November 22, 2012

Leave to appeal granted in right to public transit case

Written by: Jennifer Koshan

Case commented on:
R v S.A., 2012 ABCA 323

The *S.A.* case, which concerns the right to use public transit and the constitutionality of trespass legislation as applied to public property, has been the subject of two previous judicial decisions (here and here) and two previous ABlawg posts (here and here). On November 7, 2012, Madam Justice Myra Bielby of the Alberta Court of Appeal granted S.A. to leave to appeal the Court of Queen's Bench decision that overturned the trial decision finding a *Charter* violation in her favour.

The facts of the case are fairly straightforward. In April, 2008, S.A. and another youth were seen assaulting a third young person at an Edmonton Transit System (ETS) Light Rail Transit (LRT) station. S.A. was served with a Notice Not to Trespass by a community peace officer issued under the authority of the *Trespass to Premises Act*, RSA 2000, c T-7 (*TPA*), sections 2 and 3 and the ETS Notice Not to Trespass Policy. The Notice banned S.A. from ETS property for six months. In July, 2008, S.A. was found on ETS property and charged with trespassing under section 3 of the *TPA*. Although the ETS had an informal process allowing banned passengers to apply for a modification or early termination of a ban, no information was provided on the Notice Not to Trespass or more generally about that process.

S.A. argued that the ban and trespass charges violated her right to liberty under section 7 of the *Charter*, and that the *TPA* and ETS Policy were of no force and effect as they applied to public property. She was successful at trial before the Provincial Court (Youth Division), but that decision was overturned by the Court of Queen's Bench on appeal.

Section 19 of the *Provincial Offences Procedures Act*, RSA 2000, c P-34, provides that leave to appeal a judgment of the Court of Queen's Bench concerning an offence created by provincial legislation may be granted on "a question of law of sufficient importance to justify a further appeal." There is no dispute that the issues in the case involved questions of law, so the main issue in the leave application was whether the alleged error of law was sufficiently important to justify a further appeal.

Justice Bielby found that the appeal did raise issues of sufficient importance (at para 14). She noted that the outcome of the appeal may affect the interests of anyone using public transit, and the evidence showed that over 300 persons had been banned from public transit in the same year as S.A., 2008 (presumably in Edmonton alone), mostly for reasons not related to criminal offences; the evidence also indicated that ETS bans have significant effects on some people's lives, leading the trial judge to conclude that the bans "seriously undermine the quality of life of

the poor, the young, and the elderly"; the bans restrict access to property to which there is otherwise a right of access, and may apply to public property beyond public transit facilities; the conflicting decisions of the ABPC and ABQB show that the issues for appeal are arguable and open to novel interpretations, and the ABQB decision will continue to bind ABPC judges hearing offences under the *TPA* unless overturned on appeal; and even if the appeal was not successful in restoring the finding that the *TPA* violates the *Charter*, "judicial commentary" in the appeal decision might influence "steps and processes which may or should be undertaken to address future procedural fairness concerns."

Justice Bielby also addressed the Crown's argument that the appeal was moot because S.A.'s ban had expired. She found that S.A. still had an interest in seeing her acquittal at the ABPC level restored, so the appeal was not moot (at para 15).

Even if it was moot, the Supreme Court of Canada had established factors in *Borowski v Canada*, [1989] 1 SCR 342, for whether moot cases should be heard: (1) is there an adversarial context; (2) are there concerns related to judicial economy; and (3) is the court's "proper law-making function" engaged (para 16). Justice Bielby stated that at the stage of the leave application, it was sufficient if at least one of these factors was arguable, and she found all three to meet this test (at para 18). On the question of adversarial context, she noted that the ETS continues to issue bans, S.A. herself may be subject to bans in the future, and S.A.'s counsel, a staff lawyer with Legal Aid's Youth Criminal Defence Office, represents other youth who are banned from using public transit. As for judicial economy, it was arguable that it would be served by hearing the appeal in light of the length of the trial (eight days), the adjudication of the issues at two lower levels of court, and the fact that the Crown had covered the legal costs of all parties to date. Lastly, she found that "the public has an interest in the judicial determination of whether a statutory provision, in form or in application, violates the *Charter*, [and] [t]he Crown has an interest in ensuring the laws it enforces are constitutionally sound" (at para 20). Furthermore, the *S.A.* case showed that litigation may outlast the length of the ban, yet the constitutionality of the *TPA* remains a live issue. For these reasons, it was arguable that the court's proper law making function was engaged.

Leave to appeal was therefore granted on the following issues:

> a. are the *TPA* and/or ETS Policy of no force and effect to the extent that they apply to public property; and,
>
> b. did the actions of ETS in banning the applicant from public transit violate her rights under section 7 of the *Canadian Charter of Rights and Freedoms*? (at para 24).

In my view, the *S.A.* case involves fundamental issues about access to public property and the right to use public transit, a particular concern for members of vulnerable groups. The case ultimately raises questions about the proper scope of the protected right to liberty in section 7 of the *Charter*, which remains one of the most contentious *Charter* rights. As I argued in my previous post on *S.A.*, I believe Justice Binder at the ABQB level erred in his restrictive interpretation of the liberty interest and his consideration of whether the liberty was engaged on the facts of the case. Hopefully the Court of Appeal will take an approach that is in keeping with its obligations to apply the *Charter* broadly, purposively, and contextually (see e.g. *R v Big M Drug Mart*, [1985] 1 SCR 295), which, in my view, would require affirmation of the trial judge's approach in this case.