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)

RESPONDENT'S FACTUM

O'Neill and Pray
1267 Chapman St. Toronto, Ontario

Katrina Wyatt, Brooke Schnurr, Katrina Hodgins, Jake Colquhoun
Of Counsel for the Respondent

Telephone: 1 (519)-889-1326
Fax: (519)-475-9856
Email: Oniellandpray@gmail.com

PART I:
INTRODUCTION

1. This case is about the freedoms of a group of protestors versus the city of Thunder Bay and their attempt to evict the protestors from Prince Arthur's Landing, Marina Park. The Respondents claims that their *Charter* rights are violated in the process of the eviction notice under sections 2 (b,c), and 1. The balance between individual rights and the ability of the City of Thunder Bay to allow protestors within the community to protest in their parks with respect to their *Charter* rights is crucial. According to the protestors the gathering was a non-violent, peaceful way of getting their option of Bill C-45 across to the public. The protestor's *Charter* rights were in fact denied when they received an eviction notice from the City of Thunder Bay due to assumed damages, and safety restrictions within the park. Therefore, trail judge Justice Harcourt J. is justified in stating that the trespass notice does violate the protestor's rights under the *Canadian Charter of Rights and Freedoms.*

PART II:
SUMMARY OF THE FACTS

2. 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".

3. 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.

4. 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.

5. 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.

6. 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.

7. 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.

8. 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.*

9. 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.

10. 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.

11. Harcourt J. decided that the Trespass Notice violates s. 2(b) of the Charter on the basis that:

> "Through their camp, they are attempting to convey political messages, which have historically been protected by the courts. Their situation is much more analogous to the peace camps, meditation tents, and to the Occupy movement than to the situations raise in the *Native Women's Assn. of Canada* or *Baier."*
>
> *Para, 27.*

12. On the issue of s. 2(c), Harcourt J. stated:

> Freedom of assembly is protected in the same manner as freedom of expression, since those rights are deeply intertwined: *Corporation of the Canadian Civil Liberties Association v. Canada (Attorney General)* (1992), 8. O.R. (3d) 289. As with the protection afforded to freedom of expression, any infringement of the freedom to assemble, however limited, must be justified under s. 1 of the *Charter.*"
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> *Para, 33.*

13. With respect to s. 1, Harcourt J. found that the Trespass Notice did not pass the Oakes Test pertaining to the minimal impairment test:

> "…the Trespass Notice is not minimally impairing insofar as it prohibits any structures to be maintained in the park. The two yurts that are used by the protesters for a library and speaker's lodge are not causing significant damage to the park, nor do they pose a fire hazard. Using these two structures during the daylight hours does not pose a health risk. Nor do I think the presence of two yurts will have a significant impact on the ability of other members of the community to use the park."
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> *Para, 51.*

14. With the situation of Remedy, Harcourt J. concludes that he orders the City of Thunder Bay to not enforce the Trespass Notice on the fact that it requires the protesters to take down and remove the library yurt as well as the speaker's lodge.

PART III
GROUNDS OF APPEAL

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

15. The basic interpretation of the individual's freedom of expression is that an individual has the right to express their thoughts, beliefs, and opinions including freedom to use the press and other media communication. They are free to do this through different mediums while not promoting hate. The medium the Respondents chose was to camp in Prince Arthur's Landing, a public park in Thunder Bay Ontario. Through the course of this case the Respondents argue that "…their protest gathering is a protected form of expression." At the same time they argue "…that the camp itself is also a protected form of expression". The Respondents reason that their rights guaranteed by the *Canadian Charter of Rights and Freedoms*, have been infringed upon; specifically section 2 (b), freedom of expression. A review of section 2 (b) establishes that the

Trespass Notice issued to the Respondents does in fact infringe on their *Charter* rights under section 2 (b).

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

16. As a result of the Irwin Toy case, the court must use a two Step approach to establish if a breach of section 2 (b) has occurred. Step one involves determining if the protest conveys a meaning, and constitutes non-violent activity. The second step is to consider whether the purpose of the Trespass Notice is to restrict the protesters' freedom of expression.

Irwin toy ltd. v. Quebec (Attorney general), 1989 CanLII 87 (SCC), [1989] 1 SCR 927

A) Step One of the *Irwin Toy* Test

17. The protest occurring in Prince Arthur's Landing does in fact convey meaning and does not constitute violent activity. The purpose of the protest is to speak out against Bill C-45 and to voice their concerns about the protection of Aboriginal lands and the environment. The choosing of Prince Arthur's Landing was because of the lake-side location, that Ms. Rainfoot states "acts as a reminder of our shared environmental heritage, and the need to preserve that heritage for future generations". This is integral to the message that they are trying to portray.

Irwin toy ltd. v. Quebec (Attorney general), 1989 CanLII 87 (SCC), [1989] 1 SCR 927

B) Step Two of the *Irwin Toy* Test

18. The purpose of the Appellants action is to restrict the time the First Nations people and other concerned individuals have to protest. The Trespass Notice infringes upon their freedom of speech as guaranteed under the *Charter*, and was issued because of their continuous encampment throughout the night hours. The Respondents intent of their protest camp is not to promote violence or to harm the park. The camp itself is a protected form of expression, just like in the case of *Weisfeld v. Canada* pertaining to the peace camps. It is a protected form of expression as it suggests the urgency of the issues and is an essential role of the message they are trying to express. Furthermore, the environment of the camp demonstrates to the public how many Aboriginals live on a day to day basis. Therefore by limiting the amount of time the Respondents have to protest, is a restriction on freedom of expression which is unreasonable and unjustifiable. Likewise, section 2 of the Trespass Notice also breaches this freedom as it is preventing expressive demeanor displayed by the Respondents. The right to protest is fundamental to freedom of expression and one cannot bring about change in our society just through daily a.m. to p.m. hours. People can only bring about change through constant and pressing protest in a civil nonviolent manner, which is displayed at Prince Arthur's Landing.

Weisfeld v. Canada, 1994 CanLII 3503 (FCA), [1995] 1 CF 68
Irwin toy ltd. v. Quebec (Attorney general), 1989 CanLII 87 (SCC), [1989] 1 SCR 927

19. The Respondents have the right to go on public property such as Prince Arthur's Landing, to protest and express themselves. The Appellant's cannot restrict the rights

of the protesters. They are concerned about the damage to the tarmac and grass areas in the park however this issue is frivolous and vexatious. Prince Arthur's Landing is located in Thunder Bay, Ontario, where there is a great quantity of snow that falls during the winter months each year. After this time there will already be damage to the grass and tarmac in the park that the City will have to invest money into to repair. It is inappropriate and unjust to evict the Respondents out of the park over a minute amount of damage due to their encampment. The message the Respondents are trying to portray through their protest is the larger issue that should be taken into consideration before all else.

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

20. The basic interpretation of the individual's freedom of peaceful assembly is that an individual has the right to speak their own opinion openly, and gather with others in a nonviolent matter. In the course of this case, it is important to note the circumstances surrounding the eviction of the Respondents. The Natives were given an eviction notice to remove them from Prince Arthurs Landing at Marina Park in Thunder Bay, by the city of Thunder Bay. The Respondent argues that "the actions of the city violate their rights under the *Canadian Charter of Rights and Freedoms*, particularly: the right to freedom of peaceful assembly, and association. Under section 2(c) of the charter." A systematic review of section 2(c) demonstrates that the eviction notice the repellents received is in fact a violation of their *Charter* rights under section 2(c).

21. The main footing of the Respondents arguments regarding section 2 of the *Charter* is

that the trespass notice violates their rights, especially right to peaceful assembly and freedom of expression. Prince Arthur's Landing "lies in direct view of the peninsular rock formation known in English as 'The Sleeping Giant'. This formation is identified in Ojibwe legend as the body of Nanabijou, a supernatural being who figures prominently in the traditional stories and beliefs of local Ojibwe people." This proves that the park has extreme significance to the Native group and if they feel that it helps to express their views they should therefore be able to assemble peacefully and publicly there.

22. Concerning the violation of the Respondents section 2 rights due to the eviction notice from the park during the hours of 12:01 a.m. until 5:30 a.m. the *Canadian Charter of Rights and Freedoms* states that "our right to gather and act in peaceful groups is also protected, as it is our right to belong to an association such as a trade union." Therefore, it is within unreasonable limits that the city of Thunder Bay is attempting to evict these innocent protestors from the park due to reasons like damage to the grass, and the threat of other people not visiting the park. As stated in the C*harter* everyone has a right to peaceful assembly, and that is all that the protestors are doing in the park. In addition, this park is important to the Natives as it is "acts as a reminder of our shared environmental heritage, and the need to preserve that heritage for future generations." This park has extreme religious as spiritual meaning to the Natives and they are hence treating it with the uttermost respect, therefore the city has no right to evict them from the public park.

23. While the Appellants reasoning in the respect of public property and the usage of the park from all of the cities citizens is respected, the underlying weight of these reasons

is considerably lower than that of the Natives rights to freedom of expression. It is not tolerable, nor appropriate for the city to imply the eviction notice as they had. The Batty case (Batty v. Toronto (City), 2011), another "occupy" movement case, relevant to the OCJ, concludes with the note that, "Part of our Constitution talks about "peace, order and good government", and recognizes that the *Charter* did not displace that organizing principle which is so characteristic of Canada. The court concedes that the protestors may well, based on the evidence, also seek peace and order, but concludes that, "the rigidity and absolutism of the Protesters' position (which was summed up as) - let us keep our tents and around the clock occupation - does not fit with the balancing of competing interests which our Constitution requires." The court further notes that the protesters have other options such as applying for an exemption from the bylaws which prohibit night usage of the park and the use of shelters in the park. Speaking to the issue of proportionality, the court notes that, "the Trespass Notice would have the effect of ending the Protesters monopoly of the park...requiring them to share it with the rest of the public." The court found the limitations resulting from the enforcement of the Trespass Notice on the section 2 freedoms to be reasonable limits prescribed by law and are demonstrably justified in a free and democratic society. The Trespass Notice is found to be constitutionally valid. We the Respondent disagree with this decision because like the Natives situation, the camp was a symbol of the seriousness of my commitment and the permanence of concern. A physical camp is a necessary element of the protest in this case, as it has been serving as a demonstration of the creation of a new social model—the kind of model for which Occupiers are advocating. In addition, desire to avoid inconvenience or unease from the city, doesn't constitute a justifiable reason to limit expression and assembly, especially if the City's position is

that there should be no cost or inconvenience. Furthermore, since the City can grant a permit to allow camping in parks at its sole discretion, and since no guidelines for that decision-making process is publicly available, it failed the minimal impairments test with regard to reasonable limits on freedom of expression.

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

24. The Respondents section 2(c) and section 2(b) *Charter* rights were based on the facts of the case, violated. Nowhere is it stated in the facts of the case that the Respondents acted negatively, or violently, making the assembly non-peaceful. The Respondents protest was a mere attempt to peacefully, and productively express their opinion on bill C45. Therefore, the appellant's eviction notice towards the repellent was unnecessary and unlawful violating section 2 of the *Charter*. As proved in *Smiley v. Ottawa*, "the applicant also notes a lack of any other available venue to peacefully assemble given the time of day (which presumably refers to the 3:00 A.M. eviction from the Confederation Park site). The argument is that there were few people in the park when the police executed the trespass order; there was no evidence of violence; no damage to the park; no obstruction of passage by others; and, no imminent need to disperse the crowd for any other public order or safety reason." As in the Smiley case, the protestors were evicted under unimportant circumstances were given the unfair eviction notice.

Smiley v. Ottawa (City), 2012 ONCJ 479 (CanLII)

25. In addition to the violation of the C*harter* rights, there is also the issue of not minimally impairing in the Respondents situation. Rather than evicting the protestors completely

from the park, the Appellant could have requested that the number of protestors is limited so that minimal damage to the park occurs, if any. Moreover, the Appellants also could request that the occupied area of the park be limited into a specific area, rather than being limited to certain hours of the day. Hence the action of evicting the protestors entirely was terribly superfluous.

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

26. The Trespass Notice is not saved under section 1 of the *Canadian Charter of Rights and Freedoms*. Section 1 states "[t]he *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". This means that not all of the rights and freedoms are absolutely guaranteed, as the government has allowed for reasonable and justifiable limits to be placed on selected *Charter* rights. The First Nation's people and other supporters of the "Idle No More Movement" are peacefully protesting in a public park, causing no harm, therefore Harcourt J. did not err in judgment when he decided that the city of Thunder Bay is violating section 1 of the *Charter*.

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

27. Since the case of *R v. Oakes* there is a four step approach which must be successfully completed to establish what constitutes a "reasonable limit". All four criteria of the test must be met.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103

28. The first step of the Oaks test questions if the city's purpose in limiting the *Charter* protected freedoms of the protestors is a pressing and substantial objective according to the values of a free and democratic society. The city claims they issued the trespass notice to protect the health and welfare of the protestors, protect the park from damage and to ensure everyone equal usage of the park. These are important public concerns, meaning the city has met the first request of the Oakes test.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103

29. The second section asks whether the city's limitation of the Charter right has a rational connection to their objective. There is rationale behind the city's actions, for they are attempting to protect the grounds of the park and the safety of the protestors, so it is reasonable for them to believe that by not allowing the First Nations there at night that they are accomplishing their objective.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103

30. However section 3 of the Oakes test, minimal impairment, demands that the *Charter* rights must be minimally impaired or restricted "as little as is reasonably possible". The city does not comply with this requirement as the limit does not minimally impair the *Charter* rights of the Respondents. An appropriate response to the occupancy of the park could have been issuing a written warning following the hospitalization of the two individuals who were treated for severe frostbite. The result of these two protestors' actions, however, should not affect everyone occupying the park to the extreme of banning them between the hours of 12:01 and 5:30 am. This is not minimal impairment and is therefore inappropriate and unjust.

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103

31. The city has not passed the Oakes test meaning that they have failed to provide reason for limiting the rights and freedoms of the protestors protected by the Charter.

32. Furthermore, the Respondents' presence in the park does not limit the rights or freedoms of others, therefore the Appellants cannot use this as a substantial argument. They are not forcing their views upon the citizens who visit the park, for they have simply set up a camp in a section of Prince Arthur's Landing in Marina Park. The protestors are not restricting public use of the park, as they would like for people to visit so they can spread their message and concern for this pressing issue. The city blames the reduced attendance of the park on the First Nations occupying the park. The appellants decided that the citizens of Thunder Bay feel intimidated by the protest, though this may not be proved, as this is perceived intimidation.

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?

33. When deciding whether Harcourt J. made an err in instituting a permanent injunction against the removal of the library yurt and speaker's lodge it is necessary to understand what the purpose of both of these are. The library yurt and speaker's lodge are essential to the native protest. The library yurt contains resources of information that the natives must have to fully convey the message behind their protest. The speaker's lodge is just as important as it stands as a major stage for discussions regarding the protest and the direction the natives wish to take it. It serves as

gathering for free speech within the protest group as the natives have had several speakers attend and deliver addresses. Not only do the library yurt and speaker's lodge serve a physical purpose but they serve a symbolic purpose as well. The two establishments represent the severity of the protest. Their establishment shows the lengths to which the natives feel the need to go to convey the message they feel so strongly about. Furthermore, because these establishments convey this important meaning, as the Supreme Court of Canada has stated, the erecting of the library yurt and speaker's lodge is expressive because they attempt to convey a meaning, and are therefore protected under section 2(b) of the *Canadian Charter of Rights and Freedoms.*

34. It is also important to mention that courts have, in the past, continuously decided that shelters and encampments may constitute protected expression. This precedent has been recently upheld in the "occupy movement" encampments. To further strengthen the native protester's freedom of expression, section 2(b) of the *Charter*, the government may not under law evict individuals carrying out expressive functions on public property. This is a prima facie breach of section 2(b) of the *Charter* and is so because of the peaceful, safe, and expressive state in which the natives are holding their protest.

35. It should also be taken into account the possibility that the eviction notice was intended to be a means to silence the Idle No More movement. The grounds on which the city states as their reasons behind the eviction notice (minor damage to the grass, and the two individuals sent to the hospital with frostbite) are frivolous and vexatious in this

situation in which major issues regarding the rights of the Nishnawbe Aski First Nation's people are being fought for and protected in the most effective way the natives can. This would prove the order to be inconsistent with democracy and in that, would mean that this standard of freedom was not met. Therefore, the eviction notice holds no power under the *Charter*, and should be disregarded completely.

APPLICATION TO THIS CASE

36. In conclusion, Harcourt J. erred, not in his three findings that the Trespass Notice violates section 2(b), (c) and section 1 of the *Charter*, but slightly in his granting of the permanent injunction against removing the library yurt and speaker's lodge. Harcourt J. misunderstood the full significance that the protest symbolized including the installing, erecting or maintaining of a tent, shelter, or other structure. The twenty-four/seven occupation emphasized the extreme passion the natives have for their cause, and should not be taken lightly, or a more severe communication tactic may be used. If we choose to discredit the power and weight of the sometimes seemingly minute details that can be projected in our protests in our free and democratic society, we choose to miss the big picture and discredit our powerful system that is ours because of the *Canadian Charter of Rights and freedoms*; missing the forest because you're focusing on the tree if you will.

PART IV
ORDER REQUESTED

37. It is respectfully requested that the appeal be dismissed and that the judge be persuaded in ruling that the Trespass Notice not be enforced.

ALL OF WHICH is respectfully submitted by

Katrina Wyatt, Brooke Schnurr, Katrina Hodgins, Jake Colquhoun

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Of Counsel for the Respondent

DATED AT TORONTO this 23rd Day of **April**, **2013**

APPENDIX A

AUTHORITIES TO BE CITED

Irwin toy ltd. v. Quebec (Attorney general), 1989 CanLII 87 (SCC), [1989] 1 SCR 927

Weisfeld v. Canada, 1994 CanLII 3503 (FCA), [1995] 1 CF 68

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

Smiley v. Ottawa (City), 2012 ONCJ 479 (CanLII)

R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 SCR 103