COMPETING RIGHTS: CONTROLLING ACCESS TO MUNICIPAL PROPERTY

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Frederick Bracken protesting on Brock University campus in 2016

Overview

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- Case Discussions
  - *Bracken v. Regional Municipality of Niagara Corporation*, 2015 ONSC 6934
  - *Bracken v. Fort Erie (Town)*, 2016 ONSC 1122 and 2017 ONCA 668
  - *Bracken v. Niagara Parks Police*, 2016 ONSC 5615 and 2018 ONCA 261
  - *Langenfeld v. Toronto Police Services Board*, 2018 ONSC 3447
- Guidance for municipalities

Frederick Bracken

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“Mr. Bracken describes himself as a citizen journalist. When he disagrees with government decisions, he states his opinions, demands answers, and makes use of traditional means of protest, such as marching in the town square. He also video records his protests and interactions, sometimes aggressively questioning people at a proximity they find uncomfortable” - Ontario Court of Appeal

Bracken v. Regional Municipality of Niagara Corporation (aka Bracken I)

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Facts

- Council meeting on December 12, 2013 – asked to stop videotaping but not asked to leave.
- Council meeting on June 19, 2014 – while videotaping from the gallery, asked a councillor why she was suing him for his reporting on a personal matter involving her.
- June 24, 2014 – trespass notice issued by CAO (one year ban).



Bracken v. Regional Municipality of Niagara Corporation (aka Bracken I)

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Application by Bracken

- Sought declaration that notice was unconstitutional under s. 2 and 7 of *Charter.*

- Important finding – "the evidence does not establish that the Applicant exercised or attempted to exercise physical force against a Region staff member in the workplace that could cause physical injury to the staff member. Nor does the evidence establish that there was any statement or behaviour of his that was reasonable for a Region staff member to interpret as a threat to exercise physical force against the staff member in the workplace that would cause physical injury to him or her." (para 53)

Bracken v. Regional Municipality of Niagara Corporation (aka Bracken I)

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Decision by Justice Nightingale

- S. 2(b) rights violated – "In my view, his s. 2(b) right is actually to be able to attend and participate in open public Council meetings if he is not violent or threatens violence and abides by the applicable rules." (para 56)

- *Oakes* analysis – limit not justified under s. 1 as the notice was not minimally impairing and not proportional.
  - Other options – restrict ability to ask questions, restrict communications with Council members, warning that behaviour could result in restrictions, shorter ban from meetings.

Bracken v. Regional Municipality of Niagara Corporation (aka Bracken I)

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Decision by Justice Nightingale

- Other issues highlighted on authority to issue notice
  - *Municipal Act* s. 239 – all council meetings open to public
  - S. 241 – authority of head of Council to expel public from meetings does not give authority to ban
  - Importance of resolution or bylaw to be considered by Council regarding ban of member of public. In this case, no resolution or bylaw by Regional Council to ban Bracken from attending future meetings or to authorize the CAO to issue the trespass notice.

Bracken v. Fort Erie (Town) (aka Bracken II)

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<u>Facts</u>

- Anger over by-law regarding location of marijuana facility.



- June 16, 2014 protest
  - Letter to councillors
  - Megaphone
- Trespass notice prepared and police called.
- Refusal to leave premises and arrested.
- One year ban from three Town properties.

Bracken v. Fort Erie (Town) (aka Bracken II)

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Application by Bracken

- Sought declaration that notice was unconstitutional pursuant to s. 2(b) and 7 of the *Charter.*

- Decision of Justice Maddalena
  - The content of speech was protected but means of expression was not.
  - "Section 2(b) of the *Charter* protects lawful means of expression including peaceful assembly and association. The evidence in this case discloses that Bracken crossed the line of peaceful assembly and protest so that the expression cannot be protected under s. 2(b) of the *Charter*" (para 98)
  - Distinguished *Bracken I* on the facts because of evidence of threat of violence and intimidation, involvement of police.

Bracken v. Fort Erie (Town) (aka Bracken II)

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Decision of Court of Appeal

- Appeal granted and trespass notice found to be unconstitutional pursuant to s. 2(b) of the *Charter.*

- Key findings*:*

  - The protest was a form of expression protected by s. 2(b).

  - The location of the protest, in front of Town Hall, was a place where " free expression not only has traditionally occurred, but can be expected to occur in a free and democratic society" (para 54)

Bracken v. Fort Erie (Town) (aka Bracken II)

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- Key findings:

  - Acts of violence or threats of violence are not protected but the protest did not amount to either– "A person's subjective feelings of disquiet, unease, and even fear, are not in themselves capable of ousting expression categorically from the protection of s. 2(b)" (para 49)

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

Bracken v. Fort Erie (Town) (aka Bracken II)

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- Key findings:
  - *Oakes* analysis
    - Authority to expel or issue notice is not rooted in the *Occupational Health and Safety Act* as it does not confer powers regarding the activities of someone who is not a co-worker (para 69)
    - Not rooted in *Trespass to Property Act* either as is purely an enforcement mechanism.
    - Source is the common law – "At common law, an occupier of a property has the power to expel others, and has the power to invoke the remedies supplied by the *Trespass to Property Act*" (para 71)

Bracken v. Fort Erie (Town) (aka Bracken II)

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- Key findings:
  - *Oakes* analysis
    - " Where a government issues a trespass notice relying on the common law power to expel persons from property, it is exercising a power that is subject to implied limits. It cannot be issued capriciously" (para 75).
    - Town's actions did not have a sufficiently important purpose given its misapprehension of Mr. Bracken's actions and the threat they posed.
    - Also was not minimally impairing, was overly broad and not proportional.

Bracken v. Niagara Parks Police (aka Bracken III)

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Facts

- August 2, 2016 – holding sign on property owned by Niagara Parks Commission near entrance to Maid of the Mist with sign that reads “Trump is right. F*$% China. F*$% Mexico.”

- Complaint made, police attend, argument ensues and Bracken calls officer a “f*$% piece of s#!@”, a “power tripping f%6&ing idiot” and a “goof”

- Bracken given summons under *Provincial Offences Act* for two offences under Regulation 829



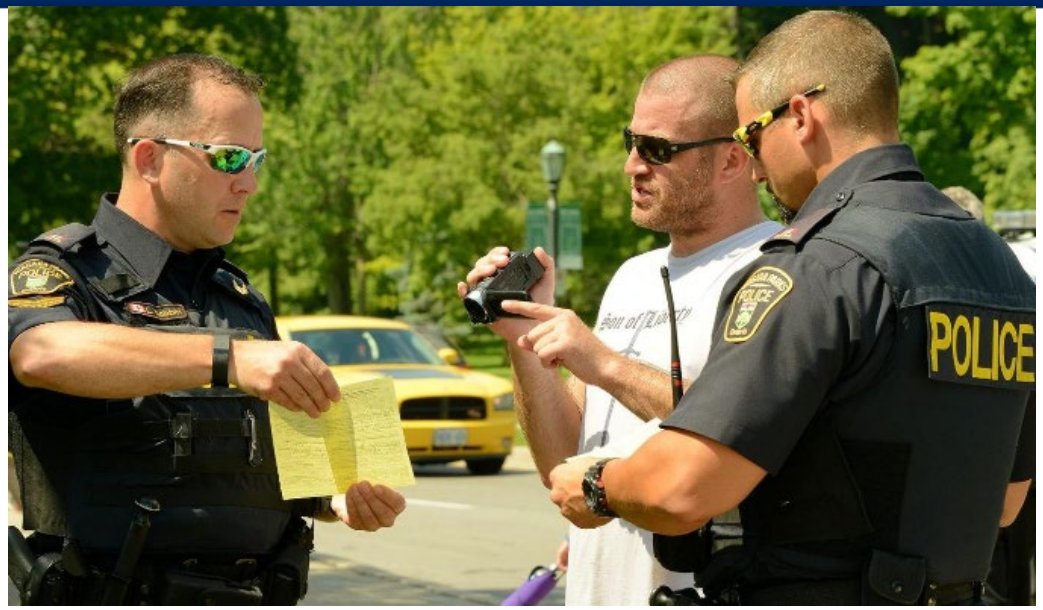
Section wording – “no person shall: use abusive or insulting language, or conduct himself or herself in the Parks in a manner that unnecessarily interferes with the use and enjoyment of the Parks by other persons”

Bracken v. Niagara Parks Police (aka Bracken III)

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Application

- Bracken challenges constitutionality of Regulation 829 as violating s. 2(b) rights



Decision of Justice Ramsay

- S. 2(b) analysis
  - One would expect a measure of freedom of expression in a provincial park but abusive and insulting language is not protected

- "most people do not go to the Parks with democratic discourse or truth finding in mind and abusive and insulting language is not an effective means to engage them." (para 13)

Bracken v. Niagara Parks Police (aka Bracken III)

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- *Oakes* analysis
  - Limit is justified under s. 1
    - "Preservation of the Niagara Parks is a pressing and substantial objective. Niagara Falls is one of the world's natural wonders. The Parks as an attraction are very important to the local economy, the quality of life in the province and Canada's international reputation. People are attracted to the atmosphere of the Parks. They are also attracted to the commercial activities, which are carefully managed so as not to detract from the natural environment." (para 15)

    - "They only have to refrain from abusive or insulting language, objectively defined. This is not disproportionate." (para 18)

Bracken v. Niagara Parks Police (aka Bracken III)

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Decision of Court of Appeal

- Found that the regulation did infringe on Bracken's s. 2(b) rights but agreed that it was justified under s. 1.

- Court disagreed with Bracken that the regulation was vague and emphasized the importance of clear drafting – "An appropriately specific law gives fair notice of the type of behaviour that enters the 'risk zone' of non-permissible conduct." (para 66)

- Court found that the regulation served a sufficiently important purpose – "safeguarding the reasonable use of the Parks by the public by prohibiting others from unreasonably interfering with that use." (para 72)

Bracken v. Niagara Parks Police (aka Bracken III)

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Decision of Court of Appeal

- Regulation minimally impaired – "Section 2(9)(a) does not cast a wide net over expressive activity at the Parks. As noted above, the provision does not control expression that society expects a reasonable person to be able to tolerate." (para 75)

- Court was critical of the oral trespass notice given by police – "there were no circumstances that would justify the removal of a single protestor with a sign from a busy plaza, and that the display of the sign, despite its profanity, did not constitute the use of insulting or abusive language within the meaning of s. 2(9)(a)." (para 93)

Langenfeld v. TPSB

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Facts

- Kristian Langenfeld – frequented TPSB meetings since 2013

- June 2017 – Chief of Police, Mark Saunders, institutes policy requiring individuals entering police headquarters submit to search

- Langenfeld denied entry when refused search





Langenfeld v. TPSB

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Application

- Langenfeld challenged the constitutionality of the search requirement pursuant to s. 2(b)

- Decision of Justice Copeland
  - Attending meetings had expressive content that was not excluded from protection
  - Search infringed s. 2(b) right
  - Screening not "prescribed by law"



Langenfeld v. TPSB

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Application

- S. 2(b) analysis
  - Attending a public meeting attracts s. 2(b) protection because going to meetings fosters public confidence in decisions and the protection extends to listeners as well as speakers.

  - Court rejected Chief's argument that option of watching hearings online and making submissions remotely meant that the right was not violated.

  - Relying on the decision *Figuerias v. Toronto Police Services Board*, 2015 ONCA 208, found that requiring submission to a search is an infringement on Langenfeld's freedom of expression right.

Langenfeld v. TPSB

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Application

- "Not prescribed by law"
  - Found that there was no authority for the search under the *Occupiers Liability Act* or *Occupational Health and Safety Act.*
  - Weight given to repeal of *Public Works Protection Act* and replacement with *Security for Courts Act.*
  - Acknowledged common law authority to screen prior to entry but, as part of the analysis, did not consider whether it provided sufficient authority for search in question.

Langenfeld v. TPSB

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Appeal

- Decision currently under appeal (Lerners acting for Appellants)
  - Main argument – Justice Copeland erred in finding that the screening process had the effect of infringing on Langenfeld's rights.
    - *Figueiras* distinguishable because the Court of Appeal found that the intent of searches was to infringe freedom of expression.
    - A precondition does not always have the effect of limiting expression.
    - Can be argued that screening actually promoted expression by ensuring a safe and peaceful place for assembly.
  - Whether screening is appropriate will be in flux until appeal decided.

Guidance for Municipalities

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(1) The right of municipalities or other public entities to impose searches or limit access to public buildings, portions of public buildings or other public property that is generally not open to the public remains unimpaired. In Ontario, the common law, the *Occupiers Liability Act* and the *Occupational Health and Safety Act* all support a municipality's entitlement to impose restrictions of this type for the protection of staff and the security of property kept on site.

(2) With respect to those portions of public buildings or public property where public use is contemplated, *Charter* concerns can arise. The closer the public use of the area in question is identified with fundamental protected rights such as freedom of expression or the right to attend public meetings of our democratic institutions the closer a court will scrutinize any restriction on the right of access or ability to express oneself in relation to those activities.

Guidance for Municipalities

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(3) In relation to any public space where restrictions on access are contemplated, a well-crafted by-law or regulation governing what is reasonable use or behaviour with respect to the premises in question is a municipality's best friend. As noted in the combination of *Bracken I* and *Bracken III*, what is reasonable behaviour in one public location will not necessarily be reasonable public behaviour in another public location.

(4) With respect to freedom of expression in relation to public meetings or at locations where free speech has traditionally occurred, a court will give significant leeway to members of the public in how they express themselves. While violence or threats of violence will never be tolerated, courts will not conclude that an individual's intentions are violent without clear evidence. To constitute a real "threat of violence" there must be a reasonable basis for fear on the part of other individuals based on an objective assessment of what was occurring. Mere discomfort caused by the nature of the protest or behaviour is not sufficient.

Guidance for Municipalities

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(5) If behaviour is occurring which violates a by-law or otherwise supports the conclusion that there is a legitimate "threat of violence" any resulting limitation placed on access or expression – either that day or on a subsequent occasion must be reasonable and no broader than necessary to address the issue that has arisen.

(6) In relation to searches prior to entry into public meetings, the repeal of the *Public Works Protection Act* in conjunction with the enactment of the *Security for Courts, Electronic Generating Facilities and Nuclear Facilities Act* has created a situation of uncertainty where none previously existed. While logically there should not be a *Charter* rights distinction between entering a court house to participate in public court proceedings and entering City Hall to attend a Council Meeting, arguably, that is what the legislature has created.

Guidance for Municipalities

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(7) While it is difficult to accept that a request for a minimally invasive search as a precondition to entering a pubic meeting constitutes an impairment of an individual's *Charter* right of freedom of expression that is what was held in *Langenfeld*. Accordingly, until the appeal in that case is determined, it is uncertain whether limited searches of this type constitute an unreasonable *Charter* violation.

(8) In the meantime, if a municipality or other public entity wants to impose a requirement for a search prior to entering a public meeting, that requirement should be imposed only after the by-law or properly developed written policy is debated and approved by Council with identification of the specific reasons the need for security is perceived. Further, it should be indicated that, in the circumstances, the approach adopted is viewed as the least intrusive means of achieving the need for safety identified while, at the same time, impairing any *Charter* rights impacted in the least intrusive way possible.

Questions?

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