

The *Charter's* guarantee of Life, Liberty and Security of Person does not include a right to use Edmonton's Transit System

Introduction

Public transit is a service that a large segment of the population relies upon, particularly the poor, vulnerable or those who face physical or other challenges. It is often their only way to get around large cities like Edmonton, Alberta and to do what is necessary for their health, welfare and personal growth. Does a temporary ban to access transit property that then makes taking public transit impossible violate a person's *Charter*-guaranteed [right to life, liberty and security of the person](#)?[1]

This question divided the Alberta Court of Appeal in its 2014 ruling *R v SA*. [2] The Court ruled that SA's *Charter* section 7 right to liberty, or freedom of movement, was not engaged and therefore the ban on using public transit was constitutional. One justice however, dissented and said that the ban did affect SA's rights to liberty, and she would have ruled that the ban could not stand because it was not in accordance with the "principles of fundamental justice." [3]

Facts

SA was a youth at the time of the incident. Neither she nor her father owned a vehicle nor had access to one, so she regularly used the Edmonton Transit System (ETS). She was known to transit authorities because she had been involved in past altercations, assaults and other dangerous behaviors at ETS stations. After SA committed an assault in an ETS station in April 2008, a transit authority officer wrote her a notice under the *Trespass to Premises Act*, [4] banning her from city property for six months. Thus, she was not allowed to enter ETS stations and could not take public transportation. But she violated the ban numerous times, and in July 2008 she was given an offense ticket for trespassing in contravention of the notice banning her from the property.

Procedural History

SA's trial on the trespass charge was heard in Provincial Court in 2011. She contested the ticket, arguing that it violated her section 7 right to liberty and therefore that it and the *Trespass to Premises Act* were unconstitutional. The Provincial Court accepted her defense, ruling the ban restricted her freedom of movement. The Court then invalidated the ticket

and acquitted SA of the charges. The Crown appealed the ruling to the Alberta Court of Queen's Bench, which allowed the appeal. The Court compared the ETS ban to a driving restriction and noted both had the same effect on a commuter – they would have to find alternate means to get around. Therefore, ETS had committed no section 7 violation. SA then appealed the decision to the Alberta Court of Appeal.

Issues

In rendering its judgment, the Court of Appeal considered the following:

1. Was the correct law challenged in the courts below?
2. Did the ban to ETS properties engage the appellant's Charter section 7 right to liberty, or have the potential to engage anyone else's?
3. If so, was the ban "in accordance with the principles of fundamental justice" so that it was not a section 7 violation?

Decision

The Court of Appeal's judgment was divided. The majority dismissed the appeal, finding there was no "right" to public transit. They held that the ban did not engage the appellant's section 7 rights. The majority stated that the ban did not unduly infringe SA's basic human dignity and choice. Therefore, there was no section 7 violation.

Justice Bielby dissented. She would have allowed the appeal and restored the Provincial Court's ruling. Since the municipal government ban on ETS restricted SA's movement, it affected her liberty rights. It was also not in accordance with the "principles of fundamental justice" because of the manner in which the ban was issued. Justice Bielby also stated that the scope of the restriction was overbroad (it covered situations that it was not intended to cover).

Analysis

Correct Law

The majority opinion by Justices Côté and O'Ferrall began with a lengthy criticism of how the case had been litigated to that point. They noted that the legal foundation of the case was incorrect; it was the Edmonton Transit Bylaw not the *Trespass to Premises Act* that was the appropriate law to be considered. Even if the Act was unconstitutional, the bylaw, in combination with common carrier law, supported ETS's actions in banning a dangerous passenger from the premises. Therefore, had the case been litigated on this correct law, a section 7 defense could not have been presented.^[5] This is because a carrier has a duty of care to ensure its passengers are safe. The majority rhetorically asked: "if dangerous people had a constitutional right to be on subway premises, how could a fellow-passenger injured or killed by them (or his survivors) have any right to sue the carrier for failure to eject those dangerous people?"^[6]

In her dissenting opinion, Justice Bielby did not write on these matters.[\[7\]](#)

Engaging Section 7 rights

The majority found that SA's *Charter* section 7 rights to life, liberty and security of the person were not engaged by the ban to ETS property. The judgment said SA's argument that access to public transit is a right "trivializes" the rigid criteria the Supreme Court of Canada has set for a section 7 right.[\[8\]](#) According to those criteria, the ban did not affect something fundamental like SA's dignity, personal autonomy, health and safety, or privacy; "she was merely told temporarily not to come onto the subway (and buses)."[\[9\]](#) In coming to this decision, the majority disregarded the evidence that led Provincial Court Judge Dalton to determine that the ban restricted SA's fundamental section 7 rights to liberty. Judge Dalton had relied on the testimony of a youth worker about the ban's effect on the liberty of youth, but the majority noted that that person was not a trained social worker and therefore the worker's opinions "have no weight."[\[10\]](#) The majority also rejected the arguments of SA's counsel that poverty allowed her no other alternative than public transit. Instead the Court viewed travel by public transit as a choice, not a fundamental right; there was no evidence submitted as to why she could not purchase and use a second-hand bicycle with the savings of not buying transit tickets, or why she could not do her shopping closer to home.[\[11\]](#)

Justice Bielby dissented and noted that SA's section 7 right to liberty was engaged by the transit ban. The City, as intervener, conceded the point, and the Crown conceded that under section 7 "liberty can include freedom to make choices that are fundamental or inherently personal to the individual."[\[12\]](#) Justice Bielby relied on a Supreme Court of Canada case where it considered restrictions on freedom of movement as triggering a section 7 right. Since Edmonton is a city that is spread out and in a harsh climate, the mode of transportation is fundamentally connected to the exercise of freedom of movement. Therefore, Justice Bielby wrote that since SA had no other access to transportation to go about her daily life, make fundamental personal decisions, and go to school or meet appointments, the law interfered with her ordinary right of movement. Therefore, she ruled that section 7 was engaged.[\[13\]](#)

Principles of Fundamental Justice

Because Justice Bielby wrote that the Act and trespass ticket impaired SA's liberty rights, she considered whether the restriction was in accordance with the principles of fundamental justice. If so, the law would be valid.

To examine the principles of fundamental justice, a court must examine the purpose of the legislation in question and ensure that it is not overbroad (doesn't cover situations it was not intended to cover) or that any government action taken in accordance with the legislation is in keeping with its purpose. On a plain reading of the *Trespass to Premises Act*, Justice Bielby noted the ban would prohibit entry to any city property like sidewalks and roads, not just transit stations, subways and buses.[\[14\]](#) Therefore she wrote that the Act was overbroad since it would keep SA or anyone else who was issued the ban in virtual

house arrest.^[15] She also noted the scope of the Act and its related ban to be disproportionate to what its purpose was. If the purpose of the ban was public safety, its purpose was not being served if involvement in criminal activity which did not endanger the public, attracted the ban.^[16] As a result, she found that the ban was not in accordance with the principles of fundamental justice and therefore, unconstitutional.

Significance

R v SA outlines some of the limits to the Charter's section 7 guarantee of liberty. Liberty, as interpreted by the Alberta Court of Appeal, does not include the ability to choose one's mode of transportation, regardless of one's circumstances. So long as there is an alternative way to travel about the city in carrying out one's daily life, even if it is not one's preferred mode of transportation, the right to liberty has not been engaged. Therefore, bans to accessing public transit are constitutional.

^[1]*Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

^[2]*R v SA*, 2014 ABCA 191. <
http://www.canlii.org/canlii-dynamic/en/ab/abca/doc/2014/2014abca191/2014abca191.html#_ftn3>

^[3]*Ibid*.

^[4]*Trespass to Premises Act*, RSA 2000, c T-7.

^[5]*R v SA*, Supra note 2, at para 39-44.

^[6]*Ibid*, at para 79.

^[7]*Ibid*, at para 305.

^[8]*Ibid*, at para 151.

^[9]*Ibid*, at para 153.

^[10]*Ibid*, at para 160.

^[11]*Ibid*, at para 174 - 177.

^[12]*Ibid*, at para 308.

^[13]*Ibid*, at para 324-327.

^[14]*Ibid*, at para 368-369.

^[15]*Ibid*, at para 376.

[16]*Ibid.*