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Case Law Update: Batty v City of Toronto: Municipalities at Forefront of Occupy Movement

December 20, 2011

Batty v City of Toronto[1] marked the first in a series of court rulings in the "Occupy movement," applying the *Canadian Charter of Rights and Freedom*[2] within the municipal context. Shortly after the *Batty* decision, courts in British Columbia and Alberta heard similar applications from the City of Vancouver and City of Calgary. Protesters were ordered to comply with local by-laws and remove all tents and structures from Art Gallery Land in Vancouver[3] and Olympic Plaza in Calgary. [4]

Occupy Toronto Ruling On October 15, 2011, protesters began to occupy St. James Park, a 3.2-acre park located about three blocks east of the City's financial core.[5] On November 15, City of Toronto staff served many protesters with a notice under the *Trespass to Property Act*,[6] stating that protesters were prohibited from erecting tents or other structures on the park and from using the park between 12:01 a.m. and 5:30 a.m.[7] The protesters immediately began an application challenging the constitutional validity of the City's trespass notice.[8] On the afternoon of November 15, the Ontario Superior Court granted the protesters an interim stay order r until the hearing of the application and the release of the court's reasons.[9] At the issue was whether the City, by issuing the trespass notice, had violated the protesters' rights under Section 2 of the *Charter* by infringing their freedoms of conscience, expression, peaceful assembly and association.[10]After hearing the application on November 18 and 19, with supplementary email submissions filed on November 20, the Court released its decision on November 21, dismissing the protesters' constitutional challenge.The City's Order Constituted a Reasonable Limit Under the *Charter*Justice Brown held that the structures and tents erected by the protesters in St. James Park constituted a mode of expression protected by section 2 of the *Charter*.[11] Thus, the City's enforcement infringed the protesters' section 2 freedoms by restricting the protesters' expressive activity, assembly and association, as well as the manifestation of their beliefs.[12] However, Justice Brown upheld the City's trespass notice. The Court found that the limitations imposed on the protestors' rights were justified under section 1 of the *Charter* as "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[13] What Constitutes "Reasonable Limits" by the City?The City relied upon its Parks By-law in Chapter 608 of the *Toronto Municipal Code* as authority to invoke the enforcement mechanisms of the *Trespass to Property Act*.[14] The Court in *Batty* confirms that limits contained in municipal by-laws satisfy the "prescribed by law" requirement as their adoption is authorized by statute.[15] Applying this analysis, the Court rejected the protesters' argument that the Parks By-law was overbroad and vague.[16]The Court then applied the *Oakes* test to ascertain whether or not the limit can be demonstrably justified in a free and democratic society.[17] First, the reasonable limits must have a pressing and substantive objective; and second, the measure chosen by the City to achieve that objective must be proportional to the objective.[18] Applying the *Oakes* test Justice Brown concluded that the trespass notice was constitutionally valid. First, by ordering the protesters to take down their structures and vacate the park during the midnight hours, the City's objective was to balance fairly the different uses of public parks. This objective carried sufficient importance. Second, the measures taken also met the three aspects of the proportionality test:

- The limiting measures met the rational connection test:

[19]

- The City issued the trespass notice, asking the protesters to "share the park with other people in Toronto and to afford the

neighbouring community some peace and quiet during the midnight hours".

[20]

The measures impaired the *Charter* rights at issue as little as possible:[21]

- (a) The City was not imposing an absolute ban on the protesters' political expression or associational activities. Protesters could continue to protest in the park for close to 19 hours a day.

[22]

(b) The Court rejected the argument that a less intrusive means for the City would be to redirect the non-protesting public to other parks. Justice Brown notes that if every protest group possesses a constitutional right to occupy a park of their choice, the result would be a "tragedy of the commons" rather than greater popular empowerment.[23] (c) The Court also rejected the submissions that the City had a duty to consult with the protesters. Aside from issue of aboriginal rights and interests, municipalities have no constitutional obligation to consult with the protesters before enforcing its by-laws.[24] Justice Brown noted whether "a municipality should consult with those who occupy public spaces before seeking to limit their use of those spaces is a matter of political prudence".[25] (d) That the City did not include a policy providing more details in which an exemption permit from the Parks By-law would be issued does not render the by-law constitutionally invalid.[26]

The measures' deleterious effects were proportional to their salutary effects:[27] The protesters had other means to express their message, including continued use of the park under terms, while other Torontonians could resume use of the park.

The City as the authority representing the greater community was entitled to reopen the park to the rest of the city by enforcing the by-law.

Concluding Remarks: Obligation to Share Urban Space Fairly In the opening to his reasons Justice Brown began by asking: how do we live together in a community and how do we share common space? The *Charter*'s preamble, he suggested, reminds us that we are not unconstrained free actors but are all subject to the "rule of law".[28] Justice Brown noted that "the expression of those questions has assumed a specific form the creation of an encampment" in St. James Park.[29] In effect, the protesters argued that the *Charter* sanctioned their "unilateral occupation of the Park" indefinitely, because of the importance of the message and the way in which they convey it"by taking over public property".[30]Justice Brown took a different approach. He emphasized that the *Charter* does not "remove the obligation on all of us who live in this country to share our common urban space in a fair way."[31] The *Charter* does not allow us to "take over public space without asking, exclude the rest of the public from enjoying their traditional use of that space, and then contend that they are no obligation to leave."[32] Common sense still must play a very important role in balancing the competing rights.[33]

[1] 2011 ONSC 6862 [*Batty*] (dated November 21, 2011).

[2] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] 2011 BCSC 1647 (dated December 1, 2011).

[4] 2011 ABQB 764 (dated December 6, 2011).

[5] *Batty supra* note 1 at paras 3 & 24.

[6] RSO 1990, c T21.

[7] *Ibid* at para 4.

[8] *Ibid* at para 6.

[9] *Ibid* at para 7.

[10] *Charter supra* note 2, s 2.

[11] *Batty supra* at para 72.

[12] *Ibid* at para 75.

[13] *Ibid* at para 124; *Charter supra* note 2, s 1.

[14] *Ibid* at para 82.

[15] *Ibid*.

[16] *Ibid* at paras 83-90.

[17] *Ibid* at para 79, citing *R v Oakes*, [1986] 1 SCR 103.

[18] *Batty supra* note 1 at para 79.

[19] *Ibid* at paras 97-99.

[20] *Ibid* at para 97.

[21] *Ibid* at paras 100-121.

[22] *Ibid* at para 104.

[23] *Ibid* at paras 112-113.

[24] *Ibid* at paras 114.

[25] *Ibid* at para 115.

[26] *Ibid* at paras 116-121.

[27] *Ibid* at paras 123.

[28] *Batty supra* note 1 at para 1.

[29] *Ibid* at para 3.

[30] *Ibid* at para 10.

[31] *Ibid* at para 14.

[32] *Ibid* at para 15.

[33] *Ibid* at para 13.

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