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The Captive Audience Doctrine: Protecting the Unwilling Listener's Right to Privacy from Unwanted Speech

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Matter commented on: Section 2(b) of the *Charter* and the Captive Audience Doctrine

Consider the following scenarios:

- Your lunch on an outdoor patio on Stephen Avenue Mall is interrupted by someone with a bullhorn blaring religious commandments, telling you that if you don't follow their God, you are going to Hell;

- You have given up taking your Sunday afternoon naps because a protest group has set up in a neighbouring park and conducts its meetings with the use of amplification which can be heard in your living room;

- While you wait in line in a government building to pay an invoice, you have no choice but to endure a prayer service being conducted by a grassroots religious organization in the lobby of the building;

- You are walking to work and someone confronts you, asking you to join their charitable cause. You decline but the person follows you for several blocks, pressing you to change your mind and once that becomes futile, starts yelling at you.

These scenarios, or similar ones, are commonplace in any big city. They happen in Calgary with some frequency. Each one illustrates the tension which lies at the heart of the right to freedom of expression: *Does your freedom to express your opinion include forcing me to listen? Even when I find your point of view hurtful or offensive?*

Is it time to re-think our traditional concept of the purpose served by our public spaces such as parks, gardens, plazas, streets and squares? The idea of setting aside "public space" for people to share as a spontaneous, democratizing environment to meet one another, share and disseminate opinions, express themselves and engage in lawful protest activity is one which harkens back to a time when these were the only spaces outside of home or work where the proletariat, tied to their industrialized place of work, had any opportunity to escape their dreary conditions, enjoy their surroundings and interact with their fellow citizens.

Yet the nature of public space has changed significantly with the advent of new technologies allowing people to connect to anyone in the world at minimal cost from the comfort of their sofa.

Do the new crossroads and modern thoroughfares of the world created by the internet require us to re-evaluate whether the traditionally hallowed nature given to the importance of exercising free speech in public should be considered anew?

This post provides a brief introduction to the concept of the "captive audience doctrine" which has benefitted from judicial and academic treatment in the United States yet is relatively unknown here in Canada. We situate the doctrine within the political context of the First Amendment Free Speech Clause, discuss its application, briefly highlight some of the academic commentary, summarize its treatment in Canadian law, and consider the implications of the Supreme Court's recent decision in *Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401*, 2013 SCC 62 (*AIPC v UFCW*) for our arguments.

We believe that expressive activity which occurs on government-owned property such as public streets, parks and any other places to which the public is entitled to be, and which creates a captive audience should, like violent expression, fall outside the protection of section 2(b) of the *Charter*. Using government-owned property to create a captive audience undermines the values which section 2(b) seeks to protect and is not consistent with the intended historical or actual function of these spaces -- which is to create a venue where ideas can be freely expressed and voluntarily exchanged rather than imposed upon others. Public parks, gardens, plazas, and streets cannot fulfill their intended purpose and function as a venue for expressive activity to be shared by everyone if they get taken over by those with the largest placards, loudest megaphones or biggest demonstrations.

In our recent case commentary on *R v Booyink*, 2013 ABPC 185, published on ABLawg.ca here, we posed the following question:

> While waiting for your luggage or the arrival of your family in an airport concourse, how easy is it for you to avoid looking at the graphic, bloody placards depicting aborted foetuses? Do your children, sitting in the back seat of your car in a traffic jam have any choice other than to stare at the same placard (only bigger) affixed to the back of the van in front of your car? How free do you feel to avoid a protester's message when the sidewalk you are walking along is flanked on both sides by protesters yelling at you into bullhorns and shaking their placards?
>
> We wonder whether the "captive audience" doctrine might apply in appropriate circumstances to place sensible limits on expressive activity which occurs in a public place. While the doctrine has been relied upon in limited cases to justify restrictions on expressive activity at abortion clinics (*R v Spratt*, 2008 BCCA 340, 298 DLR (4th) 317), and in the lobby of a courthouse, municipal hall and fire station (*R v Breeden*, 2009 BCCA 463, [2009] B.C.J. No. 2106), it has not yet been more generally applied to justify an infringement on expressive activity which takes place on a public street.

Since we cannot claim to have any great familiarity with First Amendment jurisprudence and the current trends in scholarship regarding American constitutional law, we have relied on, and cited heavily from, the following academic articles: Caroline Mala Corbin "The First Amendment Right Against Compelled Listening" (2009), 89 B.U. L. Rev. 939; Marcy Strauss "Redefining The Captive Audience Doctrine" (1991-1992), 19 Hastings Const. L.Q. 85; Patrick J. Flynn "Street Preachers Versus Merchants: Will The First Amendment Be Held Captive In The Balance?" (1994-1995), 14 St. Louis U. Pub. L. Rev. 613; Michael Taylor "I'll Defend To The Death Your Right To Say It...But Not To Me" – The Captive Audience Corollary To The First

Amendment" (1983), 8 S. Ill. U.L.J. 211; Franklyn S. Haiman "Speech v Privacy" Is There A Right Not To Be Spoken To?" (1972-1973), 67 Nw. U.L. Rev. 153; Thomas P. Crocker "Displacing Dissent: The Role of "Place" In First Amendment Jurisprudence" (2007), 75 Fordham L. Rev. 2587; Charles L. Black Jr. "He Cannot Choose But Hear: The Plight of the Captive Auditor" (1953) Faculty Scholarship Series Paper 2585.

The Captive Audience Doctrine

Under the captive audience doctrine, a listener's right to privacy from unwanted speech which he or she finds offensive may in some cases trump the speaker's freedom to express it. This doctrine allows government to regulate speech delivered to an unwilling listener who finds the message antagonistic, hurtful, offensive or profane. The freedom to speak enshrined in the First Amendment right of the U.S. Constitution can therefore be restricted if "substantial privacy interests are being invaded in an essentially intolerable manner." (Corbin, at 943)

A review of the American jurisprudence and case commentary indicates that a listener may be considered a captive audience to another's unwanted speech if two factors are present:

- First, the method of communicating the unwanted speech must thrust the message upon the audience in such a manner that the listener cannot reasonably avoid it. Consequently, a listener who can take reasonable steps to avoid the offending speech cannot be said to be harmed and therefore does not require legal protection; and

- Second, the unwanted speech must be received in a location where the listener has an expectation of privacy. Forcing the unwanted recipient to be exposed to the speech where he or she has a right to quiet enjoyment and privacy intrudes upon the listener's privacy interest in an "essentially intolerable manner".

Can the audience reasonably avoid the message?

American jurisprudence appears to have settled the proposition that an audience is more likely to be captive to speech which is *heard* rather than *seen*. An unwilling listener can almost always avoid a message written on a placard, billboard, sign or pamphlet by turning away and looking elsewhere. Avoiding auditory speech, however, is virtually impossible and once a message is unwillingly heard, it cannot be unheard.

In an early landmark case, the U.S. Supreme Court upheld an ordinance which imposed an absolute ban on the use of sound trucks using amplification to emit "loud or raucous noises" in public streets. The Court recognized that a message which is broadcast through amplification denies the unwilling listener the ability to avoid it:

> The unwilling listener is not like the passerby who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street, he is practically helpless to escape this interference with his privacy by loudspeakers except through the protection of the municipality. (*Kovacs v Cooper*, 336 U.S. 77 (1949) at 86)

Similarly, the U.S. Supreme Court has upheld restrictions on sound heard, but not on images seen, within the inside of a family planning clinic because "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards

through the windows of the clinic". (Corbin, at 945, citing from *Madsen v Women's Health Centre Inc.*, 512 U.S. 753 (1994) at 773)

The U.S. Supreme Court has struck down prohibitions in a number of cases in regard to non-auditory speech that was deemed to be obscene or controversial because the recipient could simply turn away, look elsewhere and avoid it. As a result, the Court has invalidated legislation which makes it a public nuisance for a drive-in movie theatre to exhibit films containing nudity visible from a public street because any offended viewer could readily avert his eyes (*Erznoznik v City of Jacksonville*, 422 U.S. 205 (1975). Additional cases include administrative orders prohibiting utilities from using bill inserts to present matters of a political nature or advertising contraceptive products because the recipient could avoid it "...simply by transferring the bill insert from envelope to wastebasket" (*Consolidated Edison Co v Public Service Commission*, 447 U.S. 530 (1980) at 542); and the provision of a state penal code under which a protester was convicted for wearing a jacket emblazoned with the phrase "Fuck the Draft" because while the mode of expression was being "thrust upon unwilling or unsuspecting viewers", it could not be said that the unwilling recipient's "substantial privacy interests were being invaded in an essentially intolerable manner", especially when it occurred in a public place (*Cohen v California*, 403 U.S. 15 (1971) at 21).

U.S. courts have recognized that an unwilling listener can be considered a captive audience even in public if, while in public, the listener is harried and pursued by the messenger, making escape from the source of the communication impossible. In this regard, the U.S. Supreme Court has upheld a fixed buffer zone surrounding abortion clinics to prevent anti-abortion "sidewalk counsellors" from harassing women entering the clinics to get an abortion by walking alongside them, trying to persuade them from getting an abortion and resorting to aggressive persuasion including "in your face" yelling, pushing, shoving and even grabbing if the more subtle approach failed (*Schenk v Pro-Choice Network of W.N.Y.*, 519 U.S. 357 (1997). Additionally, the U.S. Supreme Court has affirmed the constitutionality of a law which made it an offence for anyone to pass out a pamphlet, display a sign or engage in oral protest, education or counselling to any person within 100 feet of a health care facility (*Hill v Colorado*, 530 U.S. 703 (2000). The Court took the view that an individual's right to be free from continued solicitation after declining an offer to communicate should be weighed against the right to free speech. The Court cited the following passage from its earlier decision:

> How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation... (*Hill v Colorado* at 717, citing the case of *American Steel Foundries v Tri-City Central Trades Council*, 257 U.S. 184 (1921) at 204).

Where will privacy interests defeat the right to free speech?

It is now generally well settled in American jurisprudence that within certain spaces, an individual's privacy right to quiet enjoyment and repose will trump another's rights to free

speech. An unwilling listener bombarded with unwanted speech in their home, office or in a medical facility cannot be expected to move in order to avoid the unwanted communication. Further, forcing them to listen to unwanted speech may have a deleterious impact on their health and well-being.

In a landmark case, the U.S. Supreme Court upheld an ordinance which prohibited the practice of residential picketing around a home which was owned by an abortion doctor. The objective was to protect the homeowners' quiet enjoyment of their home and privacy (*Frisby v Schultz*, 487 U.S. 474 (1988). As a policy matter, U.S. courts have long protected the sanctity of the home as a place where a person's expectation to privacy is at its strongest relative to the free speech guarantee and have issued injunctions or upheld laws prohibiting residential picketing on the basis that this type of activity interfered with residential privacy. Below, we reproduce various quotes, which the Supreme Court in *Frisby v Shultz* cited from a number of its previous decisions at pages 484-487, where the privacy rights of someone seeking quiet enjoyment of their home trumped another's individual to free speech:

> "The State's interest in protecting the wellbeing, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."
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> "Our prior decisions have often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick."
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> "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."
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> "One important aspect of residential privacy is protection of the unwilling listener. Although, in many locations, we expect individuals simply to avoid speech they do not want to hear, the home is different."
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> "...A special benefit of the privacy of all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions. Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes, and that the government may protect this freedom."
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> "To those inside...the home becomes something less than a home when and while the picketing...continue[s]... [The] tension and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility."
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> "The target of the focused picketing...is just such a "captive". The resident is figuratively, and perhaps literally, trapped within the home, and, because of the unique and subtle impact of such picketing, is left with no ready means of avoiding the unwanted speech."

In another landmark decision, the U.S. Supreme Court upheld an order issued by the Federal Communications Commission finding that an afternoon broadcast of the comedian George Carlin's "Filthy Words" monologue depicting "sexual and excretory activities" in a particularly offensive manner was indecent and therefore prohibited (*FCC v Pacifica Foundation,* 438 U.S. 726 (1978). Rather than draw a parallel between a person's ability to avoid the offending

broadcast (by changing the station or turning off the radio) in much the same manner as receiving an offensive insert or mail-out (by placing it in the trash), the Court fixated on the fact that the radio show was broadcast into people's homes. As the Court held at pages 748-749:

> Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content. To say that one may avoid further offence by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.

As stated earlier, the U.S. Supreme Court has extended the protection afforded to privacy of the home to the privacy of those attending medical facilities such as abortion clinics or family planning centres. The Court has upheld a state injunction which established a 36-foot buffer zone around an abortion clinic which allows patients free passage in and out and dampens the sounds of the protesters outside (*Madsen v Women's Health Centre Inc.*, 512 U.S. 753 (1994). The Court noted that noise control would ease the emotional strain placed upon patients undergoing or recovering from surgery as well as their families.

There have been other locations in which a listener's privacy interests have been invaded in an essentially intolerable manner because the listener did not have any practical way of avoiding the unwanted speech. Take public transit, for example. In one case, the Supreme Court upheld the decision of a municipality to deny a candidate's request who was running for public office to advertise his candidacy on public busses (*Lehman v City of Shaker Heights*, 418 U.S. 298 (1974). The Court concluded at page 307 that commuters were a captive audience because their use of public transit was not voluntary but a matter of compulsion or necessity, and that:

> [W]hile [the] petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it... [T]he right of the commuter to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

Some thoughts about the captive audience doctrine:

The captive audience doctrine is borne of the same rationale as the right to free speech. American legal commentators have suggested that the free speech clause contained in the U.S. Constitution was based upon the belief that participatory democracy could best be achieved through a free trade marketplace of ideas by fostering individual autonomy, self determination, self-realization, and the exercise of personal choice. (Crocker, at 2591-2595 and Corbin at 965-972) The right to be free *from* unwanted speech is therefore seen as a necessary corollary to the right *to* free speech:

> If freedom of thought and personal autonomy of the listener require that the government refrain from suppressing an idea or communication, the same principles forbid the government from forcing an unwilling listener to receive a communication. (Taylor, at 216)

The rationale for the captive audience doctrine is therefore centered on values of individual privacy, autonomy and self-determination. It is argued that people have a right to make their own decisions about how to live their lives, repose without being bothered by unwanted interruptions or disturbance and be free from speech which they find offensive. Consequently, "[f]orced listening by definition removes decision-making authority from the individual" (Strauss, at 109) and threatens the basic rationale which drives an explanation for the free speech guarantee.

With this context in mind, consider the following passage. It illustrates a libertarian rejection of the notion that the right to free speech includes the right to intrude upon someone's right to privacy and communicate to an unwilling audience:

> Few shafts could strike with more on-target insult at the very manhood of humanity than its degradation into a collectivized object of speech, powerless to escape, powerless to answer. Much has been said and written, throughout the captive-audience controversy, on the relations between "freedom of speech" and "freedom from unwanted speech." The question whether the former includes the latter, as a matter of sound construction, is a technical one of great difficulty. What is perfectly clear is that the claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense. Forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communicating freedoms. It contradicts, moreover, what some would regard as a deeper though not often spoken ground for letting people say feely what they choose to say – respect, namely, for each man as a person, in his uniquely human and finally mysterious function as user of language... (Black, at 967)

The right to free speech which is guaranteed by the Free Speech Clause of the First Amendment to the U.S. Constitution and the captive audience doctrine are twins nourished from a rich tradition which treasures individual freedoms, participatory democracy, and the free exchange and debate of ideas. But there is also tension here as the captive audience doctrine quells the brash aspirations of its ebullient mirror image.

One concern with the captive audience doctrine is its potential for quashing unpopular views, minority expression and dissent. While the *application* of the captive audience doctrine is usually content-neutral (such as in a law which prohibits residential picketing) it is usually only invoked because someone finds the *content* of the message to be offensive or hurtful, though not amounting to hate speech. Consider, for example, how curtailed the right to free speech might become if people were given expansive privacy rights in public:

> Once a person is deemed captive in every public setting, the audience has virtually absolute power to control the speaker's right to free speech. The fact that someone is offended, or does not like the message, is sufficient to curtail another's First Amendment rights. The audience acquires "veto power", and the captive audience doctrine could be used to "undermine the entire freedom of speech fabric", particularly with respect to unorthodox views. (Strauss, at 104)

Another issue which has arisen is the weight individual privacy rights should receive when assessing the limits of free speech. While the U.S. Constitution recognizes the right to free

speech in The First Amendment, it does not expressly recognize an individual's right to privacy. Yet almost every decision involving the application of the captive audience doctrine has required the courts to weigh privacy with the right to free speech and in many of the cases discussed in this article, the right to privacy has been given a preferred weighting. As several First Amendment scholars have noted, granting the concept of individual privacy similar stature as that given to the right to free speech contorts the plain reading of the U.S. Constitution and allows the court to curtail the free speech rights guaranteed by the Free Speech Clause to competing interests. (Flynn, starting at 627)

Can the captive audience doctrine be applied in Canada?

In determining how far the limits of section 2(b) of the *Charter* should extend to protect the right to freedom of expression, what importance should be given to an individual's right to privacy?

At first blush, the protection afforded by the *Charter* to expressive activity such as peaceful protest in public space 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)* [1989] 1 SCR 927, 58 DLR (4th) 577, that an activity as mundane as parking a vehicle may convey meaning and constitute an expressive activity worthy of *Charter* protection. However, we suggest that the section 2(b) *Charter* right is not as expansive as articulated by Justice Lamer and that the captive audience doctrine has already been applied in Canadian law *at the threshold stage* to determine whether the expressive activity should be protected by section 2(b) of the *Charter* thereby avoiding the need to proceed to a section 1 analysis.

In the case of *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, 1991 CarswellNat 1094, the Supreme Court of Canada accepted that individuals have a right to engage in expressive activity protected by section 2(b) of the *Charter* on government-owned property but *only* if the form of expression they use is compatible with the principal function or intended purpose of that place. Both Chief Justice Lamer and Justice Sopinka advocated a "compatibility of function" test as described by Chief Justice Lamer at paragraph 17 (1991 CarswellNat 1094):

> [17] ... In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.

Chief Justice Lamer continued by stating:

> [21] In my view, if the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s. 2(*b*). ...

At paragraph 243, Justice McLachlin (as she then was) referred to *Irwin Toy* and recognized the values that act as the backdrop for the guarantee for freedom of expression, namely "(1) the seeking and obtaining of truth; (2) participation in social and political decision-making; and (3) the encouragement of diversity in forms of individual self-fulfillment and human flourishing by cultivating a tolerant, welcoming environment for the conveyance and reception of ideas".

For Justice McLachlin, expressive activity engaged in on government-owned public property is not automatically entitled to section 2(b) protection and, as she continued at paragraph 243, "[o]nly if the claimant can establish a link between the use of the forum in question for public expression and at least one of these purposes is the claimant entitled to the protection of section 2(*b*) of the *Charter*".

The Supreme Court's decision in *Commonwealth* was followed in the case of *Montréal (City) v 2952-1366 Québec Inc* 2005 SCC 62, [2005] 3 SCR 141, in which Chief Justice McLachlin and Justice Deschamps (writing for the majority) set out the following test which serves as a screening process for determining whether expressive activity carried out on government-owned property passes the threshold needed to trigger section 2(b) protection:

> [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 section 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.

In essence, 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 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 how to consider what function a public place might have:

> [75] The historical function of a place for public discourse is an indicator that expression in that place is consistent with the purposes of section 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 setting out their test, Chief Justice McLachlin and Justice Deschamps were aware of the difficult balance in assessing the scope of the section 2(b) *Charter* right at the threshold stage of the analysis and held at paragraph 79 of their decision:

> [79] Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(b) stage, on the understanding that governments can limit that protection if they can justify the limits under section 1 of the *Canadian Charter*. The proposed test reflects this. However, it also reflects the reality that some places must remain outside the protected sphere of section 2(b). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under section 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

In Canada, the most comprehensive treatment of the captive audience doctrine occurred in *R v Breeden*, 2007 BCPC 79, 2007 BCSC 1765, 2009 BCCA 463 where Justice Hall of the B.C. Court of Appeal confirmed that political protest in the lobby of a courthouse, municipal hall or a fire station did not attract *Charter* protection. These places were not a "public arena" suitable for such discourse and their historical or actual function did not constitute a forum for public expression. At paragraphs 33 to 34 of the 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 to avoid witnessing the expressive activity:

> [33] The respondent submits that when the appellant displayed his signs inside the buildings, individuals going about their business at those locations effectively became a captive audience. This court recently considered the ability of protesters to force their message on an audience in *R v Spratt*, 2008 BCCA

340, 83 B.C.L.R. (4th) 243 (B.C.C.A.), a case dealing with limitations on abortion protests, where Ryan J.A. referred to the following passage from *Ontario (Attorney General) v Dieleman* (1994), 117 D.L.R. (4th) 449, 20 O.R. (3d) 229 (Ont. Gen. Div.) where Adams J. stated at 723-724:

> The principle behind a constitutional aversion to "captive audiences" is that forced listening "destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms": see Black Jr., "He Cannot Choose but Hear: The Plight of the Captive Auditor" (1953), 53 Columbia L. Rev. 960 at p. 967. Free speech, accordingly, does not include a right to have one's message listened to. In fact, an important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. Where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question. ...

[34] These comments were made within the context of a s. 1 analysis, but 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 section 2(b) analysis as well. The *Montréal (City)* 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.

(For a decision finding that expression is protected in a courthouse lobby under different circumstances, see *Canadian Broadcasting Corp. v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19).

In Canada, the right to privacy is not expressly recognized as a *Charter* right, but legislation protecting privacy has achieved quasi-constitutional status. As the Supreme Court of Canada held at paragraph 19 of *AIPC v UFCW*:

> [19] ...The focus is on providing an individual with some measure of control over his or her personal information...The ability of individuals to control their personal information is intimately connected to their individual autonomy, dignity and privacy. These are fundamental values that lie at the heart of a democracy. As this Court has previously recognized, legislation which aims to protect control over personal information should be characterized as "quasi-constitutional" because of the fundamental role privacy plays in the preservation of a free and democratic society...

The various decisions at different court levels in *AIPC v UFCW* have been commented on by Linda McKay-Panos here, here, and here, and do not require further discussion in this post, other than a very brief comment.

In *AIPC v UFCW*, it was accepted that the broad prohibition imposed on organizations in collecting, using and disclosing personal information without the individual's consent was not saved by section 1 of the *Charter* because of its disproportionate effect on the union's right to engage in expressive activity. We suggest that the courts' decisions in this regard have more to do with the drafting shortcomings of the legislation (which can be rectified) and with the importance that freedom of expression has historically played in the context of labour disputes rather than with any move away from recognizing the fundamental role privacy plays in our lives.

We believe that the captive audience doctrine should be recognized by Canadian courts at the threshold point of determining whether the expressive activity being exercised should be protected by section 2(b) of the *Charter*. If expressive activity which occurs on government-owned property such as parks, squares, and streets create a captive audience, that activity should be excluded from the protection of section 2(b) of the *Charter* without having to proceed to a section 1 analysis.

Our public space is an extraordinary resource because it is a legacy to which we are all rightful heirs. If we lose our public space, we lose it forever and with it, the very lifeblood and heartbeat of our cities. We believe that Canadian courts ought to re-consider whether expressive activity which creates a captive audience should be excluded from the protection of section 2(b) of the *Charter*, on the basis that it undermines the values of what section 2(b) seeks to protect and is not consonant with the function of government-owned property.

This blog does not necessarily represent the views of The City of Calgary.

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