December 16, 2014

Imposing Limits on the Public's Right to Access Transit Services: Is the Alberta Court of Appeal's Train of Thought in the Case of R. v. S.A. on the Right Track?

By: Ola Malik and Sarah E. Hamill

Case Commented On: *R. v. S.A.*, 2014 ABCA 191, leave denied December 11, 2014 (SCC)

The trilogy of decisions in *R. v. S.A.* discusses the limits that may be placed on the public's right to access transit services. Initially, S.A.'s *Charter* arguments succeeded at trial (2011 ABPC 269 (*SA (ABPC)*), but she lost the subsequent appeal at the Court of Queen's Bench (2012 ABQB 311 (*SA (ABQB)*) and, after having been granted leave from that decision to the Court of Appeal (2012 ABCA 323 (*SA (leave application)*), she ultimately lost at the Court of Appeal (2014 ABCA 191 (*SA (ABCA)*). On December 11, 2014, the Supreme Court of Canada denied leave to appeal. This decision has been the subject of previous posts on ABlawg here, here, and here.

In *R. v. S.A.*, a thirteen year old girl was issued a Notice Not to Trespass under Alberta's *Trespass to Premises Act*, RSA 2000, c T-7 (*TPA*) after she assaulted another youth at a train station. She was subsequently convicted of that offence. Edmonton Transit Service (ETS) issued the Notice, and banned S.A. from being on any ETS property for a period of 6 months. Although not obvious from the text of the Notice, it could be modified on application by the affected party to allow access to public transit for specified purposes and times, such as to attend school. With the help of a youth worker, S.A. sought, and was granted those modifications for certain hours during the week. S.A. was not ticketed on occasions where she used transit to travel to school, appointments, or for other "legitimate" purposes. She admitted to using ETS property on occasions which were subject to the ban. Several months following the issuance of the Notice, S.A. was found on ETS property and was charged with trespass under the *TPA*.

S.A. brought a *Charter* challenge asserting that the Notice unjustifiably infringed upon her section 7 *Charter* rights by:

- Preventing her from accessing places to which the public was generally permitted or invited to be;

- Impairing her ability to make meaningful choices going to her personal autonomy, contrary to her section 7 *Charter* rights; and

- Violating her liberty in a manner that was contrary to the principles of justice, because the Notice was overbroad and did not allow for a proper review process.

The S.A. case raises important public policy questions for any municipality and, in what follows, we examine four of the key issues. The first issue is whether or not trespass legislation should apply to public property. Should a municipality have the power to exclude someone from accessing public transit property like a bus or subway station? The second issue is related to the first and is whether or not a transit ban affects personal autonomy in cases where a banned individual cannot access or afford other methods of transport. The third issue is how much deference courts should show to a municipality's process with respect to such bans. The fourth issue is how to balance the rights of transit passengers to a safe transit environment with the rights of banned users to access essential public services. With respect to the fourth issue, we discuss Justice Bielby's dissent at the Court of Appeal because we believe she provides useful, practical suggestions on how a municipality might craft a constitutional ban.

Is it appropriate to apply Trespass to Premises legislation to public property?

At trial, S.A. argued that the Notice engaged her section 7 rights because it banned her from accessing public property to which the public otherwise had a right of access. During the Occupy protests of 2008, one of the issues before various courts was the constitutionality of bans issued against protesters pursuant to trespass to premises legislation. That question was never satisfactorily settled until the S.A. case (for decisions in which trespass to premises legislation has been used, see *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). The Crown argued that no such breach of S.A.'s section 7 rights had occurred because the *TPA* applied to all property, whether owned by a private landowner or by government, to which the public had a general invitation and right to attend.

The trial judge, Judge Dalton, reviewed the common law of trespass and concluded that the concept of trespass only applied in the context of privately-held ownership over lands. She found S.A.'s case to be readily distinguishable given that it was one in which a municipality was seeking to ban a member of the public from accessing public property specifically made available for public use (*SA (ABPC)* at paras 69-88). Judge Dalton concluded that while the *TPA* might properly reflect the common law as it pertained to the unlimited right of control exercised by a landowner over his or her private property, applying these same powers in respect of public property "...is not commensurate with modern conceptions of public goods and public property." (*SA (ABPC)* at para 90).

In Judge Dalton's view, limiting the applicability of the *TPA* to privately owned lands:

> ...accords better with a modern understanding of public property and a citizen's right 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...is, in my view, an antiquated conception that is neither borne out in the context of emerging social mores nor in the jurisprudence. (*SA (ABPC)* at para 91)

Consequently, Judge Dalton found that the *TPA* was unconstitutional as it applied to public property and declared the *TPA* of no force and effect as against S.A.

While Judge Dalton was ultimately overturned on appeal, her comments are nevertheless instructive and raise important questions of public policy. The *TPA* only applies to trespassers but the act's definition of "trespasser" which is set out at section 1(f) as "a person who commits a trespass under this Act" does not really clarify what, exactly, a "trespasser" is. In the case of private property, you're a trespasser if you don't have the owner's permission to be on their property. Defining trespass on public property is more of a challenge because the public has an invitation and implied right to be there. The justifying factor for excluding the public seems to depend on the activity which the alleged trespasser is engaged in. The challenge is to establish a clear dividing line between behaviour which is so inimical to the use of the public property in question that it would justify banning someone as a trespasser, and non-offensive conduct which would not. How would a potential "trespasser" know where that dividing line falls, and whose responsibility is it to draw this line -- the legislature's, the courts', or the property owner's?

On appeal, Justice Binder of the Court of Queen's Bench reversed Judge Dalton's findings. Although most of his judgment focused on whether S.A.'s section 7 rights had been infringed, he also held that while ETS Property was property on which the public was ordinarily entitled to be, public transit property is unique in the purpose which it serves (*R v SA (ABQB)* at paras 88-89). He noted that users of public transit find themselves in "confined spaces with limited opportunities to exit in the event that they are exposed to violence" (*SA (ABQB)* at para 90). He recognized that public carriers have an obligation to keep other transit users safe and found that S.A.'s violent behavior justified a ban. He further recognized that there was no constitutional bar to prevent the *TPA* from applying to public property. Rather, it was the *use* of the *TPA* by public bodies which was potentially unconstitutional (*SA (ABQB)* at para 85).

Justice Binder's point is an important one because it reminds us that not all public spaces are created equal and so rights of access will differ. Banning someone from attending a municipal park, for example, is a very different proposition than banning someone from the atrium of City Hall, judge's chambers, or a Fire Hall (For more on this line of thinking, see the *Breeden* decisions: 2007 BCPC 79, aff'd 2007 BCSC 1765, aff'd 2009 BCCA 463).

Justice Binder is not the first to point out that the function of a public place is important, as the majority of the Supreme Court of Canada did the same in *Committee for the Commonwealth of Canada v Canada* (*Committee for the Commonwealth of Canada v Canada,* [1991] 1 SCR 139 at 156-158). In that case, a majority concluded that expressive activity carried out on government-owned property on which the public is ordinarily entitled to be would 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. 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.

The majority of the Alberta Court of Appeal in *S.A.* (Justices Côté and O'Ferrall) agreed with Justice Binder's observations that it is the intended purpose or function of public property which matters rather than the mere fact that it is made available to the public. The majority emphasized that, unlike a municipal park which is designed to accommodate public idling and a range of other activities such as "...camping, selling wares, partying or sleeping", subway stations are "public" spaces with a very specific design and purpose: that of transporting a high volume of people at high speeds ((*SA (ABCA)* at paras 101, 98; note however that camping is banned in some public parks: Sarah Hamill, "The *Charter* Right to Rudimentary Shelter in Victoria: Will it Come to Other Canadian Cities?" (25 March 2010), *Centre for Constitutional Studies).*

In fact, the majority held that the *TPA* was merely the machinery through which breaches of the Edmonton Transit Bylaw could be enforced or addressed. The power to exclude S.A. from ETS Property did not derive from any powers granted by the *TPA*, but came from the Transit Bylaw, which banned certain conduct on transit property and arose out of the common law of common carriers (*SA (ABCA)* at paras 65-81). Common carriers have a longstanding obligation to keep the travelling public safe and this obligation includes the duty to prevent "physical injuries of any kind including injury from the acts of other passengers" (*SA (ABCA)* at para 76).

Given that the power to exclude the public derived from breaches of the Transit Bylaw or out of the common law of common carriers, the majority held that there was no basis for challenging the constitutionality of the *TPA*. If a *Charter* challenge should have been brought at all, the majority thought it should have been directed at the Transit Bylaw rather than the *TPA (SA (ABQB)* at paras 33-41). Moreover, given that the *TPA* did not contain special rules for public property, the majority concluded that the legislature must have intended that it apply generally, whether to public or private property. In respect of public property, the majority held that permission, once given for public access, could always be revoked. Consequently, someone who engages in activities which are inconsistent with the purpose for which transit property exists or who otherwise engages in behaviour which threatens the health and safety of other users, could properly be subject of a ban under trespass to premises legislation (*SA (ABQB)* at para 105).

Does banning someone from using transit property impair their ability to make meaningful choices which go to their personal autonomy?

The next question was whether the Notice engaged S.A.'s liberty rights by precluding her from exercising those life choices which lie at the heart of her individual dignity and personal autonomy. Put differently, what impact does a ban on using transit property have on the lives of people who do not have alternative means of transportation to get to work, medical, family appointments, recreational activities or other day-to-day activities? This is a fascinating public policy question and, as far as we know, has not been dealt with elsewhere.
Having heard from several young people called as witnesses and an outreach worker, Judge Dalton held that access to transit was a critical component for allowing people to exercise those basic choices which lie at the core of section 7. She noted that access to public transit is "the *means* by which those basic choices can be expressed" and that the "old, the young and the poor ... are most affected" by transit bans (*SA (ABPC)* paras 146 and 148). In her view, the freedom to make the choices at the heart of the section 7 right "is an empty one indeed when one does not have the means to reify those choices":

> ...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.
>
> ...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 (*SA (ABPC)* at paras 146-150).

Irrespective of whether one agrees with Judge Dalton's conclusions, her observations are worthy of further thought. She highlights that for many people living on the margins of our society, restricted access to public transit would have a dramatic impact on their day-to-day lives. Of course any violation of section 7 must then be balanced against the rights of other transit users to be safe when using transit property under section 1 of the *Charter*. We can well imagine how even a short term ban might have a disastrous impact on someone who is entirely dependent on public transit. In whose favor should the balance lie?

Justice Binder reversed Judge Dalton's decision on the basis that not every restriction on someone's ability to access public property will engage their section 7 rights. Having examined the jurisprudence on section 7, he concluded that the Notice would only engage a person's 7 liberty interests were it to:

- Prevent that 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*

- Affect (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 (*SA (ABQB)* at para 60).

Justice Binder held that S.A. failed to satisfy the first branch of this test. Following on from his conclusion that transit property was different from other "public" property (which might allow for unhindered public access), it was a small leap for him to conclude that a train platform was not a place "...intended primarily for roaming, loitering, conducting business or engaging in social or recreational activities" (*SA (ABQB)* at para 61). As for the second branch of the test, Justice Binder held that being unable to use public transit was no more deleterious to her section 7 rights than a driving suspension or living in a place where there was only limited public transit services (*SA (ABQB)* at para 62).

Justice Binder concluded that S.A. had failed to provide sufficient evidence on how the Notice had impaired her day-to-day activities. He pointed to the fact that S.A. had not been ticketed on those occasions when she had a legitimate explanation for using transit, such as going to school, work, probation appointment or any other appointment (*SA (ABQB)* at para 65). This seems to have eased his concerns regarding the potentially draconian effects on S.A. were the ban to amount to an outright prohibition.

The majority of the Court of Appeal was particularly critical of the sufficiency of S.A.'s evidence on this point. They reiterated the guidelines for a *Charter* claimant raising hypotheticals to prove that there is a sufficient causal connection between the restriction and the claimant's section 7 rights. The majority noted that "the proposed hypothetical....must not be remote or extreme" and that legislation will not be unconstitutional simply because one "can imagine an emergency which would compel violating a restriction given for a previous string of mild offences" (*SA (ABCA)* at paras 117 – 120). The hypotheticals relied on by the provincial court did not, in the majority's view, meet these tests. In fact the majority found that, aside from issuing restrictions for "persistent loitering," there was "no evidence" that transit restrictions were issued for "minor offences" such as "smoking while underaged" (*SA (ABCA)* at para 124).

Both the opinions of Justice Binder and the majority of the Court of Appeal underscore the point that, when assessing whether a restriction upon someone's liberty rights violates section 7, what matters is actual evidence of infringement, not merely hypothetical discussions about the impact of such restrictions. While we acknowledge that restrictions affecting someone's right of access to public transit would likely have a disproportionate impact on already vulnerable and marginalized groups, these should not be determinative if the applicant who is bringing the *Charter* challenge cannot demonstrate a *Charter* infringement on an individual level. An applicant who brings a *Charter* challenge must prove that a law actually infringes the *Charter* – making an argument about a hypothetical breach without evidence may be important in terms of advancing the public policy debate, but is insufficient to establish a legal case.

The majority of the Court of Appeal also agreed with Justice Binder's finding that not every restriction on someone's liberty amounts to a violation of their section 7 rights:

> Section 7 does not bar a small restriction on something vital. Exiling a person to live in one municipality when his or her work and family and friends are in other municipalities, might be protected. But that is not the same as requiring him or her not to use a certain travel route, or to drive or to purchase gasoline only on even-numbered days. A small impairment of important human choices does not violate s 7 just because ultimately it is conceivable that a cloud of such small impairments might cumulate into something worse (*SA (ABCA)* at para 170).

For the majority, the threshold for finding a section 7 breach is high indeed and they sought to keep it there. Their concern was that section 7 could come to be over-relied upon if they made it any easier to prove an infringement:

> Is s 7 to be implicated when municipalities temporarily exclude private vehicles from certain neighborhoods, or restrict parking there to local residents? Will cancelling the only bus route into one neighborhood, or cutting out bus service on Sunday mornings or after 11 pm, be upset by a s 7 injunction? Will courts regulate increases in transit fares under s 7? Will cancelling seniors' bus passes be unconstitutional? Does s 7 guarantee the right of pedestrians and cyclists to use every freeway or bridge? Does s 7 bar curfews imposed by bylaws, bail orders, peace bonds, conditional sentences, or conditional discharges? (*SA (ABCA)* at para 167).

The majority's point is that section 7 should not be used to second guess a government's policy decisions. Yet here the majority seems to be importing a section 1 analysis into section 7. It may well be that the hypothetical examples the majority lists could breach section 7 but that such breaches would be justified under section 1.

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

The *Edmonton Transit System Notice Not to Trespass Policy* (ETS Policy) required that bans be issued to anyone found committing a breach of the Transit Bylaw, particularly if that breach endangered the safety and security of ETS employees or the public. The ETS Policy used the severity, frequency, and nature of the conduct being engaged in to help determine the length of time an individual could be banned for. At trial, the question was whether the ETS Policy was "law" and thus subject to *Charter* scrutiny and, if so, whether the ETS Policy unlawfully deprived S.A. of her section 7 rights for being overbroad, and therefore contrary to the principles of fundamental justice.

As a matter of evidence, Judge Dalton found that the ETS Policy was not a confidential document, had been made available on request to the public, and was intended to guide the actions of ETS enforcement personnel (*SA (ABPC)* at para 196). Having also concluded that the ETS is a government entity, Judge Dalton held that as the ETS Policy "...sets out a standard that is meant to be binding, and is sufficiently accessible and precise," it was "law" for the purpose of *Charter* application (*SA (ABPC)* at para 193, citing *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31, [2009] 2 SCR 295 [*GVTA*]).

Having concluded that the ETS Policy was "law" and therefore subject to *Charter* review, Judge Dalton held that it was overbroad. She found the policy to be overbroad because bans could be issued against someone who had not yet been convicted of the offence giving rise to its issuance and would not be automatically revoked even where the affected the person was later acquitted; bans were not limited in geographical scope and therefore captured all transit property including transit stops and buses; the issuance of a ban 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 behavior), 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. In addition to this overbreadth, 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 (*SA (ABPC)* at paras 205-240).

Justice Binder did not address the question of whether the ETS Policy was "law" because he did not find there the issuance of the Notice or ETS Policy wrongfully infringed upon S.A.'s *Charter* rights. He concluded that the guidelines set out in the ETS Policy were more administrative than judicial and that no more than minimal procedural fairness was required since the ban was temporary in nature and allowed for an administrative appeal (*SA (ABQB)* at para 75). Justice Binder pointed out that S.A. had availed herself of the appeal process and had successfully obtained some modifications to the ban restrictions. In his view, S.A. had not sufficiently established how she had been prejudiced by the ban – there was no evidence to show that S.A. had been ticketed for trespassing when attending school, work, or other appointments, and she had apparently not been ticketed when she provided ETS enforcement personnel with a "legitimate" explanation for being on ETS Property. While Justice Binder was generally satisfied with the adequacy of the safeguards found in the ETS Policy, he did point out that the ETS Policy fell below the minimum requirements of procedural fairness by failing to provide a contact number to seek a modification of the ban. Without it, an affected party would not know who to contact (*SA (ABQB)* at para 78).

With respect to the level of procedural fairness required of the ETS Policy, Justice Binder set a very low bar and explicitly stated that the municipality would be granted a great deal of discretion in its selection of the administrative process to follow. He held that individuals under a temporary ban "have little or no legitimate expectation as to any particular element of procedural fairness" because the decision "is on the lower end of the spectrum of importance to the individual" (*SA (ABQB)* at para 75).

The majority of the Court of Appeal disagreed with Judge Dalton and held that the ETS Policy was not "law" and that the issue was, in any event, completely irrelevant to a section 7 analysis. For the majority, the issue of determining the ETS Policy as "law" was only to be dealt with under section 1 (which refers to "reasonable limits prescribed by law"), but not under section 7.

Further, the majority differed on the evidence heard before Judge Dalton and held that as the ETS Policy was understood to be discretionary, served as a guideline only, was non-binding upon ETS enforcement personnel, and as it had been heavily modified over the years, it should not be considered to be "law" to which the *Charter* applied. As the majority stated, "[t]he courts cannot review internal policy documents for Charter compliance, and the issue is not "the quality of the guidebooks" (*SA (ABCA)* at para 250).

With respect to the argument of overbreadth, the majority concluded that the ETS Policy, like most administrative policies meant to apply universally, has to have some measure of in-built flexibility. The mere granting of administrative discretion or flexibility to administrative decision makers (or in this case, ETS enforcement personnel) which might produce some inconsistency in the application of standards does not in itself render the policy vague or overbroad. The majority put it this way (at paras 212-215):

> It is often hard to justify constitutionally any government policy, or legislation, which is completely rigid, and treats identically a host of individuals and types of activities or organizations. That can violate a number of rules of administrative and constitutional law. Conversely, almost inevitably government activity will occasionally interfere unduly and unnecessarily with individuals, and even cause them actual harm...
>
> But putting into the legislation or policy some flexibility, or leaving a lot of leeway and judgment for the officials applying the legislation or policy, equally opens up a new range of attacks. Counsel call them vagueness, uncertainty, inaccessibility, secrecy, arbitrariness, discrimination, bias, and lack of procedural fairness. Again, counsel can multiply hypothetical examples.
>
> None of that proves that constitutional limits are a bad thing, or are to be doled out only with stingy hands.
>
> However, it does show that neither of the above two extremes, neither type of attack, should be broad enough that the two attacks come together (or even overlap), and so produce a Catch-22. Legislators, governments and municipalities must have enough room to navigate between that rock and that whirlpool.

In this respect, the judgments of Justice Binder and the majority of the Court of Appeal are of tremendous help to municipalities who delegate much of their regulatory function to administrative processes. It is, of course, long-settled law that municipalities must be granted a degree of deference in their decision-making process (see e.g. *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at paras 19-35; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 at paras 6-8;*114957 Canada Ltee (Spray-Tech, Societe d'arrosage) v Hudson (Ville),* 2001 SCC 40, at paras 3 and 23). In practical terms, however, it is usually a municipality's application of administrative guidelines and policies which ultimately affect an individual's ability to use or have access to municipal resources. When an aggrieved party challenges a municipal bylaw it is usually on the basis that they were denied some right subject to a discretionary administrative decision. Consequently, the critical question becomes whether the administrative decision maker complied with its obligations regarding the affected party's natural justice and procedural fairness rights.

What does this mean for an individual seeking to challenge the application of administrative rules? If the administrative guideline or process is not "law", only its *use* can be challenged under the *Charter* and the majority seemed to leave a wide degree of discretion for municipalities here. Has the majority left municipalities "off the hook" as far as the application of their administrative processes as long as the bylaw being challenged is found to be *Charter* compliant? Doesn't this complicate the remedy which an affected individual has to pursue?

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.

How can the rights of transit passengers to be free from harassment or intimidation be balanced with rights to access essential services?

Justice Bielby wrote the dissenting judgment for the Alberta Court of Appeal and it is worth discussing in some detail as it provides a useful and practical path forward for municipalities who might be somewhat perplexed on how to proceed with their own banning procedures.

Justice Bielby noted that *S.A.* was not about:

> ...preferring the rights of an offender to use public transit over those of other users. Rather, the task is how to address the balance which must be achieved between these two considerations; acknowledging that a rider who has assaulted another person nonetheless retains some rights does not drive the conclusion that no other rider has any rights (*SA (ABCA)* at para 309).

She agreed with Judge Dalton that the Notice engaged S.A.'s liberty interests because it interfered with S.A.'s "fundamental personal autonomy" (*SA (ABCA)* at para 313; see the discussion of S.A.'s liberty interests at paras 307-362). In particular, Justice Bielby noted that for S.A. and others like her "the mode of transportation … is fundamentally connected with the exercise of her general right to freedom of movement" (*SA (ABCA)* at para 326). However, Justice Bielby agreed with the decisions of both Justice Binder and the majority judgment of the Court of Appeal that the *TPA* should apply to publicly owned property (*SA (ABCA)* at paras 343-344). With respect to the ETS Policy, Justice Bielby disagreed with the majority of the Court of Appeal and held that while application of the ETS Policy had some discretion, it was generally intended to be binding on ETS employees and so was subject to *Charter* scrutiny (*SA (ABCA)* at para 358). Justice Bielby further concluded that the manner in which the ETS Policy was being applied by ETS personnel was not in accordance with the principles of fundamental justice because the Notice did not provide information about how to seek a modification; as worded, the Notice applied to *all* Edmonton public property, not just ETS Property; the ETS Policy allowed Notices to be issued for any type of criminal activity, however minor; and the appeal process for challenging the Notice was informal and not clearly explained (*SA (ABCA)* at paras 365-387).

However, Justice Bielby recognized that the issues which she identified with the Notice would be relatively straightforward to fix. With respect to the overbreadth of the Notice's geographical scope, Justice Bielby recommended that the wording of the Notice should specify that it applied only to "LRT Stations and Trains, all ETS Buses, shelters and terminals" (*SA (ABCA)* at para 383). Justice Bielby commented that although the City's Notices currently reproduce the information about ways to modify the ban, they do so "in very small type, so small as to be

unreadable to some and easily missed by all" (*SA (ABCA)* at para 384). She recommended that the information about modification be made much bigger and more noticeable by being placed within a box (*SA (ABCA)* at para 385). Such recommendations are simple for other municipalities to follow: written trespass notices must clearly give information about how they can be modified or appealed, and they must be clear about their geographic scope.

With respect to the Notice's appeal process, Justice Bielby found that when S.A. was issued the Notice, she could not appeal it herself but needed an adult to do it on her behalf (*SA (ABCA)* at para 295). The process also did not allow for bans to be overturned, only modified. Not surprisingly Justice Bielby recommended that "any individual, even youth who had no adult representation" should be allowed to apply for their ban to be modified and that the adjudicator of such applications should have "the power to set a ban aside in its entirety" (*SA (ABCA)* at para 387).

Justice Bielby also suggested that Notices should not be issued for minor infractions but ought to be limited to "conduct which occurs on transit property or which otherwise affects the safety and security of others who ride or work for ETS, whether or not that conduct also constitutes a criminal or provincial offence" (*SA (ABCA)* at para 386). Her comments in this respect were prompted by the fact that ETS had issued bans to a large number of people: "333 persons were banned from public transit in 2008; fewer than half of them were banned for reasons involving the commission of a criminal offence and fewer than a quarter for the commission of an offence involving violence" (*SA (leave application*) at para 14).

The recommendations included within Justice Bielby's dissent are broadly in keeping with similar jurisprudence in other jurisdictions. In *Zhang v Vancouver*, 2010 BCCA 450, for example, the British Columbia Court of Appeal found Vancouver's policy about free-standing structures on city streets to be unconstitutional because it did not set out procedures for individuals to apply for an exception (at paras 48, 67). The British Columbia Court of Appeal thus balanced the need for free movement on city streets with the need to protect free expression.

The section 7 rights at issues in *S.A.* are equally if not more important than the section 2(b) rights at issue in *Zhang*, and will likely be the source of future litigation in Edmonton or elsewhere. Implicit in Justice Bielby's dissent is the idea that Notices are being overused and if they are to be issued at all, their use should be tempered and well-considered. In order to avoid unnecessary challenges, municipalities would do well to well to follow Justice Bielby's practical advice.

Conclusion

The fundamental issues regarding the public's access to municipal services and government owned property raised by S.A.'s case are here to stay. Each of the court decisions in *S.A.* raises important questions of law and public policy and, irrespective of which view you ultimately take, makes for fascinating reading. And perhaps that is where the true value of a case such as this truly lies – in its capacity to make judges, lawyers, and the public think about issues in a way that challenges our own perceptions of what we would like our society to look like.

This article was originally published in the Digest of Municipal and Planning Law, (2014) 6 DMPL (2d) December 2014, Issue 24, and is being reproduced here (with some changes) with kind permission.