Date: 2002-04-11

IN THE PROVINCIAL COURT IN THE PROVINCE OF NOVA SCOTIA
[Cite as: R.v.Marcocchio, 2002NSPC007]

HER MAJESTY THE QUEEN

versus

BRUNO S. MARCOCCHIO

s. 129(a) CC
s. 266(b) CC
s. 129(a) CC
s. 3(1)(e) PPA

DECISION

Before: His Honour Judge A. Peter Ross

Counsel: Mr. John MacDonald, for the Prosecution
Mr. Bruno Marcocchio, on his own behalf

Released: April 11, 2002

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INTRODUCTION

[2] The backdrop to this case is the Sydney Tar Ponds, an unfortunate legacy of decades of steel-making in the former City of Sydney, now part of the Cape Breton Regional Municipality. The tar ponds and a former Coke Ovens site are within the Muggah Creek watershed. The Joint Action Group (JAG) is a society formed to partner federal, provincial and municipal governments with members of the community in an effort to find a solution for the contaminants in the Muggah Creek watershed. Central to its mandate is the active promotion of public involvement.

[3] The defendant had been a member of JAG, and later an observer and public participant in the process. In light of what it considered unacceptable behaviour, JAG chose to exclude the defendant from all its public meetings and functions by issuing a notice under the Protection of Property Act (PPA) of Nova Scotia which forbid him from attending on any premises occupied by JAG. The defendant asserts that the ban infringes unreasonably on his right to freedom of expression as guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms. He seeks various remedies and relief under s. 24(1). These two opposing interests clashed on May 22nd, 2001 at Melnick Hall and again on August 1st, 2001 at the Steelworkers Hall, the premises on each occasion being rented by JAG. The clash of these interests is at the heart of this case.

[4] Although there are many related issues arising here for determination, this is the underlying question - Can the government (here under the aegis of JAG) use the provisions of the Protection of Property Act (given the powers of police arrest and the penalties which may then be engaged) to indefinitely ban someone (here Bruno Marcocchio) from attending upon premises in circumstances where the government is making those very premises available as a forum for public expression? No case has been made that the Protection of Property Act is unconstitutional per se; rather, it is argued that its use in these circumstances is an unconstitutional infringement of Mr. Marcocchio's right to freedom of expression. Other collateral and related issues will be identified and addressed in the course of these reasons.

OVERVIEW OF EVENTS

[5] On February the 28th, 2001 JAG passed a motion at a meeting of its Roundtable excluding the defendant from attendance at all JAG meetings. He was advised of this by letter dated March 2nd, 2001. It served "formal notice" to him that his entry to any premises occupied by JAG was prohibited, notwithstanding any general invitations to the public. A copy of this correspondence was sent to the Cape Breton Regional Police so that in future, should Mr. Marcocchio be found on premises occupied by JAG, they would be in a position to take immediate action. Many JAG meetings are open to the public, not only special events such as those organized for May 22nd and August 1st, 2001. However, it was on the latter two occasions that the defendant decided to challenge the ban issued to him under the PPA.

[6] The meeting of May 22nd, 2001 at Melnick Hall on Laurier Street, Sydney related to a decision by JAG to do soil sampling and testing on properties within a defined area known as “North of the Coke Ovens” or NOCO. JAG meant to meet with residents of only those streets and circulated invitations accordingly. The defendant had many concerns about the JAG process, including criticisms of how the testing area was defined. He suspected the governments' motive was to limit liability for past wrongdoing. He saw the Melnick Hall meeting as an attempt to "divide and conquer" the community. Although it is impossible to gauge the extent of support, undoubtedly some others shared this view, and there was a general level of anxiety and contentiousness among those who came.

[7] When the defendant arrived at Melnick Hall he was refused entry by the police who were waiting for him. In response, he and others lay down on the landing just outside the entrance. Eventually the defendant was carried away, put in the back of a police car and taken away. He was later charged with resisting a police officer in the execution of his duty, contrary to s. 129(a) of the Criminal Code of Canada (CCC) and with a simple assault on Constable Turner, contrary to s. 266(b). It appears Mr. Marcocchio was originally charged with a violation of the Protection of Property Act also, but for technical reasons this charge was withdrawn. The ban nevertheless remains critical to the Crown's case in establishing the validity of the actions of the police.

[8] On August 1st, 2001 the defendant and a group of supporters entered an "open house" at the Steelworkers Hall. This event was organized by JAG to provide an opportunity for the general public to discuss the environmental sampling of the NOCO area and the steps which were next proposed. The defendant was concerned by the apparent formulation of what he styled a

"made in Sydney standard" for levels of certain contaminants. He wished to challenge what he called the "fraudulent science" being employed. While he met no police presence at the door, the police were called upon his arrival and removed him shortly thereafter. Again Mr. Marcocchio, when approached by the police, lay down and refused to move, with the result that he was again carried away, put in a police car, and taken to the police station. He was later charged with entering on premises where entry was prohibited by notice, contrary to s. 3(1) of the PPA, and also with resisting police officers engaged in the execution of their duty, contrary to s. 129(a) of the CCC.

[9] The defendant is alleging infringements of his Charter rights as contained in s. 2(b) (freedom of expression), and also s. 7 (not to be deprived of liberty except in accordance with fundamental principles of justice) and s. 9 (arbitrary detention), although the latter sections are raised only obliquely. He seeks a remedy under s. 24(1) of the Charter declaring the notices issued by JAG invalid and a consequent acquittal on the Criminal Code charges since, as a result, the police would not in the execution of valid duties. As noted, there are other related and collateral issues which have been raised and will be addressed.

APPLICATION OF CHARTER TO JAG

[10] S. 32 of the Charter states that it applies to “the Parliament and government of Canada.... and to the legislature and government of each Province” in respect to all matters falling withing their respective spheres of authority.

[11] Conflict between authority and the individual has presented challenges for societies throughout history. It may be said that the primary purpose of the Constitution is to check the power of government over the individual. The Supreme Court of Canada has concluded that the Charter applies only to the legislative, executive and administrative branches of government.[1]. Hence, actions which, if done by police or other state agents, would be searches or detentions under s. 8 and 9 of the Charter do not amount to such when done by private or non-governmental persons. All laws and regulations are subject to Charter scrutiny, as are the actions of police or other governmental officials in their treatment of individuals. Since the exclusive focus of the Charter is as a judicially enforceable check on government, politicians, and

[1] RWDSU v. Dolphin Delivery Limited(1986) 33 D.L.R. (4d) 174

public officials, it is necessary that I first determine whether the Charter applies to the actions of JAG. If JAG is a "private actor", the Charter does not apply.[2]

[12] It is not always immediately obvious whether an given entity is governmental. For instance, the Supreme Court of Canada has determined that a hospital does not perform a government function. Rather, it provides a public service. Hospitals, controlled by their own boards, though incorporated to provide services within the responsibility of government are not themselves branches of government.[3]

[13] Some guidance on general principles of application may be found in the Supreme Court's decision in McKinney v. University of Guelph (1990) 76 D.L.R. (4d) 545. La Forest, J. states at p. 637

> "The mere fact that an entity is a creature of statute and has been given the legal attributes of a natural person is in no way sufficient to make its actions subject to the Charter...the Charter was not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental responsibility."

[14] Railroads, airlines, symphonies and institutions of learning were cited as examples of bodies which perform important public functions but are not part of the government. Hence, while the Charter is not limited to entities discharging functions that are inherently governmental in nature, neither is a simple "public purpose test" sufficient. The Court stated that while legislatures may determine much of the environment in which various entities operate, they nevertheless function as autonomous bodies within that environment.

[15] In Stoffman the Court referred to its previous decision in Dolphin Delivery. Cautioning against an overly restrictive interpretation, it noted that the Charter could apply to more than just Parliament, Legislatures and Ministers of the Crown. It was clearly indicated that the Charter might apply to the actions of subordinate bodies created, supported or supervised by government. Nor did Dolphin Delivery preclude the possibility of reliance

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[2]For an instance where the Charter was found not to apply to a private action of an association, even though it was closely regulated by government, in its use of a notice under legislation akin to the Protection of Property Act, see Russo v. Ontario Jockey Club [1987] O.J. No. 1105 (Q.L.)

[3]Stoffman v. Vancouver General Hospital [1990] S.C.J. No. 125 (Q.L.)

on the Charter in a dispute between private actors if it could be shown that the party against whom the Charter was invoked relied upon some form of governmental action. Significant to the outcome of in Stoffman was the finding that the Hospital Regulation, while requiring Ministerial approval, was not "instigated" by the Minister. The regulation was found to be a "rule of internal management" applying to the hospital's medical staff. While the government had a sort of ultimate or extraordinary control over the hospital, it did not exercise routine or regular control.

[16] JAG could not exist without its "government partners". Its creation was largely a government initiative, and its ongoing activity depends entirely on funding from one level of government or another. The impugned action in this case, the issuance of a PPA notice against a particular individual, is not something "routine" or "regular" or "internal" to JAG functioning. JAG itself is, if not unique, at least a special instrument created and authorized to advance a specific public objective. It does not provide a "public service" in the broad and usual sense of that term.

[17] While citizen representatives comprise the majority of seats at JAG's Roundtable, there are designated government representatives. Ultimately any clean up or remediation recommended by JAG will be undertaken by government, with government funding, subject to statutorily mandated reviews and assessments.

[18] JAG could not function without the ongoing involvement of Health Canada and the Provincial Departments of Health, Transportation and Public Works. Notably, the ban under the PPA against the defendant was instigated by these "government partners", who wrote to JAG indicating that they may reconsider lending their employees to the JAG process unless something were done about the defendant's behaviour. It was this letter which led to the discussion, the subsequent Roundtable motion, and the issuance of the PPA ban.

[19] For both the events in question, at Melnick Hall and the Steelworkers Hall, government departments had direct input into the substance and conduct of the functions. Witnesses appeared to sense little distinction between a function organized by JAG with Health Canada support, and a meeting organized by Health Canada with JAG support. While the Open House at the Steelworkers Hall on August the 1st was billed a "JAG event", the same newspaper advertisement bore the logos of the governments of Canada and Nova Scotia.

[20] I thus conclude that JAG, acting in the way it has here against a member of the general public, falls within the broad parameters of "government" as set out by the Supreme Court of Canada. Certain cases have determined that searches carried out by private citizens at the instigation of police are converted into government acts and thus subject to s. 8 Charter scrutiny. By analogy, I would conclude that even if JAG is not inherently governmental in nature, its actions in this case have been converted into a governmental action because of Health Canada's instigation of the particular PPA ban.

[21] By contrast, if a meeting were held by private group concerning the Tar Ponds or the health of Sydney residents, a person could be evicted under the PPA and no Charter remedy would lie. If a private entity conducts a meeting and decides to exclude certain individuals, it might detract from the entity's credibility, and compromise the process, but no remedy will lie under the Charter. Hence it is not the subject matter of the meetings of August 1st and May 21st that make the actions of JAG "governmental" but rather the other factors noted above.

THE PROTECTION OF PROPERTY ACT

[22] Section 3 of the PPA provides that

> "...every person who enters on premises where such entry is prohibited by notice and who does so without legal justification or without permission of the occupier is guilty of an offence on summary conviction."

"Occupier" is defined to include a person in possession of premises or a person with responsibility for and control over the condition of premises or activities there carried on, or control over persons allowed to enter the premises. The definition contemplates that there may be more than one occupier of the same premises. "Person" is defined by the Interpretation Act to include a corporation. A "society" such as JAG, formed under the Societies Act is defined therein as a corporation. Thus JAG has the legal capacity to be an occupier and to issue notices under the PPA prohibiting entry on its premises by stipulated persons. S. 10 of the Act contemplates that it can be invoked by an occupier even with respect to premises "generally open to the public". S. 14 preserves the availability of injunctive relief and the civil remedy for trespass to property. Under s. 16, the Act does not apply

to a person engaged in lawful picketing, nor to "a peaceful demonstration in the vicinity of premises to which the public normally has access".

[23] This latter point is an important pre-condition to any possible conviction in this case and I will deal with it here. Having considered the evidence relevant to this point, and the defendant's submissions, I conclude on neither occasion did his actions fall within the phrase "a peaceful demonstration in the vicinity of premises". At the Steelworkers Hall, Mr. Marcocchio was clearly within the premises. Even at Melnick Hall, although he did not pass the entrance, he was on the front steps and more than merely "in the vicinity". I interpret that phrase to apply to such activities as were, in fact, being carried out by a group of protesters across the street from Melnick Hall on the evening of May 22nd. They were parading with signs and voicing their protest while not on or interfering with the use of the premises in any way.

[24] S. 6 of the PPA gives a police officer power to arrest a person for an offence under the Act and detain such person in custody if reasonably necessary to prevent a continuation of the offence. S. 7 creates an offence of disturbing an occupier of premises by "disorderly behaviour". S. 4 makes it an offence to remain on premises after being directed to leave by the occupier. S. 5 creates a defence to a charge where the person charged "reasonably believed that he had legal justification or permission of the occupier...to enter on the premises or do the act complained of".

[25] Most, possibly all Canadian provinces have similar statutes to deal with acts of petty trespass in a summary fashion. The tools available to a property owner at common law are rather cumbersome and expensive. Whether at common law or under the PPA, a property owner is not required to supply reasons to justify the exclusion of a particular person from premises. An occupier is under no duty to follow principles of natural justice in issuing a "ban" such as we have here.[4]

[26] Although arising in a different context than we have here, the case Harrison v. Carswell (1975) 25 C.C.C. (2d) 186 is an example of how Canadian law has evolved. In that case a tenant in a shopping plaza was being peacefully picketed. The owner charged the defendant under the Petty Trespass Act of Manitoba. Convictions were upheld, the Court stating that it could not weigh the respective values to society of the right to property and the right to

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[4]See Russo, supra, at p. 3

picket, since any resolution would be arbitrary and embody personal economic and social beliefs. With the implementation of the Charter, Courts today are often faced with such difficult balancing of interests.

[27] That the government is entitled to the benefit and remedies available in the PPA is suggested by certain cases[5]. The Ontario Court of Appeal appears to have concluded that the Ontario counterpart to our PPA was available to an airport authority to prohibit a person from entering upon the premises of Pearson International.[6]

[28] The Bill later to become the Protection of Property Act came forward for 2nd reading before the 1st session of the Nova Scotia House of Assembly on May 27th, 1982. Open hearth furnaces were then still operating at Sysco. The Attorney General of the day, the Honourable Harry How, spoke to the concerns which the Bill was intended to address. He noted first the concerns of shopping centre owners who wished to have some simple sanction available against improper conduct and behaviour in shopping malls. Another concerned group were operators of private recreational parks who, again, wished a simpler remedy than a civil tort action in order to restrict and remove people who were misbehaving. Others concerned were rural land owners, whose wood lots, and farms were subject to continuing trespass by snowmobilers and other forms of recreation. It appears the Bill was thus intended to address the mercantile interests of mall owners and recreational parks, and the privacy interests of rural land owners. It was noted that the common law remedies such as injunctions or damages in tort were to be preserved. The bill reflected changes brought about through the intervention of various groups such as hunters and fishers, spoken to by the member for Cape Breton South, Mr. Vincent MacLean, and the concerns of the Trade Union movement spoken to by the member for Halifax-Chebucto, Ms. Alexa McDonough. She also felt the arrest powers expressed in the legislation were "inadvisable", and found herself in the "rather unusual position" of agreeing with the member for Cape Breton Nova Mr. Paul MacEwan and joined him in voting in opposition to the Bill.

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[5]For instance R, v, Behrens [2001] O.J. No. 245 (Q.L.) in which the Speaker of the Ontario Legislature issued a notice against various protesters

[6]R. v. Asante-Mensah [2001] O.J. No. 3819 (Q.L.)Presumably the Court considered the Airport Authority an arm of government in that it dealt with Charter issues raised by the defendant.

[29] Legislative debates may sometimes be referred to as an aid to interpretation of a statute. I do not know whether any of the Honourable members contemplated that the PPA would be used in circumstances such as we have here. The ban against Mr. Marcocchio does not spring from the protection of a commercial interest or the need to protect privacy. The August 1st, 2001 function at the Steelworkers Hall was distinctly public in nature. However, there is nothing in the Act or the legislative process which would lead to a conclusion that the PPA is not available to government or government-type entities.

[30] I am led by the foregoing cases and analysis to conclude that JAG can avail itself of the provisions of the PPA. The question remains whether in certain circumstances, at certain venues, this capacity is over-ridden by the Charter.

A CLOSER LOOK AT THE TWO EVENTS

[31] I have listened to, reconsidered and reviewed the testimony of the various witnesses, the video footage, and the other photographic and documentary evidence relating to the events at Melnick Hall and the Steelworkers Hall on May 22nd and August 1st, 2001, respectively. In the following discussion certain findings of fact will be noted. However, I do not intend a complete and exhaustive of review of all of the evidence.

Melnick Hall - May 22nd, 2001

[32] There is evidence from which I infer that JAG rented and held some measure of control over the premises at Melnick Hall on the evening of May 22nd, 2001. Mr. MacCallum said that JAG was the "sponsor" of the meeting, although it was "hosted" by the federal and provincial Departments of Health. Mr. Dan Fraser, JAG Chairman, said JAG had "arranged for" the hall. While the Departments of Health appeared to have set the agenda and conducted the proceedings, clearly they did so in their capacity as "government partners" of JAG.

[33] JAG prepared and circulated flyers meant as invitations to certain people to attend the event. The flyer is headed "Meeting For Residents of the Area North of Coke Ovens (NOCO)" and goes on to specify five streets which are included in that area. The invitation states that Dr. Lewis and Dr. Scott would be available to discuss results of a previous study, to review and

comment on Canadian Council of Ministers of the Environment (CCME) guidelines and discuss "next steps". The invitation states

> "Due to limited space at Melnick Hall, and to ensure that we can respond to your questions, this meeting is open only to residents of the NOCO area...for anyone interested in hearing Dr. Lewis, they are welcome to attend a public meeting organized by JAG scheduled for the following evening at another location."

[34] Although the decision to limit attendance to residents of NOCO did not meet with universal approval, it is clear that JAG discussed this with community representatives and believed it to be the best course of action. A public meeting was scheduled for the following night; nevertheless, certain of those who came to Melnick Hall believed that the limitation on attendance was an attempt to "divide and conquer" the residents of Sydney. Their concern was relayed to Dan Fraser, JAG Chairman and to Don Ferguson, Director General (Atlantic) for Health Canada who appears to have been chairing the proceedings inside the hall. This, coupled with the fact that a number of people from outside NOCO had already gained entry by showing a flyer (genuine or bogus), led to officials opening up the meeting to all who were present. This occurred inside at the same time as the commotion took place outside which led to with the defendant's arrest. Nevertheless, JAG/Health Canada as "occupier", as of the time the defendant arrived, clearly intended to limit its invitations to residents of NOCO. While the police were there with an eye on excluding the defendant in particular, they also attempted to enforce this general limitation on attendance. Others besides the defendant were denied entry to the hall based on residency.

[35] Inside, before the meeting had got under way, Don Ferguson told a Mr. Green that it was not an "official JAG meeting". Perhaps he meant that there would be no motions, no voting. However, at about the same time, Dan Fraser spoke to police at the entrance in the presence of the defendant and confirmed that the defendant, specifically, should not be allowed in. I do not find that Mr. Fraser told the police to "arrest Mr. Marcocchio". He did advise police, as they had been told prior to being called out to duty, that the function was a JAG event. The defendant, having received the letter and this verbal direction, cannot reasonably claim a belief that the function was not a JAG meeting to which the PPA notice would apply. Mr. Marcocchio thus

presented an imposition in two respects - both as a non-resident of NOCO, and as a person specifically excluded under the PPA notice.

[36] The available video footage shows a JAG official emerging on the front step to tell persons outside the meeting would start “in two minutes” and that they should come in to take a seat. Shortly afterwards Constable MacKinnon says “close the door”. A discussion ensues with Mr. Green about the people outside with invitations in their hands who are not being allowed in. Mr. Green gains entry as do some other individuals before the defendant arrives at the threshold. He is stopped by Constable Turner. The defendant says "we're here to protect our children and your children...its time to stop the lies". He is insistent that he should be allowed inside the hall. Police tell him it is by "closed invitation" and that he was "not welcome here". During this conversation some others are allowed to go through but many appear to be awaiting Mr. Marcocchio's fate.

[37] There is a break in the video footage at this point. It resumes with Mr. Marcocchio sitting or lying down on the step and someone else saying "everybody sit down". Those who do begin to sing "We Shall Overcome" and to say "move our people now". At this point the defendant is lying in the threshold of one of the two entrance doors. The police push the defendant forward but he wriggles back into his former position with his head against the open door. Police eventually move Mr. Marcocchio and close the door. At this point he is lying on the landing and others are seated on the steps. The Defendant had ample opportunity, up to this point, to walk away. The police are seen putting cuffs on Mr. Marcocchio. A lady screams and hollers "leave him alone" while grasping onto the defendant. Police warn the lady not to get involved and are heard to say to Mr. Marcocchio "you're causing a disturbance". The defendant displays some resistance to the placing of the cuffs on him, although the fact that only one cuff was applied might equally be attributable to the actions of the lady. In any event the police do not succeed in cuffing both of the defendant's wrists and as they begin to lift him off the step, the defendant cries out "you're hurting me". At this point it is possible that police may have stepped on the defendant's hair which trailed behind him, but it would be difficult to conclude in the circumstances that this was done deliberately, given the commotion and difficulty in removing the defendant. The defendant asks what he is being arrested for and the police are heard to say "causing a disturbance". He is told to stand up but does not. Shortly afterwards, at the sidewalk, the police remove the cuffs and load Mr. Marcocchio into the back

of the police car. Although his shirt is torn, the defendant does not appear to be in any real distress when seated there.

[38] Shortly after the defendant is taken away, a Mr. Steele is seen on the landing wearing cuffs and apparently under arrest. However, at this point the door opens and a police officer, after conversing with someone inside, is heard to say, "okay let him in". Mr. Steele is released at a point coinciding with the decision taken inside the hall by Don Ferguson (who was unaware of the actual events occurring on the step), to "open" the meeting to all who were present.

[39] The video later shows some of the proceedings in the hall including remonstrations by many about moving residents from the NOCO area.

[40] There was some evidence pertaining to a lady who had wished to exit the hall at about the time the scuffle was occurring on the front step. This evidence is less than clear - I would not conclude that Mr. Marcocchio was aware that anyone inside the hall needed to exit through the closed doors nor that his actions on the step precluded such from occurring.

[41] However, it does appear that the defendant, although told that he was not permitted to be there, moved himself back into a position such that the police could not close the door when they wanted to, as a crowd control measure. Police likely wanted to ensure that the meeting inside proceeded without the Defendant, and without undue disruption.

[42] It is impossible to arrive at any firm conclusion about some aspects of the evidence. Certain police witnesses indicated that while the door was closed there was pounding from inside by someone "n duress". Clearly an ambulance was called and did arrive at the site a short time later.

[43] It was during the break in the video footage that certain of the alleged behaviour occurred, including the alleged assault of Constable Turner. Constable Turner described this as a shove by Mr. Marcocchio which pushed him back against the door. It appears the defendant attempted to discredit this assertion by exaggerating it. In other words, the defendant argued from selective portions of the evidence that Turner's claim must imply that he was thrown several feet into the doorway, a claim which the defendant then characterizes as unbelievable. However, I find the shove did occur as Constable Turner described it. It was not caused by the actions of the crowd in pushing the defendant forward towards the door.

[44] I also conclude that the defendant pulled his arm away from the police officer when he attempted to apply handcuffs. I think it unlikely that the police deliberately cuffed only one wrist, with one cuff swinging free,

simply to use it as a handle to carry him. Despite some evidence to the contrary, I find that the defendant was arrested after he lay down in the doorway. As noted above, he also impeded the police, briefly, from closing the door.

[45] In any discussion of the ambit of free speech, the example often cited is this one (attributable, I believe to Walter Lippman): 'the right to free speech does not give a person the right to yell "fire" in a crowded hall'. It is a good thing no one yelled “fire” inside Melnick Hall that evening because it was crowded indeed. “Fire” could be the theme for the evenings proceedings. One of the policemen in attendance was Deputy Chief of the Glace Bay Fire Department. Fire and brimstone of another sort was coming from some of the residents who addressed the assembly. To the extent Mr. Marcocchio claims the right to yell "fire" in this situation he likely believes it was necessary to sound an alarm about the testing procedure authorized by JAG. To return to the classic example, be believed there *was* a "fire" (of sorts).

Steelworkers Hall - August 1, 2001

[46] Mr. Marcocchio says he decided to go to the Open House at the Steelworkers Hall on August 1st, 2001 because he was in a “unique position" to challenge the standards being employed to measure and assess the risk from certain soil contaminants. Just prior to going he telephoned the local radio show "Talk Back". His comments there show that he believed the function to be a JAG event and that he was cognizant of the ban on his attendance. Taken together with comments made later inside the venue it seems clear that he expected to be confronted by police. Mr. Marcocchio happens to have had certain of his trial witnesses along with him, one shooting video footage and another still shots.

[47] While Mr. Marcocchio met no opposition at the door, I do not consider the words or actions of the people he first encountered to constitute either express or implied permission to be there. The defendant suggested that the actions of Ms. Taweel in inviting him and the others to speak to Mr. Esposito constituted a permission and thus a defence under the Protection of Property Act. However, while Ms. Taweel likely knew who Mr. Marcocchio was and the fact that he was not supposed to be there, she merely assumed a neutral posture vis-a-vis the defendant as a possible

trespasser. Others in the group did have permission to enter and it is not surprising that she thus conducted the group along without singling out Mr. Marcocchio. I doubt she felt it was her place to assume the role of the "occupier of premises" under the PPA. It was while the defendant was at the second of two "stations" set up inside the hall that he was approached by police. (He never did get to a third, unless one counts the local lock-up.) This station was manned by Steve Esposito. The defendant could hardly have met a more equable individual. Questions were fired at Mr. Esposito by the defendant and others with him, but they gave no opportunity to answer. The accusations hurled included " you're no scientist", "you're victimizing us", "you are here to allow the poisoning of our children", "this process leads to infinity". Mr. Esposito did get the odd word in edgewise, such as "the study is not finished but will be finished in September". He did not agree that there was sufficient existing evidence to justify immediate action.

[48] Just prior to the police arriving, Mr. Marcocchio says "I don't have much time here, maybe I should ask a few quick questions". The video captures the defendant's response to a policeman putting his hand on his shoulder - he turns around abruptly and shouts "get your hand off me". The police are heard to put him under arrest under the PPA to which Mr. Marcocchio immediately responds "I have a right under the Canadian Charter of Rights and Freedoms to freedom of association and freedom of speech". Someone, possibly the camera operator, the exhorts Mr. Marcocchio to "get down, get down". Mr. Marcocchio lies on the floor and the group immediately begin to chant "made in Sydney standards kill".

[49] I would conclude that Mr. Marcocchio knew the police were approaching and was aware of the reason for his arrest. He knew JAG considered him a trespasser at that point. The police also were aware of the letter sent to Mr. Marcocchio banning him from JAG meetings, having spoken to a JAG official and having read a copy of the letter immediately after they arrived at the hall.

[50] When asked at trial to summarize the actions of the defendant which constituted "resisting", the police referred to his refusal to walk, that he was "pulling from us", that he grabbed a wheelchair nearby and made strong movements to pull away. At the same time, another police witness said that he was "not physical towards us" although he did grasp at a wheelchair. Another said that he was "struggling physically, pulling his legs". The video footage does capture some of this activity. The efforts of the police in lifting

Mr. Marcocchio up and carrying him out of the hall were made no easier by the actions of a lady who hung on to him at one point and of a man who stood in the way of the police at the door. Although police were accused of "hurting him" there was no indication of this whatsoever. At the same time, I am not able to conclude that Mr. Marcocchio's actions constituted more than what cases refer to as "passive resistance". The defendant says he was passive on arrest. He certainly made no attempt to escape or elude the police outside the hall when left him virtually unguarded, albeit still on the ground. While he may not have been quite as easy to carry as a mannequin of equal size and weight, it seems a reasonable possibility that whatever grasping or movements he made were an automatic or unthinking response to the actions of others around him.

[51] Whatever defence witnesses may have claimed the event at the Steelworkers Hall gave every appearance of being a carefully staged piece of theater, with the defendant cast as the protagonist, having to overcome the forces of darkness in pursuit of the truth, his supporters functioning as a 'Greek chorus', in giving expression by their chant, to the moral sentiments evoked by the action of the play. Mr. Marcocchio has said that this is a "political trial". In doing so he may seek to write the Court into the script. This is not to dismiss the use of dramatic gestures or theatrical tactics in public protests. "Expression" takes many forms. It is true today in a way that even Shakespeare could not have imagined that "all the world's at stage...".

THE CHARTER DISCUSSION - BACKGROUND AND CONTEXT

[52] It is important to remember that the behaviour of the defendant which created his conflict with law was not so much his behaviour on May 22nd or August 1st, 2001, but rather his behaviour at JAG functions prior to the issuance of the PPA notice. It was this behaviour (using the word in its broadest sense to include words and other expressive actions) that prompted JAG to issue the "ban". The PPA notice is the action which in turn made Mr. Marcocchio's presence at the two venues an apparent violation under that Act. It is also the only possible foundation for the valid execution of police duty which is a necessary component of a charge of resisting the police under s. 129 of the Criminal Code. Only the simple assault charge against Constable Turner stands alone from the PPA ban, in a legal sense, but obviously even this would not have occurred were it not for the ban.

[53] One might therefore think that there should be evidence of this “pre-ban” behaviour before the Court. However, the parties did not lead such evidence

and I would not have permitted it. This would have protracted the proceedings to an unnecessary degree. The focus might easily have become the issue of whether Mr. Marcocchio, on those occasions, committed criminal offences, when none are alleged. Alternately, it might have become a dispute about whether JAG ought to have issued the ban against attending JAG meetings because of non-criminal behaviour which JAG deemed objectionable. Ultimately what is important here is not whether JAG ought or ought not to have banned the defendant, but whether the ban was issued for *bona fide* reasons and according to some sort of process. This is a crucial aspect of the case which I will address under s. 1 of the Charter.

[54] Nevertheless, the defendant refers to the fact that he was not charged, much less convicted, of any criminal offences with regard to this prior conduct. There may be many reasons for this besides the possibility that the conduct was non-criminal (such as an unwillingness to lodge a complaint or a misapprehension of the law). It is useful to consider some aspects of the criminal law and the law of tort as context for the s. 2(b) discussion which follows, for it is the defendant's assertion that his freedom of expression in public venues occupied by JAG should only be restricted where it is shown that he has committed a criminal offence or committed libel or slander. To his argument I add, as indicated, a brief consideration of possible civil remedies available to an entity like JAG.

[55] Under s. 265 of the CCC a person commits an assault when he attempts or threatens by an act or gesture to apply force to another person if he has present ability to effect his purpose. Of course, the actual application of force intentionally without consent also constitutes assault. Under s. 264.1 a person can be charged with uttering a threat to cause any person bodily harm or to damage their property. In these sections person would presumably mean a natural person. The little-used section of defamatory libel is contained in s. 268. S. 430 defines the offence as mischief more broadly than is commonly thought. Not only actual damage to property, but any conduct which obstructs, interrupts or interferes with the lawful use or operation of property is defined as mischief. The *mens rea* for mischief is set out in s. 429. It includes causing the occurrence of an event by doing an act, knowing that the act will probably cause the occurrence and being reckless whether the event occurs or not. Under s. 72 a person commits forcible entry when he enters real property that is in the actual and peaceable possession of another in a manner that is likely to cause a breach of the peace or a reasonable apprehension of a breach of the peace. Finally, s. 175

makes an offence of causing a disturbance in or near a public place, by screaming, shouting, swearing or using insulting or obscene language or by impeding other persons.

[56] It thus may be seen that there is an impressive arsenal available in the criminal law to deal with behaviour of persons at public meetings such as JAG functions. Additionally s. 810 of the Criminal Code gives the Court authority to issue a so-called "peace bond" where it is considered desirable in the interests of the safety of a person who has shown that they have reasonable grounds to fear that they will be injured or their property damaged. Where the conditions for a peace bond are met, (something that obviously requires cogent proof), or where a criminal conviction is entered for any of the above charges, a Court is then in the position to make an Order by way of recognizance under s. 810 or as a term of probation for any of the other offences. Such an order could, and commonly does, contain a condition that a person refrain from contacting certain individuals, or stay off certain defined premises. Any such court-ordered conditions would, almost by definition, not constitute an infringement of the Charter of Rights of the person to whom they apply.

[57] In addition, and as noted above, the PPA does not foreclose common law civil remedies. So called ‘Petty Trespass Acts’ like the PPA were created to cope with trespasses which are annoying but too trifling to make an expensive and protracted civil action feasible. Nevertheless, in a matter of sufficient importance, JAG would have standing before a court of competent jurisdiction to seek the civil remedy of an injunction against a troublesome individual if it could show that torts such as trespass to land or trespass to the person were being committed resulting in significant harm to the plaintiff. A balancing of interests is at the centre of most injunction applications. The fact that a defendant's conduct is punishable under criminal law or that damages are available, does not preclude a court from issuing an injunction in an appropriate case. To reiterate, while I do not propose to be an expert in tort law, nor to give gratuitous legal advice to the parties, nor to create another battlefront if none need exist, it is worthwhile to set out some surrounding legal context. This context may have some bearing on the reasonablenss and proportionality tests which I will mention later when discussing whether, under s. 1 of the Charter, any limitation on the Defendant's rights is "demonstrably justified"

[58] Given JAG's ‘raison d'etre’ and stated mandate, it does not seem possible that it could deal with what it considers to be disruptive behaviour by closing off its meetings to the public. This option is simply not available.

[59] As another preliminary observation I note that JAG meetings provide an opportunity for the public to learn, to become apprised of JAG's intentions, to consider such action against possible alternatives, to glean information from persons involved, and to form bases for making critical judgements. Obviously people may include other sources of information in forming their opinions. This aspect of JAG's public meetings is not a specifically enunciated "right" but it is an important part of the JAG process and is central to freedom of opinion and assembly which are related to freedom of expression.

[60] It is also well to remember, at the outset, that freedom of expression includes the right to persuade others, a right to challenge and assert. Freedom of speech is a sub-set of freedom of expression. Expression may take many forms, in word and deed. Further, freedom of speech obviously includes the right to speak expressively, with emotional content where appropriate. Words would sound hollow indeed if they could only be uttered in robot-like fashion.

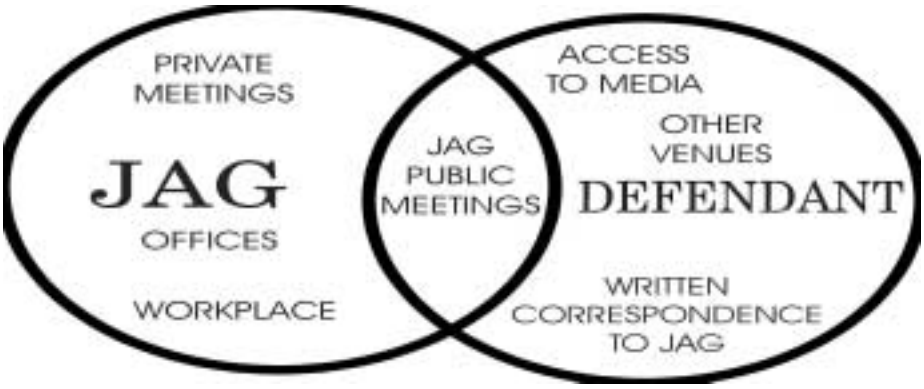
[61] The defendant suggests that if, as a result of this trial, he loses his right to speak out, others will be afraid to do so. While I think Mr. Marcocchio may be underestimating the willingness of the typical Cape Bretoner to speak his or her mind, the Court must nevertheless be aware of the possible implications of its decision here. The Court must as well be cognizant of the fact that in some situations, allowing a restriction on a person's right to speak before a public body may not only limit the individual's rights, but may also diminish the public body itself. Finally, it is well to remember the obvious truth about all individual rights, namely that they are necessarily circumscribed by the rights of others.

FREEDOM OF EXPRESSION - CHARTER s. 2(b)

[62] One may conceptualize interests of JAG as forming a “set”, the limits of which are defined by a circle. In various sectors of the circle are JAG operations such as its private meetings with employees and consultants, and aspects of its operations which do not involve meetings of any sort. A large part of the circle, however is occupied by public meetings of one kind or another.

[63] Likewise one might think of the ambit of defendant's rights, (in so far as his freedom of expression is concerned,) as a "set", represented as a circle. In this set would be included his ability to express himself by means other than attendance at meetings, his access to public arenas other than JAG and his access to various media. In one portion of this circle lies his right in expressing himself at public meetings of JAG. It is the overlap of these two areas, JAG's interests and the Defendant's rights, where the two sets intersect - at public meetings of JAG - that defines the field of conflict in this case.

[64] The components of freedom of expression under s. 2(b) include both content and form - both the substance of an idea and the means by which it is disseminated. While Mr. Marcocchio has suggested that JAG does not want to hear the content of his message and is attempting to prevent the broader public from hearing what he has to say, it does not appear that the PPA notice sprung from an intolerance to his views per se. Rather, the difficulty seems to be the manner and extent to which the defendant wished to express his views at JAG functions. Put another way, and to cite a recent example, this is not a case where the



government sought to limit the substance or content of expression as in the Sharpe case.[7]

[65] I note again here that the PPA ban has the effect of curtailing the defendant's present and future expression, not as a result of his behaviour on May 22nd and August 1st, 2001 but rather owing to his previous expressions by word and deed at JAG functions.

[66] In 1957 the late Justice Rand famously stated that freedom of expression "is little less vital to man's mind and spirit than breathing is to his physical existence". The Supreme Court of Canada "attaches great weight to freedom of expression. Since the Charter came into force the Court on many occasions has stressed the societal importance of freedom of expression and the special place it occupies in Canadian Constitutional Law".[8] The Court went on to recall "the fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy. It protects not only accepted opinions but also those that are challenging and sometimes disturbing". The Guignard judgement contained the following statement - "Some forms of expression, such as political speech, lie at the very heart of freedom of expression." Here it referred to its decisions in Sharpe (supra), Irwin Toy[9]and Thomson Newspapers[10]

[67] The Court has also quoted with approval the following statment of the U.S. Supreme Court in Cox v. Louisiana:

> 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. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.

[68] A important decision, referred to by both Crown and Defence, is the decision of our Supreme Court in the case often referred to as Canada v.

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[7] R. v. Sharpe [2001] 1 S.C.R. 45

[8] Guignard v. City of Saint-Hyacinthe, 2002 S.C.C. 14 (neutral citation)

[9] Irwin Toy Limited v. Quebec (Attorney General) [1989] 1 S.C.R. 927

[10] Thomson Newspapers v. Canada (Attorney General) [1998] 1 S.C.R. 877

Canada.[11] While concurring in the result, Chief Justice Lamer, Justices L'Heureux-Dube and McLachlin each plotted a distinct approach to s. 2(b). These three tests have been referred to in R. v. Behrens, (a case to which I will return later in these reasons) as being the "compatibility of function" test of Chief Justice Lamer, the "public arena entitlement" test of Justice L'Heureux Dube and the "furtherance of values" test of Justice (now Chief Justice) McLachlin. The Canada case was the first occasion on which the Supreme Court considered the extent of the Charter guarantee of freedom of expression on state-owned property. While there are important factual differences, it was stated at paragraph 22 that "the crux of the government's attempt to defend the provision at issue relates to its property interest in the airport". I have attempted to give this case the careful consideration that it obviously deserves. I do not intend to expound on it at great length. I have decided to focus primarily on the approach developed by McLachlin, J., as she then was, as it seems to me to be more appropriate to the facts at hand and more helpful in dealing with the issues raised. In any event, I will eventually get to a consideration of s. 1 which would most likely occur even if either the "compatibility of function" test or the "public arena entitlement" test were employed. All roads eventually lead to s. 1.

[69] After defining the position taken by her colleagues, McLachlin, J. begins her analysis as follows:

> "Freedom of expression does not, historically, imply freedom to express oneself wherever one pleases. Freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another's private property as a forum for expression. A proprietor has had the right to determine who uses his or her property and for what purpose. Moreover, the Charter does not extend to private actions. It is therefore clear that s. 2(b) confers no right to use private property as a forum for expression.
>
> The matter is less clear where public property is involved. Since the Charter applies to government action, the government must make its property available as a forum for public expression in so far as the guarantee of freedom of expression in s. 2(b) of the Charter so requires. This poses squarely the question of whether s. 2(b) should be read as guaranteeing access to some or all government property for use as a forum for public expression. That is the issue at the heart of this case.

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[11] Committee for the Commonwealth of Canada v. Canada [1991] 1 S.C.R. 139

[70] She goes on to state at para. 225

> "The jurisprudence supports the view that the state's property interest in a forum does not give it the absolute right to control expression in that forum."

The U. S. Supreme Court is quoted as follows

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[12]

[71] On the other hand, McLachlin, J. acknowledges that the state must not be obliged to defend in the Courts its restrictions on expression where such does not raise the values and interests traditionally associated with a free speech guarantee. Thus, certain types of government property such as private offices or state owned broadcasting towers and prisons do not engage s. 2(b). She says that any person asserting an infringement of 2(b) rights must make out a *prima facie* case, meet a "threshold test", in showing that the public property in question engages traditional free speech concerns and hence falls within the ambit of s. 2(b). Like her colleagues, she would not extend 2(b) to “violent” forms of expression.

[72] Her judgement confirms that by virtue of its property interest and the law of trespass, the Crown may in fact limit legitimate free speech by the device of denying access. However, the question in such a case remains whether that denial of access infringes s. 2(b).

[73] McLachlin, J. considers the compatibility of the property's purpose with free expression as a proper factor, if not an adequate test. In the present case both Melnick Hall and the Steelworkers Hall are by their very nature meeting spaces compatible with free expression by members of the public. She states that a 2(b) analysis should focus on determining when, as a general proposition, the right to expression on government property arises. In the present case, both functions were predicated on expression and exchange of information and views.

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[12] Marsh v. Alabama 326 U.S. 501 (1946)

[74] As I indicated earlier limitations may fall into two categories, firstly, the restriction may be content based, (in which case it is more likely to be struck down by the courts). Secondly, it may be content-neutral but tied rather to the "manner" of expression, with its purpose being to avoid the "harmful consequence" of the particular conduct in question. An example given by McLachlin, J. is “prevention of interference with the proper and orderly functioning of government owned property”. I have concluded earlier in these reasons that the restriction placed on Mr. Marcocchio is essentially content neutral. Where such is the case the jurisprudence in Irwin Toy, supra, requires the claimant to establish that his expression promote *one* of the purposes underlying s. 2(b). These purposes were defined in Irwin Toy as 1. the seeking and obtaining of truth; 2. participation in social and political decision making; and 3. the encouragement of diversity through the cultivation of a welcoming environment for the conveyance and reception of ideas. In order to claim protection of 2(b) and prove an infringement, a claimant must establish a link between his use of the forum in question and at least one of these three purposes. On the facts of the present case, the first is difficult to evaluate. Truth is always a somewhat slippery and malleable concept. What Mr. Marcocchio views as the shining of a bright light into dark spaces might be seen by JAG as obfuscation. As to the third purpose, this too begs a difficult question. The defendant's participation may encourage other views to come forward, but it also might discourage other views from being presented.

[75] Wherever a further analysis of the foregoing may lead it seems relatively clear that the defendant *can* establish a link between the second of the three Irwin Toy purposes - participation in social and political decision making - with the uses to which Melnick Hall and the Steelworkers Hall were being put on May 22nd and August 1st. An analysis of the law and the facts at hand leads me to conclude that the form of expression the defendant sought to exercise here falls within the scope of s. 2(b) thus defined. I conclude that the ban constituted a limitation on the defendant’s rights under s. 2(b) of the Charter. This leads to the further question of whether the limitation (the PPA ban) is justified under s. 1. At that stage the onus is on the Crown to establish that the limitation is reasonable, prescribed by law anddemonstrably justified in a free and democratic society. At that stage the concern is primarily one of balancing and weighing the conflicting interests - the individual's interest in using the forum in question for his or her

expressive purposes against the state's interest in limiting the expression on the particular property. I will turn to that aspect presently.

[76] Before proceeding, I wish to make brief mention of the rather different nature of the Melnick Hall meeting. Although my analysis of s. 1 will subsume all charges arising from both events, it is not clear to me that the Melnick Hall event was sufficiently "public" in nature to engage the defendant's 2(b) rights. JAG decided, for apparently legitimate reasons, and after community consultation, to meet with just one sector of the public - persons in the NOCO area. It is not clear to me that JAG should not or could not limit its invitations in this way. The vast majority of people in the CBRM were not invited to the meeting and technically would have trespassed had they gone. There are many who might have wished to attend but simply observed the limitation expressed in the invitation. In any even, there was a fully public meeting with the same presenter scheduled for the following night. Listening to the evidence, it appears that the audience Mr. Marcocchio wished to address were the NOCO residents themselves, not the government or JAG representatives who were speaking. Mr. Marcocchio or any anyone else was free to arrange a venue and invite these people to listen to him if he chose. While accusing the government of a divide and conquer approach, the defendant's objective was to divide those same people from the government, for he did not want them to hear the government's message (or propaganda, if you will). While his motives may have been sincere, it is somewhat patronizing to think that they were all going to be brainwashed. If anything, the video footage shows that many had their minds fixed firmly against JAG's intentions. Some, at least, saw the meeting as an opportunity to demand specific and immediate action and they were apparently as able as the defendant would have been to take possession of the event for that purpose. To put it succinctly, Mr. Marcocchio did not get across the threshold of Melnick Hall and, quite likely, neither did his s. 2(b) rights. In this sense it is distinguishable from the "open house" at the Steelworkers Hall

[77] As to the defendant's contention that the entire invitation system was a ruse to exclude him, this is belied by the evidence. Clearly others besides the defendant were kept out of the hall based on their residency. While it does at first glance appear suspiciously coincidental that the hall was opened up just after Mr. Marcocchio was taken away by the police, I note that Mr. John Steele had been arrested and handcuffed by the police at this time. Although

his removal was not effected, it appears the police were treating him exactly the way they had treated the defendant. As noted earlier in these reasons, there was no indication that the persons hosting the meeting, who decided to open it at that particular time, knew in anything other than general way, what was happening on the outside step. Most obviously, JAG believed their notice to be valid and told the police quite pointedly that the defendant, aside from his residency outside NOCO was for that reason alone not permitted inside the hall.

POTENTIAL FOR ABUSE OF PROTECTION OF PROPERTY RE S. 2(b) RIGHTS

[78] The simplicity and ease with which a private landowner may prohibit another person from entering on property, merely by issuing or posting a notice under the PPA, with summary procedures available upon breach, are desirable features of the legislation from that point of view. That very ease, however, might open up potential abuses of individual rights where government property is being used as a public forum. The Protection of Property Act should not be available to government, or agencies or arms of the government, as a convenient tool to quell the voices of those who disagree with it or who might foment public opinion to such an extent that it would impede government from its preferred course of action.

[79] For example, one might imagine a hypothetical case where government was involved in a public consultation about the issuance of an aquaculture lease. The government department rents a community hall and invites the public to participate in a public forum. Prior to the meeting, one particular individual has caused an annoyance or proven to be an embarrassment to a government official, as a result of which the official in charge of organizing the meeting sends a notice under the PPA banning the particular individual from the Hall. A copy is sent to the local police force so that when the individual arrives he is arrested and removed. The potential nuisance is eliminated. I emphasize that there is no evidence in this case of any such instance of arbitrary and badly motivated behavior from a governmental official. I set it out merely to indicate a recognition that given the other civil and criminal law provisions potentially applicable, as discussed above, the Courts should not countenance the inappropriate use of a PPA notice to quell dissent where

there is no indication of an interference with the use of property or with due process. Where a private landowner needs no reason whatsoever to ban someone from their property, government, as a property owner, where the property is used as a public forum, will most often be required to justify such a step. This brings us to the crux of the matter, the application of s. 1 of the Charter.

RIGHTS AND INTERESTS IN THE BALANCE - S. 1, CHARTER

[80] Readers of a certain leading national newspaper may be familiar with the following quotation: -

> "The subject who is truly loyal to the Chief Magistrate will neither advise nor submit to arbitrary measures." - Junius

In R. v. Therens[13] LeDain, J. of the Supreme Court of Canada said

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary.

[81] A brief discussion of the ambit, principles and early cases pertaining to s. 1 of the Charter is contained in the Canada v. Canada (supra) decision. I find the comments of McLachlin, J. instructive and will thus set out certain portions of that judgement beginning at paragraph 260.

> I would incline to the view that the act of the airport officials in preventing them from handing out leaflets and soliciting members constitutes a limit ***prescribed by law*** because the officials were acting pursuant to the Crown's legal rights as owner of the premises. (Emphasis added)

> Under...the common law...the Crown as property owner is entitled to withdraw permission from an invitee to be present on its property, subject always to the Charter...the limit, in other words, results from the application of the Code (or

[13] R. v. Therens (1985) 45 C.R. (3d) 97

common law or statute). It follows that it is "prescribed by law" within the test set out in Therens. (words added)

From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency...such would make it unduly difficult to justify limits on rights and freedoms which may be reasonable, and indeed, necessary.

It is under s. 1 of the Charter that the respective interests of the individual in free expression and the state in limiting that expression are addressed. The exercise is one of balancing. The balancing must be done contextually having regard to the facts and values of the particular case before the Court...the onus lies on the Crown of establishing this.

Rights cannot be viewed as absolute. Sometimes a right must yield to another, conflicting right or give way to an overriding objective of public importance.

Only if certain conditions are established can a limit on a fundamental right or freedom be justified. First, the state should be required to demonstrate a compelling reason for the limitation, second, the limit on the right should not go beyond what is necessary to achieve that objective - it should not be over broad and should contain sufficient safeguards to ensure that as the law is applied, the right in fact will not be infringed more than necessary. (citing Oakes [1986] 1 S.C.R. 103 and R. v. Edwards Books [1986] 2 S.C.R. 713)

The state may have either of two dominant objectives - to control the content of expression - alternatively to control the consequences of public expression on the property in question...it is sometimes observed that content neutral restrictions may be easier to justify than content-based restrictions.

It may be useful to elaborate on the concept of the function or use of government property in the context of the second category, that of content neutral restrictions. Purpose or function may extend beyond the mechanical aspects of the task to which the location is dedicated, to embrace considerations such as decorum or fairness that affect its overall long term functioning.

> On the other side of the balance lies the interest of the individual in effectively communicating his or her message to members of the public. Considerations include - how suitable is the location for the effective communication of the message to the public? Does the property have special symbolic significance? Are there other public arenas in the vicinity in which the expression can be disseminated? In short, what does the claimant lose by being denied the opportunity to spread his or her message in the form and at the time and place asserted?

[82] In the foregoing decision in Canada v. Canada, the limitation was determined not to be "saved" by s. 1 of the Charter. There are however, factual differences. In the Canada v. Canada case the defendants were handing out information about their goals and conducting recruitment of members when asked to cease their activities at the airport. The limitation in question was in the form of a regulation which prohibited the conduct of any business or undertaking, or any advertising or soliciting at an airport, except as authorized in writing by the Minister. This limitation, although content-neutral, was overly broad and disproportionately infringed upon the defendant's right to free expression.

[83] To rely on s. 1, the Crown must demonstrate that the limitation is (1.) prescribed by law; (2.) reasonable; and (3). demonstrably justified in a free and democratic society.

[84] Reference to portions of the foregoing Canada judgement are likely sufficient to conclude that the PPA ban was "prescribed by law", as that decision makes explicit reference to the Crown's ability (whether under common law or its extension, the PPA, seems immaterial) to manage the use of its property.

[85] I note as well that certain well recognized and long standing rules of procedure were employed by JAG before the PPA notice was issued. Evidently a motion was brought forward, there was opportunity for discussion, a vote was taken and the motion was passed by a majority. It appears JAG was operating within a formal structure of internal governance which, as a society incorporated under the laws of the Province, it had an obligation to do.

[86] Certain cases hold that limitations on rights cannot be left to the unfettered discretion of administrative bodies. Vagueness is often a fatal feature of such legislative schemes. However most involve bodies such as boards of censors or customs officials deciding on seizure of certain types of material,

or bodies setting limitations on entire classes of persons. Such decisions are most often content-based and different than the present case which is concerned with specific instances of individual behavior. The PPA ban is reasonably clear and sets out with "tolerable certainty[14]" the extent to which the defendant's actions are restrained.

[87] Finally, under this topic, I note the following comment from Lamar, C.J. in Canada at para. 27. By way of example or *dicta*, he said

> The person presiding over a municipal assembly will generally be justified in limiting the time each member has to speak in order to allow everyone a chance to speak in an orderly manner. In my opinion, such a concern comes under s. 1 of the Charter as do many others.

I find that the PPA ban, and steps taken to enforce it, were measures “prescribed by law” as that is meant in s.1 of the Charter.

[88] The discussion which follows pertains to the second and third aspects of s. 1 - whether a reasonable limit - whether demonstrably justified. In doing so I am mindful of the guidelines laid down by the Supreme Court of Canada in R. v. Oakes, supra, and R. v. Edwards Books, supra, reiterated in the Canada case and many other subsequent decisions. I will begin with specific reference to a case put forward by the defendant, R. v. Behrens, (supra). While not binding on me, it bears many features in common with the present case although it is, ultimately, distinguishable.

[89] In Behrens a group of protesters were involved in an incident that led to them being notified in writing of their banishment from Queen's Park. The notice, issued under legislation very similar to the PPA of Nova Scotia, prohibited named individuals from entering the precincts of the Ontario Provincial Legislature. Evidently the Sergeant-At-Arms believed the defendant's had defaced government property by pouring a substance, thought to be blood, onto the front wall of the legislature. The defendants contended that they had used water soluble fake blood and did no real damage to the building. Months later, in 1999, the defendants entered

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[14] Re Luscher (1985) 45 C.R. (3d) 81 (Fed. C.A.)

Queen's Park carrying placards and banners protesting government policies. They acted peacefully and dispersed without incident, but were subsequently charged under the Trespass to Property Act and summoned to appear in Court.

[90] In considering the balance between the interests of government and the right to freedom of expression, Quan, J.P. had this to say -

> If the terms and policies only relate to acting non-violently, not destroying or damaging public property, not endangering the safety of others, and not frustrating the public from reasonable access to government services, then restrictions would be reasonable.

[91] However, on the facts of this case, the Court had a difficulty with "an indefinite ban placed on individuals to be in public areas on state owned property". While granting that a reasonable restriction on the behavior of individuals on public property is allowed, it concluded that the ban must yield to the Charter

> "...if a certain scenario exists...it would only be ineffectual if the defendants demonstrate and behave peacefully while on Queen's Park property. Peacefully means not committing acts of violence, not endangering the safety of others, not damaging government property and not unreasonably obstructing the public's use and benefit. Hence, s. 2(b) would override any charge under the Trespass to Property Act in spite of a ban imposed by the Speaker as long as the trespassers are non-violent and non-destructive in their expressive activities. If their behavior falls outside these governing factors, then they may be arrested and charged and the Charter will not protect them from being convicted under the Trespass to Property Act."

[92] In effect the defendants were free to ignore the ban so long as they kept their behavior within certain limits. This is essentially what Mr. Marcocchio is arguing for in his case. However, it is important to note certain differences. The behavior which prompted the ban was property damage, not behavior which directly engaged other individuals. The grounds surrounding Queen's Park are somewhat different than a meeting room. The Ontario Legislature does not conduct its proceedings on the lawn. It is also not clear what, if any, consultation or decision making occurred prior to the Sergeant-At-Arms issuing the ban. It is not known what process or criteria might have preceded or governed its issuance.

[93] In considering "proportionality", whether the objective of the limitation is balanced against the nature of the right it violates, courts have been warned to avoid rigid and inflexible standards. The defendant here argues that the ban is disproportionate, that he should only be disentitled from attendance and speaking at JAG meetings if he commits criminal conduct. However, even in Behrens, the judge appears to endorse a ban where the activities of a protester "frustrate the public from reasonable access to government services". The Crown has argued, on JAG's behalf, that the defendant was frustrating the JAG process.

[94] While the reasonableness of the PPA ban is not founded upon the interactions between the defendant and JAG officials and employees on August 1st, 2001 at the Steelworkers Hall (it is, if at all, founded on events before the ban was issued) the brief interaction between Mr. Marcocchio and Steve Esposito may provide a glimpse at the kind of conduct, below the threshold of criminal behavior, which, if protracted, might frustrate the JAG process. As noted above, Mr. Esposito was assailed by questions and accusations while given no opportunity to respond. The best he could do was send a letter to Mr. Marcocchio's home afterwards providing the requested information. It appears Mr. Marcocchio's presence was necessary for the expression of his views, while his absence was necessary for the expression of the views of others.

[95] S. 3(1)(f) of the PPA permits an occupier to prohibit certain activities on premises, and one can thus envisage a notice issued to Mr. Marcocchio which did not deny him entry on premises but prohibited him from speaking. While this would be a more minimal impairment, it is unlikely the defendant would accept it, and would simply be an invitation to non-verbal behavior.

[96] While the defendant does not think much of the concession, the notice does not preclude Mr. Marcocchio from submitting comments and questions to JAG and receiving answers in due course. As well, the motion behind the ban indicates that he may request reconsideration after one year.

[97] In his testimony, Mr. Marcocchio stated "the promise of JAG has been turned upside down...fraudulent science is being used to defraud a disempowered community...JAG is a rubber stamp". He appears to believe that JAG has become hopelessly compromised. Whether he is right or wrong, there is evidence that his motive is to attack JAG itself, and it is not an unreasonable inference to conclude that his actions had that effect. He

described one witness as "a proponent of JAG". I am not at all sure that the issues relating to the Muggah Creek clean up can be subsumed in the question "Are you for or against JAG?".

[98] After what is widely perceived as a poor beginning, governments have eventually chosen the current JAG model to facilitate public involvement in this clean up. It is clearly an open process. JAG provides a platform for people to express their views. Some may be unhappy with steps taken or not taken. Some may feel they do not receive sufficient deference nor their ideas sufficient credence by JAG. Nevertheless an opportunity is given to attend and participate. It must not be forgotten that all such people are free to air their views elsewhere and to other bodies, in public, to the media and to their elected officials. However, it is not possible for each person to have unlimited access to the JAG process. No one possesses an inherent right to have views adopted by JAG. Nor does anyone have the right to interfere unduly with the very process which gives the public that opportunity. It is reasonable that bodies like JAG should have some power to protect their own process.

[99] Given that JAG is committed by its constituting documents to an open process, it is obviously a fairly serious and drastic step to ban someone from their premises and thus exclude them from the process. JAG might expect to be criticized for taking such a step and indeed have been. The Court's task is not simply to examine the propriety of their decision. More germane is whether the decision was taken lightly, capriciously or arbitrarily. I do not think that it was.

[100] Whether one is in agreement with the JAG process, standards being employed, or the science being utilized, the JAG meetings provide an opportunity to learn. Those interested in hearing and listening have rights which must be respected as well - rights which should not be hijacked by a few, no matter how worthy the cause. Those whose minds are made up, who believe that all the necessary facts exist to justify a certain course of action, regardless of anything else which might be done, do not thereby have the right to frustrate the JAG process. There are legal and democratic means by which JAG could be shut down in the same way that it was started up.

[101] L'Heureux-Dube, J. in the Canada case speaks of the "marketplace of ideas". Although recent history shows a considerable degree of economic dependency, a good many Cape Bretoners are reluctant to buy into anything

which emanates from a government source. In the local marketplace, it might easily be that the dissenter, the angry voice, the person with the grievance has the easier claim on public sympathy. But the government too should have a reasonable opportunity to present its case. Here the chosen vehicle is JAG, which by design gives the public a chance for input. Once again, I am led to conclude that JAG has the right to protect its own process. Within JAG, the ordinary constraints of civility and respect for others seem to be reasonable parameters for the behavior of all, whatever the content of the message.

[102] Giving legal effect to the PPA ban does not immunize JAG from criticism, then or now, either by the defendant or others. The proceedings at Melnick Hall bear witness to this.

[103] The letter of March 2nd, 2001 which notified the defendant of the PPA ban cannot be divorced from the motion of the JAG roundtable which preceded it and the events to which that refers.

[104] The minutes of the February 28th, 2001 meeting disclose considerable discussion about a Code of Behavior and a system of "flags". The preamble to the motion refers to Mr. Marcocchio's behavior as "consistently disruptive and rude". It mentions the early termination of November and January meetings due to the defendant's behavior and notes further disruptions at February 19th and 20th meetings. The minutes state

> "...discussion of this motion touched on the Charter of Rights and Freedoms, the lack of proof or evidence of wrongdoing, the fact that the incident was under investigation...the wording of the motion and the importance of protecting employee's health and safety. JAG legal counsel was invited to answer questions."

[105] Barry MacCallum spoke to the reason for the PPA ban and the process which culminated in the roundtable meeting of February 28th, 2001 when the motion was passed to issue it. He said the basis for the decision taken by JAG was rooted in the defendant's behavior. He characterized him as having "no respect for the Chair, for the organization". He said the discussion at the meeting centered on the defendant's conduct and the wording of the motion reflected that. He spoke of previous meetings which had to be canceled or terminated, particularly a roundtable meeting in November of 2000, which

he said was "dominated" by the defendant. He made mention of a physical altercation between the defendant and a staff member.

[106] The motion on February 28, 2001 was presented at a meeting of JAG's roundtable with thirty-five voting members in attendance. Six of these were government representatives, the rest citizens of the community. The motion was duly made, seconded and carried with 28 voting in favor, 6 against.

[107] In effect the defendant has been ostracized from the JAG process. Ostracism has its etymological origins in the ancient Greek practice of banishment by popular vote without trial. The Defendant claims not to have had an opportunity to challenge the imputation of bad conduct. Neither did the defendant have the opportunity to speak to the pre-ban conduct during *this* trial. However it was neither necessary nor desirable that he do so. He is not charged with any criminal offences here as a result of that previous conduct, and it may be assumed that it was non-criminal in nature. My purpose in mentioning it, and the steps taken in response, is to confirm the *bona fides* of JAG's ultimate decision to impose the ban. The correctness of the decision can be left with the court of public opinion.

[108] I thus conclude that while there was a limitation on Mr. Marcocchio's s. 2(b) right to freedom of expression, the limitation is saved by s. 1. There is thus no breach of his Charter rights as would entitle him to any remedy or relief under s. 24(1).

SECTION 7, CHARTER

[109] Although mentioned in the defendant's brief and submissions, neither at trial nor in submission was a s. 7 argument developed. I do not intend to conduct an analysis under s. 7. It is necessary only to say in the merest possible terms that the defendant has not proven that his right to liberty, contained in s. 7 of the Charter, has been infringed by reason of the fact that he is prohibited from entering premises occupied by JAG. Freedom of expression, as an aspect of liberty, has been addressed.

[110] The Ontario Court of Appeal in Asante-Mensah, [15] supra, considered whether the trespass notice violated the accused's s. 7 Charter rights. Though the accused in that case was engaged in a commercial, not an

[15] See paragraphs 24-31

expressive, activity, the Court did not predicate its decision on s. 7 on this factor. It assumed the defendant's liberty interest was engaged but then went on to say that the deprivation was in accordance with the fundamental principles of justice. If a case has been developed under s. 7, I think the ultimate conclusion would be as it was in Asante-Mensah.

SECTION 9 - CHARTER

[111] Similarly I would say that s. 9 of the Charter has not been engaged in argument or on the facts. Mr. Marcocchio's detention was not arbitrary. It resulted from the enforcement of a valid PPA notice. A power of arrest is given in the statute. The right to use reasonable force is an incident of the statutory power of arrest. Therefore his detention by police on these occasions was not arbitrary.

S. 129(a) CRIMINAL CODE - RESISTING - EXECUTION OF DUTY - S. 266

[112] In returning to this aspect of the charges against Mr. Marcocchio, it is not necessary to add very much to what has been set out earlier. The police having a valid power of arrest, there is a legal substrate for the charges of resisting arrest on each of the two dates. The analysis then turns to the defendant's actual conduct at the time of arrest and as he was being carried away.

[113] Without referring to an extensive list of cases I intend to apply the law as set out in R. v. Stortini[16]. While a decision of the Provincial Court of Ontario, it appears to represent the proper and usual approach taken to the question of what constitutes resistance.

[114] Acts of positive physical resistance, amounting to so-called "forcible means" offered by an accused to a police officer in the execution of his duty constitutes the sort of resistance that is contemplated by s. 129 of the Criminal Code. On the other hand, conduct which is often referred to as "passive resistance" which is to say resistance without some degree of applied force, is generally found to be outside the scope of s. 129 and not punishable by criminal sanction. Obviously, this does not mean that police

[16] 42 C.C.C. (2d) 214

are disentitled from using reasonable force to effect an arrest. When doing so, particularly in a crowd situation such as pertained in this two instances, it is possible that a detainee might get the odd bump or scrape and react to this. It will always be a question of fact whether the actions of the defendant were deliberate and forceful, and of course the burden of proof is on the Crown beyond a reasonable doubt.

[115] I find that the Crown has met this burden with respect to the defendant's actions on May 22nd at Melnick Hall. Although police told the defendant he was being arrested for causing a disturbance, the arrest was warranted under the PPA, whether or not a s.175 offence was occurring (I doubt that it was). Consquently I find the defendant guilty of resisting a police officer engaged in the execution of his duty contrary to s. 129(a) of the Criminal Code on May 22nd, 2001. For reasons given earlier I find him guilty of the simple assault under s. 266(b).

[116] Applying the same analysis to the charge under s. 129(a) from August 1st, 2001, as a result of the findings and observations made earlier, I find the defendant not guilty.

PROTECTION OF PROPERTY ACT - DEFENCE of "REASONABLE BELIEF"

[117] In conclusion I turn to the last remaining charge under s. 3(1)(e) PPA on August 1, 2001.. Under that section a person who enters on premises when prohibited by notice without the permission of the occupier or without legal justification commits an offence. I note the defendant has suggested in his cross examination of the police that they ought to have taken account of the justification defence in the PPA or possible application of the Charter when they were effecting the arrests of the defendant. In many cases it is neither practical nor possible for the police to do this. Police officers who are engaged in the execution of their duty must always be mindful of an individual's Charter rights and the parameters of police power. However, the police could not be expected to conduct an inquiry either prior to or at the time of arrest into possible justification for the actions of the defendant. They acted on what they believed was a valid PPA notice. Such a belief was reasonable and appropriate in the circumstances.

[118] While I have concluded that the defendant did not have justification in fact or in law for his entry into the Steelworkers Hall on August 1st, 2001, this is not the end of the matter. S. 5 of the PPA specifically creates a defence in

circumstances where "the person charged reasonably believed that he had legal justification...to enter on the premises". There is no doubting that the defendant held the belief that his s. 2(b) Charter rights permitted him to enter the Steelworkers Hall and engage Mr. Esposito in a non-violent and non-criminal fashion, as he did. If he held this belief "reasonably" he is entitled to the defence afforded him in the PPA. Once again, I doubt the drafters of the legislation had anything like this situation in mind when the defence was created, but just as the Act is available to the Crown, so it is available to the defendant. He has put forward a reasoned argument here in support of his position. While I have not found in his favour on the central and underlying issue the outcome was no "given". It appears therefore that his belief was reasonable and so he is found not guilty of the charge under s. 3(1)(e) of the PPA on August 1st, 2001. However, I should add the following comment.

[119] With this decision, unless and until it is overturned on appeal, the defendant can no longer claim to reasonably believe that he has justification to flaunt the PPA ban. The s. 5 defence had a relatively short shelf life. It expires today.

Dated at Sydney, Nova Scotia, this 11th day of April, A.D., 2001.

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A. Peter Ross, JPC