

COURT OF APPEAL FOR ONTARIO

CITATION: Bracken v. Fort Erie (Town), 2017 ONCA 668

DATE: 20170825

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Feldman, Lauwers and Miller JJ.A.

BETWEEN

Fredrick Bracken

Applicant (Appellant)

and

The Town of Fort Erie

Respondent (Respondent)

Fredrick Bracken, acting in person

Christine Carter and Michael Krygier-Baum, for the respondent

Heard: November 17, 2016

On appeal from the judgment of Justice T. Maddalena of the Superior Court of Justice, dated February 12, 2016, with reasons reported at 2016 ONSC 1122.

B.W. Miller J.A.:

Overview

[1] The appellant, Mr. Bracken, describes himself as a citizen journalist. When he disagrees with government decisions, he states his opinions, demands answers, and makes use of traditional means of protest, such as marching in the

town square. He also video records his protests and interactions, sometimes aggressively questioning people at a proximity they find uncomfortable. He can be confrontational, loud, agitated, and excitable. He is a large man and some people find him intimidating.

[2] The respondent, the Town of Fort Erie, is like all employers, required to take steps to protect the safety of its employees. It has a Workplace Violence Prevention Policy, and a Workplace Violence Committee and Officer. When Mr. Bracken protested outside the Town Hall on June 16, 2014, an employee inside Town Hall who had never seen a protest before was alarmed. She placed the Town Hall under lockdown, and advised the interim Chief Administrative Officer of her fears for her safety and the safety of others.

[3] The CAO gave instructions to call the police, issue a trespass notice, and direct Mr. Bracken to leave. The police attended and directed Mr. Bracken to leave. He refused. He was arrested, handcuffed, and held in the back of a police cruiser for 15 minutes. He was then issued a trespass notice banning him from all Town property for one year, as well as given a provincial offences ticket for failing to leave. He tore up the trespass notice and left the premises without further incident.

[4] As I explain below, the Town's response to Mr. Bracken's protest, in expelling him from the premises and issuing the trespass notice, was a violation of

his rights under the *Canadian Charter of Rights and Freedoms*. I would quash the trespass notice.

[5] In what follows, I will set out the events of June 16, 2014, which must be placed in the context of an on-going dispute between Mr. Bracken and the Town of Fort Erie, particularly with its former interim CAO, Richard Brady. I will then address the errors in the reasons of the application judge, which led her to conclude, mistakenly, that Mr. Bracken's acts of protest were not protected by s. 2(b) of the *Charter*. This will require an analysis of both s. 2(b) and s. 1 of the *Charter*. I will not address Mr. Bracken's claim under s. 7 of the *Charter*, because it is not necessary for the resolution of this appeal.

Background

1. Background to the protest

[6] Mr. Bracken was angered by the Town's decision to introduce a by-law permitting a medical marijuana facility to be built across the street from his home. The by-law was on the agenda for a Council meeting on June 16, 2014. He believed that he had been misled by Mr. Brady, when the latter had been interim CAO, about the content of the proposed by-law. Mr. Bracken had attended previous Town Council meetings and had made a video recording on at least one occasion. He had also attended at the front desk of Town Hall some weeks prior to June 16, pounded his fist on the counter, and angrily demanded to meet with

Mr. Brady. He had a video recorder with him. His aggressive behaviour was frightening to the Town employee working at the counter on that day. Mr. Brady came, reprimanded Mr. Bracken for his aggressive behaviour towards the staff member, and then proceeded to a closed door meeting with him about the marijuana facility and the proposed by-law. No further action was taken against Mr. Bracken on that day.

[7] Subsequently, several of the employees working at Town Hall discussed Mr. Bracken's outburst among themselves, and watched some of Mr. Bracken's videos that he had uploaded to Youtube. The videos themselves were not in the record before the Court, and the only description was that they were video recordings made by Mr. Bracken as he ran up to people and questioned them. Although the evidence from some employees is that watching these videos was a principal source of their concern about Mr. Bracken, there is nothing in the record to explain why this was the case, other than Mr. Brady's complaint that Mr. Bracken filmed too close to people's faces.

2. The protest at Town Hall – June 16, 2014

[8] On June 16, 2014, Mr. Bracken attended at Town Hall to protest the scheduled vote on the by-law permitting the marijuana facility to operate across the road from his home. The meeting was scheduled to begin at 6 p.m. He arrived around 5 p.m., entered the unlocked Council chamber and placed a note on each

councillor's desk, as well as the media desk. The notes expressed his objection to Council's expected decision regarding the marijuana facility:

Congratulations on being the ONLY COUNCIL AND STAFF IN CANADA to go under the 70m setback recommended by Health Canada and the provincial D-6 guidelines. You crooks must be proud[.]

[9] He then left the Council chamber and set up his protest outside. On his evidence, he wanted to ensure that his megaphone would not be audible inside the Council chamber. He did not want to disrupt the meeting. To check the volume of the megaphone, he turned on its siren, set it on the ground outside, and ran back into the empty Council chamber. He shut the doors behind him and listened for the sound of the siren. When he was content that it could not be heard, he ran back outside through the Town Hall to turn it off again. He moved quickly, he explained, because he was concerned that someone from the nearby skateboard park would steal the megaphone while he was gone.

[10] He began his protest, shouting "kill the bill" while walking from the parking lot to the front doors of the Town Hall, where his presence activated the motion sensor that opened the doors. He shouted other things, including calling Mr. Brady a liar and a communist, and demanding that Mr. Brady be fired.

[11] Although Mr. Bracken did not encounter anyone either time that he ran in and out of the Council chamber, he was observed by Victoria Schultz, the Town employee who had originally felt threatened by Mr. Bracken's aggressive

behaviour at the counter some weeks earlier. And his siren was also audible to some other employees inside Town Hall, particularly when the automatic doors opened. Signe Hansen, the Manager of Parks and Open Space Development, heard the siren from within her office located at the rear of the second floor of the building. She came out to investigate, and found some of her co-workers gathered on the second floor balcony, watching Mr. Bracken's protest below. She watched "from a safe distance" as Mr. Bracken walked back and forth and shouted into his megaphone. Several of the staff members with her on the balcony "expressed fear for their safety". She deposed that she also became concerned that Mr. Bracken's "erratic behaviour" would intimidate persons coming to the Council meeting, which was scheduled to begin an hour later.

[12] Ms. Hansen moved downstairs to alert the current interim CAO, Tom Kuchyt. She was informed that he was in a closed meeting with the mayor, the councillors, and all of the senior staff (including Mr. Brady). They had not heard Mr. Bracken and were unaware of the commotion. Ms. Hansen was sufficiently alarmed to interrupt the meeting, which she and Mr. Kuchyt both stressed was an unprecedented act, in order to get directions. She appeared to Mr. Kuchyt to be flustered and upset, and advised him that Mr. Bracken was present and pacing outside the front entrance with a megaphone, that he had run into the building towards Council chambers, that he appeared agitated, and that the staff were fearful for their safety.

[13] As interim CAO, Mr. Kuchyt is responsible for the administration of Town property. He also has duties under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, particularly with respect to the obligation to maintain a workplace free of violence and harassment. On the basis of the information he received from Ms. Hansen, Mr. Kuchyt consulted with Mr. Brady and they determined that they “had had enough of [Mr. Bracken’s] intimidating behaviour”. Mr. Kuchyt directed Beverley Bradnam, his Executive Assistant, to prepare a trespass notice and to call the police. Once the notice was ready, Mr. Brady was to go outside and tell Mr. Bracken to leave the premises. If Mr. Bracken refused to leave, Mr. Brady was to hand him the trespass notice.

[14] Mr. Brady then watched Mr. Bracken for a few minutes from inside the Town Hall. No one from the Town confronted him. A police officer arrived and advised Mr. Bracken that a trespass notice had been issued by the Town, and directed Mr. Bracken to leave the premises. Mr. Bracken refused and was arrested and placed in handcuffs. He was then placed in the back of a police cruiser and held for 15 minutes. After Mr. Bracken had been arrested, Mr. Brady went outside, gave the police officer the trespass notice and a covering letter to give to Mr. Bracken. After Mr. Bracken was released, the police officer provided him with the trespass notice and letter, which he tore up, as well as the provincial offences ticket.

[15] The letter stated “this extraordinary action has been taken as a result of your persistent and escalating confrontational behaviour with Town staff.” The trespass notice provided that Mr. Bracken was not to enter three Town properties for a period of one year: Town Hall, the Municipal Campus, and the Public Works Yard. On cross-examination, Mr. Kuchyt explained that these three locations were chosen because they were all the Town properties where Town employees worked.

[16] Exceptions were made in the trespass notice for Mr. Bracken to make an appointment in advance with the CAO to attend at Town Hall on Town business. He was also permitted to use the drop box in the public parking area to pay his property taxes.

[17] The provincial offences ticket was later withdrawn. Mr. Bracken brought this application challenging the constitutionality of the trespass notice under s. 2(b) and s. 7 of the *Charter*.

The reasons of the application judge

[18] The application judge dismissed Mr. Bracken’s application on the basis that he “crossed the line of peaceful assembly and protest”, was engaged in acts of violence, and that his expression therefore “cannot be protected under section 2(b) of the *Charter*.”: at para. 98. She rejected Mr. Bracken’s argument that he was protesting peacefully: “Given the overwhelming evidence to the contrary, which I

accept, I'm not persuaded that he was, under the circumstances of that day, protesting peacefully. On the contrary, I accept that his language was shouting, incomprehensible, and his behaviour was erratic and intimidating.”: at para. 95. She concluded that “this was a legitimate use of a trespass notice to protect public and staff, so there has been no 2(b) violation of the *Charter of Rights and Freedoms*.”: at para. 101.

[19] Because she concluded that Mr. Bracken had no right under s. 2(b) to protest in the manner that he did, the application judge found that his rights had not been limited by government action, and it was therefore not necessary to proceed to an analysis under s. 1 to determine whether any limits placed on his rights could be justified. She also determined that the absence of a s. 2(b) infringement made it unnecessary to consider Mr. Bracken's further claim under s. 7 of the *Charter*.

[20] The application judge dismissed the application.

Analysis

[21] The application judge made an error of law in concluding that Mr. Bracken's protest did not come within the ambit of s. 2(b) of the *Charter*. Consequently, she did not conduct the subsequent analysis to determine whether the expulsion and trespass notice limited Mr. Bracken's s. 2(b) rights, or whether such limitation was nevertheless justified under s. 1 of the *Charter*. She further erred in concluding that

her finding on the s. 2(b) claim was also dispositive of Mr. Bracken's s. 7 claim. Additionally, there were palpable and overriding factual errors concerning Mr. Bracken's conduct on June 16, 2014.

[22] I will set out below the principles of s. 2(b) jurisprudence, before conducting the s. 2(b) and s. 1 analyses that ought to have been performed. I begin by addressing some of the procedural irregularities of this application.

The Procedural Irregularities

[23] First, the application was moot at the time it was heard, as the trespass notice had already expired. The application judge exercised her discretion to hear it, deciding that the issue was of some importance, particularly since the conflict was likely to recur given the relationship between the parties. I agree.

[24] Second, the form in which the application proceeded raises some difficulties. Mr. Bracken, who has been self-represented throughout, applied for a declaration that his *Charter* rights had been infringed. There was, however, a preliminary question that was never addressed: whether the Town's expulsion of Mr. Bracken from the premises and the issuance of the trespass notice was lawful in the circumstances. The application ought to have been framed, in the first instance, as an application for judicial review under the *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, rather than a declaration of Mr. Bracken's *Charter* rights. This may have obviated the need for a *Charter* analysis, and would have brought

to the fore the issue of the implied limits on the common law authority of government actors to exclude persons from public property.

The analytical framework – s. 2(b) analysis

[25] Freedom of expression has received broad protection in Canadian law, not only through the *Charter*, but also through legislation and the common law. As Rand J. noted in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329: “Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.” Section 2(b) further entrenches the limits on government action in order to safeguard the ability of persons to express themselves to others. As expressed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 968-969:

Freedom of expression was entrenched in our Constitution and is guaranteed ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, “fundamental” because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court “the matrix, the indispensable condition of nearly every other form of freedom” (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J.

of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the *Handyside* case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

. . . is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[26] In its early s. 2(b) jurisprudence, the Supreme Court drew on the academic literature developed in the context of the First Amendment of the US Constitution to identify a set of human goods thought to be advanced by a constitutional protection of freedom of expression: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. These goods have been expressed variously in different decisions over the years. In *Irwin Toy*, they were summarized as: (1) enabling democratic discourse, (2) facilitating truth seeking, and (3) contributing to personal fulfillment. In *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, at para. 32, they were rendered as: "self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas." Freedom of expression is thus not only inherently valuable to the self-constituting person, but courts have long recognized that it is also instrumental to

the functioning of a healthy political community, particularly by facilitating the open criticism of government: *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

[27] Although the right is broad, the Supreme Court has identified several limits that are inherent in the right itself.

[28] Of particular significance to this appeal, acts of physical violence or threats of violence do not come within the scope of s. 2(b): *Irwin Toy*, at pp. 969-70; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Montréal (City) v. 2592-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141. Violence, the Supreme Court of Canada held in *Montréal (City)*, at para. 60, “is not excluded because of the message it conveys (no matter how hateful) but because the method by which the message is conveyed is not consonant with *Charter* protection.” Violence and force are predicated on the denial that persons are equal in dignity, negating the reciprocity necessary for communication and genuine dialogue: violence “prevents dialogue rather than fostering it.”: *Montréal (City)*, at para. 72.

[29] The exclusion of acts of violence is one of the few limits on the protection of expression that is internal to s. 2(b), rather than operating as one reason among many in determining whether a limit placed on expression is justified under s.1. The rule against violence is thus an exclusionary rule: it excludes by kind and not by weight: Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009), at p. 22. As such, once it is determined that an act is an act of

violence, deliberation is at an end: there is no further information, no other reasons, that can be relevant to the determination of whether a claim of right under s. 2(b) can succeed. Acts of violence do not receive the *prima facie*, defeasible protection that puts government to the task of establishing under s. 1 that the limits imposed on the claimant are reasonable and demonstrably justified in a society such as ours: the society of a free people, democratically constituted.

[30] Although some might find it difficult to understand the rationale for excluding violence categorically at the s. 2(b) stage rather than dealing with it in the s. 1 analysis, to give acts of violence even defeasible protection under s. 2(b) would give them an unacceptable legitimacy: Grégoire Webber, *The Negotiable Constitution: on the limitation of rights* (Cambridge: Cambridge University Press, 2009), at p. 122. It would be tantamount to declaring that Canadian constitutional morality is open to the proposition that an individual's self-expression through acts of violence could, in some conceivable circumstances, take priority over the public good of protecting persons by restraining acts of violence.

[31] The scope of the "violence" exception has not received much attention. In *Keegstra*, the exception was clearly limited to acts of physical violence. Dickson C.J. considered, and rejected, the proposition that threats of violence could also be categorically excluded from the protection of s. 2(b). This was not to say that restrictions on threats of violence would therefore be unconstitutional, only that such restrictions would have to be assessed at the s. 1 stage of analysis. In *R. v.*

Khawaja, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70, however, McLachlin C.J. expressly enlarged the category of internal limits to include *threats* of physical violence, on the basis that a person who threatens violence takes away free choice and undermines freedom of action in the same manner as if the person actually committed the threatened act of violence.

[32] A second exclusionary rule, internal to s. 2(b) reasoning, relates to the physical *location* where the expression takes place. Freedom of expression does not extend to the same degree in every public location: *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139. It does not, for example, extend to publicly owned spaces that are used as private offices. As L'Heureux-Dubé J. noted in *Commonwealth*, at pp. 199-200:

[T]he *Charter's* framers did not intend internal government offices, air traffic control towers, prison cells and Judge's Chambers to be made available for leafletting or demonstrations. It is evident that the right to freedom of expression under s. 2(b) of the *Charter* does not provide a right of access to all property whether public or private.

[33] The question, as posed in *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 42, is “whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression.” The

public square is, paradigmatically, a place traditionally used to express public dissent is: *Montréal (City)*, at para. 61.

[34] Having concluded that the claimant has engaged in expression and the protection of s. 2(b) is not negated because of an inherent limit such as method or location, the next step in the s. 2(b) analysis set out in *Irwin Toy* is to ask whether the government action in question restricts expression in purpose or effect: *Montréal (City)*, at para. 82. If the government action in question does not purposefully limit the expression in question, but limits it only as a side-effect of pursuing some other purpose, the claimant is put to the additional burden of establishing that the expression in issue promotes one of the three purposes of freedom of expression articulated in *Irwin Toy*, at p. 976: enabling democratic discourse, facilitating truth seeking, and contributing to personal fulfilment: *Montréal (City)*, at para. 83.

Application – s. 2(b) analysis

[35] The application judge, as I stated above, found that Mr. Bracken was engaged in violence, and his actions therefore did not come within the protection of s. 2(b). This conclusion was an error.

The s. 2(b) claim was wrongly dismissed based on erroneous findings that Mr. Bracken engaged in violence and interfered with others

[36] What was the basis of the application judge's conclusion that Mr. Bracken was engaged in violence and that his expression was therefore excluded from s. 2(b) protection?

[37] The application judge relied principally on the evidence of Town employees, all of whom expressed fear for their physical safety. When considering this evidence, it is important to bear in mind that only one employee, Mr. Brady, had any face to face interaction with Mr. Bracken on the day in question, and that was after Mr. Bracken was already handcuffed and under arrest. All of the employees who witnessed Mr. Bracken's protest on that day observed him "from a safe distance."

[38] None of their allegations about Mr. Bracken's behavior, in my view, survived Mr. Bracken's amateur cross-examination of them.

[39] The three Town employees who observed Mr. Bracken's protest and provided evidence were Mr. Brady, Ms. Schultz, and Ms. Hansen. Ms. Schultz provided a four paragraph affidavit. Like all of the affidavits filed on behalf of the Town, it is short on details of what actually transpired, and instead provides conclusory statements about the affiant's subjective response to Mr. Bracken: "Mr. Bracken is loud, overbearing and very intimidating. I did not approach him on my

own and would not do so because I am not sure how he will react. I am very afraid of him.”

[40] This affidavit does not explain what Mr. Bracken did on that day or any other that caused Ms. Schultz to be fearful. On cross-examination, she admitted that he had never threatened her and had never acted violently towards her. The basis of her fear, she said, “I think it’s just your whole demeanour and your voice and just your body language in general that’s a little intimidating.” When questioned, she also mentioned his interaction with her at the service counter on a previous day in which he was “getting very loud”, and her discussions with colleagues about his Youtube videos.

[41] Ms. Hansen’s affidavit was 10 paragraphs. In it she states that she was concerned that Mr. Bracken’s “erratic behaviour would intimidate those trying to get into the meeting” that was scheduled to begin an hour later. She was concerned “to make sure staff on the first floor were safe and secure” and instituted a lockdown procedure to ensure the safety of the staff. (On the evidence in the record, the “lockdown” consisted of locking an internal door between the Council chamber and the administrative offices.) She stated that she remains concerned about her safety and the safety of others around Mr. Bracken.

[42] As with Ms. Schultz's affidavit, Ms. Hansen's affidavit chronicles no acts of violence or threatened violence during Mr. Bracken's protest, or of Mr. Bracken preventing or attempting to prevent anyone from entering Town Hall.

[43] Ms. Hansen's attitude to public protest, and the fragility of her safety concerns, emerged on cross-examination:

171. Q: You're not aware if protesting is allowed on Town property?

A: I'm not.

172. Q: Have you ever seen a protest on Town property?

A: No.

...

179. Q: have I ever been verbally violent or physically violent with you, ma'am?

A: I've never had a conversation with you before.

...

251. Q: is it normal for someone who has never had a conversation with somebody - has never spoken a word with somebody, who's never interacted with somebody, who's never been threatened by anybody who is - to be so concerned for their safety that they require police presence at a cross-examination? Does that make sense to you, ma'am?

A: it does when I observe the behaviour that you demonstrated on that day.

252. Q: we already said that was just pacing back and forth with the megaphone.

A: Yeah.

[44] Ms. Bradnam, the Executive Assistant to the CAO and member of the Workplace Violence Committee, swore a 10 paragraph affidavit. She did not observe Mr. Bracken on the day in question. At the direction of Mr. Kuchyt, Ms. Bradnam prepared the trespass notice and phoned the police. She was told by Ms. Hansen that Mr. Bracken was “acting in a very intimidating way”. She attested that Ms. Hansen was very upset and concerned for the safety of staff and other members of the public. Ms. Bradnam also expressed her fear for her safety if Mr. Bracken returns to Town Hall. Like Ms. Hansen, she admitted on cross-examination, that Mr. Bracken had never been violent with her, threatened her, or even met her.

[45] The third witness to the protest, Mr. Brady, was the only affiant to state that he observed Mr. Bracken physically preventing people from attending the meeting at Town Hall. If true, this could constitute an act of violence. However, the totality of the evidence, including Mr. Brady’s evidence on cross-examination, renders not credible the evidence in his affidavit. He only observed Mr. Bracken for five minutes, compared with Ms. Hansen, who observed him for nearly the entirety of his protest, which she stated was approximately 20 minutes, and who did not observe Mr. Bracken physically obstruct anyone. Mr. Bracken himself vehemently denied obstructing anyone. There were no affidavits from any member of the public claiming that Mr. Bracken had obstructed them. And on cross-examination, Mr. Brady was unable to provide a single detail to back up his assertion that Mr.

Bracken had obstructed anyone. Indeed, it would have been odd for Mr. Bracken to prevent anyone from attending the meeting. He wanted people to attend. He wanted an audience. He wanted to publically expose Town Council. His protest was of an entirely different nature than those who seek to obstruct government or to deny others a platform on which to speak.

[46] Indeed, the thrust of Mr. Brady's evidence was not that Mr. Bracken was preventing people from entry, but that he was creating an "unsafe" environment for Town staff: employees were frightened because of Mr. Bracken "bullying them". The employees were indeed frightened, but the evidence does not disclose any reasonable basis for their fear. The bullying claim is impossible to square with the evidence. Mr. Bracken had no interaction with any Town employee in the Town Hall that day, including Mr. Brady, prior to his arrest. And the only employee with whom he had ever engaged, aside from Mr. Brady and Mr. Kuchyt, was Ms. Schultz, in the single incident at the service counter, weeks earlier.

[47] There was other evidence relied on by the application judge to determine that Mr. Bracken was violent on June 16. Some of it was irrelevant, such as Mr. Bracken's conduct a year later when he had a disagreement with a Town works crew at a fire hydrant. Some of it was both irrelevant and hearsay, such as unsworn police statements about Mr. Bracken's conduct after arrest. The application judge's inference is that Mr. Bracken's aggressive conduct post arrest, while handcuffed and confined in the back of a police car, is some evidence that he must have

engaged in acts of violence while protesting. It is tantamount to concluding, as counsel for the Town urged us to conclude, that Mr. Bracken is a violent man and therefore must have engaged in violent acts. It is not a sound inference.

[48] This, then, is the totality of the evidence that Mr. Bracken's protest was violent and not meriting *Charter* protection. The application judge described it as overwhelming. With respect, it is not.

[49] Violence is not the mere absence of civility. The application judge extended the concept of violence to include actions and words associated with a traditional form of political protest, on the basis that some Town employees claimed they felt "unsafe". This goes much too far. A person's subjective feelings of disquiet, unease, and even fear, are not in themselves capable of ousting expression categorically from the protection of s. 2(b).

[50] The consequences of characterizing an act as violence or a threat of violence are extreme: it conclusively defeats the *Charter* claim without consideration of any other factor. Accordingly, courts must be vigilant in determining whether the evidence supports the characterization, and in not inadvertently expanding the category of what constitutes violence or threats of violence.

[51] The Town's logic, accepted by the application judge, appears to be this: (1) Mr. Bracken was agitated, loud, and angry; (2) his protest was therefore not

peaceful; (3) all non-peaceful protest is violent; and (4) violence is not protected by s. 2(b). The error is readily apparent. A protest does not cease to be peaceful simply because protestors are loud and angry. Political protesters can be subject to restrictions to prevent them from disrupting others, but they are not required to limit their upset in order to engage their constitutional right to engage in protest.

[52] A finding that a person's expression is an act of violence or a threat of violence is, as explained above, determinative that their expression is not protected by the *Charter*. Once it is determined that an act is violent or a threat of violence, deliberation is at an end and the claim of a s. 2(b) *Charter* violation is defeated. Courts should therefore not be quick to conclude that a person's actions are violent without clear evidence. Here, there is no evidence that Mr. Bracken's protest was violent or a threat of violence, and the finding that it was constitutes a palpable and overriding error.

[53] With respect to location, the second internal limit to s. 2(b), the application judge did not make a direct finding that Mr. Bracken's protest was at a location where s. 2(b) protection does not exist, or that his use of the space was inconsistent with its function. She did, however, find that "he... interfered with the public's use of space at the Town". Again, this finding is unsupported. There is no evidence whatsoever that he physically obstructed anyone, or otherwise impaired anyone's ability to use public space. He paced back and forth with a megaphone. These are not idiosyncratic actions, notwithstanding the Town's characterization

of them as “erratic”. They have a clear meaning within the long tradition of civic protest. The purpose of such actions is not to occupy that space to the exclusion of anyone else. One person, alone in front of Town Hall with a megaphone and a camcorder, is not, of itself, an interference with public space that displaces the protection of s. 2(b).

[54] There can be no question that the area in front of a Town Hall is a place where free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society. The literal town square is paradigmatically the place for expression of public dissent.

Were s. 2(b) rights limited by the trespass notice?

[55] The next question in the constitutional analysis is whether the expulsion of Mr. Bracken and the issuance of the trespass notice by the Town limited Mr. Bracken’s s. 2(b) rights, and whether the limit was by purpose or only by effect. The application judge did not address these questions.

[56] Taking the evidence of Mr. Kuchyt and Mr. Brady, it would be possible to conclude that the Town’s decision to revoke Mr. Bracken’s permission to be present on the premises, and to issue the trespass notice encompassing all Town property where employees work, with a one year duration, was not done with the purpose of preventing Mr. Bracken from conveying his message, but was rather done to protect the safety of staff and ensure the orderly proceeding of the Council

meeting. Nothing much turns on this point, as I conclude that even if the silencing of Mr. Bracken was only a side-effect of the ultimate purpose to ensure the safety of employees and visitors, he is able to establish that the effect on him is to impair his participation in each of the three goods advanced by the guarantee of freedom of expression articulated in *Irwin Toy*, namely enabling democratic discourse, facilitating truth seeking, and contributing to personal fulfilment.

[57] I acknowledge that several of the affiants attested that Mr. Bracken's speech was incomprehensible, and that the application judge made that finding. But again, the finding was unsupportable. Some affiants, up on the balcony or elsewhere on the second floor, might not have heard him distinctly. Others, who distinctly heard him saying "kill the bill" might not have had sufficient context to understand the message. That did not make his speech "incomprehensible", with the insinuation – made in various places in the Town's affidavits – that Mr. Bracken was raving. To the contrary, Mr. Brady, watching from the atrium and well-acquainted with Mr. Bracken's grievances, heard Mr. Bracken and clearly understood what he was saying. He didn't like it.

[58] Mr. Bracken's speech, that day, was directed towards protesting the expected adoption of a by-law that he understood to be promoting the interests of a marijuana facility across from his home. He wanted the by-law defeated. He also criticized the members of Town Council. No doubt, they did not like being called liars and communists. Mr. Brady did not like Mr. Bracken calling for him to be fired.

On cross-examination, he stated that Mr. Bracken had no right to say so. He viewed it as a threat to his livelihood. The language was neither polite nor restrained. But as this Court pointed out in *Cusson v. Quan*, 2007 ONCA 771, 87 O.R. (3d) 241, rev'd 2009 SCC 62, [2009] 3 S.C.R. 712, at para 125: “(d)emocracy depends upon the free and open debate of public issues and the freedom to criticize the rich, the powerful and those ... who exercise power and authority in our society... Debate on matters of public interest will often be heated and criticism will often carry a sting and yet open discussion is the lifeblood of our democracy.”

[59] Whether the issuance of the trespass notice is viewed as a means to silencing Mr. Bracken or simply as a means of protecting others, it had the effect of preventing him from conveying his message to his intended audience, not only on June 16, but for an entire year thereafter. This was unquestionably a limit on his s. 2(b) rights.

Section 1: the analytical framework

[60] Where, as here, a person's *Charter* right has been limited by the action of a government actor, in this case the Town, the actor can seek to justify its action under s. 1 of the *Charter*, which provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[61] In establishing the framework for *Charter* analysis, the Supreme Court determined early on that the finding of a *Charter* rights violation would be a two-step inquiry. The preliminary finding that a right such as freedom of expression has been limited by government action is thus an intermediate conclusion, and not itself a finding of a violation of a *Charter* right: “(i)t is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*”: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Lamer J. (in dissent but not on this point). It is only after determining that the limitation placed by legislation or government action on the exercise of the right is invalid that we can say that the right has been violated: Aharon Barak, *Proportionality: constitutional rights and their limitations* (Cambridge: Cambridge University Press, 2012), at pp. 101-03. The violation of a *Charter* right is thus established at the conclusion of the s. 1 analysis, after taking into account the reasons for the limit imposed by government, responding to the needs and circumstances of others living in community in a free and democratic society: Régimbald and Newman, *The Law of the Canadian Constitution*, 2nd ed. (Markham: LexisNexis Canada, 2017), at p. 546-47; see also Webber, *The Negotiable Constitution*.

[62] The framework for determining whether a *legislative* limit on the exercise of a *Charter* right is justified in accordance with the principles of a free and democratic society was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The

proportionality test at the heart of the *Oakes* analysis was recently summarized by Karakatsanis J. in *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, at para. 58:

A law is proportionate if (1) there is a rational connection between the means adopted and the objective; (2) it is minimally impairing in that there are no alternative means that may achieve the same objective with a lesser degree of rights limitation; and (3) there is proportionality between the deleterious and salutary effects of the law... The proportionality inquiry is a normative and contextual one, which requires courts to examine the broader picture by “balanc[ing] the interests of society with those of individuals and groups” (*Oakes*, at p. 139).

[63] Where, as here, there is no challenge to the constitutionality of legislation, the analytical framework changes, although the nature of the justification remains the same. In *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, the Supreme Court explained that the application of the s. 1 test set out in *Oakes* needed to be adapted for the review of administrative actions: see also *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613, at para. 40. In doing so, the Court did not lay down a rigid formula, but stressed that flexibility is needed in order to adapt the analysis to the great variety of administrative decisions that come for judicial review: “while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality.”: at para. 5. The reasonableness of a decision is “contingent on its context”: at para. 7. The ultimate question, whether the context is legislative or a

matter of government action, is whether, in all the circumstances, a limit that has been placed by government on the exercise of a *Charter* right is reasonable in a free and democratic society.

Section 1: application

[64] Although the appropriate analysis for determining whether the rights limitation was reasonable and satisfies the requirements of s.1 is guided by *Oakes* and *Doré*, it must be adapted to this specific context.

Prescribed by law

[65] Section 1 establishes that limits to *Charter* rights must be reasonable and must be “prescribed by law”. In the context of governmental action, such as expelling a person from government owned property and issuing a trespass notice, this means that the action must be grounded in law. That is, the action must have been an exercise of a sufficiently defined legal power, guided by legal norms: *Slaight, R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. A “law” need not be a statute to satisfy the “prescribed by law” requirement. “Law” in this context includes regulations and the common law, and it is sufficient that “the limit simply result by necessary implication from either the terms or the operating requirements of the “law”.”: *Greater Vancouver*, at para. 52.

[66] Accordingly, in offering a justification for the limit it has imposed on Mr. Bracken's expression, s. 1 requires the Town to first establish that the limit is one that is "prescribed by law".

[67] Although Mr. Bracken does not challenge the Town's authority to expel a person from Town property or issue a trespass notice, it is nevertheless important to be clear about the source of this authority in assessing the constitutionality of the Town's actions.

[68] Although neither the trespass notice nor its cover letter reference the legal authority for expelling Mr. Bracken or issuing the notice, the Town's position is that the CAO, who made the decision to issue the trespass notice, draws authority from two sources: (1) s. 229 of *The Municipal Act, 2001*, S.O. 2001, c. 25, which grants the CAO authority for "exercising general control and management of the affairs of the municipality", and (2) the *Occupational Health and Safety Act*, s. 25(2)(h), which requires an employer to "take every precaution reasonable in the circumstances for the protection of a worker". The Town also references a Workplace Violence Prevention Policy which is posted in public areas of the Town Hall, and lists four "customer behaviours that we do not tolerate": threatening, verbal abuse, crossing physical barriers, and physical contact. In terms of sanction, it states that "any customer who engages in this conduct may be refused service and/or removed from the premises."

[69] I do not agree with the Town's characterization of the source of its authority. Although the *OHSA* imposes a duty on the Town to take reasonable precautions to protect workers, it does not confer any powers on the Town regarding the activities of someone who is not a co-worker: *Rainy River (Town) v Olsen*, 2017 ONCA 605. And although s. 229 of the *Municipal Act* grants authority to the CAO to exercise certain powers of the Town, it does not resolve the question of what powers the Town has.

[70] Neither does the authority to exclude others from property come from the *Trespass to Property Act*, R.S.O. 1990, c. T.21, which does not set out the preconditions for its use. The authority to invoke the Act must come from other legal sources, such as the right to exclude others that is inherent in the status of an occupier in the common law of property. That is, the Act does not create any substantive property rights, but functions as an enforcement mechanism for rights that come from other sources: see *Batty v. Toronto (City)*, 2011 ONSC 6862, 108 O.R. (3d) 571, at paras. 81-82; *R. v. S.A.*, 2014 ABCA 191, 312 C.C.C. (3d) 383, at para. 277-278.

[71] In *Commonwealth*, McLachlin J. noted that under the common law, "the Crown as property owner is entitled to withdraw permission from an invitee to be present on its property, subject always to the *Charter*." At common law, an occupier of a property has the power to expel others, and has the power to invoke the remedies supplied by the *Trespass to Property Act*. In my view, the authority to

revoke Mr. Bracken's licence to be present on the premises and issue the trespass notice, and thus the "law" that is the source of the limit on Mr. Bracken's rights, is the common law.

[72] The *Trespass to Property Act* has also long been used by government as a mechanism to exercise this common law power to exclude persons from public property: see, for example, *Batty, Smiley v. Ottawa (City)*, 2012 ONCJ 479, 100 M.P.L.R. (4th) 306; *R. v. Semple*, 2004 ONCJ 55, 119 C.R.R. (2d) 295; *Gammie v. Town of South Bruce Peninsula*, 2014 ONSC 6209, 322 C.R.R. (2d) 22. Unlike other municipalities, the Town has no by-law regulating its use of trespass notices, or even a trespass policy. I observe that the risk of arbitrary action is higher in the absence of a well-crafted by-law, and there are greater opportunities for uncertainty as to what sorts of actions will be permitted.

[73] I am nonetheless satisfied that in relying on the common law power of an occupier, the Town was imposing a limit on *Charter* rights that it can seek to justify under s. 1 of the Charter. The expulsion of Mr. Bracken and the trespass notice must be assessed by means of the proportionality test.

Proportionality test

[74] It is not appropriate, in the context of the decision to expel Mr. Bracken and issue the trespass notice, to engage in a full blown *Oakes* analysis into all of the inquiries that come under the umbrella of the proportionality test. As I explain

below, the proportionality analysis can be resolved on the basis of the preliminary issue that the Town could not, on the facts of this appeal, establish that it was acting for a sufficiently important purpose. But even if it were able to succeed on this basis, it would nevertheless fail on the grounds of minimal impairment and proportionality between the deleterious and salutary effects of the expulsion and trespass notice.

[75] I observe that where a government issues a trespass notice relying on the common law power to expel persons from property, it is exercising a power that is subject to implied limits. It cannot be issued capriciously; that is, it cannot be issued, in the circumstances of a public protest in the town square, without a valid public purpose. What constitutes a valid public purpose need not be fully canvassed here, but it would include, for example: the prevention of unlawful activity, securing the safety of persons, preventing the appropriation of public space for exclusive private use, and preventing the obstructing of the operation of government and the provision of government services. These implied limits are echoed in the proportionality analysis.

[76] The Town sought to secure the physical safety of its employees and visitors by means of the immediate expulsion of Mr. Bracken, and the issuance of the trespass notice banning him from all Town property for a year. Its stated justification was that he had engaged in an escalating pattern of abuse of Town staff, and that there was a reasoned apprehension that he posed a threat to

employees, wherever they worked. As noted earlier, the factual basis on which Mr. Kuchyt issued the trespass notice was largely erroneous. Mr. Bracken was not engaged in any violent activity. He was not blocking anyone. He was not preventing anyone from accessing the building. His behaviour was neither intimidating, in any relevant sense of the word, nor erratic. The Town employees, both junior and senior, were alarmed, but they were alarmed too easily. At its highest, the evidence is that several employees said they felt unsafe. The basis for that fear appears to be (1) one prior interaction in which Mr. Bracken was loud and “intimidating”, but in which he was never violent or threatening; (2) Mr. Bracken’s videotaping of a Council meeting; (3) Mr. Bracken’s videos posted to Youtube, in which he is said to chase people down and question them; (4) his actions on the day of his protest. If anyone felt intimidated by him, other than Town employees who had never before witnessed a protest and doubted that protests in front of Town Hall were lawful, it was not because he was threatening anyone.

[77] Accordingly, the Town’s actions, both in (1) requiring Mr. Bracken to leave the premises that day, and (2) issuing a prospective trespass notice, were premised on factual errors. These errors constituted a fundamental misapprehension of the nature of Mr. Bracken’s actions and the threat they posed to the safety of other persons and the decorum and operation of the meeting of Town Council. On these facts, it cannot be said that the Town was acting for a purpose that could satisfy its burden of justification under s.1.

[78] That is sufficient to dispose of the appeal. I will, however, address some of the additional branches of the proportionality test.

[79] Even if it had had a sufficiently important purpose, the Town's actions were not minimally impairing. There were many options that the Town could have chosen short of expulsion that could have achieved the same purpose: for example, actually talking with Mr. Bracken and cautioning him not to use the megaphone in the building, asking him to lower the volume if it was disruptive to those working inside, and asking him to keep a respectful distance from people entering Town Hall. It should be recalled that the first person to address Mr. Bracken after he began his protest was a police officer, instructing him that a trespass notice had been issued and that he was required to leave the premises.

[80] With respect to the terms of the trespass notice, recall that the trespass notice and covering letter were hurriedly drafted by Ms. Bradnam at the direction of Mr. Kuchyt, as Mr. Bracken was outside denouncing Mr. Kuchyt and Mr. Brady. The trespass notice took on a punitive nature, banning Mr. Bracken from all Town property for a full year, terms which were far in excess of whatever immediate threat, real or imagined, the notice was intended to ameliorate. In a free and democratic society, it is no small matter to exclude a person from public property. To do so for a full year is extraordinary and must be amply justified. Here it was not. Even if the facts had been as alleged by the Town, it would not have justified the leap to a one year exclusion.

[81] With respect to the geographic reach of the notice, that too was overbroad. Mr. Bracken was banned for one year from attending every Town property where Town employees worked. The overbreadth is evident from the fact that there was no suggestion that he had ever set foot in two of the three properties, let alone caused any problems there.

[82] Finally, on a comparative analysis of the salutary and deleterious effects of the Town's actions, the effects on Mr. Bracken were disproportionate to any benefit that was achieved, given the finding that the expulsion of Mr. Bracken did not in any way advance the common good. The statutory obligation to promote workplace safety, and the "safe space" policies enacted pursuant to them, cannot be used to swallow whole *Charter* rights. In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.

[83] The conclusion must be that "the deleterious effects are out of proportion to the public good achieved by the infringing measure": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 78.

[84] The limits placed on Mr. Bracken's s. 2(b) rights by the Town were not justified under s. 1 of the *Charter*.

Disposition

[85] I would allow the appeal, quash the trespass notice, and issue a declaration that the issuance of the trespass notice by the Town constituted a violation of the appellant's rights under s. 2(b) of the *Charter*.

[86] I would award costs of the appeal to Mr. Bracken, in the amount of \$4,000 inclusive of disbursements and taxes. Mr. Bracken is also entitled to his costs of the application below. I would encourage the parties to consult and come to a resolution on quantum. If they are unable to do, the court will accept brief written submissions on costs from each party, no more than two pages in length, within 15 days of the date of the release of these reasons.

Released: "KF" AUG 25 2017

"B.W. Miller J.A."
"I agree. K. Feldman J.A."
"I agree. P. Lauwers J.A."