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The Debate over the Charter's Reach Continues: A Question Regarding Free Expression at Airports

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Cases Considered: *The Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform*, 2014 ABQB 493

In *The Calgary Airport Authority v Canadian Centre for Bio-Ethical Reform*, 2014 ABQB 493 ("*CAA v CCBR*"), Chief Justice Wittmann granted an interim injunction prohibiting an anti-abortion group from protesting at the Calgary International Airport. Separate and apart from the polarizing subject-matter, this case is interesting because it raises some basic *Charter* questions that stubbornly refuse to be settled. Despite raising interesting questions regarding the reach of the *Charter* to quasi-governmental entities and the meaning of public property, the Court did not provide any answers at this stage. Given the nature of an interim injunction application, Chief Justice Wittmann was only asked to determine if the matters raised "serious issues to be tried" – a decision he had little difficulty making. Even without final answers though, this decision still merits attention. Not only are the issues themselves thought-provoking, the parties clearly viewed the application as one of massive importance, and accordingly prepared forceful arguments. At the very least, Chief Justice Wittman's direction that the matter move expeditiously via case management signals that the Court will be providing a substantive answer to these questions in the not-too-distant future.

Facts

On three dates between 2011 and 2013, members of the anti-abortion group Canadian Centre for Bio-Ethical Reform ("CCBR") staged protests in the Calgary Airport's arrival and departure areas. The demonstrations featured approximately 10 members of CCBR, some of whom were holding large graphic signs of aborted foetuses. The demonstrators attempted to hand out pro-life literature and to engage passersby in conversations about abortion (at para 22). The Calgary Airport Authority ("the CAA") received various complaints about the demonstrations (at para 23).

- The first demonstration resulted in the protesters being relocated to facilitate pedestrian traffic. However, the CCBR protesters would not move to the area designated by the CAA (at para 24).
- During the second demonstration, the CAA issued the protesters tickets under the *Trespass to Premises Act*, RSA 2000, c T-7 ("*TPA*"). The Calgary Policy then issued summons for contravening the *TPA*. The CCBR protesters were acquitted at trial (see *R v*

Booyink, 2013 ABPC 185 (blogged about here)). Judge Fradsham relied on an exception in the *TPA* to conclude that the protesters, who were acting on legal advice, "acted under a fair and reasonable supposition that [they] had a right to do the act complained of" (*TPA,* s. 8). Alternatively, drawing on case law regarding freedom of expression in other Canadian airports, Judge Fradsham concluded that CCBR's actions were protected by s. 2(b) of the *Charter*, and that the infringement was not justified by s. 1.
- At the third demonstration, CCBR refused to leave the Airport when the CAA asked them to do so. The Calgary Police were called, but advised the CAA that they could not remove the demonstrators without a court order, unless the activities were violent or threatened violence.

After the third event, the CAA moved forward with an action seeking, *inter alia*, a permanent and interlocutory injunction banning CCBR protests on their premises. Soon after, the CAA brought an interlocutory injunction application pending final resolution of the action.

The Decision

Chief Justice Wittman granted the CAA's application after applying the well-known three-part test for an interim injunction, as articulated in *RJR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. I have outlined the salient points raised under each stage of the test below.

1. **Is there a serious issue to be tried?**

The CAA satisfied Chief Justice Wittman that there was a serious issue to be tried, namely the correct characterization of CCBR's conduct (a trespass or a constitutional exercise of free expression). In challenging this finding, the CCBR launched several interesting but ultimately unsuccessful arguments.

First, it argued that the issue was *res judicata* in light of Judge Fradsham's acquittal in *Booyink*. As outlined above, *Booyink* was a prosecution under the *TPA* resulting from the second of the three CCBR protests. This argument passed the first two stages of the issue estoppel test – the issue determined was fundamental to the prior proceeding, and that proceeding was final. Ultimately, Chief Justice Wittman rejected the argument because it failed to meet the final hurdle – neither the CAA nor CCBR (nor their privies) were the same in both actions (at para 63). He noted, however that while not binding, Judge Fradsham's "thorough analysis and findings [in *Booyink*] may be persuasive authority for this Court" (at para 64).

Second, CCBR argued that its actions were shielded by the *Charter* because s. 2(b) protects the right to expression on all public, government-owned property whether or not the CAA is "government". Chief Justice Wittman rejected CCBR's claim that this raised no serious issue. To do so, he drew on the recent (and somewhat controversial) decision of *R v SA*, 2014 ABCA 191 (ABlawg post forthcoming; see here and here for posts on earlier decisions in *SA*). Specifically, the ABCA held in *R v SA* that while government property is "public", this does not create an automatic entitlement to unlimited access and protection under the *Charter* (*SA* at paras 91-97). Public ownership does not necessarily equate to public rights of use (*CAA v CCBR* at para 74). Therefore, CCBR's entitlement to *Charter* protection while on government property raised a serious issue.

Lastly, CCBR argued that the *Charter* protected their protest because the CAA was either government itself, or if not, was performing a government activity. This argument raised an

entire body of case law dedicated to the application of the *Charter* to entities that fall on a spectrum of government control, authority, or functions. While the CCBR emphasized the government mandate, objectives, and activities of the CAA, the CAA countered with affidavit evidence painstakingly outlining its relationship with (and emphasizing its independence from) the federal government. Chief Justice Wittman declined to wade into the debate, but held that the *Charter* application issue raised a serious issue to be tried (at para 87).

If the *Charter* indeed applied, Chief Justice Wittman held that application of s. 2(b) raised a serious issue to be tried (at para 88).

2. If the injunction is not granted, will the plaintiff suffer irreparable harm?

Chief Justice Wittman accepted the CAA's evidence of irreparable harm. The CAA argued, among other things, that CCBR's actions disrupted passenger flow, created safety risks, interfered with its ability to fulfill its mandate and contractual obligations, and negatively impacted its reputation (at paras 91, 92). CCBR attempted to undercut these arguments by emphasizing that core Airport functions (including safe air travel, Airport services, systems and operations) were not disturbed. The Court accepted that irreparable harm can occur despite the maintenance of these core functions (at para 94).

3. Who does the balance of convenience favour?

Chief Justice Wittman was asked to balance the CAA's right to govern use of its property with the right of demonstrators to express their views (at para 99). Ultimately, the balance of convenience favoured the CAA. While emphasizing that the content of CCBR's message did not impact his decision, Chief Justice Wittman was guided by the fact that it would be able to express its views through other means until the case was finally determined.

As a condition to granting the application, Chief Justice Wittman ordered that the litigation proceed to trial or other resolution "with reasonable dispatch" (at para 100). To this end, he appointed a case management judge to oversee the action, and invited CCBR to apply to vary this injunction if the CAA failed to proceed with its case at a reasonable pace.

Discussion: What is the Future of Freedom of Expression in Canadian Airports?

From an academic perspective, this decision is intriguing, but nonetheless unsatisfying – one cannot help but notice that none of the important questions raised in it were answered. Of course, this is entirely appropriate for an interim injunction application, where it would be incorrect to move any further than determining that the facts and law raise "serious issues to be tried". Thus, while inconclusive, interested parties will have to wait for another day to see how the Court finally determines this contentious dispute. In the meantime however, it is possible to use what is known about the case, the *Booyink* decision, and s. 2(b) jurisprudence to make some predictions about what this final determination will bring. My thoughts on this are outlined below.

A. The CAA Faces an Uphill Battle that it is not Subject to the *Charter*

As the CAA has undoubtedly realized by now, banning unwanted demonstrators from the Airport is a substantially more difficult task than it originally seemed. The CAA may go about its daily functions as a private landlord, but an inextricable link between air transport and government control complicates its relationship with the Canadian public. To clarify this area,

the CAA has chosen to focus on ousting the *Charter*'s application entirely. While this is a wise strategy, it is undoubtedly an uphill battle. In order to successfully argue that they are not subject to the *Charter*, the CAA will either have to cleverly distinguish or completely overturn some forceful existing precedents.

To explain, the CAA's most daunting challenge will be distinguishing the Supreme Court of Canada decision *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, 1991 CanLII 119 (SCC) [*Commonwealth*]. *Commonwealth* held that freedom of expression protected a political group's freedom to hand out pamphlets in a Montreal airport terminal. Should the *Charter* apply, the CAA will have a very difficult time distinguishing this on-point, detailed, and impassioned precedent on the breadth of freedom of expression in airports.

However, the Court in *Commonwealth* basically assumed the *Charter* applied to the airport because it was government property – it failed to undertake any detailed analysis on this point. Thus, by challenging the *Charter*'s application, the CAA may be able to circumvent *Commonwealth* entirely by relying on more recent case law about the application of the *Charter* to quasi-government entities and distinguishing the now-defunct assumption that all activity on government property is protected by the *Charter*.

While this is an interesting strategy, it remains a precarious argument. The last 20 years of case law on *Charter* application is broad and emphasizes that the *Charter* cannot simply be ousted through the government delegating its duties to non-government agencies (see, for example *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 (SCC), at para 42; *Pridgen v University of Calgary*, 2012 ABCA 139 at paras 78 - 98).

What's more, in order to succeed the CAA will have to confront Judge Fradsham's extensive and thorough discussion on this issue (and the case law) in *Booyink*. Judge Fradsham plainly concluded that the *Charter* applied to the CAA because the CAA was either government itself, or even if not, it carried out a government function (*Booyink* at paras 109, 114). While the CAA dodged a bullet when it successfully argued that its case was not *res judicata* in light of *Booyink,* it cannot expect to entirely avoid Judge Fradsham's findings. Even Chief Justice Wittman stated that Judge Fradsham's "thorough analysis and findings [in *Booyink*] may be persuasive authority for this Court" (at para 64).

As such, if the CAA is going to succeed in arguing that the *Charter* does not apply to its actions, it must compel the Court of Queen's Bench to reach a different conclusion than Judge Fradsham when he was faced with the same question on largely overlapping facts. This will be no small feat, as Courts are loathe to reach inconsistent conclusions out of respect for the administration of justice.

B. If the *Charter* Applies, the CCBR will Likely Succeed in Establishing a s. 2(b) Breach

There is little doubt that, should the *Charter* apply, the CCBR will be able to establish a s. 2(b) *Charter* breach. CCBR's protests are a non-violent attempt to convey meaning with clear expressive content, bringing it *prima facie* within s. 2(b)'s protections.

Furthermore, it is unlikely that the location of this expression will remove that *prima facie* protection. While most people would not traditionally associate an airport as an arena where public expression is fostered, *Commonwealth* likened airport terminals to "modern boulevards,

extensions of Main Street" in firmly establishing that "the non-security zones within airport terminals…are properly regarded as public arenas" (*Commonwealth* at pp. 205, 206).

The Supreme Court's more recent discussion regarding freedom of expression on public buses also suggests that CCBR would easily establish a s. 2(b) infringement. CCBR seeks freedom from undue state interference, not the creation of a sphere for their expression; the expressive activity in question does not impede the primary function of airports; and the expressive activity does not undermine the values underlying freedom of expression (see *Greater Vancouver Transportation Authority v Canadian Federation of Students,* 2009 SCC 31 at paras 29, 35, 42 - 46).

C. The CAA Must Mount a Forceful Argument on Section 1

In *Booyink*, Judge Fradsham had little time for the Crown's attempt at a s. 1 justification, finding no evidence that the CAA's actions were related to a pressing and substantial objective (*Booyink* at para 142). He noted that the CAA's actions were most likely aimed at controlling the content (rather than the consequences) of the defendant's expression, as there was no evidence that the defendants were harassing passers-by or obstructing traffic (*Booyink* at para 142, 143).

In the present case, the CAA has wisely heeded Judge Fradsham's words. They have not surprisingly submitted affidavit evidence stating that the CCBR protesters were, among other things, harassing people, obstructing traffic, creating safety risks, and preventing the CAA from fulfilling its mandate. Whether this evidence will convince the Court of Queen's Bench remains to be seen, but it clearly demonstrates that the CAA is ready to go to battle justifying its actions in a s. 1 analysis. Given the risks inherent in its *Charter* application and s. 2(b) arguments, this is a wise choice.

Presuming that the CAA's evidence establishes a pressing and substantial objective, the debate will turn to proportionality and an examination of the CAA's various attempts to relocate and ultimately remove the protesters. If its evidence regarding harassment and passenger obstruction is accepted, the CAA will likely succeed in arguing a rational connection between its actions and the protection of passengers from harassment, traffic hindrances and (perhaps) general safety.

If, as Judge Fradsham suggested, the CAA's actions sought to control the content of CCBR's messaging, a Court will closely examine whether those actions were minimally impairing. The answer to that question (as well as the proportionality inquiry) will likely depend on an examination of the exact location of the relocation zone the CAA initially proposed. If it was a "reasonable" relocation zone, the CCBR's refusal to cooperate may help the CAA justify its ultimate resort to trespass legislation. Conversely, if the attempted relocation zone was unfair or unreasonable, the CAA will have a difficult time demonstrating that its later decision to charge the protesters with trespassing was proportional and minimally impairing.

Conclusion

This case, and ones like it, tests the limits on free expression in Canada and the reach of the *Charter* to entities that are not clearly public or private. Given the parties involved and their respective interests at stake, settlement appears unlikely in this case. Thankfully, Chief Justice Wittman directed that the matter proceed expeditiously via case management so answers to the serious issues raised in this application will be provided in the near future.

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