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Transporting Liberty: Where Is The Track Heading?

By Ola Malik and Heather Beyko

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

In many Canadian cities and towns, public transit is the only available means for some citizens to go about their daily lives. Can a balance be found in denying access to public transit to those who would abuse this service and the rights of other users of that service, in order to be safe, secure, and free of harassment or intimidation? Or, have we come to a point where citizens who face the daily burden of harassment, rude and intimidating behaviour or interference from others on buses, trains and transit stops must simply accept that this is an inevitable cost of using a public transit service?

Of all the recent cases which explore the limits of governments' ability to restrict the use of, and access to, public space, the contrasting trial court and appellate decisions in *R v S.A.* make for a stimulating read (2011 ABPC 269; 2012 ABQB 311). For anyone who believed that constitutional law was mundane, the contrasting judgments of Judge Dalton and Justice Binder illustrate how court decisions involving *Charter* issues are not derived by blindly adhering to abstract legalistic formula but are more often the outcome of legitimately held philosophical views regarding the equilibrium to be found when balancing individual and state rights.

The decisions in *R v S.A.* provide a fascinating discussion on the "public" nature of essential services such as public transit or any other service which a municipality provides to, and is often required by, its citizens. While there is ample case law in Canada that addresses the application of provincial trespass legislation to public places (*Weisfeld v R*, [1995] 1 FC 68; *R v Semple*, 2004 ONCJ 55; *R v Breeden*, 2009 BCCA 463; *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647; and *Batty v Toronto (City)*, 2011 ONSC 6862), this is the first case in Canada which we are aware of that addresses whether a government entity can utilize provincial trespass legislation to ban a person from accessing a municipal service which is ordinarily accessible to the public.

In the ABlawg posting "Transporting Liberty: A Right Not to be Deprived of Access to Public Transit?" Professor Jennifer Koshan provides an excellent summary and commentary of the decisions in *R v S.A.*

In this comment, we raise three issues which arise out of Judge Dalton and Justice Binder's decisions which will likely require some clarification by the Alberta Court of Appeal, namely: (1) How important is public transit in the exercise of an individual's section 7 *Charter* rights?; (2) How much deference will a municipality's administrative process be entitled to?; and (3) How "public" is public transit?

How important is public transit in the exercise of an individual's section 7 *Charter* rights?

The first issue which requires some consideration due to its importance to municipalities is the extent to which someone's use of, and access to, a local government service such as public transit is essential to their ability to exercise those fundamental life choices which go to their personal individual autonomy and dignity, to the extent that denial of that service constitutes a breach of an individual's section 7 *Charter* rights.

At the trial level, Judge Dalton held at paragraphs 146 to 148 and 150 that the ban issued pursuant to the *Trespass to Premises Act*, RSA 2000, c T-7 (*TPA*) which applied in respect of the Edmonton Transit System (ETS) property infringed upon S.A.'s section 7 *Charter* right to liberty by limiting the choices she could make regarding her personal autonomy and independence:

> [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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> [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 contrast, Justice Binder 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 *Charter* right to liberty. His Lordship 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.

At paragraph 60 of the decision, Justice Binder held that section 7 of the *Charter* would only be triggered where a person could show that the restriction prevents them from having the same access to property enjoyed by other members of the public *and* that the restriction affects their autonomy with respect to important, fundamental, inherently personal life choices going to the core of what it means to enjoy individual dignity and independence.

Justice Binder was not prepared to find on the facts of the case whether or not the ban deprived S.A. of her liberty rights. His Lordship made it clear that there must be an evidentiary basis necessary to establish that the activity sought to be restricted was essential to the affected individual's liberty. For Justice Binder, there was insufficient evidence on this point: the evidence indicated that S.A. 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 (para 65). 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.

Justice Binder's decision underscores the point that when assessing whether banning someone from having access to public transit services represents an infringement of section 7 of the *Charter* this ultimately depends on how the ban would impact the affected individual. We agree with Professor Koshan when she points out that the impact of a transit ban is likely to have a more severe impact on vulnerable groups who may not be able to afford, or have access to, private transportation. In that respect, Judge Dalton's discussion of the critical importance of access to public transit for many who have no alternative means to travel is important and noteworthy.

However, we question whether Justice Binder could have reached any other conclusion given the paucity of evidence in respect of the ban's impact on S.A.'s ability to exercise those fundamental life choices which were the basis of the section 7 *Charter* argument. The mere fact that a transit ban may have a disproportionately severe impact on the young, old and poor should not be determinative if the applicant who is bringing the *Charter* challenge cannot demonstrate at trial a *Charter* infringement on an individual level. For an applicant bringing a *Charter* challenge to be successful, they must prove that a law in actuality infringes the *Charter* – making an argument about a hypothetical breach without evidence, while interesting, is insufficient.

How much deference will a municipality's administrative process be entitled to?

Following a discussion at paragraphs 205 to 240, Judge Dalton came to the conclusion that the *Edmonton Transit System Notice Not to Trespass Policy* (the Policy) constituted an unlawful deprivation of S.A.'s section 7 *Charter* rights because of its overbreadth. Judge Dalton found that a ban which was issued pursuant to the Policy was overbroad for the following reasons:

- It could be issued against someone who had not been convicted of the offence giving rise justifying its issuance. Furthermore, if the person was later acquitted, it was not required that a ban be revoked;

- It did not have geographical limits and therefore captured all transit property including transit stops and buses;

- It was not restricted in its application to serious public safety offences but could be served on a person for activities not giving rise to safety and security issues such as nuisance type activities (loitering, drug and alcohol use or other unacceptable behaviour), under-aged smoking, fare evasion, etc.;

- There were insufficient procedural safeguards for engaging in a review or appeal of a ban; and

- No information was provided to the affected person with respect to the procedures for initiating an appeal. Individuals were not provided with a specific contact person to speak to within ETS and the procedure for having the ban modified was time-consuming, shrouded in secrecy, cumbersome, and difficult to navigate.

In contrast, Justice Binder concluded that 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 a 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.

Justice Binder concluded that the 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.

Justice Binder's decision suggests that courts must grant significant deference to the way in which a municipality crafts its administrative process and renders decisions. Has this lowered the extent to which a municipality must, in exercising its discretionary powers, provide an affected party with natural justice and procedural fairness?

One case suggests otherwise. In the British Columbia case of *Vancouver (City) v Zhang* (2010 BCCA 450), 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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> [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.

In the appeal before Justice Binder, The City of Edmonton argued that the Policy was not prescribed by law and did not meet the test set out by the Supreme Court of Canada in the case of *Greater Vancouver Transportation Authority v Canadian Federation of Students* (2009 SCC 31) where Justice Deschamps, writing the majority opinion for the court, held as follows at paragraph 65:

> [65] Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

The City of Edmonton relied on this test and argued that the Policy was not authorized by statute, did not constitute a general norm to be applied (as it was only used by City of Edmonton employees) and was not meant to be binding or sufficiently precise as it merely contained a number of general guidelines to be used at the discretion of City of Edmonton peace officers. For The City of Edmonton, the Policy constituted an internal interpretive aid and, as it did not constitute "law," could not be impugned under the *Charter*.

Justice Binder agreed with The City of Edmonton and concluded that the Policy used to ban S.A. was not "prescribed by law." The Policy merely contained guidelines for issuing a ban under the *TPA*. Furthermore, the Policy recommended that peace officers issue a trespass notice to anyone who placed the safety and security of ETS employees and the public at risk only after all other means to control this behaviour had been exhausted. The Policy also contained criteria for the length of time an individual could be banned from ETS property depending 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.

Justice Binder's decision certainly shifts the advantage to a municipality in the event someone wishes to challenge the application of a municipality's administrative process.

In practical terms, it is a municipality's application of administrative guidelines and policy which ultimately affect an individual's ability to use or have access to municipal resources. 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.

The implication of Justice Binder's decision is that an individual who wishes to challenge the administrative process or internal guidelines which are not "prescribed by law" and therefore not properly the subject of a *Charter* challenge cannot simply bring a *Charter* challenge in respect of both the bylaw and administrative process but would have to commence two distinct legal proceedings: a *Charter* challenge of the bylaw and a judicial review application of the administrative process.

However, it must also be recognized that municipalities face the practical challenge of making thousands of administrative decisions on a daily basis. To expect municipalities to act in every case as if it was acting in the capacity of a judicial decision maker would set a standard which no municipality could ever hope to achieve.

Indeed, Justice Binder's comments regarding the deference which the courts ought to accord a municipality's administrative decision is consistent with the position that Canadian courts have taken in respect of the deference which must be granted to municipalities when interpreting municipal powers and authority. See *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 19, 20, 24, 30 and 32; *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at paras 47, 48 and 94; *United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City)*, 2004 SCC 19 at para 8; *R v Guignard*, 2002 SCC 14 at para 17; *114957 Canada Ltd (Spray-Tech, Société d'arrosage) v Hudson (City)*, 2001 SCC 40 at para 3; and *Shell Canada Products Ltd v Vancouver (City)*, 88 BCLR (2d) 145 at paras 62 to 68.

How "public" is public transit?

In addressing the application of the *TPA* to public property, Judge Dalton discussed the difference between the virtually unlimited rights which landowners have when controlling access to their own private property as compared to the much more limited rights of government entities in restricting access to public property to which the public generally has an invitation to enter.

Specifically, at paragraphs 90 and 91, Judge Dalton states that government that holds property may only restrict the use of and access to that property for valid purposes and does not, unlike a private property owner, have an unfettered discretion to exclude public access:

> [90] If ever government bodies had the absolute and unfettered right to exclude citizens at will from public property to which the public had a general invitation to access, that common law right has been truncated. It is not commensurate with modern conceptions of public goods and public property. In more recent jurisprudence that right has been characterized more as a fiduciary responsibility to manage public property for the common good.
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> [91] Far from being a ruinous entropy to be avoided, this is a conception that accords better with a modern understanding of public property and a citizen's rights vis-a-vis that property in a liberal democracy. 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.

That being said, Judge Dalton acknowledged at paragraphs 180 and 183 that a municipality has a right to manage and impose restrictions on the use of public property and may, in appropriate circumstances, ban someone from accessing public property in the interest of public safety:

> [180] Unquestionably, government entities have a right to manage public property for the benefit of citizens, and this must, of necessity, include restrictions regarding how and when that property is to be used. This may, on occasion, require that specific persons be banned from particular public premises for a variety of good reasons...
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> [183] Of course, the legislation does not specifically address public safety as a reason for banning someone from public property, but I have no difficulty in accepting that this would be a justifiable reason for banning someone in the appropriate circumstances...

Justice Binder took a much more bullish perspective on the question of municipal regulation and examined the public policy imperatives which justified government regulation in the context of transit services. As His Lordship stated at paragraphs 61, 89 and 90:

> [61] ... ETS property is dedicated to a system of transport and it is regulated to 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.

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> [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.

We would argue that the decisions of both Judge Dalton and Justice Binder are committed to protecting the public interest in having access to, and use of, public transit services. Where they differ however, is how they define the concept of "public interest." For Judge Dalton, the importance of preserving public access to public property and services is an essential political right which supersedes a government's capacity to regulate (save where imperilled by real threats of public safety). For Justice Binder, a municipality's capacity to regulate access to services in order to preserve the rights of the public to enjoy the quiet, safe and peaceful use of those services is paramount.

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