be at issue (at para 83). As for the exercise of discretion by ETS, the ban was issued in relation to an assault committed by S.A. on ETS property, it was made for public safety purposes, it was time-limited and S.A. had been

informed that she could request modification in order to use transit for legitimate reasons. Therefore, Justice Binder held that the ban was not an arbitrary, overbroad or grossly disproportionate exercise of discretion (at paras 88-91).

Commentary

The general conclusions that Justice Binder drew about the scope of the section 7 liberty interest are consistent with the case law. It is in the application of these principles that I think his judgment falters. First, his statement of the criteria for engaging the liberty interest in section 7 is too restrictive. Unlike Judge Dalton's judgment, which held that either preventing a person from having the same access as others to public property, or affecting a person's autonomy with regard to fundamental choices going to the core of individual dignity and independence would be sufficient to engage section 7, Justice Binder seemed to require that both kinds of state action be present (2012 ABQB 311 at paras 60-62). This approach is simply not consistent with the case law he cited – any one of the accepted ways to engage the liberty interest that he noted at paragraph 57 should be sufficient for section 7 purposes. It is true that some of these definitions of liberty have not yet received support from a majority of the Supreme Court, but that does not mean that a claimant's liberty must be engaged in multiple ways for section 7 to apply. Justice Binder also applied each of these two criteria quite restrictively. In particular, he did not seem open to considering that use of public transit may be required in order to have access to public property or to be able to make fundamental life choices – i.e., as Judge Dalton found, public transit may be a crucial means for exercising these protected liberties, and therefore may merit protection itself.

Another problem is that Justice Binder did not mention youth even once in his analysis of the liberty interest, and did not engage with Judge Dalton's finding that bans on access to public transit would have an adverse impact on the young, elderly and poor. This omission was made in spite of the trial evidence of Wallis Kendal, a youth worker, to the effect that transit bans are a real problem for high risk youth, affecting their ability to attend school, social events and shelters since most of them have no other means of transportation (2012 ABQB 311 at para 21). Justice Binder's acceptance of the government's analogy between public transit and the privilege of driving rings hollow in the context of this evidence. Judge Dalton's judgment, while extending the section 7 case law, did so in a principled manner that is more in keeping with the requirement that courts take a broad, liberal, contextual approach to *Charter* interpretation rather than trying to fit access to public transit into pre-existing categories of case law (see e.g. *R v Big M Drug Mart*, [1985] 1 SCR 295). Her approach was also more in line with the evidence.

I also disagree with Justice Binder's analysis of whether there was a deprivation of liberty in the circumstances of the case. To say that S.A. was only ticketed when she was not using ETS property for legitimate purposes is to ignore the fact that she was living under threat of sanction for violating the ban (including the imposition of a longer ban), and that ETS decisions about ticketing were discretionary and outside the scope of the *TPA*, the Notice Not To Trespass, and the ETS Policy at the time. It also ignored the evidence of Wallis Kendal about the impact of public transit bans on youth more broadly. This reasoning is akin to arguing that because the law against possession of marijuana is not consistently enforced, it does not result in a violation of *Charter* rights – which would be inconsistent with the Supreme Court's ruling in *Malmo- Levine* that a "risk of deprivation of liberty" is sufficient to move on to the principles of fundamental justice stage (2003 SCC 74 at para 89).

At the principles of fundamental justice stage, overbreadth and procedural fairness were at play in both Judge Dalton's and Justice Binder's judgments even though they were not entirely explicit about that. Judge Dalton organized her analysis around the principle of overbreadth, but procedural fairness concerns also seem to have animated her judgment. For example, she spoke of the "unconscionability" of requiring someone to engage in civil disobedience to challenge a public transit ban, since there were no procedures for doing so in the *TPA*, ETS Policy, or the Notice Not to Trespass (2011 ABPC 269 at para 170). It was also "wildly optimistic" to expect a young person of limited means to mount a review of the ban in the Court of Queen's Bench (at para 169). These findings stand in stark contrast to Justice Binder's judgment, which was deferential to the procedures chosen by ETS and noted that S.A. had actually obtained a modification. In his analysis of the principles of fundamental justice, Justice Binder did not refer to the evidence of Wallis Kendal that the modification process was "extremely difficult" and took about three months for one of his clients (2012 ABQB 311 at para 21). Justice Binder also appears to have relied on evidence of changes made to the ETS procedure after S.A. received her ban (see paras 16-17 and 76). Judge Dalton's judgment is to be preferred on questions of procedural fairness.

On the issue of overbreadth, it is curious that Justice Binder separated this out from his analysis of the principles of fundamental justice, as it is well accepted that laws that are overbroad violate those principles (see e.g. *Heywood, supra*). His statement that "The legislature is not required to incorporate the *Charter* into all statutes of general application, to set out exceptions with respect to the many different circumstances which may give rise to a *Charter* breach in relation to government property, nor to expressly exclude the government from application of such a statute" (at para 82) is concerning. However, it does find support in *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567. In that case, a majority of the Supreme Court held that the duty to accommodate *Charter* rights and freedoms did not extend to legislative acts of the government as opposed to government policies or other state actions (see 2009 SCC 37 at para 69). Justice Binder did not cite the *Hutterian Brethren* case, however, even though the majority opinion would also have buttressed his characterization of driving as a privilege (at para. 98). The notion that governments can pass laws of general application without thinking about the impact on *Charter* rights and freedoms is problematic for a number of reasons, as my colleague Jonnette Watson Hamilton and I have argued (see "'Terrorism or Whatever': The Implications of *Alberta v. Hutterian Brethren of Wilson Colony* for Women's Equality and Social Justice," in Sheila McIntyre and Sanda Rodgers, eds. *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (2010) 50 Supreme Court Law Review and LexisNexisCanada, 221 at 240-242, noting e.g. the inconsistency of this approach with human rights law and the ways that governments can now avoid their duty to accommodate *Charter* rights and freedoms by enacting laws rather than policies). That being said, if legislation like the *TPA* violates the *Charter* in particular circumstances, claimants will still be entitled to a remedy. This is essentially what Judge Dalton found in *S.A.*, but Justice Binder disagreed, accepting the City's arguments that the *TPA* was not applied disproportionately or arbitrarily. His decision can be contrasted with the recent judgment of Justice Paul Jeffrey in *R v Whatcott*, 2012 ABQB 231, where the University of Calgary was found to have unjustifiably breached a person's *Charter* rights when it used the *TPA* to ban him from university property (see also Linda McKay Panos's ABlawg post on that decision here).

As noted, the Supreme Court drew a distinction between law and policy in *Hutterian Brethren* when it came to the duty to accommodate *Charter* rights and freedoms. In *S.A.*, Justice Binder found that the ETS Policy was "not prescribed by law," and thus was not at issue (at para 84). This appears to be an incorrect application of the case law on government policies and the

requirement that they be "prescribed by law." There are many instances where the *Charter* has been found to apply to policies of government actors. For example, in *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295, the *Charter* applied to the advertising policy of a municipal transit authority. Generally, when policies form the basis of government action, they will be subject to *Charter* scrutiny. The question of whether a policy is "prescribed by law" relates to section 1 of the *Charter,* which permits "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Limits are prescribed by law when they are legislative, derived from common law, or are otherwise authorized by government either directly or indirectly (see e.g. *R v Therens*, [1985] 1 SCR 613). A policy or other government action that is not prescribed by law cannot be justified under section 1 of the *Charter*, as it is by definition beyond the authority of the state, but that does not mean that the *Charter* is inapplicable. Instead, it means that a policy that violates a protected *Charter* right or freedom must be remedied without the government actor having an opportunity to justify the violation. On this basis, Judge Dalton correctly considered whether the ETS policy violated S.A.'s liberty under section 7 of the *Charter*.

S.A. filed an application for leave to appeal Justice Binder's decision on June 14, and the leave hearing is set for September 18. If it grants leave, it will up to the Court of Appeal to determine which of the two contrasting approaches discussed here is appropriate. My own view is that a protected liberty to use public transit to access essential services fits comfortably within the case law on the scope of section 7, especially in the case of youth and other marginalized groups. This does not mean that limits can never be placed on access to public transit, but those limits would have to accord with the principles of fundamental justice and the section 1 justification test.

To the extent that a ban on public transit has an adverse impact on youth, the elderly, and the poor, it may also engage section 15 equality rights. Although this was not one of the grounds argued by S.A., Justice Binder did note that section 15 may be relevant in cases involving "denial of access or movement" (at para 59). Indeed, this case reminds me somewhat of *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, where the Supreme Court found that Deaf persons have a right to sign language interpretation in order to have equal access to medical services. Although section 15 arguments in the context of access to public transit will have to await another case, the analogy to *Eldridge* may be relevant to a consideration of section 7 as well.