C.A. Nº A-093-17

COURT OF APPEAL FOR ONTARIO

BETWEEN:

The CITY OF THUNDER BAY, ONTARIO

(Appellant)

- and -

MICHELLE RAINFOOT
DAVID MORRISON

(Respondents)

APPELLANT'S FACTUM

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PART I:
INTRODUCTION

This case will address the Trespass notice, which was enforced on the Respondents, members of the Nishnawbe Aski First Nation, by the Appellants, the City of Thunder bay. There are four main issues that will be argued including whether Harcourt J. erred in finding the Trespass Notice violates s. 2(b) and (c) of the Charter and whether or not it is justified under s. 1 of the Charter. Topics such as the health and safety of the Respondents, and the effect of the encampment on the park and the community will be explored in depth in order to prove that the City has the right to impose the Trespass Act on the Respondents in this situation.

PART II:
SUMMARY OF THE FACTS

1. In October 2012 the federal government introduced Bill C-35, the *Jobs and Growth Act, 2012.* The *Act* became law the following December. Since its introduction, concerns about the *Act's* impact on Indigenous rights and environmental regulation – and about Indigenous rights and the environment in general – have become the basis for protests across Canada and abroad. Collectively, these have become known as the "Idle No More Movement".

2. The Respondents are members of the Nishnawbe Aski First Nation, which is a party to James Bay Treaty No. 9 and the Ontario portions of Treaty No. 5. Ms. Rainfoot and Mr. Morrison each live in Thunder Bay and they are deeply connected to their First Nations community and their heritage.

3. In connection with the Idle No More Movement, the Respondents, along with other protesters, began holding weekly gatherings at Prince Arthur's Landing at Marina Park in Thunder Bay in December 2012. The purpose of these meetings was to speak out against Bill C-45 and to call attention to the approach of the federal government to the protection of Aboriginal lands and the environment.

4. Part of the protesters' message was one of support for the hunger strike of Attawapiskat Chief Theresa Spence. Chief Spence's strike was the subject of a great deal of media scrutiny and so kept the concerns of the Idle No More Movement in the public eye for its duration.

5. After Chief Spence ended her hunger strike, the protesters felt that there needed to be a continued presence that reflected the ongoing urgency of the issues regarding Bill C-45 and development on Aboriginal lands. Inspired by the Occupy Movement, they felt that a continuous encampment would illustrate the seriousness of their concerns, and provide a permanent space to allow the voices of First Nations and other concerned individuals to be heard through the media. The Respondents and fellow protesters began occupying Prince Arthur's Landing since January 24, 2013.

6. The continuous encampment raised the concerns of the Appellant. On March 1, 2013, citing issues of safety to the protestors and the public, public access to and enjoyment of the park and damage to the park, the City of Thunder Bay (City) issued Trespass Notices to everyone who was present in the park, and posted these notices on unoccupied tents. The Trespass Notice states:

> You are hereby given notice that you are prohibited from engaging in the following activities at Prince Arthur's Landing and in any other City of Thunder Bay 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.

7. The Respondents brought an application seeking an injunction against the enforcement of the Trespass Notice. The trial judge, Harcourt J., considered this application and found that:

> a) the Trespass Notice violates s. 2(b) of the *Charter of Rights and Freedoms;*
> b) the Trespass Notice violates s. 2(c) of the *Charter*; and
> c) the Trespass Notice cannot be saved under s.1 of the *Charter.*

8. Turning to remedy, Harcourt J. granted the injunction in part, ordering the City not to

enforce the Trespass Notice insofar as it required the dismantling of the library yurt and the speakers' lodge.

9. The City has appealed this decision and is challenging the decision on the three Charter issues and on the issue of remedy. The Respondents are counter-appealing the fourth issue and seeking an injunction against acting on any aspect of the Trespass order.

10. Justice Harcourt granted a partial injunction against the removal of the Speaker's Lodge and the Library Yurt. He granted this injunctive relief after determining that the Trespass Notice violated the Respondents' freedom of expression (Section 2(b)) and their freedom of peaceful assembly (Section 2(c)). The judge concluded that these infringements were not reasonable or justified, as they did not meet the criteria of the Oakes test.

PART III
GROUNDS OF APPEAL

ISSUE ONE: DOES THE TRESPASS NOTICE VIOLATE THE RESPONDENTS' S. 2(B) FREEDOM OF EXPRESSION?

11. Section 2(b) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

Canadian Charter of Rights and Freedoms
Schedule B, Constitution Act, 1982, s.2(b)

12. The Respondents, through their protest gathering, are raising awareness around "the

need for greater consultation with First Nations, greater environmental protections, and the repeal of Bill C-45."

***Reasons for Judgement*,** para. 10

13. The Appellant fully accepts the Respondents reasons for protesting. The protestors are attempting to convey a specific message that is closely connected to their history, as well as the history of Canada, and their current living conditions on reserves. However, the manner in which they are expressing themselves poses a problem for the City of Thunder Bay, and gives the Appellants reasonable grounds for a limitation on their *Charter* right.

14. The Respondents argue that their protest gathering "is a protected form of expression." They have also effectively stated that "the freedom to express political ideas and opposition to government is at the core of what it means to live in a free and democratic society."

Reasons for Judgement, para. 18

15. The Appellant fully accepts that the freedom to articulate one's political opinions is a necessary facet of Canadian democracy. However, the Appellant does not accept that the spirit or the specific wording of the *Charter* protects this protest gathering. While the camp is arguably representative of the living conditions on some reserves, the yurts have been proven to be damaging the land at Prince Arthur's Landing. In *Smiley v. Ottawa (City)*, the Superior Court of Justice quoted the Right Honourable Justice MacLachlin who wrote, "It is difficult to see how society would value expressive activity that ... damages property, no matter how minimal." We, the Appellant, agree wholeheartedly with the sentiments of the esteemed Supreme Court Justice. The Respondents are displaying an obvious disregard for the preservation of public property.

***Smiley v. Ottawa* (City)**, [2012] ONCJ 479

16. Additionally, the presence of the Protesters at Prince Arthur's landing poses a problem for the other members of the community. Constant, twenty-four hour protest has proven to be intimidating, and a result; the skating rink is no longer being used to the extent that it once was. Its usage has in fact been diminished by seventy per cent, compared to the past five years. This protest has clearly prevented other community members from feeling welcome in their own public space.

17. The City of Thunder Bay has an undeniable responsibility to the public. The maintenance of the public park, and the preservation of its regular uses are important government functions. The Appellant respectfully requests that the court adopt the logic used in R v. Marcocchio, where the judge found that the freedom of expression may be limited if the manner in which one is expressing themselves is an "interference with the proper and orderly functioning of government owned property." Permanent shelters and night time protests inhibit the flow of events in the park, and therefore are not protected by Section 2(b) of the *Charter*.

R. v. Marcocchio, [2002] NSPC 7

18. In regards to Justice Harcourt's citing of *Weisfeld v. Canada* (1994), 116 D.L.R. (4th) 232 (F.C.A.), [1995] 1 FC 68 (CanLii), the Appellant wishes to respectfully submit that the judge may have misinterpreted the ruling of the Honourable Justices Mahoney, Linden and MacDonald JJ. A. Justice Harcourt sought to highlight the fact that certain "props" (banners, megaphones, pictures ...etc...) are protected by the tenets of the *Charter*. While this is undoubtedly true, the learned judge failed to acknowledge that the Supreme Court viewed the removal of permanent structures as reasonable and appropriate. Judge Linden acutely conveyed sentiment when he wrote:

> I am of the viewpoint that merely denying the appellant the right to erect and to occupy a permanent shelter, but leaving unimpaired his other means of communicating his message, infringed the appellant's freedom as little as was reasonably possible under the circumstances.

19. Finally, the Appellant would like to recapitulate their arguments by quoting the late

Justice Goldberg of the Supreme Court of the United States of America. "The rights of free speech and assembly, while fundamental in our democratic society, do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."

Cox v. Louisiana (State), 1965 379 U.S. 536

20. The City of Thunder Bay holds that the freedom of expression is integral to the legal framework of this great nation. The City also acknowledges that the message being expressed by the Protesters is very valid, and thus they have a right to articulate this message. The manner in which they have chosen to express themselves, however, is contradictory to the principles of a free and democratic society in that it is destructive in nature, and does not promote unity and order among the citizens of Thunder Bay. Therefore, we, the Appellant, feel that the Trespass Notice does not infringe upon the Respondents' Section 2(b) *Charter* rights.

ISSUE TWO: DOES THE TRESPASS NOTICE VIOLATE THE RESPONDENTS' S. 2(C) FREEDOM OF PEACEFUL ASSEMBLY?

21. "The Applicants ask this court to adopt the reasoning of Tarnopolsky and Beaudoin in *The Canadian Charter of Right and Freedoms (1982)* at pp.138, 142-43, where the authors state:

> "If we do indeed have a right to speak, and to be heard, the right to assemble may be the only way of ensuring the advocacy of the right to speak... Groups without the money to advertise often find it necessary to demonstrate. If their right to demonstrate is denied, the group must languish in a communicative vacuum. Demonstrations guarantee medial exposure, and in Western society access to the media are essential to the communication of a point of view, and to the fulfillment of group interests."

Reasons for Judgement, para. 31

22. According to the *Assembly of First Nations* Resolution Procedures, "The resolutions process serves to effectively foster and capture national consensus on significant policy matters and are considered at the Annual General Assembly or at the Special Chiefs Assembly." It is unnecessary for the protesters to assemble in the park incessantly because they have a national committee that can advocate for their rights and engage in a constructive dialogue with the federal government. They would receive free media coverage because the *Assembly of First Nations* is a nationally recognized organization that attracts the attention of the media when vocalizing their opinions regarding current events. Surely if the protesters wanted to speak out against Bill C-45 and have their voices heard, the most effective method would be to send their resolutions to the resolutions committee and have it heard by the Chiefs-in-Assembly to garner media and news coverage.

Resolutions Procedures [2011], Assembly of First Nations

23. The protesters are free to enter the park and express themselves as long as it is in accordance with the law; in this case, the Trespass to Property Act. As Justice Mackey ruled in Smiley v. Ottawa case, "Protesters can access public parks, as any citizen, during the normal hours of operation of the public place to express themselves, but are subject to reasonable limits such as the bylaws prescribe." Other citizens have as much right to use the park as the Protesters do. The Trespass to Property Act is intended for all citizens and should be followed by all citizens of this nation. There must be limitations on protests in a public park, just as there are limitations on all other public gatherings. Whether it be a concert, a farmer's market or even a public protest, each event is required to follow proper procedures and guidelines to make it fair for everyone using the park. All that the city is asking is for them to refrain from occupying the park between 12:01am and 5:30am. Surely this is a reasonable limitation, clearly defined by the City for the purposes of allowing all citizens equal access to the public park.

***Smiley v. Ottawa* (City)**, [2012] ONCJ 479

24. With respect, we the Appellant, find that the erection of structures on public property is not protected under the Charter, section 2(c). If we might again draw the Court's attention to Smiley v. Ottawa (section 51), it would become clear that " the erecting of structures of any type, contrary to the rules and regulations governing the said public property, is not a protected expressive activity". The charter gives an individual a right to assemble with another person or persons.

25. However, the charter does not protect every single object of this assembly. Considering the ruling in Roach v. Canada, the Appellant believes that "Freedom of peaceful assembly was geared toward protecting the physical gathering together of people and was not intended to protect the objects of an assembly that is organized to foster freedom of thought, belief, opinion or expression, or freedom of association, for that would be protected independently." Sections 2(b) and 2(c) was closely intertwined. Section 2 and its subsections were intended to protect the gathering of citizens so that they could express themselves in a free and democratic society. Nevertheless, freedom of assembly was meant for the person(s) and was not designed for each and every object used in a protest gathering.

Roach v. Canada, [2008] ONCA 124

26. A very obvious parallel can be drawn between this case and that of Batty v. Toronto (City). The protesters were issued a Trespass Notice after they continued to sleep in the park between the hours of 12:01am and 5:30am, also erecting structures that violated the Trespass to Property Act. The judge in this case, found that, "…by occupying the Park the Protesters are breaking the law", and that, "the Trespass Notice is constitutionally valid." We concur with Justice Brown on this matter.

Batty v. City of Toronto, [2011] ONSC 6862

27. The Appellant does not wish to make it seem as though the right to peaceful assembly is not an important part of democracy. Similar to the freedom of expression, this right allows citizens to vocalize their positions on certain, pressing issues. However, there are other more efficient avenues to be pursued when attempting to ensure one's voice is heard. As mentioned, the Assembly of First Nations would provide a proper platform for political conversation with government officials.

28. Furthermore, the Protestors, so as to ensure the continuance of a stable society, must respect the Trepass to Property Act. For these reasons, we, the Appellant, feel that the Trespass Notice, insofar as it disallows protesting between the hours of 12:01am and 5:30am, does not infringe upon the Respondents' Section 2(c) *Charter* rights.

ISSUE THREE: IS THE TRESPASS NOTICE SAVED UNDER S. 1 OF THE *CHARTER?*

29. Section 1 of the Canadian Charter of Rights and Freedoms clearly state that, with reasonable justification, the Canadian government may use this Section to limit rights and freedom enjoy by its people if the situation demands it. In this case the Aboriginals feel that thei rights in regard to s. 1, enforcing the Trespass Act considering their encampment and protests has violated s. 2. However, Section 1 of the *Charter* states: "the *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by laws as can be demonstrably justified in a free and democratic society". In the 1986 R. v. Oakes decision, the four criteria establishing what constitutes a "reasonable limit" were instituted, and must be applied to the case at hand.

Canadian Charter of Rights and Freedoms,
Schedule B, Constitution Act, 1982, s. 1

30. The first criteria of the Oakes Test states that "the objective, which the measures responsible for a limit are designed to serve, must be of sufficient importance to

warrant overriding a constitutionally protected right or freedom"

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

31. This section assures certain rights, but can also be used as a tool to limit those rights, "in pursuit of other legislative objectives". Fundamentally, where there are contending interests in respect to the *Charter*-protected rights, section 1 can determine whether it is acceptable to allow a right to be infringed in order to pursue other shared goals. Therefore, the rights protected under the *Charter* are not absolute.

32. In the present case we believe that though the legislation has the effect of limiting a *Charter* right the subject matter of the legislation is of "sufficient importance, which overrides the constitutionally protected right or freedom"[10]. Governments in a free and democratic society have the right to issue trespass notices and administer consequences to a person or group that disobeys the governing rules, regulations and bylaws.

33. Furthermore, occupying, or inhabiting a property owned by the community unreasonably infringes on the free use and access of other members. Several issues surrounding the protests such as politics, health and safety, destruction of the park, and sanitation may also intimidate or make other members intimidated.

34. The Batty v. Toronto case is a recent case in Ontario at the Superior Court level, and involves the same type of demonstrative encampment and issued trespass notice. The court found "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."

***Batty v. City of Toronto*,** 2011 ONSC 6862 (CanLII)

35. The second criteria, the three-stage proportionality test, states that

(a) The measures adopted must be carefully designed to achieve the objective in

question. They must not be arbitrary, unfair or based on irrational consideration; (b) the means, even if rationally connected to the objective in the first sense, should impair as little as possible the right or freedom in question; and (c) there must be a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance.

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

35. The Case States:

"The Applicants say that the camp is fundamental to their protest and the messages that they are trying to convey. . . the camp is a demonstration of the living conditions facing many first Nations people on a permanent basis- many of our people live in shelters that are not much more advanced that the ways we are living in the park. The camp also provides the space and time to discuss the issues of the Aboriginal economies, environmental sustainability and environmental sustainability; to come up with solutions, and to continually put pressure on decision-makers to make responsible decisions."

***Reasons for Judgement*,** para. 7.

37. We find this to be a unnecessary and an irrational force of action for the Respondents. They may claim that it is violating their freedom to assembly or expression; however, the degree of protection the Charter will provide when the case involves freedom of expression, will vary depending on the nature of the expression. Certain types of expression will receive a higher degree of protection. Attempts by Parliament to restrict those types of expression will demand a less respectful approach from the courts: see *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199 at ¶71 and following. We do not believe that the political expression that the Respondents are carrying out is sufficient enough to assume control of the park and break the Trespass to Property Act.

38. Furthermore, the Respondents do not have a valid enough reason because there are other organizations, such as the First Nations Assembly, that can effectively and lawfully raise awareness and fight for their cause. There is no reason for them to be

using public park space unreservedly, when there are designated places and organizations put in place for issues such as this.

39. An issue of pressing and sufficient importance is that of the health and safety of the people. To reiterate para. 12 in the case the city decided to issue the Trespass Notice because of the serious risk of fire in the camp and because two protestors had been hospitalized for severe frostbite.

40. The safety and well being of our citizens is of top priority to the city of Thunder Bay. We cannot allow for the people to put themselves in harms way therefore to prevent this from happening they should abide by the law and limitations of the Trespass Notice since their procedures of permanent protest have proved to be ineffective.

41. There is rational connection because the city is not prohibiting their protesting it is simply putting appropriate restrictions on it. Protesters can access public parks, like any other citizen, during the normal hours of operation of the public place to express themselves, but are subject to reasonable limits prescribed by the bylaws.

42. For these reasons such an arrest can hardly be considered arbitrary, unfair, or based on irrational considerations with the circumstances. The Trespassing Act is in effect and the city is exercising its power for the comfort and safety of the protesters and the citizens of the city.

43. The rights of the Respondents have been minimally impaired as they have been treated with respect and patience in this situation. Firstly, they have been treated by the city's hospitals for their medical needs. Furthermore, there has been no violence or destruction of their encampment even though they have been destructive to the park. There has been no evidence of discrimination against them and have been allowed to continue their protest for, what we believe to be, an appropriate length of time.

44. However, negative effects of the Respondents encampment and protests are becoming increasingly evident. This includes the health and safety concerns and well as the destruction of the park. In addition, the community members may feel pressured or intimidated in a park that rightly belongs to them. For example the yurts used that destroy the park's grass and do not provide equal ease of the park for other members. For these reasons the Trespass Act is a is a necessary action that impairs their rights and freedoms as little as possible. The objective of the city can not be achieved with less drastic means.

45. Finally, in consideration of the proportionality of effect, we believe that the importance of the objective outweighs the infringement's severity. We believe that the analysis on s. 1 is highly contextual in this case which reflects the ideas of the *Committee for the Commonwealth of Canada v Canada.*

46. There must be a balance when reflecting on situations of expression and assembly on the park's land. For example, there is the cost of the taxpayers of this city to take into consideration. The people of the city may have no involvement in this case yet their money must go towards the health treatment of those on the encampment and towards the rebuilding of the park which they are inhabiting. Canada is a democratic and free country striving towards equality and contributing equally towards free health care and maintenance of public land. It is not a fair balance for the whole city to have to pay the price for those who are protesting.

47. There must also be a balance between people expressing their rights and assembling and the health and safety of the people in and around the park. The danger and destruction of the park has been previously and clearly stated. We believe that the message that they are trying to convey is being more obscured than promoted with the negative attention and happenings that are going on because of the permanent encampment and protest.

48. Another thought for consideration is the importance of the strictness of law. If the government begins to make allowances for certain groups to break the law, such as in

this case with the respondents breaking the Trespassing Act, than what will stop others in doing the same. Our society is built on constructive rules that are put in place for reasons. If one is not enforced correctly, then our society and foundation of law could crumble.

49. Furthermore, we would like to bring, to attention of the court, that there have been other cases with similar arguments that have proved to be reasonable and justifiable, therefore; ruled in favour of the city.

The British Columbia Supreme Court [In Chambers] (November 2011), dealing with another Occupy encampment demonstration, where the City of Victoria sought interlocutory relief, ruled in favour of the City noting that the laws (Park bylaws) which the protesters seek to suspend, or from which they seek to be exempted, have been enacted by democratically elected legislatures and are generally passed for the common good.

The Alberta Court of Queen's Bench (December 2011), Calgary (City) v. Bullock continues the encampment occupy demonstrations cases. The court found in favour of the City and ordered the removal of the occupiers and their encampment. The court noted that the City's limits on the protestors were reasonable (in balancing the competing usage of the public facilities) and prescribed by law (a municipal by-law).

***Smiley v. Ottawa* (City)**, [2012] ONCJ 479

ISSUE FOUR: DID HARCOURT J. ERR IN FINDING THAT GRANTING THE INJUNCTION AGAINST THE REMOVAL OF THE LIBRARY YURT AND SPEAKERS' LODGE WAS A JUST AND APPROPRIATE REMEDY?

50. Harcourt J. did err in granting a permanent injunction against removing the library yurt and the speaker's lodge.

51. The Protesters can't have any permanent structures because the structures destroy the grass and could be hazardous to other people using the park. The Respondents are allowed to assemble in daytime hours as long as they are not destroying public property. The camp is causing damage to the tarmac and the grass areas, which will cost thousands of dollars to fix. The City States:

> In the summer months, Prince Arthur's Landing is a community hub which hosts a weekly farmer's market and summer concert series, including the Thunder Bay Blues Festival. Prince Arthur's Landing is also a regular destination for families for picnics and afternoons by the lake.

If the protesters are not removed soon, the City will not have enough time to repair the damages to the park before the summer.

Reasons for Judgment para. 13

52. The Natives are not allowed to protest overnight because they have the whole afternoon to do so. The Trespass Notice states "you are hereby given notice that you are prohibited from engaging in the following activities at Prince Arthur's Landing and in any other City of Thunder Bay 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." They are only allowed to protest from 12:01 to 5:30, not allowing them to stay overnight at the park.

Reasons for Judgment para. 7

53. Why would the natives want to stay overnight at the park anyways? Sure it might prove that they are serious about their protest, but there would be no one at the park during the night, so it wouldn't make sense for the natives to stay overnight at the park.

54. In *R.J.R. McDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada set out the principles to be applied in every case:

Part 1) there must be a serious issue to be tried
Part 2) the applicant must establish he will suffer irreparable harm if the injunction is not granted
Part 3) the balance of convenience must favour the applicant

55. The three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

Is there a serious issue to be tried?

56. At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious issue to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

57. There is a serious issue to be tried because the Respondents are protesting about the Idle No More Movement in the public park and the city is violating their rights and freedoms with reasonable limitations. The Protesters are damaging the park with their tents, two people were severely injured with frostbite and the amount of people attending

the park has decreased, so the city placed a Trespass Notice on the park for everyone in it.

Which party will suffer irreparable harm if the injunction is not granted?

58. The second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. `Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

59. The Respondents will not suffer irreparable harm if the injunction is not granted because they could go to a different park or a different location to protest. The only thing they would suffer harm from is the fact that their rights have been violated. The park will suffer irreparable harm because of the damage to the grass and the fires they have. The damage will cost thousands of dollars to fix and may not get fixed in time for the summer. If the Protesters continue to stay at the park, no one would want to go to it anymore because the grass is damaged and it wouldn't look very appealing.

Balance of Convenience

60. The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

61. If the injunction is granted, the city of Thunder Bay would find it hard to keep people safe in the park. The protesters would be able to stay in the park and keep damaging it. This would drive people away, as well as intimidation because no one wants to go to a damaged park, where there are a group of protesters who look intimidating.

62. If the injunction is granted, the Protesters would feel that they have achieved their goal. Therefore the Respondents would be able to continue protesting at the park about the Idle No More Movement and keep their permanent structures.

63. All three prongs of the test must be met in order for the interlocutory injunction to be granted.

64. The appropriate remedy is to deny the request injunction because the Trespass Notice is justified under the Oakes Test and does not severely impinge upon the Protesters freedom of expression and freedom of assembly.

65. Section 1 of the *Charter* states 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. The rights and freedoms can be limited in order to protect other rights or important national values. This limitation is appropriate in order to protect the other people using the park. Other people in the park might feel intimidated by the natives even though they don't appear to be intimidating.

APPLICATION TO THIS CASE

67. In conclusion, we, the Appellant, find that even if the Trespass Notice allegedly infringes upon the Respondent's rights, it should be enforced because it is reasonable and justified. Public protests cannot have a monopoly on public property; they must consider the needs of the greater community and, more importantly, the health and safety risks. Therefore, we find that it is not appropriate for the protest to occur between the hours of 12:01am and 5:00am. We would also like to draw attention to

the damages inflicted on the park by the construction of yurts and other structures, the heating for food and the requirement for bathroom facilities. These are unreasonable uses of the park and we believe that the Respondents should obey the laws of the city just as the rest of the members of the community do. The intent of this argument is not to hinder the freedom of expression or assembly. These are freedoms that are of the utmost importance and are integral to Canadian society. Rather, this argument seeks to create a balance among the citizens of Thunder Bay, thereby promoting safety, equality, and unity. All rights must have limits and restrictions in order for our society to properly function in a just fashion. Without these limits, our nation would not be the model of freedom, equality, and democratic dialogue that it is.

PART IV
ORDER REQUESTED

68. It is respectfully requested that the appeal be granted, and that the Trespass Notice be given the full force of law. Subsequently, the partial injunction against the removal of the Library Yurt and the Speaker's Lodge will have no effect.

ALL OF WHICH is respectfully submitted by

Jennah Dohms, Brendan King, Sydney Schnurr, Andrew Zettel

Of Counsel for the Appellant

DATED AT Walkerton, ON this 23th Day of **April, 2013**

APPENDIX A

AUTHORITIES TO BE CITED

Batty v. City of Toronto, [2011] ONSC 6862

Canadian Charter of Rights and Freedoms
Schedule B, Constitution Act, 1982, s.2(b)

Cox v. Louisiana (State), 1965 379 U.S. 536

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R.J.R. McDonaldInc. v. Canada (Attorney-General), [1994] 1 S.C.R. 311 (S.C.C.)

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R. v. Marcocchio, [2002] NSPC 7

***Smiley v. Ottawa* (City)**, [2012] ONCJ 479