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Should They Stay or Should They Go? Occupy, The City and the *Charter*

By Jennifer Koshan

I've been to Zuccotti Park in New York City, the base camp of Occupy Wall Street, a few times this fall. The first time was in early October, the day before Mayor Michael Bloomberg told the protestors they had to de-occupy the park for a day to allow a clean-up. The de-occupation was resisted and never happened; the occupiers are still there, sometimes under tarps and in tents. Bloomberg and the City started out as relatively supportive of the occupation, but that support has waned over time with complaints from some nearby residents and business owners about the noise emanating from the Park, as well as concerns about unsanitary conditions, drug use, and assaults (Cara Buckley and Colin Moynihan, "Occupy Wall Street Protest Reaches a Crossroads", New York Times, Nov. 4, 2011). Similar waning of support is occurring in Canadian cities. Vancouver has now brought an application for a court order that Occupy Vancouver take down their tents from the space in front of the Art Gallery after a 23 year old woman was found dead in her tent, the second apparent drug overdose in a week (Rod Mickleburgh, Vancouver's bid to end Occupy protest encampment stalls in court, Globe and Mail, Nov. 9, 2011). In Calgary, City Council voted on November 7 to order the removal of Occupy Calgary tents from Olympic Plaza (CBC News, "City to remove Occupy Calgary tents in Olympic Plaza", Nov. 7, 2011). What does the law say about all of this, and in particular, is the Globe and Mail's recent editorial correct that "There is no constitutional right to Occupy"?

Let's begin with the relevant bylaws that a city such as Calgary might rely upon to take action against the occupiers. The *Parks and Pathways Bylaw*, Bylaw Number 20M2003, prohibits the following activities in City parks: remaining in the park between the hours of 11:00 p.m. and 5:00 a.m. (s. 4), camping or erecting a tent or other structure (s. 9), engaging in any conduct or activity that may disturb the use or enjoyment of the park by other users or that is inconsistent with the purpose of a park (s. 20), and doing anything that is likely to attract a crowd (s. 21(f)).The Bylaw also bans the use of an amplification system in a park (s. 21(e)) and the placement of signs of any kind in a park (s. 25). These activities are allowed if a permit is obtained (s. 49), but it does not appear that the occupiers in Calgary have applied for or received any permits. Olympic Plaza seems to meet the definition of "park" in the bylaw ("a public space controlled by The City and set aside as a Park to be used for rest, recreation, exercise, pleasure, amusement, and enjoyment" (s. 2(m)), and is in fact referenced in another section (prohibiting hockey on certain rinks – s. 22). Based on the facts provided in media reports, it appears that there may have been some violations of the *Parks and Pathways Bylaw* by members of Occupy Calgary.

Calgary also has a *Community Standards Bylaw*, Bylaw Number 5M2004, which provides that "no Person shall make or cause or allow to be made or continued any noise which disturbs or annoys a Person, including any loud outcry, clamour, shouting, movement, music or activity" (s. 27(1)). Again, a temporary permit may be obtained to engage in activity that would otherwise

violate the Bylaw. I am unclear from the media reports whether noise is one of the concerns that has been raised with respect to Occupy Calgary, but if so, this Bylaw may be engaged.

Under the *Parks and Pathways Bylaw*, which seems the most relevant to the Calgary occupation, a bylaw officer may issue an order to remedy an alleged violation, issue a violation ticket, or do both. If the order is not complied with in the time specified, the City may take steps to remedy the breach, including recovery of the costs of taking those steps (s. 60). Schedule A of the Bylaw contains specified penalties for various violations.

This brings us to the next issue – what constitutional rights and freedoms might protestors rely upon in the face of being ordered to de-occupy Olympic Plaza? To start with the basics, a claimant under the *Canadian Charter of Rights and Freedoms* must prove that their activities were protected by one or more *Charter* rights or freedoms and that the actions of the government violated those rights or freedoms either in purpose or effect. The burden then turns to the government to justify its actions under s. 1 of the *Charter*, which permits "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Section 2(b) of the *Charter* protects "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Freedom of expression protects all activities that convey meaning, whatever the content of the message, provided the form of the expression is not violent (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 969-70). A group of people sitting in a park, or someone pitching a tent there might not convey meaning for the purposes of s. 2(b) in ordinary circumstances (like the example of parking a car in *Irwin Toy*). However, once those acts are done in solidarity with others for the purposes of conveying a message, they become expressive activity protected by s. 2(b). Although there has been some criticism of the lack of a coherent message or demands coming from the Occupy movement in Canada and the U.S., these occupations clearly convey a message of protest against global capitalism, the unjust concentration of wealth in society and the influence of the wealthy 1% on government, and the impact of all of this on the other 99%. This is the message, and the occupation is the form of the expression. The same message could be conveyed via numerous other forms, some of which are on display in New York at the moment (see e.g. the exhibit of Diego Rivera murals at MOMA, The Radical Camera: New York's Photo League, 1936-1951 at the Jewish Museum, and the recent performances of Pete Seeger and Crosby and Nash at OWS). An occupation is, by definition, the taking up of space, or perhaps in this case the taking back of space by the 99%, using the means that they have at their disposal. Provided the occupations remain non-violent, they should be seen as within the protected scope of s. 2(b) the *Charter*.

There can also be internal limits on the protection of expression in public places, depending on whether the expression impedes the function of the place or fails to promote the values underlying freedom of expression (promotion of truth, participation in democratic dialogue and individual self-fulfillment) (*Montreal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 at para. 72). Parks and other public spaces have traditionally been recognized as valid sites of protest, so the place itself may not limit the protected expression of the occupiers, although the form of expression in that place may be an issue. If the tents or other elements of the occupations are impeding the normal functions of the parks, art gallery steps or other public places, the cities might argue that these forms of expression are not protected in those places. This is more likely to be an issue under section 1 of the *Charter*, as freedom of expression is normally broadly construed.

Assuming the occupations in parks are protected expression, the next question is whether either the purpose or effect of the cities' actions has violated s. 2(b) of the *Charter*. Taking Calgary as an example, if the City's motion to remove the tents was made to control the particular message, or the content of the expression, this would be a clear violation of s. 2(b) (see e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697, dealing with hate speech laws as a restriction on the content of expression). There is some support for this proposition, as the CBC reports that Mayor Naheed Nenshi "said he's frustrated by the demonstration because it's distracting from bigger issues and none of the demands being made by Occupy Calgary relate to city hall." If the City is acting on the basis that it disapproves of the content of the expression, this is a clear violation of s. 2(b). If the City's focus is more on the form and place of expression (i.e. the occupation in tents at Olympic Plaza), which is more likely, then the question is whether limiting that form in that place will restrict access to the meaning being conveyed. Because the Occupy movement is tied to the notion of occupation of public spaces by the disenfranchised, and to the extent that banning tents will make such occupations practically impossible, especially come winter, then a strong argument can be made that restricting the form and place of expression does limit the message being conveyed. In other words, the effect of the City's actions in this scenario is to violate freedom of expression, even if that is not its purpose. On the other hand, if the City's purpose was to control the physical consequences of the expression – e.g. to reduce littering, unsanitary conditions, or other consequences of the tent-based occupations – then the question would be whether the effect of those actions violated the values underlying freedom of expression (see *Irwin Toy* at 976). Here too the answer seems clear – if freedom of expression protects democratic dialogue and truth seeking, and the occupation is effectively shut down by the removal of tents, then these values are being undermined by the actions of the City.

I therefore disagree with the Globe and Mail's editorial position that "There is no constitutional right to "occupy."" The Globe is technically correct, in that occupation is a protected freedom rather than a right, but I doubt the editors were invoking Wesley Newcomb Hohfeld's distinction between the legal definitions of rights and freedoms (see "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913-1914) 23 Yale L.J. 16). The Globe also suggests that occupation implies force, perhaps relying on the internal limit on violent expression noted above. But apart from some recent violence in Vancouver (see Mickleburgh, above), occupations in Canada have been peaceful rather than forceful, and are therefore not outside the protected scope of s. 2(b) of the *Charter*. The crux of the Globe's argument seems to be that limits on occupation are justified: "It is justifiable, fair and constitutionally permissible for cities to say enough is enough, and look for a way to quietly conclude the protests, or move them on to a mutually agreed space." This does not mean that the occupations are not constitutionally protected, however – just that cities may have a reasonable basis for placing limits on the expression. Lastly on this point, it seems rather inconsistent that the Globe and Mail, a staunch defender of freedom of expression in all manner of litigation and editorials dealing with freedom of the press, does not support the freedom of expression of those conveying a message in less privileged ways.

Before discussing s. 1 of the *Charter*, are there any other rights or freedoms at issue in the occupations? The *Charter* also protects the freedom of peaceful assembly (s. 2(c)), but this freedom is not as well developed as freedom of expression and is unlikely to add much to the occupiers' case (unless it helps avoid the internal limits on place under s. 2(b)). Freedom of association, protected under s. 2(d) of the *Charter*, has been most influential in cases involving labour unions, and is unlikely to be relevant here. Another possibility is s. 7 of the *Charter*, which protects "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." This section

figured largely in the litigation surrounding a tent camp in Victoria a few years ago. In *Victoria (City) v. Adams*, 2008 BCSC 1363, varied in part 2009 BCCA 563, a municipal bylaw that prohibited taking up temporary shelter overnight and erecting tents or other structures in city parks was found to violate the rights of homeless persons under s. 7 of the *Charter*. *As noted in my* blog *on the case, the evidence established that there were insufficient shelter beds for homeless persons in Victoria, that* the kind of overhead protection banned by the bylaw was necessary to protect people sleeping outside from the elements, and that without such protection they faced significant threats to their rights to life and security of the person. The bylaw was found to be overbroad, contrary to the principles of fundamental justice, and was therefore not justifiable under s. 1 of the *Charter*. While it is reported appears that some members of Occupy Calgary are homeless, the City has apparently agreed to provide them with housing (see the CBC report above), and so a s. 7 argument in the spirit of *Adams* would be difficult to mount in the circumstances.

Turning to s. 1 of the *Charter*, the question of justification is a contextual one, with a number of factors to be considered. As noted recently by the Supreme Court, "It is clear from this Court's s. 1 jurisprudence on freedom of expression that location matters, as does the audience. Thus, a limit which is not justified in one place may be justified in another. And the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 at para. 78). The nature of the expression also matters, with limits on political expression being more difficult to justify than limits on commercial expression or expression that is harmful to others (*Keegstra*, above; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 91).

In the case of Occupy Calgary, the expression is political in nature, and so the City's actions in limiting the occupation by ordering the removal of tents should be more difficult to justify. The City is not really acting to protect a vulnerable group such as children or members of religious or ethnic minorities in limiting Occupy Calgary's expression. Neighbours, nearby business owners and other users of the park are not the sort of groups that we would normally consider vulnerable. The City would be expected to lead evidence of the harms of the occupation and who was experiencing those harms, and might be accorded some leeway if there was conflicting or inconclusive evidence (*Thomson Newspapers* at para. 90). Overall, however, this does not seem like the sort of case where the City should be granted deference with respect to justifying its limits on expression under s.1.

The *Oakes* case mandates a multiple step inquiry under s. 1 of the *Charter*. First, was the government acting on a pressing and substantial objective when it limited the *Charter* rights or freedoms in question? Second, were the government's means of limiting the rights or freedoms reasonable and proportional to the importance of the objective? Sub-steps of this second step require analysis of (a) whether there is a rational connection between the objective and the means used to achieve it, (b) whether the means minimally impaired the right or freedom, and (c) whether there is proportionality between the objective and the means, and between the actual benefits and harms of the government's actions (*R. v. Oakes*, [1986] 1 S.C.R. 103 at 138-140). All of these steps must be satisfied for a government to satisfy s.1 scrutiny.

What are the City's objectives in ordering the removal of Occupy Calgary's tents from Olympic Plaza? According to the CBC, "The motion to end Calgary's occupy camping was introduced by Ald. John Mar, who wants the city to enforce all bylaws, including the one against camping in city parks. He says Calgarians are frustrated with the three-week-old camping protest in Olympic

Plaza." The enforcement of bylaws is not a valid objective for s. 1 purposes – if bylaws violate *Charter* freedoms then they cannot be enforced without a *Charter* remedy. The frustration of others is also not a sufficient basis for overriding a constitutionally protected freedom – if so, the *Charter* would mean very little, particularly in relation to unpopular expression. However, it is rare for the government's case to fail at the stage of asserting a pressing and substantial basis for limiting a *Charter* freedom, and the City of Calgary may have some credible arguments to pass this step. If the evidence established that other people were prevented from using or enjoying the park by the tent camp, that might qualify as a pressing and substantial reason for limiting the occupation (see *Adams* and *R v Pawlowski* , 2011 ABQB 93 at para. 94). Preventing harm to the occupiers themselves, such as drug overdoses or concerns related to fire safety, might also be pressing and substantial objectives. Another objective that was found to be pressing and substantial in the *Adams* case was protection of the park environment from the harms of tent camping. The City would likely pass this step.

The next question is whether there is a rational connection between the objective(s) and the means used to achieve them. Would enforcing the removal of tents restore the enjoyment of the park by others, protect the occupiers from harm, and / or protect Olympic Plaza itself, or is the removal arbitrary in relation to these objectives? These are questions on which the City should be required lead evidence, although sometimes rational connection can be decided as a matter of common sense and logic as well. In *R v Pawlowski*, another case concerning the constitutionality of the *Parks and Pathways Bylaw*, a question raised at trial relating to rational connection was whether limiting expression in certain parks would restore those parks to places of public enjoyment (see 2011 ABQB 93 at para. 44, referencing 2009 ABPC 362). If a park has become a place where the public rarely goes because of drug use or other criminal activity, such as Triangle Park in Calgary, limiting expression or the method of expression (in Pawlowski's case, amplified sound) may not be rationally connected to the objective. This argument may not apply to Olympic Plaza, which is a park frequented by the public for skating, theatre performances, and pedestrian traffic, but it may be relevant in the case of other public spaces that are being occupied. The nature of Olympic Plaza – largely concrete – also makes environmental protection an unlikely outcome of removing the tents. As for protecting the protestors themselves, much is being made of the drug overdoses at Occupy Vancouver, but I have difficulty seeing the logical connection between removing tents and preventing overdoses – sadly, people die of overdoses in lots of other urban spaces, where they are not hidden from the police or public view. A focus on the removal of tents as tied to the enjoyment of Olympic Plaza by others would likely be the City's strongest argument at this stage.

The minimal impairment step is the one at which governments most often fail. This step has been modified somewhat since the days of *Oakes*, and the test is now whether the government limited the relevant right or freedom as little as reasonably possible. One important consideration here is whether the government action constituted a complete or partial ban on the activity, with complete bans being more difficult to justify (see e.g. *City of Montreal*). In *Adams*, the bylaw prohibiting shelters was found to be overbroad and to fail the minimal impairment test because there were several alternatives that would have advanced the City's objective of preserving urban parks short of a total ban (such as requiring that shelters be taken down every morning, or prohibiting sleeping in sensitive environmental regions only (2009 BCCA 563 at para. 116)). In contrast, in *Pawlowski*, Justice Hall found that the *Parks and Pathways Bylaw* was minimally impairing in large part because it was a partial ban on expression, as permits could be obtained for the use of amplified sound (although Pawlowski is challenging this finding on appeal, since he was effectively denied access to permits by the City. See *R v Pawlowski*, 2011 ABCA 267 and here). One could look at the Occupy Calgary scenario a couple of ways. First, there is a

complete ban on camping and tents in the *Parks and Pathways Bylaw*, and to the extent that tents are a key part of the occupation (especially now that it is cold), and thus of the expression, this amounts to a total ban on the occupation. The removal of tents should therefore be difficult for the City to justify, unless it can show that it had no alternative ways to advance its objective(s). Alternatively, one could say that only tents are being banned, and not the occupation or the underlying expression, which would be easier for the City to justify. My own view is that taking a contextual approach, and looking at the effects of the City's actions, the removal of tents should be seen as akin to a total ban on the occupation, and thus on the expression. As in *Greater Vancouver Transportation Authority*, the actions here can be seen as "a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse" (at para. 77). The City may have difficulty at this step of s.1.

The final balancing step of the *Oakes* test has not historically played a determinative role in s. 1 analysis, but it was given new life by the Supreme Court in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at paras. 75-78. The gist of this step is to balance the negative impact of the violation on the claimants against the beneficial effects of the limitation for others. There is a danger that the interests of the many will outweigh the rights and freedoms of the few if too much weight is accorded to this stage. Consequently, governments should be required to lead evidence of the actual beneficial effects of their actions in implementing the objective of the law or policy rather than rely on benefits that are hypothetical (see the dissent of Justice Rosalie Abella in *Hutterian Brethren* at paras. 150, 162). Turning to the case at hand, will the removal of tents from Olympic Plaza result in the actual reduction of the harms that underlie the Bylaw and the City's actions? Again, the strongest argument for the City here seems to be with respect to the enjoyment of the park by other users and the beneficial effects of removing the tents in this context. Still, if the removal of tents is characterized as a complete ban on the occupation, the negative effects of the City's actions on freedom of expression should be seen as very high and difficult to outweigh, especially because the City is not protecting the interests of a vulnerable group.

There are some decent arguments that can be made on both sides of the Occupy v. City debate. In my view, much will turn on how the tents are characterized – as a key component of this particular expression, inextricably part of the message that is being conveyed through occupation, or simply as a method that adds to but is not inherent in the expression itself (perhaps akin to Pawlowski's amplification system, although that could also be debated). My sympathies are with the former argument, which, if accepted, should defeat the City's claim that the removal of tents is justified.