

CITATION: Batty v. City of Toronto, 2011 ONSC 6862
COURT FILE NO.: 11439487-0000
DATE: 20111121

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Bryan Batty, Mari Reeve-Newson, Lana Goldberg, Ann Crooke and Dave Vasey,
Applicants

AND:

The City of Toronto, Toronto Police Services Board, Toronto Fire Services,
Respondents

BEFORE: D. M. Brown J.

COUNSEL: S. Ursel, K. Rowen, S. Scott and K. Ensslen, for the Applicants

D. Smith and A. Murakami, for the Respondents

J. Copeland and D. Iny, for the intervenor, the Canadian Civil Liberties
Association

HEARD: November 18 and 19, 2011; with supplementary email submissions filed
November 20, 2011.

REASONS FOR DECISION

I. Overview: Occupy Toronto's encampment in St. James Park

A. The question posed

[1] How do we live together in a community? How do we share common space? These questions have elicited quite different answers in different political communities at different times over the centuries. In our Canadian community we have crafted an understanding which has drawn on long strands tracing their roots back to both secular and religious sources. In the realm of political and civic relationships we have articulated that understanding most recently in the *Canadian Charter of Rights and Freedoms*. The *Charter's* Preamble makes two points: as a consequence of the "supremacy of God", we all must bring humility to our dealings with our fellow citizens; as a consequence of "the rule of law", we all must live subject to some rules – we are not unconstrained free actors.

[2] Now, of course, some dissent from that last point of view. Anarchism has a long political history. But, Canada has not chosen anarchism. Instead, when we collectively adopted the *Canadian Charter of Rights and Freedoms* some 30 years ago, we embraced, in a constitutional way, a political philosophy which places great emphasis on the liberty of the individual - as can be seen from the various rights and freedoms set out in sections 2 through 15 of the *Charter* –

while at the same time re-iterating that those rights and freedoms are not absolute. Indeed, the first section of our *Charter* reminds us that individual action must always be alive to its effect on other members of the community: it states that limits can be placed on individual action as long as they are “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.

[3] Since October 15, 2011, the applicants and other protesters (the “Protesters”), have encamped overnight in St. James Park (the “Park”) as part of the “Occupy Toronto” movement which, as a branch of the Global Occupy Movement, has posed, in its own way and in many cities, the questions: How do we live together in a community? How do we share common space? In Toronto the expression of those questions has assumed a specific form – the creation of an encampment in the Park in downtown Toronto at which the Protesters express a variety of political views and from which they sally forth in periodic demonstrations to take their messages to other parts of this city.

[4] On the morning of November 15, the City of Toronto served many of the Protesters with a Notice under the *Trespass to Property Act*, R.S.O. 1990, c. T.21. That Trespass Notice stated the Protesters were prohibited from engaging in the following activities in the Park and in any other City of Toronto park:

- (i) installing, erecting or maintaining a tent, shelter or other structure; and,
- (ii) using, entering or gathering in the park between the hours of 12:01 a.m. and 5:30 a.m.

[5] The Trespass Notice went on to spell out what would happen if the Protesters did not comply with it:

The City of Toronto hereby directs you immediately to stop engaging in the activities listed above and to remove immediately any tent, shelter, structure, equipment and debris from St. James Park. If you do not immediately remove any and all tents, shelters, structures, equipment and debris from St. James Park, such tents, shelters, structures, equipment and debris shall be removed from St. James Park by or on behalf of the City of Toronto. You are further ordered immediately to stop using, entering or gathering in St. James Park between the hours of 12:01 a.m. and 5:30 a.m.

In other words, the City of Toronto has given the Protesters notice that if they do not dismantle their tents and other structures and refrain from using the Park during the midnight hours, so to speak, the City will take steps to see that they do.

[6] The applicants commenced this application challenging the validity of that Trespass Notice. They contend that the Trespass Notice violates the protesters’ rights under sections 2(a) through (d) of the *Canadian Charter of Rights and Freedoms*, that is to say, their rights of freedom of conscience, expression, peaceful assembly, and association.

[7] This past Tuesday I granted an interim order (i) requiring the City and its agencies to refrain from enforcing the Trespass Notice, or taking any other steps to evict or remove the applicants and other protesters from the Park until the release of these Reasons, and (ii) restraining the applicants and any other persons having notice of the order from installing,

erecting or maintaining any tent, shelter or other structure in the Park which was not in place as of 10:00 a.m. on November 15, 2011. I further directed a full hearing on the merits, which took place this past Friday.

B. The question answered

[8] Four of the applicants filed affidavits which described part of the message of the Protesters as advocating the reform democracy - render it more participatory, “direct”, “horizontal” and ground it on “consensus-based decision making”. As well, their message expresses a fundamental disagreement with the structure of the global economy. Those are most legitimate issues to raise in the public forum. The Protesters have every right to voice their critiques of the current political, economic and financial systems and to seek to bring others over to their point of view.

[9] Although proclaiming a message of participatory democracy, the evidence, unfortunately, reveals that the Protesters did not practise what they were preaching when they decided to occupy the Park. Specifically, they did not ask those who live and work around the Park or those who use the Park – or their civic representatives – what they would think if the Park was turned into a tent city.

[10] The Protesters now say, in effect, that the *Charter* did not require them to ask; that the *Charter* sanctions their unilateral occupation of the Park– which they intend to continue for an indefinite period of time – because of the importance of their message and the way in which they convey it – by taking over public property.

[11] With the greatest of respect to the Applicants and the Protesters, they are mistaken.

[12] The *Charter* offers no justification for the Protesters’ act of appropriating to their own use – without asking their fellow citizens – a large portion of common public space for an indefinite period of time.

[13] The *Charter* does not remove the need to apply common sense and balance to the way we deal with each other in our civic relationships. The *Charter* does not remove common sense from the process of trying to figure out how to balance the competing rights which now characterize our contemporary Canadian polity. On the contrary, the *Charter* speaks of “reasonable limits” on guaranteed freedoms, thereby signaling that common sense still must play a role – indeed, a very important role – in that balancing exercise.

[14] Nor does the *Charter* remove the obligation on all of us who live in this country to share our common urban space in a fair way.

[15] The *Charter* does not permit the Protesters 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 under no obligation to leave. By taking that position and by occupying the Park the Protesters are breaking the law. Such civil disobedience attracts consequences. In this case the civic authority which represents the Toronto community now seeks to enforce the law. It wishes to re-open the Park to the rest of the city to enjoy as was done before. That is what the City sought to do by serving the Trespass Notice last week. For the reasons which I will set out

below, I conclude that the Trespass Notice is constitutionally valid. The City may enforce it. I dismiss the application.

II. The parties and their interests

[16] The applicant, Bryan Batty, is a 24 year old student living and studying business management at Humber College in the City of Toronto. Lana Goldberg is a 30 year old graduate student who is studying political science at York University. Dave Vasey is a 33 year old researcher for the University of Manitoba who lives and works in Toronto. Mari Reeve-Newson is a 24 year old child and youth worker who lives, works, and studies in Toronto.

[17] All of these applicants have encamped in the Park since October 15, 2011.

[18] The City of Toronto owns the Park, the western boundary of which abuts grassed land owned by the Anglican Archdiocese of Toronto as part of the grounds of St. James Anglican Church. Some of the Protesters' tents and shelters occupy Church land. The Church has not sought to enter these proceedings. Accordingly, what is at issue simply is the validity of the Trespass Notice in respect of the City-owned lands.

[19] The respondent, Toronto Fire Services, is part of the City of Toronto and was represented by the City's counsel at the hearing. The Toronto Police Services Board did not appear.

III. Procedural history

[20] Last Tuesday the applicants brought an urgent motion in their yet-to-be-issued application seeking an interim stay of the enforcement of the Trespass Notice pending the determination of the constitutional questions they intended to raise in this proceeding. I granted an interim stay on terms and directed that a hearing of the application be held this past Friday: *Batty v. City of Toronto*, 2011 ONSC 6785.

[21] The parties have filed application and responding records. No cross-examinations were conducted – the material facts really are not in dispute.

[22] The Canadian Civil Liberties Association (“CCLA”) moved to intervene as a friend of the Court. I heard the motion by teleconference last Thursday afternoon and granted the CCLA leave to intervene on terms. Let me say that I appreciate the assistance which counsel for the CCLA provided to me during the hearing. The CCLA acted as a true friend of the court.

[23] Thursday morning the applicants served Notices of Constitutional Questions on the provincial and federal Attornies General. Neither appeared in this proceeding.

III. The Occupy Toronto protest and the Park

A. The Park

[24] The Park is 3.2 acres in size, bounded on the south by King Street East, along the east by Jarvis Street, on the north by Adelaide Street East and on the west by St. James Church and its church grounds. It is located about three blocks east of the City's financial core. A triangular

ornamental horticultural garden surrounded by pathways (the "Ornamental Garden") of 0.5 acres in size is located immediately north of King Street. A large circular gazebo (the "Gazebo") stands near the intersection of the paths going through the Park. Apart from the pathways and the Ornamental Garden the protesters have occupied all of the Park's land. As well, they have occupied part of the adjacent property owned by St. James Church. The protesters have occupied 2.73 acres of the Park.

[25] According to Richard Ubbens, the Director of Parks for the City and a Registered Professional Forester, the Park is a "lovely urban oasis" in the middle of a densely populated area of the City:

Prior to the occupation, the uses of the Park were those typical of an urban park. Its citizens enjoyed strolling through the Park, walking their dogs, eating lunch, reading books, playing catch, sitting on the grass, in the Gazebo or on the benches, playing with their children, etc. There are permits issued for weddings in the Park (five this year). As well, this year a permit was issued for a one day dog event, Woofstock.

[26] The occupied areas are largely covered with grass and are gently undulating. They are also well treed, with mature trees. According to Mr. Ubbens, "prior to the occupation, it was a lovely restful space."

B. The "Occupy Toronto" Movement: What is it?

[27] Lana Goldberg attached to her affidavit an extract from the Occupy Toronto website which described the movement:

Occupy Toronto is a peaceful grassroots movement that is fed up with the current political and economic systems in this nation and all over the world. We are an independent branch from the movement that started with the Occupation of Wall Street but we endorse the same values and philosophy. We have come together to find solutions to the difficulties we are facing in society today. We have not yet put out a unified message but be sure it will come.

Occupy Toronto is a movement that intends to show its solidarity with the Occupy Wall Street and European indignant movements. We stand in unity with the rest of the world to seek and work towards drastic changes to economic systems that are destroying our business, social liberties, and environment. We are, through entirely non-violent means, sending a message to the financial sector worldwide that banks exist to serve us, not the other way around, that the practice of speculation and fractional reserve lending have created a massive inequality and are no longer valid systems.

Current monetary policies enacted through globalization and privatization are unacceptably harming the majority. Monetary policy should be created to help these very people. Our target is to change these systems to help the 99% of the population, instead of just the elite 1% that they currently benefit. Everyone is encouraged to join the movement, this movement affects us all.

C. How the Occupy Toronto protest uses the Park

[28] One of the applicant Protesters, Dave Vasey, gave the following description of how Occupy Toronto has used the Park:

As of November 15, 2011 immediately prior to the notices of eviction being served on protestors at the site, there were approximately 300 tents, 3 Yurts, approximately 10 larger tent structures used for a variety of purposes including but not limited to, a kitchen, library, meeting spaces, media, free facilities store for basic necessities, free workshops (provided through the "Free School"), and approximately 25 port-a-potty facilities. All of these facilities are open to be used by any member of the community whether or not they are members or supporters of the Occupy movement.

[29] Richard Ubbens, the City's Parks Director, provided additional details in his affidavit:

The occupation of the Park by Occupy Toronto began on October 15, 2011. Prior to the occupation, its participants did not seek any permission from the City to move on to the Park. On October 15, 2011, large numbers of individuals appeared at the Park and began erecting tents and various other structures described below.

Most of the structures erected in the occupied area are tents. Currently, there are approximately 193 structures in the occupied area and 26 on Church lands. The number of tents on site has been fairly stable since the occupation began. The vast majority of the structures are tents.

There are a number of semi-permanent structures that have been erected on site. These include two large yurts. The participants in Occupy Toronto have erected large wooden platforms upon which they placed those yurts and some tents. One yurt is being used as medical centre, the other as a library. There is a third yurt (used as a yoga/mediation centre) on the Church property.

There is also a group of large tents that have been put together and used as a meal/food tent on the Church property.

There is also a structure made of tarps and wood pallets, which is known as the "Theatre".

There is also a tent tarp shelter known by the participants as the "Sacred Fire" area. Fires are regularly burned there and it is a popular assembly place.

In the north/west corner of the Park there are 26 port-o-lets.

There is an information tent where pamphlets are available.

At some time, either late November 15 or early November 16, 2011, a shelter in a tree appeared on site...

The Occupiers have also created a media centre contained in a large tent. It has computer access and power.

Concerning power, the Occupiers have moved gas powered generators onto the occupied property. They have also moved gas containers onto that property.

The Occupiers also keep large stocks of firewood on site. Open fires take place.

The participants in the occupation have also moved mattresses onto the site which I believe are kept in tents.

Other materials moved onto the site include barbeques and propane tanks. After concerns were raised by the Fire Department, my staff have reported that the propane was removed.

Many of the larger items on site have been delivered over time by trucks, which have driven on to the Park grass, damaging it. They have also driven on Park walkways which are not designed for trucks.

[30] From observations made by City staff, the number of people at the occupation site varies during the day: typically low in the early morning (20 or so), rising during the day to around 70, and occasionally up to larger crowds in the hundreds. It appears that during the evening hours many tents are not occupied.

[31] Inspector Gary Meissner, a member of the Toronto Police Service and the Site Commander in the Park, deposed:

It is clear that many of the tents on site (there appears to be in excess of 150 sleeping tents) are vacant on any given night. From the information provided by police officers on site reporting to me, which I verily believe, it appears that on most nights there probably in the range of 20 – 40 people sleeping at the Park. Most of the sleeping tents are in the City Park.

Based on the reports I receive from officers in the vicinity, which I verily believe, there have never been any demonstrations between 10:00 p.m. and 5:30 a.m. during the course of the occupation, or any speech making or related activity during those hours. My information is that all is quiet on the site during those hours – there is no political or protest activity going on during that time.

D. The Protesters seek to create a community within a community

[32] From reading the applicants' affidavits it is evident that they regard the Occupy Toronto movement as creating a new, distinct community in the Park. Bryan Batty stated:

The Occupy movement is demonstrative of a new community structure that uses dialogue and inclusive principles to empower individuals to lead, support and develop their communities.

Lana Goldberg stated:

I feel I am conveying those messages by being in the park, organizing with like-minded people, participating in General Assemblies and various Committee meetings, learning to operate and coordinate with strangers, and building a progressive model of living.

...

In conveying these messages through my activities at the encampment I am also exercising my conscience and political beliefs. My desire for a radically different society requires that I am able to learn through experience a new economic and social model. If we are to move forward as a country and world, citizens must have the opportunity to practice an alternative form of living and working, preparing for a more participatory, horizontal model of democracy.

Mr. Batty deposed:

We are also using the structures and resources in the camp to actively creating alternatives to inadequate government social assistance— the tents and resources are required to continue to provide the social services mentioned above to the most marginalized member of the community;

Creating reform within the city requires resources and a permanent space to facilitate this expression and civic engagement, our message would be significantly if not totally watered down by the dismantling of the encampment.

[33] The Occupy Toronto movement has developed its own organizational structure. According to the applicants, an important element of the camp is the General Assembly which occurs twice a day: at noon and 6:30 p.m. Lana Goldberg described the General Assembly as an important aspect of the occupation:

It is a mechanism through which we practice direct democracy and consensus-based decision making, in an attempt to practice our political beliefs and enact the type of society we wish to live in. I believe that the process of organizing ourselves in General Assemblies and Committees is central to the purpose of the movement, and is a critical contribution and achievement in and of itself.

[34] Occupy Toronto has an extensive committee structure, including: logistics; marshalls; medics; legal; peace keeping; media; action; outreach; labour; kitchen; winterization; sanitation; arts and film; theatre; as well as some smaller working groups. The encampment has also created a number of special, functional spaces - a library, children's tent, a safe space for women, a Sisters in Solidarity station (a safe space for women of colour), an indigenous space, an information tent, a workshop tent, and a sign-making station. According to Lana Goldberg:

[T]he camp has provided a unique opportunity for local homeless members of the public to take advantage of the services offered at the camp, and to participate in the activities of the camp as full and equal members. Homeless members of the camp are participating in various committees, getting experience working in groups, and connecting to the general

public. In my opinion, members of the homeless community feel empowered by their contribution to the camp. I think it is significant that we are bridging the gap between the homeless community and the rest of society, which aligns with the movement's message of solidarity amongst the 99%.

E. The messages the applicants seek to convey

[35] The messages which the applicants seek to express through their participation in the Occupy Toronto movement are best found in their own words. Bryan Batty stated:

Through my participation in Occupy Toronto, by remaining encamped at the St. James Park site, I am intending to convey the following messages/information: The Canadian Government has been manipulated by corporate interest and protected by the corporate media agenda. Everything from our governance to our natural resource acquisition and even our health care system is being manipulated by individuals with very little interest in the general well-being of Canadian society. In a sense I am here to convey that our government and corporate elite are not performing and adhering to the necessary standard of care that should be expected of our elected officials and the most affluent and influential members of society.

Mari Reeve-Newson put it the following way:

I joined the Occupy Toronto encampment because I became aware that the Occupy Wall Street movement was becoming global and that there would be an encampment in Toronto. In my work as a Child and Youth Worker I have often encountered issues, including women's issues, first nation's issues, and issues surrounding poverty and the unequal distribution of wealth in North America. I decided to join the movement because it spoke to these important issues and I realised that we have the power to build a community and connect our resources together to collectively shift the attitudes of the members of our modern society that are perpetuating those issues. The multiple issues that have evolved within our movement directly relate to every aspect of my work.

...

Through my participation in Occupy Toronto, by remaining encamped at the St. James Park site, I am intending to convey the following messages: hope and the need for equality in Canada. This encampment is a physical representation to the members of Canada's government that we as taxpayers have a right for our voices to be heard. The encampment is a physical representation that represents to the members of the public that there is hope that things can change and that in a large city like Toronto where the 99% are struggling to survive it gives a place where we can find an equal ground because we are physically there. Without the encampment, it would be difficult to connect on a human level with like-minded people who are concerned about the issues that the movement engages.

...

The message I hope to convey by working with my fellow protestors and other members of the public is that there is a collective group in our society, whose voice is not normally heard, who have important concerns about societal issues. To anyone in society who is facing the issues that we are concerned with, I hope to convey that they are not alone and they have support within our movement and within society.

Lana Goldberg stated:

Through my participation in Occupy Toronto, by remaining encamped at the St. James Park site, I am intending to convey that we, the people, care about the world, are unhappy with the current state of affairs, want to put in the time and effort to improve it, and are willing to put our lives on hold and live in a park in order to bring about substantial changes.

I feel I am conveying those messages by being in the park, organizing with like-minded people, participating in General Assemblies and various Committee meetings, learning to operate and coordinate with strangers, and building a progressive model of living.

...

The message I hope to convey by working with my fellow protestors and other members of the public is that participatory democracy is possible, that change is possible, and that a dramatically better world is possible.

Dave Vasey deposed:

I joined the Occupy Toronto encampment because I am an environmental justice organizer who is concerned with environmental justice and given Canada's ongoing disregard for climate related issues and the continuing degradation of our environment. I felt I had to find a new way to express my views on these issues. My research at the UM involves working directly with Indigenous communities impacted by tar sands development and as such I have witnessed first-hand changes to the land and culture of First Nations people in Alberta. Financial decision made in Toronto impact these communities that I work directly with and in the past I have challenged financial institutions regarding their policies on human and environmental rights, which have been largely ignored to date.

...

Through my participation in Occupy Toronto, by remaining encamped at the St. James Park site, I am intending to convey that government and industry are continuing to prioritize economic growth over the well-being of people and the planet. The decisions being made during financial crisis will catalyze further ecological crisis and will further the polarization of wealth. The message of the Occupation movement is also that democracy is not working – the first past the post system has elected at the Federal level an extreme right wing government by a minority of the population whose policies and decisions directly threaten the world's current and future populations.

...

The message I hope to convey by working with my fellow protestors and other members of the public is that through non-violent activism change can be had. We are also able through the Occupy movement to actively build the alternatives to the current system.

F. The relationship between the encampment and the applicants' messages

[36] How do the applicants perceive the relationship between their encampment in the Park and the messages they seek to convey? Bryan Batty stated:

The existence of the encampment and my participation in it is essential to my ability to convey those messages because direct, public conversation accessible to all is one of the only ways to achieve solidarity and open and transparent consensus.

The encampment is also critical to facilitating my activities as it serves as a model of transparency and respect that government, corporations and corporate media should strive for. The encampment is a demonstration of social action that provides solutions to our local, national and international problems.

Marginalized members of the community that prior to the occupation suffered from drug addiction and mental health issues are now receiving much needed services at the encampment. These community members regardless of municipal eviction will continue to inhabit the neighbouring areas. Accordingly evicting the occupiers will not solve the homelessness and drug problems prevalent in the city of Toronto – it will simply strip those member of the community of a voice that the occupy movement has provided them. It will also prevent them from continuing on the path to becoming a productive member of community – a path that the occupy movement has been able to provide them.

He went on to say:

I believe that the encampment is a physical manifestation of my political beliefs in an open and horizontally democratic process.

The encampment itself is a symbol of the evolution of humans from the nationalist rhetoric of our forefathers, to a true unification of all humankind. It is an experiment and example of the form of inclusive, respectful, and honest society that Canada could indeed become.

In conveying these messages through my activities at the encampment I am also exercising my political beliefs that all humans are rightful tenants and keepers of the earth. I further believe that all human beings are created equal regardless of circumstance or choice and that Canadians, as a result of our history and foundations have a duty and right to stand up against oppression.

Mari Reeve-Newson deposed: “To me, the encampment itself is a symbol of the voices of the unheard majority in society.” She went on to say:

This encampment is a physical representation to the members of Canada's government that we as taxpayers have a right for our voices to be heard. The encampment is a physical representation that represents to the members of the public that there is hope that things can change and that in a large city like Toronto where the 99% are struggling to survive it gives a place where we can find an equal ground because we are physically there. Without the encampment, it would be difficult to connect on a human level with like-minded people who are concerned about the issues that the movement engages.

Lana Goldberg stated:

The existence of the encampment and my ability to participate in it is integral to my ability to successfully convey my messages because the camp *is* the movement. Since the issues we are concerned about are structural and persistent, they require continuous organizing to address. The encampment provides the space and time to discuss the issues, come up with solutions, and continually put pressure on decision-makers to make responsible decisions. More importantly, the encampment is giving us a chance to learn first-hand about democracy, cooperation, and respect.

The encampment itself is a symbol of unity to me.

Dave Vasey put it this way:

The Occupy movement is more than simply a protest or a picket line – the encampment is an expression of the permanency of our convictions as a movement and symbolic of the commitment that we have to addressing these systemic issues within our society.

...

The existence of the encampment and my ability to participate in it is central to my ability to convincingly and authentically convey my political message. The permanent nature of the encampment expresses the seriousness of my concerns and provides a permanent space to allow the voices of the participants to be heard both through the media and involvement with the community.

The encampment itself is a symbol of direct democracy to me.

G. Why the applicants consider continuous encampment necessary for their activities

[37] All the applicants stated that restrictions preventing them from encamping in the Park during the night would interfere with their expressive and associational rights. Bryan Batty deposed:

While the City of Toronto has suggested that I can just as easily express my conscience and beliefs, as well as my freedom to assemble and associate, during the hours 5:30 a.m. to 12:00 a.m., I respectfully disagree for the following reasons:

- (a) We are actively caring for the most marginalized members of the community in a safer space. Many of those who live on the streets have communicated to me

personally that their lives have improved as a result of the services being provided by the encampment. They have also experienced a decrease in violence and making use of the onsite resources that help those with mental health and addiction issues. These services all require the resources that we provide within the tent structures that the City of Toronto is forcing us to dismantle;

- (b) The physical encampment is itself a demonstration of our commitment to these issues and a message that we will not relent until change occurs;
- (c) The encampment is emblematic of the fact that the people in it are distraught and motivated for change so fundamentally that they are willing to give up the comforts of their homes in an effort to have their voices heard;
- (d) Many of the people who occupy the site are not from Toronto and need a place to stay while they exercise their rights to expression and association. Because many of these participants are from marginalized communities paying for private spaces to stay in while protesting and demonstrating would not be feasible. I am aware of people travelling from international destinations including the United States and Australia as well as from all over Ontario and Canada;
- (e) We are also using the structures and resources in the camp to actively creating alternatives to inadequate government social assistance– the tents and resources are required to continue to provide the social services mentioned above to the most marginalized member of the community;
- (f) Creating reform within the city requires resources and a permanent space to facilitate this expression and civic engagement, our message would be significantly if not totally watered down by the dismantling of the encampment.

Mari Reeve-Newson stated:

While the City of Toronto has suggested that I can just as easily express my conscience and beliefs, as well as my freedom to assemble and associate, during the hours 5:30 a.m. to 12:00 a.m., I respectfully disagree because the Occupy movement would be hindered without the encampment. Given the various barriers that people face in their lives, it will be very difficult to gather together the group of individuals who currently are protesting a St. James Park on a regular basis. Without this physical base, and the ability to keep protesters in continuing physical proximity to one another, the information sharing and learning and political strategizing that is currently going on in St. James Park will be very difficult to continue. Also, without the encampment as a physical reminder to the people of our society that there is a group of people with our concerns existing in Toronto, the strength of the movement could be hindered. We are in the 99%'s face who don't even realize we support their issues regardless of whether they directly or indirectly affect us.

Lana Goldberg deposed:

While the City of Toronto has suggested that I can just as easily express my conscience and beliefs, as well as my freedom to assemble and associate, during the hours 5:30 a.m. to 12:00 a.m., I respectfully disagree because living in the space is the central element of the movement, allowing us to experiment and learn about constructing a fair and equitable society. At St. James Park, we are learning about and practicing the kind of system we are calling for – a fair and equitable society in which human needs come before profit.

H. How long do the applicants intend to remain at the Park?

[38] The applicants deposed that while they did not seek personally to remain at the encampment indefinitely, they believed that it is an essential aspect of their freedom of expression, conscience, assembly and association to be able to determine for themselves when leaving the encampment would be consistent with the messages, information and beliefs they are trying to express by their presence there.

IV. The impact of the occupation on the use of the Park by others

A. The Protester's perspective

[39] All the applicants deposed that during their encampment in the Park they have never witnessed any member of the public being turned away from entering the park. As to their occupation interfering with the City's maintenance work on the Park they deposed:

[T]he City of Toronto has suggested that the protesters are causing damage to the park and are preventing maintenance for winter being carried out. I am not aware of any efforts on the part of the City of Toronto to engage myself or any other protesters in a discussion about how these issues might constructively be addressed without removing the encampment. From my experience with the Occupy Toronto encampment, these are the kinds of issues the occupiers, myself included, would welcome a discussion about and would work with the City to address, as we have other issues.

[40] Mr. Batty deposed that "community members...continue to enjoy the park in the same ways as they did prior to the occupation". I do not accept that statement. The amount of space available for public use in a tent-free park necessarily would be much greater than the amount available in a park populated with 300 tents, 3 yurts and approximately 10 larger tent structures. Such a dense coverage of the Park's space by structures inevitably reduces the amount of land available for non-protesters to use and enjoy in the Park. The evidence shows that the Protesters have appropriated to their exclusive use most of the area in the Park.

[41] Further, as I will now set out, the affidavits from those who live around the Park support a finding that the Protesters' occupation of the Park has materially altered the traditional use of the Park and has prevented traditional Park users from using and enjoying the Park, and I so find.

B. How some of the local residents regard the occupation

[42] The City filed affidavits from 11 residents who live in the vicinity of the Park. St. James Park is located in a part of town in which extensive condominium development has occurred and buildings surrounding the Park house various residential, commercial and retail uses. Just as I have let the applicant protesters speak in their own voices about why they are in the Park and the messages they seek to convey, I think the residents of the area should be heard in their own voices. I set out below extracts from the residents' affidavits:

Hilda Whincup

I am a resident in the vicinity of the park...

I am a frequent user of the park, as part of my route to and from my residence, as well as to walk my dog several times a day. Since the protesters have arrived, my family and I have experienced a number of altercations with the occupiers.

One of these altercations occurred on October 31, 2011, when I was walking my dog with several other dog owners from the area. As the tents erected by the Protesters in the park have left little space for residents to use, we must walk around the outer perimeter of the park to the other side of the church where protestors are not yet camping.

On that day we saw a large group of Protesters giggling and defacing the cement by the fountain in the park. One of the dog owners told the vandals to stop writing on the cement. The vandals yelled at us to "fuck off" and that the park is theirs, not ours. One of us told the vandals again to stop defacing the fountain area. The vandals screamed at us, "you were all raised by Nazis." I took great offence to this, and so did the other dog owners.

One Protester then assaulted the dog owner who had told the vandals to stop. The protestor pushed the dog owner's chest with his own chest in a violent and intimidating manner. Our group was then swarmed by a group of protestors. One protestor approached the other dog owners and I and asked to see our identification. He called himself a "park marshal" and said he had "jurisdiction" in the area.

...

On November 16, 2011, myself and four other dog owners were walking our dogs along King Street just past St. James church. We passed some protestors who were waiting by a donation box. We were approached by one protestor who began to taunt one of the dog owners. It was very aggressive behaviour and made me very uncomfortable. My husband asked the protestor to leave us alone repeatedly before he finally left.

It is unsafe to walk our dogs in the area and the protestors often yell insults at us. I no longer walk my dog alone in the evening and make arrangements to walk my dog with other dog owners in the area, in case incidents like these happen again.

...

I feel that I am at the end of my rope. We have tried to salvage the park, to no avail. I am tired of being harassed and pushed out of a public space.

Haley Mitchell

I live in a residential condominium less than one hundred and fifty (150) metres from the park.

Prior to the commencement of the Occupy Toronto protest, I used the park on a regular basis, including walking my dog. I no longer use the park. I am afraid to do so because it feels unsafe.

I have personally experienced two unprovoked verbal altercations with members of the protest.

On the first occasion, we came across some residents of the area speaking with a person who claimed to be a moderator for the Occupy Toronto group.

During the discussion, I asked the moderator the protest's purpose, its message, and how long protesters intended remaining in the park. In reply, the moderator called me a "bitch." I left the conversation.

On the second occasion, two men approached my spouse and asked him if we had seen someone with a generator, as it had been stolen. I explained that we don't go into the protest area. The man was agitated and aggressive. He yelled at us, saying that he had not asked us whether we go into the protest area. We walked away and did not respond to him.

...

I have witnessed occupiers engaging in illegal and disruptive behaviour. I regularly see occupiers smoking marijuana in plain view throughout the park. I have seen dogs tied to trees in below freezing weather and left overnight, visibly shivering. I have also witnessed these dog owners leaving dog waste strewn across the sidewalks and grass. On at least two other occasions, I have seen occupiers screaming obscenities at one another.

The continued presence of the Occupy Toronto protest in St. James Park is not just an inconvenience. I no longer feel safe in my neighbourhood. I am also concerned about the physical damage to the park and the potential aftermath of the occupation in my community.

Tammy Taylor

My home is in a building located adjacent to St. James Park, the site of the Occupy Toronto camp...

...

Since the Occupy Toronto occupiers moved into the park a month ago, we have been unable to enjoy the park and surrounding area. This is especially so at night, when many of the occupiers appear to be under the influence of alcohol or drugs and are belligerent and threatening towards us as we walk in or near St. James Park. The structures that the occupiers have erected in the park have also reduced my enjoyment of the park and, in one case, created a safety hazard.

For example, about one month ago I tried to walk from the north to the south end of St. James Park with my dogs. A male occupier stepped out in front of me and told me that I could not walk between the tents for "security reasons". This occupier told me that I could only walk through the park using the path and refused to let me continue walking the way I was originally headed. He approached me in a threatening manner and forced me back the way I had came.

...

Last week, I was walking my dogs on the sidewalk on Adelaide Street East. There were some tents installed in the northernmost area of St. James Park near the sidewalk. As I walked by, an occupier yelled at me to "keep [my] fucking dog away from [his] tent" because his tent was not a portapotty. I was then approached by another occupier who asked if I "had any weed". When I said no, he asked me if I "at least had a fucking cigarette".

All of these incidents have left me and my husband feeling very threatened in our own neighbourhood. Because of this, we no longer enjoy walking through or near the park or spending time there. Not only is the park an unpleasant place to be, but the behaviour of the occupiers has left us feeling threatened and vulnerable in our own neighbourhood.

Alena Wratislav

I live with my husband in an apartment in the neighborhood near Saint James Park...

...

As the Park is the only convenient green space to which we can bring our dog I have continued to make use of the Park throughout its occupation by the protestors; however, my use of the Park has gone from one of enjoyment to one in which I am harassed, berated and threatened.

On one occasion when I was at the Park I was told by a number of protestors that the Park was "not a dog park any more" and was told to leave. When I walk through the Park protestors that are standing on the pathways through the Park do not move so that I am forced to walk around them in the mud. On other occasions I have been spat at, I have had had change thrown at me, and I have been called a "cunt" numerous times.

Even when I am not in the Park the protestors affect my quality of life. Although my apartment does not directly overlook the Park, I have a balcony that faces that direction.

There are loud noises and severe odours emitting from the Park at all hours of the day and night such that the balcony is no longer a pleasant place to be.

Normally I would walk by the Park every day on my way to work. Now, given my experiences walking through the Park, I avoid doing so and am forced to take a different route in order to avoid being harassed and intimidated.

Michael Elliott

My home is an apartment located adjacent to St. James Park...

...

[B]efore the Occupy Toronto camp was established, I used to enjoy walking through St. James Park on my way to and from work or simply for recreation.

Since the arrival of the squatters, I have been unable to enjoy walking through St. James Park due to the squatters' presence.

Further, the walk around the perimeter of St. James Park has become very unpleasant due to the Occupy Toronto camp. The squatters have installed portable toilets, or "portapotties", in the park. The smell of these portapotties is very strong, particularly during the recent spell of warm weather.

For the past month, the squatters' presence in St. James Park has also reduced my enjoyment of my home.

Those who have set up camp in St. James Park frequently have open fires in the park. Depending on the direction of the wind, the smoke from these campfires blows into my apartment.

The noise of the crowds of squatters and visitors to their campsites – including yelling, singing and drumming – can be heard in my apartment, even when I close my windows. It is particularly loud on the weekends, during which time the number of people attending the Occupy Toronto events in the park swells and they use amplifiers and invite bands to play for them.

...

Before the Occupy Toronto squatters took over St. James Park, it was a lovely place to be and to admire. Since the squatters arrived, the park has suffered extensive damage which includes but is not limited to the turf.

The fountain in the centre of St. James Park has been damaged repeatedly by the squatters smearing wax or paint on it.

The metal fences, lamp posts and gazebo in the park are extensively damaged from the endless number of signs and posters that have been taped and glued to them since October 15, 2011.

Moreover, the trees in the park have been damaged by the ropes that the squatters have tied to them to hold up their tarps and tents, and by the locks that have been used to lock bicycles to them.

...

On my way home from work the evening of Wednesday, November 16, 2011, I noticed that the squatters had erected a tent in a tree in the northernmost area of St. James Park, near Adelaide Street East.

This structure was not present in the park on the previous day.

Michael Comstock

My home is in an apartment-condominium building located adjacent to St. James Park...

Before the Occupy Toronto occupiers began camping in St. James Park, I enjoyed reading in my apartment. Now that the occupiers are living in the park, it is very noisy. I find it impossible to read in peace and quiet in my apartment until at least 11:00 p.m.

...

In addition, the occupiers in St. James Park have turned the park into an eyesore with all of their tents and their garbage. As a result, I no longer enjoy walking through the park or spending time there.

Even after the Court ordered on Tuesday, November 15, 2011 that the occupiers not expand their activities, they did. Attached as Exhibit "A" is a photograph which I took between 10:00 and 11:00 a.m. on Wednesday, November 16, 2011. It shows a painting that the occupiers made defacing the sidewalk at the corner of Jarvis Street and Adelaide Street East.

John Darrigo

I live with my wife and 8 month old daughter in a condominium in the area surrounding St. James Park. The "Occupy Toronto" encampment has negatively impacted our enjoyment of our neighbourhood and has made it impossible for use to enjoy our local park.

Prior to the erection of tents and structures at St. James Park my family and I were frequent users of the park. In the time since this occupation began my family and I have been deprived of this public space due to the danger and fear caused by both individual occupiers and the conditions that have been created in the park itself.

When my family and I have visited the park since the occupation began we have been subject to intimidating behaviour by persons residing in the park. I have had my personal space invaded, I have been verbally assaulted on more than four occasions, and my dog has been taunted by occupiers to the point that I was concerned my dog may lash out and bite them.

The park itself has been turned into a dangerous area due to the action of the occupiers. I have seen numerous open fires in the park. I have seen evidence of rat and other rodent infestation due to food remnants and scattered garbage left everywhere. I have also been forced to dodge vehicles that have been driven into the park by occupiers.

For all these reasons my family and I have been unable to use St. James Park since the time the occupation began.

Frank Ciccolini

I live with my wife in a building that is adjacent to Saint James Park in the City of Toronto (the "Park"). For some time now the Park has been illegally occupied by a group of protesters popularly known as "Occupy Toronto." The illegal activities in the Park have had a significant impact on our day-to-day lives. As a result of these illegal activities our quality of life has been diminished and we have suffered economic harm.

My wife and I rent an apartment that directly over looks the Park. We were drawn to the apartment we live in because of the breathtaking view of the Park and surrounding neighborhood. The terrace to our apartment is a favourite feature of our home. We normally enjoy spending significant time either on the terrace or enjoying the view from inside our apartment.

Since the Park has been "occupied" it has been impossible for my wife and I to enjoy our home in the way we are accustomed. Our terrace, once a refuge from which we could observe the park in peace and quiet, is now a wholly unpleasant place owing to the severe odours and loud noises coming from the park and the complete disfigurement of the once pleasant appearance of the Park.

Even within our apartment where we are mostly sheltered from the odours and somewhat sheltered from the noises emitting from the Park, my wife and I no longer enjoy the view that was one of the biggest attractions to our home.

Carolyn McGregor

I am a home owner in a condo building adjacent to Saint James Park in the City of Toronto (the "Park"), which has been the subject of "occupation" by a group of individuals that are camping in the Park, known in the media as Occupy Toronto. I live with my husband, our baby daughter and our two dogs. The occupation of the Park has made me feel unsafe in my own neighborhood and has prevented me and my family from making enjoyable use of the Park, which has been a source of pleasure for all of us.

Prior to the occupation I would bring my daughter to play in the Park and my husband and I would also interact with other dog owners in the Park that have become friends. Now, the Park is a place where I observe drug and alcohol use leading to violence on a daily basis. When I enter the Park with my daughter I feel the need to wear her in a carrier attached to my body rather than using a stroller in order to keep her safe. On numerous occasions since the occupation began we have had to choose our path through the Park so as to avoid physical fights that have broken out between the protesters.

My daughter used to enjoy the grassy areas of the Park and loved to try to interact with the squirrels that once "occupied" the Park. Now the squirrels that remain in the Park stay in the trees or jump across the tents and the Park has become a slop pile of mud.

...

As taxpaying citizens my husband and I believe that we are being literally robbed of our enjoyment of the Park that belongs to the citizens of this City. We also believe that as taxpaying citizens we will no doubt bear the burden of repairing the damage that has been caused to the Park.

Tamara Lutchman

I am a resident of the area surrounding St. James Park. As a result of the "Occupy Toronto" movement and the individuals who have erected tents and other structures in St. James Park I have been robbed of enjoyment of my local park, and have been subject to ongoing disruption and nuisance in my home.

I was a daily user of St. James Park. Prior to the 'occupation' I would pass through the park on late night walks, take my pet out for fresh air and exercise, and occasionally play sports such as ultimate frisbee.

The encampment in the park now prevents easy access to the park's most important features. Tents, permanent structures, bodies and debris have all but blocked access to the gazebo, and there is no free space on the hills to the east side of the park. My daily walks through the park are now constrained to the paved paths and it is difficult to walk, let alone play any sort of sport, on the grass.

I have also lost sleep due to the continuous noise that emanates from the park and those that occupy it. This loss of sleep has affected me in my personal life, and has had a detrimental effect on my performance in the workplace since October 15, 2011.

The occupiers are now running permanently installed diesel generators which operate on a continuous 24 hour basis. I can hear this constant noise pollution through my closed windows and I have been unable to drown it out. I am also concerned about the environmental impact of such intensive use of generators.

The occupiers have created a high risk environment during night hours due to the increased use of drugs, alcohol and aggressive behaviour among protesters. I hear multiple disturbances per night, and witnessed a fight between multiple male protesters

on Monday, November 14. I have refrained from taking nightly strolls in the park as I feel I am putting myself in a dangerous situation.

Paul Vergeer

My fiancée and I live in the neighborhood near Saint James Park in the City of Toronto (the "Park"), which has been the subject of "occupation" by a group of individuals that are camping in the Park, known in the media as Occupy Toronto. The occupation of the Park has resulted in a significant disruption in our day-to-day life. We have been harassed and intimidated such that we no longer enjoy our neighborhood, which we once loved.

As residents of the neighborhood surrounding the Park it has been our habit to spend time in the park enjoying activities such as playing Frisbee, taking our dogs for a walk, reading a book and many other activities. The Park has been an important source of enjoyment in our lives.

Since the beginning of the occupation of the Park our experience of the Park has been entirely different. On several occasions when we have tried to enter the Park we have been harassed, yelled at and confronted by the protesters in the Park. When we enter the Park we find that there is trash scattered about the common areas of the Park. When I walk through the Park I do not trust the protesters' self-appointed "security team" to keep me safe.

...

On several occasions I have attempted to speak to one of the protesters' self-appointed community liaisons; however, all of my complaints have fallen on deaf ears as none have elicited a response.

As a result of the occupation of the Park I no longer feel safe in my neighborhood. I feel as though my fiancée or I could be in real danger from the occupation. Following my attempts to communicate with the protestors I feel completely ignored and insulted.

The Park is a central feature of the neighborhood in which I live and should be open to everyone. The occupation has closed off the Park for the use of a very small minority of the public such that the majority of the public feel intimidated and unwelcome in a Park that belongs to the citizens of Toronto.

C. Complaints received by the Office of the Mayor

[43] Pina Martino, an employee in the Office of the Mayor, described the types of complaints which the Office has received about the occupation of the Park and attached a number of the email complaints received. The complaints echo those by the residents and business owners who filed affidavits on this application. One email described the occupation of the Park as the "open theft and violation of the rights of the public".

D. How some of the local business owners regard the occupation

[44] The City filed two affidavits from owners of businesses which operate in the vicinity of the Park:

Stracey Burtch

I am a co-owner of Lift Salon and Spa, which is located at 90 Adelaide St. East, directly across the street from St. James Park and the "Occupy Toronto" protest. As a business owner and as a member of the community I continue to be negatively impacted by the actions of the people who are occupying the park.

...

The conduct of the Occupy group has negatively impacted my business. We have lost all of our walk-in traffic, and some of my staff have had to reduce their hours to only two days a week. Not only has this made our salon lose income, but I am concerned that my staff may leave to seek more steady business elsewhere. If the occupation continues I fear for the future our business.

Following the order of Justice Brown of November 15, 2011 which allowed the Occupy group to remain in the park provided that they "maintain the *status quo*", I have witnessed additional structures being built in the park, including the installation of structures in trees.

Rachel Young

I am a co-owner of Camaraderie, a group office space available for rent to entrepreneurs, freelancers, and other people who work independently but wish to work in a shared space with others.

Since the occupation started, we have seen a decrease in our walk-in traffic. We usually have a few drop in users weekly, but we have not had very many since the occupation started. The value of this decrease is approximately \$500.

...

I no longer feel safe in the neighbourhood after dark. I avoid the park both day and night because my street sense and common sense tell me that it is dangerous. I do not consider myself an overly cautious or hesitant person -this is an instinctual reaction to what is happening in the park. There is no dollar amount I can put to this feeling of insecurity.

I am also a member of the Friends of St. James Park. This is a community organization that was created approximately one week ago at a community meeting organized in response to the occupation. It is a collective of local residents and business owners from the surrounding community. After our meeting last week, we developed a mailing list to co-ordinate future activity. Our goal is a peaceful resolution to the protest and the eventual rehabilitation of St. James Park.

IV. The concerns of the City of Toronto

[45] Mr. Ubbens offered this view of how the Protesters' occupation had affected the ability of the rest of the public to use the Park:

The tents and other structures and materials that are being placed in the occupied area by the Occupiers has prevented members of the public from using the Park for any usual Park purpose. The tents are simply located too close together to allow any such usages. It is not feasible to go there for picnics, to throw a ball around, to take children to play, to exercise a dog or to enjoy the peace and quiet of a park, when it is full of tents, debris and mud. The only area affectively open to the general public (other than the Occupiers) are the paths that go through the Park, and the small Ornamental Garden. Entering into the other areas would involve one walking through mud and debris, between closely placed tents and structures.

[46] The affidavits filed by City staff described a large number of concerns about the occupation and its impact on the Park:

- (i) Large items have been delivered to the site by trucks, which have driven on to the Park grass, damaging it, and which used Park walkways which are not designed for trucks;
- (ii) On November 15, 2011, about 65 used tires were delivered to the site and stored on Church land. The Fire Department directed that the tires be removed since they constituted a fire hazard. That was done on November 16, 2011;
- (iii) Many of the structures in the encampment are located in close proximity to each other. There is very little room to walk between most of the tents, particularly when one takes into account the ropes and stakes holding them up. The ropes and stakes pose a tripping hazard;
- (iv) The occupied area has become muddy and denuded of grass due to the occupation, with new muddy paths, being created;
- (v) Debris has been scattered throughout the site, including dangerous items such as lumber with protruding nails. Firewood is stored on site;
- (vi) There often is the smell of rotting garbage, litter and debris;
- (vii) Protesters pour gasoline and store it on the grass and they use a gas-powered generator;
- (viii) The storage of propane tanks and a barbeque, and the burning of outdoor fires;
- (ix) The large number of structures has effectively occupied the entire occupied area of the Park, save and except the paved public pathways;

- (x) The destruction of much of the turf which covered the Park, and the risk to tree roots from soil compacted by trampling. Mr. Ubbens deposed that in the Spring the turf will have to be repaired or replaced. The cost will depend on whether it can be repaired with seed and top dressing, or new sod. It will be over \$25,000 regardless. Much of the Park will have to be fenced off from the public for six to eight weeks in the Spring to allow the new grass to grow;
- (xi) On a recent site visit Mr. Ubbens noticed a strong urine odour around the port-o-lets, indicating to him that people had been urinating beside them. On visits to the Park City staff have seen a plastic bottle marked "Pee Jug" containing urine sitting on the ground;
- (xii) The City has received a report from the owners of 142 King Street East (adjacent to the Park) of a rat infestation. Due to the presence of protesters, the City's exterminators cannot enter the Park to deal with it, as they cannot attend to locate the rat burrows and place poison in them; and,
- (xiii) Mr. Ubbens deposed that there is evidence of regular marijuana use in the Park which is not permitted by City by-laws which preclude prohibited substances in parks. City staff have filed reports of the consumption of liquor on the site and intoxication.

Mr. Ubbens filed photographs evidencing these concerns, as well as reports prepared by City staff who observed many of these conditions. Michelle Reid, a Supervisor in the City's Parks Department, filed tracking sheets recording her observations about site conditions and hazards since October 31, 2011.

[47] Mr. Ubbens also identified several impacts which the occupation has had on the City's ability to conduct regular maintenance in the Park:

There is an irrigation system underneath the Park. It consists of an automated irrigation system in the Ornamental Garden, and throughout the rest of the Park a manual irrigation system, consisting of 12 water valves to which hoses can be attached. The valves are attached to underground water pipes, which must be cleared of water before they freeze. One water line is leaking and must be repaired before any "blow out". In order to locate all valves and do the needed work, all structures will have to be removed. If water is not blown out of it before freeze up, it will be damaged and would cost approximately \$40,000.00 to repair. The head plumber in charge of that system is off work due to a serious injury. To do the necessary Winter work, staff will have to attend on site and locate the valves. This will require the removal of tents. On November 16, 2011, I am advised that an individual protestor at the Park indicated to a Parks staff member that he was prepared to discuss facilitating winterizing the Park. I have no idea if this individual speaks on behalf of anyone else. This is the first such contact regarding that system and was only made after the court proceedings were commenced. The fact is we cannot feasibly do the work unless the tents are removed.

Due to the presence of occupiers, we have been unable to plant spring bulbs in the Ornamental Garden, as staff have expressed fears about working there.

[48] Mr. Ubbens deposed that the protesters' occupation of the Park has breached numerous provisions of the City's By-Laws:

The City of Toronto Parks By-Law (Chapter 608, Municipal Code) places limits on conduct in public parks. The actions of the occupants detailed in the City's materials show many breaches of the by-law. In particular, their conduct is in breach of the requirements in s. 608-3 (including creating a nuisance, engaging in illegal conducts, interfering with the use and enjoyment of the Park by others), damaging plants and vegetation (s. 608-6), taking possession of the Park without authority and maintaining structures and dumping materials upon it (s. 608-7), drinking alcohol (s. 608-8), occupying the Park without authority, and using it without a permit between 12:01 a.m. and 5:30 a.m. (s. 608-9), lighting fires and barbeques (s. 608-10), organizing special events for more than 25 people (s. 608-11), camping on site (s. 608-13), erecting tents and structures (s. 608-14), driving vehicles in the Park (s. 608-26), parking vehicles in the Park (delivery trucks) (s. 608-27), permitting heavy vehicles to be driven in the Park (s. 608-31), attaching objects to trees (s. 608-40), and causing injury to trees (s. 608-42). As well, there have been Noise By-Law violations, in particular, Municipal Code 591, sections 591-2 and 4.

The City does not issue permits for park use after 11:00 p.m. Use of the parks overnight would create noise and hinder the peace and quiet of local residents. As well, the City does not permit overnight activities in parks because of public safety and security concerns that the City has for its citizens. It is difficult to police a park, or to see who is there, in the middle of night. As well, if parks are used overnight, they might become havens for illegal activities (such as public drinking and drug consumption) done under cover of night.

[49] Inspector Meissner described the security concerns resulting from the Park's occupation:

Toronto Police Service (the "TPS") has maintained a significant number of officers on duty in the vicinity of the Park throughout the occupation, twenty-four hours a day, to ensure public safety. The cost of this is significant.

There have been a number of arrests at the site, mostly for public drunkenness, or minor assaults. There has been one sex assault charge. There have also been quite a number of arrests under the *Mental Health Act*. There appear to be a number of vulnerable people on site, site as those with substance abuse and mental health issues, whose welfare is a particular concern to me, given their vulnerability.

There is no one particular individual who appears to be in charge or a spokesperson for the Occupy Toronto movement. There is no one person that the TPS can deal with who we know speaks on behalf of those in occupation.

VI. The eviction process

[50] There is no dispute that late in the morning of Tuesday, November 15, 2011, City employees entered the Park and served many Protesters with the Trespass Notice and an attached letter. In some cases the documents were affixed to the Protesters' tents. The Trespass Notice read as follows:

NOTICE UNDER THE TRESPASS TO PROPERTY ACT – NOVEMBER 15, 2011

You are hereby given notice that you are prohibited from engaging in the following activities in St. James Park and in any other City of Toronto park:

1. Installing, erecting or maintaining a tent, shelter or other structure;
2. Using, entering or gathering in the park between the hours of 12:01 a.m. and 5:30 a.m.

The City of Toronto hereby directs you immediately to stop engaging in the activities listed above and to remove immediately any tent, shelter, structure, equipment and debris from St. James Park. If you do not immediately remove any and all tents, shelters, structures, equipment and debris from St. James Park, such tents, shelters, structures, equipment and debris shall be removed from St. James Park by or on behalf of the City of Toronto. You are further ordered immediately to stop using, entering or gathering in St. James Park between the hours of 12:01 a.m. and 5:30 a.m.

Please be advised that this notice may be enforced in accordance with the provisions of the *Trespass to Property Act*, R.S.O. 1990 c. T21 or by any other legal means available to the City of Toronto. Please be further advised that under the *Trespass to Property Act*, every person who engages in an activity on premises when the activity has been prohibited under the Act is guilty of an offence and is liable, on conviction, to a fine of not more than \$2000.

[51] The November 15, 2011 letter from the City Manager (the "Letter") attached to the Trespass Notice stated:

Re: Use of St. James Park by Occupy Toronto and others

The purpose of this letter is to advise all those who are occupying St. James Park that the time has come to remove your tents, structures, equipment and personal belongings from the park.

The City recognizes the rights of Canadians to gather and protest. However, the City has determined that it cannot allow the current use of St. James Park to continue. In particular, the City can no longer permit the appropriation of St. James Park by a relatively small group of people to the exclusion of all others wishing to use the park and the detriment of those in the vicinity of the park. In addition, the current use of the park by Occupy Toronto and others occupying St. James Park is causing damage to the park and interfering with necessary winter maintenance of the park.

There are many activities currently being carried out at St. James Park which are contrary to the City of Toronto's by-laws, policies and practices with respect to the use of City parks and other public spaces. Attached to this letter is a notice under the *Trespass to Property Act* which sets out the activities of particular concern to the City and prohibits such activities from being undertaken in St. James Park. Pursuant to the notice, the City directs that all persons who are occupying St. James Park immediately remove all tents, structures, equipment, and other debris from the park and immediately discontinue use of the park between the hours of 12:01 a.m. and 5:30 a.m..

Please be advised that if all tents and other structures, equipment and debris are not removed immediately, the City will take the necessary steps to itself remove the tents and other structures. In so doing, the City relies on its rights under the *Trespass to Property Act* and the *City of Toronto Act, 2006*. The City is willing to offer its assistance to ensure the safe and orderly removal of tents and other structures if requested.

The City respectfully asks Occupy Toronto and others occupying St. James Park for their co-operation in this matter.

Yours truly,

Joseph P. Pennachetti, City Manager

[52] In addition, on November 15, 2011 the City posted the following press release on its website (the "Press Release"):

Toronto issues notice under Trespass to Property Act at St. James Park

This morning, City staff hand delivered a letter from City Manager Joe Pennachetti and a notice under the *Trespass to Property Act* to protesters at St. James Park, advising that they immediately leave the park.

Since October 15, staff of several City divisions including Parks, Forestry and Recreation, Public Health, Fire Services, Municipal Licensing and Standards, and Solid Waste Management have visited the park regularly to ensure that fire, health and safety standards are being met and that litter and recycle bins are emptied. In addition, Shelter, Support and Housing Administration staff have provided program information and supports to people who are homeless in the park who may be in need of emergency shelter.

The City has worked to balance people's right to protest with public safety. Residents and businesses have been very reasonable and patient. Protesters have been very peaceful and the City is very appreciative of this. However, it's time this came to a peaceful end.

The protesters have not approached the City nor has the City given permission to use St. James Park for the type of activity that has been ongoing there since October 15. Many activities at St. James Park are contrary to City bylaws, policies and practices with respect to the use of City parks and other public spaces.

Protesters are required to remove all tents and other structures, equipment and debris immediately. The City is willing to assist to ensure the safe and orderly removal of these materials.

It is the City's intent to facilitate this peacefully.

Further updates will be provided when available.

VII. Events after the interim stay was granted on Tuesday, November 15, 2011

[53] I granted the interim stay order around 5:45 p.m. on Tuesday, November 15. In his affidavit Mr. Ubbens deposed to events observed by City staff following the release of my interim order:

After the court order of November 15, 2011, the protesters erected a new structure on the site – a tree house.

Late in the day on November 15, 2011, the Occupiers delivered approximately 65 tires. The City Fire Department staff attended on site on November 16, 2011 and asked that they be removed because they were a potential fire hazard. They were removed voluntarily at that time.

[54] The Protesters should not have erected the tree house – that was a breach of my order.

VIII. The relief sought by the protesters and the positions of the parties

[55] In their Notice of Application the applicants seek several orders:

- (i) Declarations that the Trespass Notice, and any government action taken to enforce the prohibitions established under it, violate the applicants' freedoms of conscience, expression, assembly and association under sections 2(a), (b), (c) and (d) of the *Charter* and that such violations are not justified under section 1 of the *Charter*;
- (ii) A declaration that the *Trespass to Property Act*, the *Provincial Offences Act* or the *City of Toronto Municipal Code and By-laws* are contrary to sections 2(a), (b), (c) and (d) of the *Charter* in their application to the eviction or removal of the Applicants and fellow protesters from the Park and therefore are of no force and effect to the extent of the inconsistency and should be read down;
- (iii) An injunction prohibiting the City of Toronto from taking further steps to evict or remove the Applicants and fellow protesters from the Park, including issuing or enforcing orders for eviction made under the *Trespass to Property Act*, the *Provincial Offences Act* or the *City of Toronto Municipal Code and By-laws*;
- (iv) An order that the Applicants and fellow protesters be permitted to remain in the Park and maintain their encampments, including overnight; and,

- (v) Alternatively, a declaration that the Applicants are constitutionally exempt from the application of the *Trespass to Property Act*, the *Provincial Offences Act* or the *City of Toronto Municipal Code and By-laws* as it pertains to their eviction or removal from the Park.

A. Grounds for the protesters' claims

[56] The Applicants seek such relief pursuant to section 24(1) of the *Charter* and section 52 of the *Constitution Act, 1982* contending that the Respondents' conduct has or will infringe *Charter* freedoms which they enjoy. In their Notice of Application and Notice of Constitutional Questions the Applicants framed their claims of breach of *Charter* rights in the following terms:

(a) Section 2(a) – Freedom of Conscience

Ejection from the park and the disbanding of the encampment infringes the Applicant's freedom of conscience by limiting their freedom to express and enact their political beliefs. The Applicants believe that the act of "occupying" a space is central to their commitments to solidarity, community, and democracy. Their organization of the physical space of the encampment and the social organization of the community of protesters is a mechanism through which the Applicants and fellow protesters practice direct democracy and consensus-based decision making.

The encampment and its activities are an exercise of the Applicants' and fellow protesters' conscience and political beliefs. The Notice under the *Trespass to Property Act* and any government action taken to enforce that Notice substantially interfere with the Applicants' and fellow protesters' freedom of political belief and conscience.

(b) Section 2(b) – Freedom of Expression

Ejection from the park and the disbanding of the encampment infringes the Applicants' freedom of expression by denying the Applicants and fellow protesters at St. James Park an essential means by which to convey their message. The physical act of "occupying" a space is central to the message being communicated by the Applicants and fellow protesters. If they are denied the opportunity to "occupy" St. James Park because of the Notice under the *Trespass to Property Act* and any government action taken to enforce that Notice, the protesters will be inhibited in their ability to convey information and raise awareness about their social concerns.

The applicants are engaged in a prolonged protest which involves various forms of protected expression. Further, the actual encampment at St. James Park is a physical act that conveys or is attempting to convey meaning to members of Canadian society. Both the protest and the encampment are intended to convey various messages, including messages about the disproportionate distribution of wealth in society and about democracy.

Protesting and picketing are forms of expression which are highly protected by s. 2(b) of the *Charter*. The Supreme Court of Canada has recognized that the forms of expression that are protected by s. 2(b) are infinitely varied and can include the written or spoken

word, the arts, and even physical gestures or acts. The Supreme Court has recognized that even the physical act of parking a vehicle might constitute protected expression if the vehicle was parked in an attempt to convey a meaning. The Applicants' and fellow protesters' encampment is a form of political expression which should be sedulously protected by the Court.

(c) Section 2(c) – Freedom of Assembly

Ejection from the park and the disbanding of the encampment directly infringes the Applicant's freedom of assembly, by disrupting a peacefully gathering in which the Applicants and fellow protesters are collectively voicing their political beliefs and concerns. The encampment at St. James Park is the site and form of the Applicants' and other protesters' assembly, and the Notice under the Trespass to Property Act and any government action taken to enforce it directly inhibit the Applicants' rights to peacefully assemble.

(d) Section 2(d) – Freedom of Association

Ejection from the park and the disbanding of the encampment infringes the Applicant's freedom of association, by preventing them from working collectively to understand and resolve the confounding social and political problems we all face. The encampment is Occupy Toronto's primary site for collective action, solidarity, community, debate and discussion towards such understanding and resolution. The Notice under the Trespass to Property Act and any government action taken to enforce it directly inhibit the Applicants right to associate by disrupting their structures of collective organization and substantially interfering with their ability to work together toward common goals.

B. Position of the City of Toronto

[57] The position of the City was put succinctly by Mr. Ubbens in his affidavit:

The City in its Notice has asked that the protestors not install or erect or maintain any tents, shelters or other structures within the Park, or use, enter or gather in it between 12:01 a.m. and 5:30 a.m. Except for those five and one half hours in the middle of the night, individuals are free to attend in the Park and demonstrate and exercise their free speech rights. In essence the City is asking these individuals to stop living in the Park, although they are free to continue gathering there and protesting, save for those five and one half hours in the middle of the night.

...

The City wants to return the Park to the full use of the citizens of Toronto.

IX. Legislation, regulations and by-laws affecting the Park and its use

[58] Let me start the analysis by placing the government action at issue in this case – the City's move to compel compliance with two provisions of the Parks By-law by delivery of the

Trespass Notice to the Protesters – within the overarching legislative framework. Under the *City of Toronto Act, 2006*,¹ the City may pass by-laws respecting its public assets. It has done so for its parks. The relevant portions of the Toronto Municipal Code, Chapter 608, Parks (the “Parks By-law”), provide as follows:

§ 608-3. Conduct.

A. While in a park, no person shall:

...

(4) Create a nuisance or in any way interfere with the use and enjoyment of the park by other persons.

§ 608-6. Injury and damage.

No person shall in a park:

C. Unless authorized by permit, climb, move or remove the whole or any part of a tree, rock, boulder, rock face or remove soil, sand or wood;

§ 608-9. Access.

A. Unless authorized by a parks access agreement, no person shall access or occupy a park for non-recreational uses, or to access an adjacent property.

B. Unless authorized by permit, no person shall use, enter or gather in a park between the hours of 12:01 a.m. and 5:30 a.m.

§ 608-10. Campfires and barbecues.

While in a park, no person shall:

A. Light, build or stoke an open fire or bonfire unless authorized by permit;

B. Use any portable barbecues unless authorized by permit or where posted to allow the use;

C. Use fuel other than charcoal or briquettes in permanently fixed barbecues

...

¹ S.O. 2006, c. 11, Sched. A.

§ 608-11. Organized gatherings, special events, festivals and picnics.

While in a park, no person shall:

A. Unless authorized by permit, hold a picnic, organized gathering or special event for more than 25 persons;

§ 608-13. Camping and lodging.

Unless authorized by permit, no person shall dwell, camp or lodge in a park.

§ 608-14. Tents and structures.

Unless authorized by permit, no person shall place, install, attach or erect a temporary or permanent tent, structure or shelter at, in or to a park.

§ 608-53. Enforcement.

A. Any provincial offences officer or employee of the City designated by the Commissioner is authorized to inform a person of the provisions of this chapter and to request compliance with it.

B. Any provincial offences officer or employee of the City whose duties include the enforcement of this chapter is authorized to order a person believed by the officer or employee to be contravening or who has contravened any provision of this chapter to:

(1) Stop the activity constituting or contributing to the contravention;

(2) Remove from the park any animal or thing owned by or in the control of the person which the officer or employee believes is or was involved in the contravention; or

(3) Leave the park.

C. Any provincial offences officer may enforce the provisions of this chapter.

D. Where a person contravenes any of the provisions of this chapter, or fails to comply with any order referred to in Subsection B, the permission and licence of the person to remain in that park is revoked.

...

§ 608-54. Penalties.

A. Any person who contravenes any of the provisions of this chapter, other than § 608-32 resulting from the operation of a motor vehicle, is guilty of an offence.

[59] Pursuant to its enforcement powers under the Parks By-law the City issued the Trespass Notice under the *Trespass to Property Act* (“*TPA*”).² Under the *TPA* the City, which owns the Park, is an “occupier” of those “premises”. Section 3(1) of the *TPA* provides that “entry on premises may be prohibited by notice to that effect”. Notice under the Act may be given “in writing” or “by means of signs posted so that a sign is clearly visible in daylight under normal conditions from the approach to each ordinary point of access to the premises to which it applies”.³ In this case the Trespass Notice was either handed to the Protesters or attached to their tents. Where notice is given that a particular activity is prohibited, section 4(2) of the *TPA* states “that activity and entry for the purpose is prohibited and all other activities and entry for the purpose are not prohibited.”

[60] What happens if a person does not comply with a notice which prohibits a particular activity? Several things. First, section 2(1) of the *TPA* states that a person who engages in an activity on premises when the activity is prohibited and “who is not acting under a right or authority conferred by law” is guilty of an offence and on conviction is liable to a fine of not more than \$2,000. Second, section 9(1) of the *TPA* states:

A police officer, or the occupier of premises, or a person authorized by the occupier may arrest without warrant any person he or she believes on reasonable and probable grounds to be on the premises in contravention of section 2.

[61] The City’s issuance of the Trespass Notice under the *TPA* to the applicants and other Protesters was government action within the meaning of section 32(1) of the *Charter*, so one must now consider the *Charter* rights and freedoms affected by that Trespass Notice.

X. Does the Trespass Notice infringe the applicants’ section 2 freedoms?

A. The legal principles

[62] In this proceeding the Applicants contend that their fundamental freedoms guaranteed by sections 2(a), (b), (c) and (d) of the *Charter* have been infringed by the Trespass Notice. Those sections read as follows:

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and

² R.S.O. 1990, c. T.21.

³ *TPA*, s. 5(1).

(d) freedom of association.

[63] These are all very important freedoms. As the *Charter* says, they are fundamental. In *Canadian Civil Liberties Association v. Toronto Police Service* I wrote:

Canada enjoys an enviable reputation amongst the world's nations for its public culture of political expression. Although public speech still sometimes stumbles against pockets of process and content-based restrictions in public institutions, by and large Canadian public streets and places remain open and available for the expression of a wide variety of political and social messages...

Section 2(b) of the *Canadian Charter of Rights and Freedoms* provides that everyone has the fundamental “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The analytic approach adopted by the Supreme Court of Canada to claims under section 2(b) requires a court to pose and answer three questions: (i) Does the applicant's conduct or statement have expressive content? (ii) If so, does the method or location of this expression remove that protection? (iii) If the expression is protected by s. 2(b), does the government action or legislation infringe that protection, either in purpose or effect?⁴

Violent expression is not protected by the Charter, not due to any message it conveys, but “because the method by which the message is conveyed is not consonant with *Charter* protection”; “violence prevents dialogue rather than fostering it”.⁵

Not all public or government-owned property is available for *Charter*-protected expressive activity.⁶ Public streets, however, “are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted”.⁷ Expressive activities on public streets are *prima facie* protected by the *Charter*.⁸

Sections 2(c) and (d) of the *Charter* are closely related to freedom of expression, protecting, as they do, the lawful means of expression – peaceful assembly and association.⁹

B. The point of contention

[64] That the applicants are engaged in conduct expressing political and social messages is not in doubt. The content of their speech involves quintessentially political messages. What is

⁴ See *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, at para. 56.

⁵ *Montreal (City)*, *supra.*, at paras. 60 and 72.

⁶ *Montreal (City)*, *supra.*, at para. 74.

⁷ *Montreal (City)*, *supra.*, at para. 18.

⁸ *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] 2 S.C.R. 295, at para. 27.

⁹ 2010 ONSC 3525, paras. 105 to 109.

distinctive about the claims the applicants make for their speech is two-fold. First, the applicants contend that one of the methods of their expression – occupying public land and creating a tent city – is essential to their exercise of *Charter* rights. Second, the applicants claim *Charter* protection for a “prolonged” exercise of their rights, indeed one which could be indefinite and will only end when they so choose.

[65] The City submitted that its Trespass Notice did not infringe the applicants’ section 2 freedoms. In its factum the City put the argument as follows:

The Applicants have failed in their onus to establish that the City actions in any way offend their *Charter* rights. They have failed to demonstrate that camping in the tents (which very few of the occupiers actually do) is in any way an expression or that they are needed or used to express any ideas. Their act of camping out and effectively taking over a public park is not protected under section 2.

[66] The evidence in this case discloses that the applicants are using several methods or manners by which to convey their political messages: (i) posters and signs; (ii) marches or demonstrations; (iii) posting on internet sites; and (iv) erecting and periodically using structures, such as tents and yurts. The applicants place great emphasis on the link between the messages they wish to convey and the means by which they are attempting to convey them. The evidence shows that the applicants sincerely believe that the structures which the Protesters have erected in the Park are an important part of the manner by which they are expressing their messages.

[67] As to the first distinctive feature of their expression/association-related claims, the applicants articulated their position in the following way in their Notice of Application:

The Applicants believe that the act of “occupying” a space is central to their commitments to solidarity, community, and democracy. Their organization of the physical space of the encampment and the social organization of the community of protesters is a mechanism through which the Applicants and fellow protesters practice direct democracy and consensus-based decision making.

...

Ejection from the park and the disbanding of the encampment infringes the Applicants’ freedom of expression by denying the Applicants and fellow protesters at St. James Park an essential means by which to convey their message. The physical act of “occupying” a space is central to the message being communicated by the Applicants and fellow protesters.

...

[T]he actual encampment at St. James Park is a physical act that conveys or is attempting to convey meaning to members of Canadian society. Both the protest and the encampment are intended to convey various messages, including messages about the disproportionate distribution of wealth in society and about democracy.

...

The Applicants' and fellow protesters' encampment is a form of political expression which should be sedulously protected by the Court.

...

The encampment at St. James Park is the site and form of the Applicants' and other protesters' assembly...

...

Ejection from the park and the disbanding of the encampment infringes the Applicant's freedom of association, by preventing them from working collectively to understand and resolve the confounding social and political problems we all face. The encampment is Occupy Toronto's primary site for collective action, solidarity, community, debate and discussion towards such understanding and resolution.

[68] The applicants contend that they are engaged in a "prolonged protest". Several of the applicants sought to explain how the prolonged duration of their protest was linked to the messages they seek to convey. Mr. Batty said:

The physical encampment is itself a demonstration of our commitment to these issues and a message that we will not relent until change occurs.

Lana Goldberg deposed:

The existence of the encampment and my ability to participate in it is integral to my ability to successfully convey my messages because the camp *is* the movement. Since the issues we are concerned about are structural and persistent, they require continuous organizing to address. The encampment provides the space and time to discuss the issues, come up with solutions, and continually put pressure on decision-makers to make responsible decisions. More importantly, the encampment is giving us a chance to learn first-hand about democracy, cooperation, and respect.

Dave Vasey stated:

The permanent nature of the encampment expresses the seriousness of my concerns and provides a permanent space to allow the voices of the participants to be heard both through the media and involvement with the community.

...

The physical encampment is itself a demonstration of our commitment to these issues and a message that we will not relent until change occurs.

[69] Mr. Batty, Ms. Reeve-Newson, Mr. Vasey and Ms. Goldberg all deposed that it was important that the protesters be permitted to decide when to end their occupation. Mr. Batty put it this way:

I do not seek to personally remain at the encampment indefinitely, but I believe that it is an essential aspect of the freedom of expression, conscience, assembly and association that I be able to determine for myself when leaving the encampment would be consistent with the messages, information and beliefs I am trying to express by my presence there.

C. Analysis

[70] I do not accept the City's argument that the Protesters' act of camping out and, in effect, taking over a public park is not activity which engages section 2 of the *Charter*. The current approach of the Supreme Court of Canada to the issue of the mode of expression is not whether the form of the expression is compatible with the function of the public space, but whether free expression in the chosen form would undermine the values the guarantee is designed to promote.¹⁰ Shelters have been held by other courts to constitute a mode of expression which falls within the guarantees of section 2, especially section 2(b) of the *Charter*. In *Weisfeld v. Canada* the Federal Court of Appeal stated:

[E]xpression goes beyond words. People may choose to amplify or dramatize their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or to assist one in conveying a message more effectively. These "props" are part and parcel of the manner in which one chooses to express oneself and are as deserving of protection as the words used to convey the meaning. The Peace Camp structures and the tables used are, therefore, included in the concept of expression.¹¹

In *Weisfeld* the Court held that erecting a tent on Parliament Hill was conduct which fell within the ambit of section 2(b) of the *Charter*.

[71] More recently in *Vancouver (City) v. Zhang* the British Columbia Court of Appeal stated:

While the City does not agree with the chambers judge's finding that the billboard and hut in this case have expressive content, the City supports her finding that the structure was incompatible with the street's function and thus excluded at the second step of the analysis because of the "method" of expression. Like the chambers judge, in light of the majority's view ... in *Irwin Toy* as to the scope of what constitutes "expression", I find persuasive the reasoning of Linden J.A. for the Federal Court of Appeal in *Weisfeld* and cannot distinguish the Falun Gong's protest vigil from the peace camp Mr. Weisfeld established on Parliament Hill. Like the tents and tables he placed there, the billboard and meditation hut were "part and parcel of the manner" in which the Falun Gong participants chose to express themselves and as deserving of protection. The chambers judge did not err in so finding.¹²

¹⁰ *Montreal (City), supra.*, para. 77.

¹¹ (1994), 116 D.L.R. (4th) 232 (F.C.A.), para. 30.

¹² (2010), 325 D.L.R. (4th) 313 (B.C.C.A.), para. 32.

[72] I adopt the reasoning of the courts in the *Weisfeld* and *Zhang* cases and hold that the structures erected by the applicants and other Protesters in the Park form part of the manner of expressing their political message and therefore engage section 2(b) of the *Charter*.

[73] There is no suggestion that the Protesters are using a violent mode of expression.¹³ In fact, the City in its November 15 Press Release stated: “Protesters have been very peaceful and the City is very appreciative of this”.

[74] Does the government action in this case – the Trespass Notice - infringe the applicants’ fundamental section 2 freedoms, either in purpose or effect? The applicants submitted that the Trespass Notice did so because its effect would be to curtail or prohibit their protest and encampment. The City responded that there would be no infringement because the Protesters would be free to continue their expressive activities in the Park, but they could not continue to erect tents or shelters or stay in the Park during the midnight hours.

[75] On its face the Trespass Notice orders the applicants and the other Protesters to stop doing two things they currently are doing as part of their protest – erect tents and shelters and remain in the Park between midnight and 5:30 a.m. That government action clearly would impact and restrict the applicants’ current expressive activity, assembly and association, as well as the manifestation of their conscientious beliefs. I conclude that enforcement of the Trespass Notice would infringe the applicants’ section 2 fundamental freedoms.

[76] The central issue in this case, in my view, is whether such an infringement can be justified under section 1 of the *Charter*, and I now turn to that issue.

XI. Section 1 of the *Charter*: Time, place and manner restrictions

A. The section 1 analytical framework

[77] Section 1 of the *Charter* reads as follows:

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.

[78] As section 1 states, the *Charter*’s rights and freedoms are subject only to reasonable limits “prescribed by law”. The “prescribed by law” requirement chiefly is concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of section 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.¹⁴

¹³ The residents deposed to many acts of intimidation by the Protesters, but I doubt such conduct reached the level of “violent” within the meaning of section 2(b) jurisprudence.

¹⁴ *R. v. Therens*, [1985] 1 S.C.R. 613.

[79] The second requirement of section 1 is that any limit of a right or freedom must be one that can be “demonstrably justified in a free and democratic society”. Although these words govern the way in which courts must examine limits imposed by laws on *Charter*-guaranteed freedoms, our Supreme Court of Canada has adopted and consistently applied an analytical method to conduct that examination. Called the *Oakes* test, after the case in which it was created,¹⁵ the test requires a court to pose the following questions when examining the reasonableness of the limits imposed on a freedom:

In *Oakes, supra*, this Court set out two broad criteria as a framework to guide courts in determining whether a limitation is demonstrably justified in a free and democratic society. The first is that the objective the limit is designed to achieve must be of sufficient importance to warrant overriding the constitutionally protected right or freedom. The second is that the measures chosen to achieve the objective must be proportional to the objective. The proportionality requirement has three aspects: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects.¹⁶

B. “Prescribed by law”

[80] The applicants allege that the Trespass Notice, and any action taken to enforce it, violates their section 2 *Charter* freedoms in a manner which is not justified and, as well, contend that the *TPA* and Parks By-law are contrary to section 2 of the *Charter* “in their application to the eviction or removal of the Applicants and fellow protesters from St. James Park and are therefore of no force and effect to the extent of the inconsistency and should be read down”. The applicants submitted that the limitation of their *Charter* freedoms sought by the City through the issuance and enforcement of the Trespass Notice was not a limitation “prescribed by law” and therefore not a justifiable violation of their freedoms. To understand their argument on this point, I think it best that I reproduce those portions of the Applicants’ Factum where they set it out:

[72] The City of Toronto grounds its limitation of the Applicants’ *Charter* rights exclusively in the *Trespass to Property Act*, which is a provincial statute of general application designed to protect the rights of private property owners. The *Trespass to Property Act*, which was enacted prior to the entrenchment of the *Charter*, does not reflect the supremacy of *Charter* rights in respect of public property and does not articulate any limitations on the exercise of rights guaranteed by section 2 of the *Charter*.

[73] The *Trespass to Property Act* itself does not require the City of Toronto to take eviction action. The Act contains no specific provisions, nor does it provide any notice to the public, of any limitations on the use of public parks, including encampment or overnight presence.

¹⁵ *R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, para. 60.

[74] In both *Victoria (City) v. Adams*¹⁷ and *City of Vancouver v. Zhang*, the cities attempted to limit conduct on municipal property. In both cases, the cities relied expressly upon specific Bylaws and polices related to the use of the public space at issue. In *Zhang*, the limitation on public protest was found to be prescribed by law by virtue of the fact that the *Regulating the Use of the Streets* By-law at issue left the reader with no doubt as to what conduct was prohibited. The City here does not rely upon an bylaws in as the legal basis for their authority to evict the encampment at St. James park. A reading of the *Trespass to Property Act* itself does not provide the certainty required to render the City of Toronto's actions with respect to St. James Park or the Applicants' "prescribed by law".

[75] There is no evidence that the City's decision was made in accordance with any established City of Toronto policies regarding the enforcement of the *Trespass to Property Act* on City property. The City does not seek to evict based on any other legislation, bylaw or policy which relate to the use of public parks, regulation of public protest, or which otherwise articulate limitations on the Applicants' rights under s. 2 of the Charter.

[76] In this case, the sole legal basis relied upon by the City of Toronto for the eviction, the *Trespass to Property Act*, does not contain specific legal authorization for the limitation of Charter-protected activity in St. James Park. The provisions of that Act provide no notice to the Applicants regarding what conduct is prohibited.

[77] The City's decision to enforce the general provisions of the *Trespass to Property Act*, which does not itself provide for either specific limitations on the Applicants' Charter rights or sufficient notice of those limitations, is a targeted and arbitrary administrative decision which is not "prescribed by law".

B.1 Argument as to the source of the limitation

[81] Let me address the key points in this argument. First, the applicants submit that the "sole legal basis" relied upon by the City for its action against them is the *TPA*. The evidence shows that to be an incorrect assertion. The City certainly has relied upon the *TPA* for the enforcement mechanism by which to give notice to the applicants and Protesters of its order/demand with respect to the use of the Park, but the Trespass Notice patently draws on the Parks By-law as the source of its order/demand. The prohibited activities identified in the Trepass Notice replicate the contents of §608-9 (absence during midnight hours) and §608-14 (no tents/structures). That link was made clear in the Letter which accompanied the Trespass Notice:

There are many activities currently being carried out at St. James Park which are contrary to the City of Toronto's by-laws, policies and practices with respect to the use of City

¹⁷ *Victoria (City) v. Adams*, 2009 BCCA 563. I have not dealt in detail with this case in these Reasons. It was driven by a concern for the health of those who had tried to erect temporary shelters in a park during inclement weather. That is an entirely different fact situation from the present case.

parks and other public spaces. Attached to this letter is a notice under the *Trespass to Property Act* which sets out the activities of particular concern to the City and prohibits such activities from being undertaken in St. James Park.

[82] I therefore find, as a fact, that the City is relying on the Parks By-law as its authority to invoke the enforcement mechanisms of the *TPA* and the issuance of its Trespass Notice.¹⁸ The Supreme Court of Canada has recognized that limits contained in municipal by-laws satisfy the "prescribed by law" requirement because their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply.¹⁹

B.2 Argument as to the overbreadth or vagueness of the limitation

[83] The applicants and the CCLA advanced an additional argument, however, one in the nature of an overbreadth or vagueness argument. As I understand their argument, they contend that the source relied upon by the City for its authority to issue the Trespass Notice does not provide the degree of certainty required by law to render the City's actions "prescribed by law". That source does not provide the applicants with sufficient notice of the proposed limitations and therefore is "a targeted and arbitrary administrative decision" which is not "prescribed by law". The CCLA also advances this argument in the context of the minimal impairment analysis.

[84] The City objected to the applicants raising this argument because it did not form one of the grounds pleaded in their Notice of Application – the applicants have not sought a declaration of the invalidity of the Parks By-law or the *TPA*, only a declaration that they are invalid to the extent they apply to the applicants' activity. The City submitted that it would want an opportunity to file evidence on the point should I decide to deal with it. This is a very valid procedural objection by the City. However, I think I can deal with the argument on the basis of the evidence filed.

[85] Turning to the vagueness argument advanced by the applicants, as can be seen from the extract set out above from their factum they rely heavily on the recent decision of the British Columbia Court of Appeal in the *Zhang* case. The results in *Charter* cases very often are fact-driven. From my reading of the case, *Zhang* was no exception. Let me set out the key facts of the *Zhang* case; they are radically different from the facts in this case:

- (i) Falun Gong practitioners erected (i) an 8' x 100' billboard displaying pictures and posters of their persecution by the Chinese government and (ii) a one metre by two metre "meditation hut" in which persons carried on a 24/7 meditation protest;

¹⁸ §608-53(B) of the Parks By-law authorizes any employee of the City whose duties include the enforcement of the By-law to order a person contravening the By-law to stop the activity and remove any contravening "thing". That is what the Trespass Notice purports to do.

¹⁹ *GVTA, supra.*, para. 53.

- (ii) Those structures were located on property owned by the City of Vancouver immediately in front of the Chinese Consulate on Granville Street;
- (iii) Technically, the structures were situated on municipal property designated as a “street”. But they were not set up on the traffic portion of the street, as was made clear by the Chambers judge in her reasons:

The structures are located on a small grassy portion of the City street which abuts the private property of the Chinese Consulate on one side, and the City sidewalk on the other. The billboard encroaches on the City street by 0.11 metres to 0.18 metres. The hut encroaches on the street by 0.95 metres. With the exception of a small portion of the hut (0.08 metres) and some supports for the billboard, the structures are located on the City street.²⁰

Since neither the reasons of the Chambers judge nor the Court of Appeal referred to any impediment to traffic caused by the structures, I take it that the structures were on the non-road portion of property designated as a municipal street;

- (iv) This protest had been going on for many years. The Chambers judge noted that during that lengthy time the city had received only three documented complaints about the protesters’ activities, one of which was from the Chinese Consulate.

I think one can fairly characterize the degree of interference by the protesters’ structures in the *Zhang* case with the use of a public street as *de minimis* to non-existent, hardly equivalent to the occupation of an entire city park which is at issue in the case before me.

[86] I have found that the source relied upon by the City for its authority to demand the Protesters to limit their conduct is the Parks By-law. That piece of subordinate legislation possesses adequate precision to constitute a governmental limitation “prescribed by law”. The Supreme Court of Canada has taken a liberal approach to the precision requirement:

The majority in *Irwin Toy* explained this as follows (at p. 983):

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no “limit prescribed by law”.

²⁰ *Vancouver (City) v. Zhang*, 2009 BCSC 84, para. 4.

The Court emphasized in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-97, that the standard is not an onerous one. Unless the impugned law "is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools", it will be deemed to have met the "prescribed by law" requirement (p. 94).²¹

[87] In the present case the Parks By-law quite clearly, and in considerable detail, identifies what types of conduct are impermissible or require a permit. If the applicants and other Protesters wanted to know whether their occupation was a permitted use of the Park under City ordinance, all they had to do was read the Parks By-law. The answer was crystal clear. Their occupation contravened the Parks By-law. There was no imprecision.

[88] I should note that the British Columbia Court of Appeal reached a similar conclusion in the *Zhang* case regarding the degree of precision of the Vancouver street by-law:

I am satisfied that s. 71 of the By-law meets this threshold test because it is capable of interpretation: It leaves the reader without doubt as to what conduct is prohibited - objects that obstruct the use of the street or encroach on it are not permitted unless they qualify under one of the exceptions established by Council to promote municipal objectives. The fact Council has not chosen to permit the use of structures to facilitate political expression may suggest overbreadth to the appellants and others, but it does not turn a clear articulation of the limit s. 71 creates to a *Charter* right into a law so obscure it cannot be understood by those to whom it applies or by those called upon to apply it.²²

[89] I conclude that the limitations the City seeks to impose on the conduct of the applicants and other Protesters by the issuance of the Trespass Notice to enforce the Parks By-law constitute limitations "prescribed by law".

[90] I will deal with the applicants' overbreadth argument as part of my minimal impairment analysis, as did the B.C. Court of Appeal in *Zhang*.

C. Sufficient importance of the objective

[91] Toronto is a densely populated city. Competing demands for the use of its limited parklands are numerous. Without some balancing of what people can and cannot do in parks, chaos would reign; parks would become battlegrounds of competing uses, rather than oases of tranquility in the concrete jungle. Or, parks would become places where the stronger, by use of occupation and intimidation, could exclude the weaker or those who are not prepared to resort to confrontation to carve out a piece of the park for their own use. The evidence filed before me from the residents indicates that that is precisely the effect of the Protesters' occupation of the Park – the tents and other shelters hog the park land and non-Protesters who seek to use the Park face a chilly and somewhat intimidating reception.

²¹ *GVTA, supra.*, para. 54.

²² *Vancouver (City) v. Zhang*, 2010 BCCA 450, para. 56.

[92] In addition, the permissible use of parks must take into account the effect on those living by and around the parks. If parks could be used without restriction to host all-night drumfests, folks who lived near the parks would not get much in the way of sleep. And we all have to sleep at some point of time.

[93] Finally, for folks in Toronto to continue to enjoy their parks, the City must maintain them in good condition. Having a picnic on a mound of bare earth is not the same experience as being able to stretch out a table cloth on some soft grass.

[94] The Letter which accompanied the Trespass Notice indicated that these are the objectives the City is pursuing in ordering the Protesters to take down their structures and vacate the Park during the midnight hours:

The City recognizes the rights of Canadians to gather and protest. However, the City has determined that it cannot allow the current use of St. James Park to continue. In particular, the City can no longer permit the appropriation of St. James Park by a relatively small group of people to the exclusion of all others wishing to use the park and the detriment of those in the vicinity of the park. In addition, the current use of the park by Occupy Toronto and others occupying St. James Park is causing damage to the park and interfering with necessary winter maintenance of the park.

The Press Release also mentioned these objectives:

The City has worked to balance people's right to protest with public safety. Residents and businesses have been very reasonable and patient. Protesters have been very peaceful and the City is very appreciative of this. However, it's time this came to a peaceful end.

[95] When read as a whole the objective of the Parks By-law is quite clear and sensible – it is an attempt to balance, in a fair way, the different uses we wish to make of our public parks so, at the end of the day, we all get to enjoy them. The Parks By-law certainly contains restrictions, but ones with the evident purposes of enabling all to share a common resource and ensuring that the uses of the parks will have a minimal adverse impact on the quiet enjoyment of surrounding residential lands. The Trespass Notice simply seeks to secure those objectives.

[96] I conclude that the regulation of the erection of structures in public parks and the use of parks during the midnight hours is a pressing and substantial objective.

D. Proportionality

D.1 Measures chosen must be rationally connected to the objective

[97] Are the measures chosen by the City rationally connected to the objective it seeks to achieve? Without a doubt. The Parks By-law seeks to balance uses of parks to enable all in this city to access and use parks. The Trespass Notice seeks to ask one group of the public to let go of their monopoly over the use of the Park and share the Park with other people in Toronto and to afford the neighbouring community some peace and quiet during the midnight hours. What could be more rational?

[98] In their factum the applicants submitted that the restrictions at issue in this case did not meet the rational connection test because “the complete prohibition of all structures in all City Parks does nothing to ensure access to St. James Park by individuals not connected with the Occupy Toronto Protests.” The evidence belies that assertion. If the structures are removed (and after taxpayer money is spent to repair the damage caused by the Protesters), the evidence shows that people will return to the Park from which the Protesters currently are excluding them.

[99] I find that the limiting measures meet the rational connection test.

D.2 The measures chosen must impair the guaranteed freedom as little as possible

The general principles

[100] While over the years there has been some debate in the Supreme Court jurisprudence about the permissible degree of impairment under the minimal impairment part of the *Oakes* test – those who enjoy proof-texting can always pick out a word here or there which places a slightly different nuance on the test – the prevailing general approach is the one set out in the decision of (now) Chief Justice McLachlin in her reasons in *RJR-MacDonald Inc. v. Canada (Attorney General)* where she wrote:

The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.²³

[101] Dealing more specifically with the performance of a minimal impairment analysis in cases involving the use of public streets or places, in *Montréal (City) v. 2952-1366 Québec Inc.*, the decision of a very strong majority of the judges stated:

[I]n dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way. This is particularly so on environmental issues, where views and interests conflict and precision is elusive...²⁴

²³ *RJR-MacDonald*, *supra*, para. 160, citations omitted.

²⁴ *Montreal (City)*, *supra.*, para. 94.

The contending positions

[102] In its factum the City advanced the following argument about the minimal impairment to the applicants' freedoms imposed by compliance with the Trespass Notice:

The Notice merely regulates the hours the park can be used, in accordance with the City's Parks By-law. The Notice actually allows the Applicants to use the park from the early morning hours to the late evening, during its busiest hours. The limit in hours is of no, or minimal impairment as it only applies to hours which are traditionally used for sleeping. In *Banks*, a ban on squeegeeing did not prohibit individuals from expressing their message that they were in need of help. It affected their right of expression as little as possible. The same applies here.

[103] The applicants disagreed that the City's action met the requirements of the minimal impairment test. In their evidence and oral submissions they advanced several arguments on this point:

- (i) The combined effect of requiring the removal of structures and vacating the Park during the midnight hours would be the absolute ban of the encampment they have erected, not a minimal impairment of their rights. The CCLA echoed this argument;
- (ii) The public is free to use other parks while the Protesters use the Park;
- (iii) Before issuing the Trespass Notice the City was under a legal obligation to consult with the applicants and other Protesters, which they did not do; and,
- (iv) Although the Protesters did not apply to the City for a permit to erect structures or use the Park during the midnight hours, the Parks By-law is overly broad by not creating a specific exemption for political expression. The CCLA advanced a similar position. This argument draws on the *Zhang* decision.

Analysis

(a) The absolute ban argument

[104] Dealing first with the "absolute ban" argument, I accept the City's submission that the Trespass Notice which seeks to enforce two provisions of the Parks By-law would not result in an absolute ban on the Protesters' political expression or associational activities. As I observed earlier in these reasons, the Protesters employ several methods to convey their political messages: (i) signage; (ii) web postings; (iii) demonstrations and marches through City streets and to other public places; and (iv) occupying the Park. Compliance with the Trespass Notice would alter the Protesters' use of the Park – no structures, and absence during the midnight hours – but would not evict the protest from the Park. The Protesters would continue to be allowed to protest in the Park for close to 19 hours a day – hardly an absolute ban on their expressive

activities.²⁵ Should the Protesters comply with the Trespass Notice and limit their protest to the 19 hours each day permitted by the Parks By-law, that use would continue to impose a considerable burden on the surrounding neighbourhood. I should also note that the City has not sought to restrict the number of Protesters in the Park: §608-11(A) of the Parks By-law prohibits organized gatherings or special events for more than 25 persons unless a permit is obtained. The Trespass Notice does not seek to limit the size of the protest.

[105] The applicants submitted that because they regard the 24-hour a day occupation of the Park as an important part of their message, compliance with the Trespass Notice would result in an absolute ban of that form of their expressive and associational activities. This is where common sense must come into the picture. If I were to accept the applicants' argument, then any protest group could come along, assert that monopolizing a particular piece of public space was an important part of their political message, and the City would be powerless to object.

[106] The *Charter* does not create a world of such absolutes, rigidity, or lack of common sense with respect to the private use of public spaces. A few years back our Court of Appeal, in *R. v. Banks* – the “squeegeeing” case – had this to say about provisions in legislation which prohibited squeegeeing on public streets:

[T]he provisions impair the appellants' right of expression as little as possible. While the legislation does effectively ban squeegeeing on roadways, it does not prohibit the appellants from expressing their message that they are in need of help. I appreciate that the provisions of the *Act* not in issue in this appeal place other restrictions on where and how the appellants may solicit. Still, they are left with many alternatives. They can convey their message on the sidewalk. They cannot squeegee car windows, but to the extent that they may wish to provide a service in exchange for donations, there are other alternatives available.²⁶

[107] The *Weisfeld* case involved a “rudimentary shelter consisting of plastic sheets suspended from poles” located on a small portion of the vast lawn in front of Parliament Hill. Although the Federal Court of Appeal held that the mode of expressing a message of protest through the erection of a shelter engaged section 2(b) of the *Charter*, it went on to say that the removal of the shelter was justifiable government action:

In this case, however, in exercising its common law rights the Government restricted only one form of the appellant's expression: the shelter. The Government did not interfere with the various other means by which the appellant could communicate his message to the public. The appellant was free to talk with passers-by, to hand out printed literature, and even to display a banner. There were no tanks or guns used here to suppress all dissent. Much milder restrictions were employed. I am of the view that merely denying the appellant the right to erect and to occupy a permanent shelter, but leaving unimpaired his

²⁵ Therein lies the difference between the facts in this case and those in *R. v. Guignard*, [2002] 1 S.C.R. 472 and *Ramsden v. Peterborough (City)* (1993), 16 C.R.R. (2d) 240 (S.C.C.).

²⁶ 2007 ONCA 19, para. 131.

other means of communicating his message, infringed the appellant's freedom of expression as little as was reasonably possible in the circumstances.²⁷

[108] I accept that part of the message the applicants and other Protesters seek to convey is that it is both possible and necessary to build a community structure different from that prevailing in most places of our society. The evidence shows that to that end the Protesters have appropriated public land to their exclusive, private use for the purpose of forming a residential community on public lands without complying with the rules governing the residential use of land in the City – zoning, sewage, water, etc. – or the rules governing the use of public parks. In sum, the applicants and the other Protesters want to create new rules through their General Assembly and ignore the existing rules that bind everyone else in this city.

[109] Such absolutism on their part attracted the following email comment from one person who wrote to the Office of the Mayor:

I also believe the use of the park is as much their right, as it is mine. However, it is not appropriate for them to use the park in a manner that prevents me from using the park comfortably. Especially now where it appears to be more about testing how long they can stay, rather than having a specific purpose. One of the issues they were protesting was their perception of corporate greed; that corporations only care about their success, and have no concern for the well-being or lives of others. It seems Occupy Toronto has taken this mentality. They appear to believe their residence is most important, and the rights of everyone else to use the park do not matter.

[110] Part of our *Constitution* talks about “peace, order and good government”. The *Charter* did not displace that organizing principle. When people come together to live in dense urban environments, flexibility and give-and-take must permeate everyone’s actions, otherwise we would end up being at each other’s throats – peace and order would go out the window.

[111] It may well be that displacing the peace and order of our existing community is part of the message and objective of the Protesters. One could infer that from some of the evidence. But I need not go that far to conclude that the rigidity and absolutism of the Protesters’ position – let us keep our tents and around-the-clock occupation – does not fit with the balancing of competing interests which our *Constitution* requires. I am satisfied on the evidence in this case that the City is alive to the need to balance the competing rights of the Protesters with those of the Toronto community – the City said so in its Letter and Press Release. I regard the two restrictions which the City seeks to enforce through its Trespass Notice to be reasonable, tailored, minimal impairments on the expressive and associational rights of the Protesters, and a reasonable balancing of the rights of all who wish to use the Park.

²⁷ [1994] F.C.J. No. 999, para. 67.

(b) The “Go use another park” alternative

[112] In his affidavit Mr. Batty suggested that a less intrusive means would be for the City to leave the Park to the Protesters and direct the rest of the public to other parks:

I have also become aware of a number of other parks in the vicinity which are also open to the public, such as Moss Park, David Crombie Park, Cloud Gardens, Allan Gardens, Berczy Park, Nathan Phillips Square, and St. James Park is just one among these parks.

Not what one would call a sharing attitude from the Protesters. Where would that leave the McGregor family? Carolyn McGregor deposed that she and her husband live adjacent to the Park with their baby daughter. Do I understand the applicants to be suggesting that the McGregor family should have to push their baby stroller several blocks up the road to enjoy the serenity of a park? Why can't the McGregors use the Park too?

[113] Further, if the Protesters possess a constitutional right to occupy the Park and appropriate it to their use, then the next protest group espousing a political message would have the right to so occupy another park, say, Moss Park; and the next group the next park, and so on, and so forth. So would result a “tragedy of the commons”, another ironic consequence of a movement advocating greater popular empowerment.

(c) The “duty to talk” alternative

[114] In their submissions at the hearing the applicants argued that the City had failed to meet the minimal impairment test because it had not talked or consulted with the Protesters before issuing the Trespass Notice. As I understand their argument, the applicants contend that section 1 of the *Charter* imposed on the City a constitutional obligation to consult with them and to try to work things out before resorting to its by-law enforcement powers, such as the Trespass Notice.

[115] I see no merit in this argument. The applicants offered no jurisprudential support for the argument. That is not surprising. Such a constitutional obligation would paralyze municipal governments. 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, not constitutional obligation. In our constitutional system the duty to consult has been limited to the issue of aboriginal rights and interests under section 35 of the *Constitution Act, 1982* where the obligation is tied to a *sui generis* concept of the honour of the Crown.

(d) The absence of a “political speech exemption policy” to the Parks By-law

[116] The final alternative means the applicants pointed to was the option of the City putting in place a policy outlining the circumstances in which political speech in parks would be exempt from the restrictions of the Parks By-law. Actually, at the hearing the applicants characterized this not merely as an option, but as a constitutional necessity in order for the Parks By-law to be justified under section 1 of the *Charter*. As mentioned, the City objected to the applicants raising this argument at the hearing because it was not raised in their Notice of Application. I accept that objection, but I would have rejected the applicants' argument in any event.

[117] What the applicants (and the CCLA) seek to do in this part of the minimal impairment analysis is transpose a finding made by the B.C. Court of Appeal in the *Zhang* case onto the facts of this case. Such a transposition would not be appropriate, for two reasons. First, the by-law regimes are different. The Vancouver street by-law regime contained a blanket prohibition on the construction of structures on a street, except with the permission of city council. The evidence in that case disclosed that city council had passed two policies setting out the conditions for securing exemptions from the prohibition in the cases of commercial use and artistic expression. It was against that background that the B.C. Court of Appeal queried why city council could not fashion an exemption policy for political speech, and the court struck down the by-law because city council had not done so.

[118] In our case the Parks By-law enables a person to apply for a permit for an exemption from the “no shelters/no midnight hours use” portions of the by-law. §608-49 provides, in part:

§ 608-49. Permits and licences.

A. Permits for activities contemplated in this chapter may be obtained by contacting the Customer Service Section of the City’s Parks and Recreation Division.

B. Permits issued for activities contemplated in this chapter may be subject to fees established by the Commissioner.

C. Permits issued for activities contemplated in this chapter may include conditions as to time, location, area, equipment, number of participants, type of activities, release, indemnity and insurance coverage.

D. The issuance of a permit under this chapter does not relieve a person from the necessity of acquiring any other licence or permit required for the activity by any governmental or public authority.

E. No permit contemplated by this chapter shall be issued if it would result in the contravention of other applicable law.

There is no reference on the face of the Parks By-law to the existence of any underlying policies which set out further conditions applicable to the availability of permits for specific types of activities. In that respect the Parks By-law differs from the street by-law at issue in the *Zhang* case, so the reasoning of the B.C. Court of Appeal cannot be transposed from one to the other.

[119] However, the applicants went further to argue that the absence of any policy providing more details about the circumstances in which an exemption permit would be issued constitutes a constitutionally fatal defect in the Parks By-law. I disagree. First, the applicants and Protesters did not apply for a permit. It strikes me that for a litigant to argue that the exemption provisions of a municipal by-law are constitutionally inadequate when it did not try to obtain an available exemption is simply setting up a “straw man” argument. It would be one thing if the applicants had applied for a permit exempting their occupation of the Park from the two by-law restrictions identified in the Trespass Notice and had been turned down. Then they could ask a court to review whether the exercise of the delegated authority or discretion in denying the permit met the legal requirements of reasonableness, good faith, relevant considerations, and consideration

of any engaged *Charter* rights or freedoms.²⁸ That did not happen in this case. I regard this argument by the applicants as hypothetical.

[120] Moreover, it strikes me as going beyond the bounds of constitutional reasonableness to require, as a matter of general principle, that a municipality should have to turn its mind to and craft detailed exemption policies for every possible contingency. There is a reason why at a certain level in the legislative pecking order the only practical course of action is to delegate authority so that discretion can be applied to the multitude of scenarios which inevitably present themselves when applications for such things as permits are made. The way to police such delegated power is by imposing general requirements on the proper exercise of discretion, not a constitutional obligation to draft policies to cover every possible contingency. The B.C. Court of Appeal accepted that in *Zhang*: “[T]he By-law must be looked at as part of an entire regulatory scheme in which a general prohibition is necessary because the City could not foresee every encroachment or obstruction”.²⁹ While the B.C. Court of Appeal said to the municipality, “if you can craft two exemption policies, then you can craft a third”, that is not this case.

[121] I therefore do not accept the submissions of the applicants and the CCLA on this point.

(e) Summary on minimal impairment

[122] In sum, for the reasons set out above, I conclude that the City has demonstrated that its issuance and service of the Trespass Notice seeking to enforce two restrictions contained in the Parks By-law fell within a range of reasonable alternatives, tailored objective to infringement, and constituted a minimal impairment of the applicants’ section 2 freedoms.

D.3 There must be proportionality between the deleterious effects of the measures and their salutary effects

[123] Turning, then, to the final branch of the proportionality analysis, has the City demonstrated that there exists proportionality between the deleterious effects of the measure it adopted by issuing the Trespass Notice and its salutary effects? I have no hesitation in concluding that the evidence shows that there is proportionality. In seeking compliance with two provisions of the Parks By-law, the Trespass Notice would have the effect of ending the Protesters monopoly of a public park in downtown Toronto and requiring them to share it with the rest of the public. The Protesters have ample means left to express their message, including continued use of the Park (but no structures or “midnight hours”), and other Torontonians can resume their use of the Park. In my view such a result would more than meet the test for proportionality of deleterious and salutary effects.

²⁸ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, para. 82; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, para. 133..

²⁹ *Zhang, B.C.C.A., supra.*, para. 67.

E. Conclusion on section 1 of the *Charter*

[124] For the reasons set out above, I conclude that the City has established that the limitations resulting from the enforcement of the Trespass Notice on the applicants' section 2 freedoms are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

X. Remedies

[125] In light of that conclusion, I dismiss the applicants' request for declaratory and injunctive relief set out in paragraphs (a) through (g) of their Notice of Application.

[126] In paragraph (h) of their Notice of Application the applicants seek a declaration that they are constitutionally exempt from the application of the *TPA* and Parks By-law as it pertains to their eviction or removal from the Park. This remedy was not pressed strongly by the applicants at the hearing. They could not point me towards any jurisprudence which would support granting a constitutional exemption in these circumstances.

[127] The discussion to date about constitutional exemptions has been conducted in the context of a finding that a statute violates a *Charter* right, and the question then becomes whether the law should be struck down or whether it should be allowed to stand, subject to constitutional exemptions in particular cases.³⁰ I have found that the Trespass Notice was not constitutionally infirm in its particular application to the activities of the applicants and the other Protesters. The issue of the availability of a constitutional exemption therefore does not arise. In any event, it would be a most curious constitutional exemption which would have the effect of excluding many members of the public from a park, while granting a small group exclusive possession of it.

XI. Conclusion

[128] For the reasons set out above, I conclude that the Trespass Notice is constitutionally valid. I dismiss the application. The parties have agreed that there will be no order as to costs in light of the public importance of the issues raised by this proceeding.

³⁰ *R. v. Ferguson*, [2008] 1 S.C.R. 96, para. 34.

[129] May I repeat what I said at the close of the hearing. All parties to this proceeding were well served by their counsel. I appreciate the professional and co-operative manner in which counsel prepared for the hearing. I appreciate the great assistance which counsel gave to me at the hearing in gaining an accurate understanding of the positions of their respective clients, including their responses to my many questions. It was a pleasure to have had counsel appear before me, and I thank them.

(original signed by)

D. M. Brown J.

Date: November 21, 2011