LOCATION MATTERS: HOW NUISANCE GOVERNS ACCESS TO PROPERTY FOR FREE EXPRESSION

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I. INTRODUCTION

In the 1991 case of *Committee for the Commonwealth of Canada v Canada*, the Supreme Court of Canada recognized that some instances of free expression require a location.[1] Yet not all locations, even those locations that might be considered public, are necessarily available for free expression. Given that the Supreme Court has declared free expression to be a key democratic right,[2] and that the *Canadian Charter of Rights and Freedoms*

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1 [1991] 1 SCR 139 at 153, 77 DLR (4th) 385, Lamer CJC [*Commonwealth of Canada*]. See also *Greater Vancouver Transportation Authority v Canadian Federation of Students—British Columbia Component*, 2009 SCC 31 at para 78, [2009] 2 SCR 295 [*GVTA*]. For non-judicial pronouncements of the importance of location to free expression, see e.g. Richard Moon "Freedom of Expression and Property Rights" (1988) 52:2 Sask L Rev 243 at 244 [Moon, "Freedom of Expression"]; Richard Moon, "Access to Public and Private Property Under Freedom of Expression" (1988) 20:2 Ottawa L Rev 339 [Moon, "Access"]; Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 3–4 [Moon, *Constitutional Protection*]; Brian Slattery, "Freedom of Expression and Location: Are There Constitutional Dead Zones?" (2010) 51 Sup Ct L Rev (2d) 245 at 245; Timothy Zick, "Property, Place, and Public Discourse" (2006) 21 Wash UJL & Pol'y 173 at 173. Free expression is protected in Canada by the *Canadian Charter of Rights and Freedoms*, s 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11 [*Charter*].

2 See *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at 1336, 1352–53, 64 DLR (4th) 577.

famously does not mention property rights,[3] it might be expected that free expression would trump property rights, or, at the very least, grant some right of access, particularly to public property.[4] However, an examination of the section 2(b) jurisprudence strongly suggests that this is not the case, and that free expression is subordinated to the primary purpose of the property where it is located.

This article argues that in cases dealing with access to property, particularly publicly accessible property, for the purposes of free expression, the jurisprudence contains an underlying logic of nuisance.[5] By "logic of nuisance" I mean that the courts, implicitly or explicitly, compare instances of free expression to nuisances and use a similar kind of balancing as seen under traditional nuisance law. The logic of nuisance shares some similarities with the traditional law of nuisance in that both involve balancing apparently competing uses of land and both concern themselves with disturbances, such as excessive noise and unpleasant smells. Where the logic of nuisance differs from traditional nuisance law is that it is not about reciprocal rights between adjacent properties, but about competing uses of public property and spaces. The result of this logic of nuisance is that the courts prefer instances of free expression that are quiet and relatively unobtrusive, and do not interfere with the role of the property on which the expression takes place. Traditional nuisance law may have the "difficult task of maximizing mutual autonomy while making it possible for us to live together",[6] but when applied to public property and spaces, the logic of nuisance has a long history of being used to

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3 See Alexander Alvaro, "Why Property Rights Were Excluded from the *Canadian Charter of Rights and Freedoms*" (1991) 24:2 Can J Pol Sc 309; Bruce Ziff, "'Taking' Liberties: Protections for Private Property in Canada" in Elizabeth Cooke, ed, *Modern Studies in Property Law*, vol 3 (Oxford: Hart, 2005) 341.

4 For an earlier discussion of the relationship between property and free expression see Moon, "Access", *supra* note 1; Moon, "Freedom of Expression", *supra* note 1. See also W Wesley Pue & Robert Diab, "The Gap in Canadian Police Powers: Canada Needs Public Order Policing Legislation" (2010) 28:1 Windsor Rev Legal Soc Issues 87 at 102–05.

5 Timothy Zick argues that in the United States public expression is also seen as a nuisance. See Zick, *supra* note 1 at 177, 184.

6 Gregory S Pun & Margaret I Hall, *The Law of Nuisance in Canada* (Markham, Ont: LexisNexis, 2010) at 1.

sanitize the public sphere.[7] Its appearance in the section 2(b) jurisprudence results in concerns about property trumping or restricting the right to free expression.

As keen as Canadian courts are to portray the right to free expression as a deeply important right, they are equally keen to promote respect for the law.[8] In cases involving section 2(b) claims, individuals must first show that the right has been infringed, and then they must show that the infringement is not saved by section 1 of the *Charter*.[9] In section 2(b) cases that also involve the access and use of public property, the courts necessarily balance the competing uses of the property at issue. In the context of an individual's right to access and use public property for the purposes of free expression, the courts' respect for the law means that they can be too quick to defer to the government's use and regulation of property rather than protect the right to free expression.[10] The courts also fail to examine whether the individual attempting to express herself on public property has another forum for expression; instead, they focus on whether the expression at issue fits with the traditional use of the public property.[11]

Two recent lower court decisions are paradigmatic of the courts' reasoning in cases of accessing property for the purposes of free expression: *Batty v City of Toronto*, which arose out of litigation surrounding the Occupy Toronto movement,[12] and *R v Whatcott*, which dealt with the constitutionality of a trespass order issued in respect of the University of

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7 See e.g. Peter C Hennigan, "Property War: Prostitution, Red-Light Districts, and the Transformation of Public Nuisance Law in the Progressive Era" (2004) 16:1 Yale JL & Human 123.

8 See Jamie Cameron, "A Reflection on Section 2(b)'s Quixotic Journey, 1982-2012" (2012) 58 Sup Ct L Rev (2d) 163 at 168 [Cameron, "Reflection"].

9 For an early critique of this two-step test, see Michael Kanter, "Balancing Rights under Section 2(b) of the Charter: Case Comment on *Committee for the Commonwealth of Canada v Canada*" (1992) 17:2 Queen's LJ 489 at 494.

10 See Part II, below.

11 The situation regarding private property is a little different. See *infra* notes 18–20, 122–23 and accompanying text.

12 2011 ONSC 6862, 108 OR (3d) 571 [*Batty*].

Calgary's campus.[13] Of the two cases, *Batty* arguably received more press attention due to the widespread media coverage of the global Occupy movement.[14] Although there are a handful of other Canadian Occupy movement cases, to date *Batty* is the case that has received the fullest judicial consideration.[15] Given the nature of Occupy Toronto's protest—the continuous "occupation" of a public park in downtown Toronto—*Batty* contains a revealing commentary on property rights. In contrast, *Whatcott* focused on whether the University of Calgary could ban William Whatcott from its campus simply because he distributed pamphlets that others found offensive. *Whatcott* is but the latest case arising out of Whatcott's actions,[16] and throughout this article I make reference to his other cases as they often provide an interesting contrast to similar Supreme Court of Canada cases.

Before I examine *Batty* and *Whatcott* in more depth, it is necessary to outline the current law on the right to access and use property for free expression. I begin in Part II with an examination of Supreme Court cases where the location of the free expression formed a key part of the case. Through an examination of these cases, I tease out the guidelines for people wishing to express themselves on public property and for governments seeking to regulate such expression. Part III compares the decisions in *Batty* and *Whatcott* to show how both of these cases comply with the implicit logic of nuisance. Part IV explores the problems with this logic of nuisance and

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13 2012 ABQB 231, 538 AR 220 [*Whatcott*].

14 See e.g. David Schneiderman, "Free speech and dog walking", *Toronto Star* (28 November 2011) online: Toronto Star <http://www.thestar.com>. But see Daryl Slade, "Judge says U of C ban on distributing anti-gay flyer violated man's rights", *Calgary Herald* (16 November 2011) B5.

15 There have also been court cases arising out of Occupy Vancouver and Occupy Calgary. In the former instance, the case has yet to come to trial, while in the latter the movement struggled to get adequate legal representation. See *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647, 342 DLR (4th) 190; *Calgary (City) v Bullock (Occupy Calgary)*, 2011 ABQB 764, 545 AR 5.

16 See e.g. *R v Whatcott*, 2005 SKQB 302, [2005] 11 WWR 338; *R v Whatcott*, 2002 SKQB 399, [2003] 4 WWR 149 [*Whatcott 2002*]; *Whatcott v Saskatchewan (Human Rights Tribunal)*, 2013 SCC 11, 355 DLR (4th) 383; *Whatcott v Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6, 289 DLR (4th) 506.

argues that it unduly restricts free expression, particularly when that expression takes place on public property.

II. DON'T BE A NUISANCE: ACCESSING AND USING PROPERTY FOR FREE EXPRESSION

In this section, I outline the law governing access to and use of property, including both publicly accessible and private property, for the purposes of free expression. Regardless of whether property is public or private, the public's rights of access to and use of property are well regulated. The *Charter* did not grant and has not been interpreted as granting a blanket right of access to property for the purposes of free expression.[17] Instead, it is for the courts to decide whether and when publicly accessible property can be used as a site for free expression. Through an examination of the case law on both expressive behaviour and the government's attempts to regulate public property, I argue that the jurisprudence betrays a preference for certain kinds of expression over others, even if the courts have, on occasion, upheld less desirable forms of expression. In the context of section 2(b) claims, the Supreme Court grants wide discretion to public bodies tasked with regulating public property and reveals a preference for quiet, unobtrusive, and cost-free expression and the peaceful enjoyment of property. Intentionally or not, this privileges the free expression of those with private property rights or the resources needed to undertake the kind of expression the Court prefers.

In the context of publicly accessible property—by which I mean property that is held out as open to the public regardless of whether it is privately or publicly owned—whether a person has the right to free expression on that property depends on whether certain criteria are met. If the property is privately owned, it is almost certain that non-owners will not have the right to access and use that property for the purposes of free expression.[18] Despite

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[17] See W Wesley Pue & Robert Diab, "The Gap in Canadian Police Powers: Canada Needs Public Order Policing Legislation" (2010) 28 Windsor Rev Legal Soc Issues 87 at 103 (noting that there is "a sliding scale of protection . . . [for] different places in different circumstances"). See also *GVTA, supra* note 1 at para 28 ("[t]he method or location of expression may exclude it from protection").

[18] See e.g. *Harrison v Carswell* (1975), [1976] 2 SCR 200, 62 DLR (3d) 68 [*Harrison*].

the early hopes of both Moe Litman and Richard Moon that, as Moon put it, Canadian "courts could look to the state act which empowers the private property owner",[19] that has not come to pass. As the Supreme Court noted in 2005, "[p]rivate property ... will fall outside the protected sphere of s. 2(b) absent state imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*."[20] In short, private owners are perfectly entitled to prohibit protesters from their property and in some provinces are empowered by trespass legislation to declare certain *behaviours* trespass.[21]

There are two possible ways around the *Charter*'s inapplicability to private property: labour legislation and provincial human rights codes. The former typically allows striking employees to picket on their employer's property.[22] As for the latter, prior to the decision in *Whatcott*, William Whatcott won a similar case in Saskatchewan in which one of his grounds of challenge was that an anti-littering bylaw violated the *Saskatchewan Human Rights Code*.[23] In *Whatcott 2002*, Whatcott was charged and convicted of littering contrary to the University of Saskatchewan's traffic and parking bylaws.[24] Although the Court of Queen's Bench found that the bylaws were

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19 Moon, "Access", *supra* note 1 at 366; MM Litman, "Freedom of Speech and Private Property: The Case of the Mall Owner" in David Schneiderman, ed, *Freedom of Expression and The Charter* (Scarborough, Ont: Carswell, 1991) 361 at 400–01, 403–06.

20 *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 at para 62, [2005] 3 SCR 141 [*Quebec Inc*].

21 See e.g. *Trespass Act*, RSBC 1996, c 462, s 4(1)(c); *Trespass to Property Act*, RSO 1990, c T.21, s 4(1); *Trespass to Property Act*, SS 2009, c T-20.2, s 4(2); *Trespass to Premises Act*, RSA 2000, c T-7; *Trespass to Property Act*, RSPEI 1988, c T-6, s 2(1)(e)–(f); *Trespass Act*, SNB 2012, c 117.

22 See e.g. *Cadillac Fairview Corporation Ltd v RWDSU* (1989), 71 OR (2d) 206, 64 DLR (4th) 267 (CA) at 217-221[*Cadillac Fairview*]. The legislation in question was the *Labour Relations Act*, RSO 1980, c 228. This legislation did not, however, grant a blanket right of access and applied only to property where there was a standing invitation for the public to enter. See *Queen's University at Kingston v CUPE, Local 229* (1994), 120 DLR (4th) 717 at 725, 76 OAC 356 [*Queen's University*].

23 SS 1979, c S-24.2, s 5; *Whatcott 2002, supra* note 16 at para 11.

24 The issue of whether university property counts as private property is explored below. See *infra* notes 119–27.

ultra vires the university, the Court briefly commented on how the *Saskatchewan Human Rights Code* would apply. The Court found that the relevant sections of the university's parking bylaws would be rendered inoperative under the *Saskatchewan Human Rights Code* "to the extent [the bylaws] [limit] the otherwise legal expression of personal views and beliefs".[25]

In the context of publicly owned and accessible property, Canadian courts have adopted the historical use test, which functions as an inversion of the American public forum doctrine.[26] Rather than adopting the public forum doctrine and using it to extend protections for free expression to properties like malls, Canadian courts developed the historical use test, which limits free expression to only those instances of public property where "the historical or actual function of the place" is such that "one would expect constitutional protection for free expression".[27] In other words, the historical use test will not open up new spaces for free expression; it will merely offer a way to define which spaces already allow expression. In practice, the historical use test seems to require that the courts examine both the function of the place and the behaviour of the individual claiming an infringement of section 2(b), as the behaviour must be compatible with the function.[28] As such, the historical use test echoes the well-known limits on free expression: time, place, and manner. The idea that the public should not be excluded from public property seems implicit in the historical use test, as, presumably, if the expression is compatible with the historical use test the public will continue to be able to use it. Yet the public's rights with respect to public property often appear only indirectly, typically through the justifications public bodies or governments give for restricting the property's use.

While the historical use test coalesced in *Quebec Inc*, it was arguably only a clarification of the approach seen in earlier cases. In *BCGEU v British*

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[25] *Whatcott 2002*, *supra* note 16 at para 37.

[26] Since its introduction, the impact of the public forum doctrine has been much restricted; for a history of the American public forum doctrine, see Zick, *supra* note 1 at 174–76.

[27] *Quebec Inc*, *supra* note 20 at para 74. For a critique of this test, see Slattery, *supra* note 1 at 262–67.

[28] Compare with the development of the American public forum doctrine. See Zick, *supra* note 1 at 174–76.

Columbia (Attorney General),[29] for example, the Supreme Court held that an injunction prohibiting picketing outside courts was constitutional because the picketers were threatening to impede the operation of justice.[30] The Court did find that picketing is expressive and noted that the picketing in this case was peaceful, non-violent, and did not destroy property.[31] The issue with the protest was that its location was unsuitable because it impeded the public's right of access to and use of the courts.[32]

BCGEU did not, however, seriously examine the public's right to access and use public property in the way that *Commonwealth of Canada* did. At issue in *Commonwealth of Canada* was whether individuals could hand out pamphlets in the public hall of Montreal's Dorval airport. As "there was no underlying statutory or common law right to access the location in question", the Supreme Court had to decide whether or not section 2(b) of the *Charter* "ought to warrant a right of access to the location".[33] The government attempted to argue that it had all of the same property rights as a private owner and was entitled to prevent the Committee for the Commonwealth of Canada or, for that matter, anyone else from distributing leaflets in the airport.[34] Although the Supreme Court disagreed with the government and unanimously found that the prohibition on handing out leaflets violated section 2(b) of the *Charter*, the Court produced different explanations as to why that was. Moon criticized the Court's various approaches as giving "either complete or partial priority to the state's use of its property over communicative access."[35]

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[29] [1988] 2 SCR 214, 53 DLR (4th) 1 [*BCGEU* cited to SCR].

[30] *Ibid* at paras 15, 58, 68, 71.

[31] *Ibid* at para 58.

[32] *Ibid* at paras 31, 67–72.

[33] *Criminal Lawyers' Assn v Ontario (Ministry of Public Safety and Security)*, 2007 ONCA 392 at para 39, 86 OR (3d) 259.

[34] *Commonwealth of Canada*, *supra* note 1 at 154.

[35] Richard Moon, "Out of Place: Comment on *Committee for the Commonwealth of Canada v Canada*" (1992–93) 38:1 McGill LJ 204 at 208 [Moon, "Out of Place"]. See generally Slattery, *supra* note 1 at 250–59.

When it came to discussing the nature of government-owned property, the Court produced three ways to understand such property. Lamer C.J.C. and Sopinka J. found that government-owned property is really held in trust rather than privately owned.[36] This judgment echoes the traditional trust analogy of government-owned property that has long existed in the common law world.[37] In contrast, LaForest J. thought that the government or Crown had all the same proprietary rights as a private owner, subject only to the *Charter*.[38] LaForest J.'s judgement was the only one to rely on this understanding of government property, as Cory J. stated that he agreed with Lamer C.J.C. with respect to the question of access but agreed with L'Heureux Dubé J.'s conclusion,[39] while Gonthier J. expressed agreement with "several elements" of Lamer C.J.C. and L'Heureux Dubé J.'s reasoning but overall concurred with McLachlin J. (as she then was).[40] Justice L'Heureux-Dubé echoed the idea of government property only being held in trust,[41] but found that depending on the circumstances "those areas traditionally associated with, or resembling," sites of free expression could have some restrictions on free expression imposed on them.[42] Justice McLachlin offered a third way to understand government property, which she has since reiterated, suggesting that it is now good law.[43] Justice McLachlin introduced the concept of private government property and

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36 *Commonwealth of Canada*, *supra* note 1 at 154.

37 For an in-depth discussion of the history of the trust analogy—known as the public trust doctrine in the United States—see Constance D Hunt, "The Public Trust Doctrine in Canada" in John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981) 151 at 152–63; Kate Penelope Smallwood, *Coming out of Hibernation: The Canadian Public Trust Doctrine* (LLM Thesis, Faculty of Law, University of British Columbia, 1993) [unpublished] at 12–93.

38 *Commonwealth of Canada*, *supra* note 1 at 165.

39 *Ibid* at 226–27.

40 *Ibid* at 226.

41 *Ibid* at 199.

42 *Ibid* at 225.

43 See *Quebec Inc*, *supra* note 20 at para 64.

public government property.[44] According to this understanding, the test for a right of access to government-owned property is the *state*'s use of its property.

With the exception of L'Heureux-Dubé J., the justices' descriptions of government property occurred under the first step of the test for *Charter* violations: determining whether the right has been violated. It was only after describing the property at issue did the judgments go on to examine whether the government was entitled to restrict expression. Again, the judgments disagree on this point: McLachlin J. concluded the prohibition was overbroad,[45] while Lamer C.J.C. and Sopinka J. did not think that the airport regulations counted as a "law" which could be justified under section 1.[46]

Although the decision in *Commonwealth of Canada* has received much academic attention,[47] what is perhaps overlooked is its description of the expressive behaviour. After all, each of the judgments—but particularly those of McLachlin J. and of Lamer C.J.C. and Sopinka J.—required the form of expression to comply with the function of the place. *Commonwealth of Canada* involved only two members of the Committee for the Commonwealth of Canada, "[e]quipped with portable placards, advertising leaflets and magazines", with the goals of promoting "knowledge of their group and their political goals" and "recruit[ing] members."[48] An RCMP officer stopped them almost immediately and they were informed that their activities violated the *Government Airport Concession Operations Regulations*.[49] The two members left the airport and filed a complaint in

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[44] *Commonwealth of Canada*, *supra* note 1 at 227–28. See also Moon, "Out of Place", *supra* note 35 at 207, 221.

[45] *Commonwealth of Canada*, *supra* note 1 at 250–51.

[46] *Ibid* at 159–64.

[47] See e.g. Moon, "Out of Place", *supra* note 35; Slattery, *supra* note 1 at 250–59; June Ross, "*Committee for the Commonwealth of Canada v Canada*: Expression on Public Property" (1990–91) 2:4 Const Forum Const 109; Kanter, *supra* note 9; Jamie Cameron, "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports under Section 2(b) of the *Charter*" (1992) 2 Media and Communications Law Review 91.

[48] *Commonwealth of Canada*, *supra* note 1 at 167.

[49] *Ibid.* See also *Government Airport Concession Operations Regulations*, Regulations SOR/79-373.

federal court.[50] In short, there were only two people involved in the expressive activity, they limited their expression to conversation and printed materials, and they appeared to cooperate immediately with the demands of airport staff and security. Given the speed with which their efforts were shut down, the two members had little chance to bother travellers or other members of the public or to interfere with the function of the airport's public hall.

The Court returned to appropriate uses of public property in *Ramsden v Peterborough (City)*.[51] *Ramsden* focused on the constitutional validity of a municipal bylaw that banned all postering on public property. The case arose when Kenneth Ramsden was charged under Peterborough's bylaw for putting up posters on hydro poles advertising his band's upcoming performances. In a unanimous judgment, the Supreme Court held that because the bylaw represented an absolute ban, it violated section 2(b) of the *Charter*, and, even though the bylaw's purpose had merit, it could not be saved under section 1 because it was overbroad.[52]

There was no doubt that the public had access to the hydro poles; what was at issue was the *use* of the poles. Peterborough justified its ban on the grounds that posters posed a safety hazard to workers and to traffic, caused "aesthetic blight", and resulted in litter.[53] The Court agreed with the city that the purpose of its bylaw was "pressing and substantial"[54] and made no attempt to critically engage with Peterborough's claims about the dangers of posters. The exact nature of the alleged threat to traffic was never clarified, but if it really were the case that posters posed a traffic hazard, one might expect roadside billboards to be equally hazardous and therefore equally deserving of prohibition.[55]

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50 *Commonwealth of Canada*, *supra* note 1 at 167.

51 [1993] 2 SCR 1084, 106 DLR (4th) 233 [*Ramsden* cited to SCR].

52 *Ibid* at 1107–08.

53 *Ibid* at 1104.

54 *Ibid* at 1105.

55 See also *Vann Niagara Ltd v Oakville (Town)* (2002), 60 OR (3d) 1 at para 28, 214 DLR (4th) 307 (CA) (noting the town had not advanced any hard evidence that billboards were a driver distraction but accepting that they were likely a hazard regardless). But see *R v Whatcott*, 2004 SKQB 413 at paras 5–6, 246 DLR (4th) 695 (a peace officer's request

Although the Court found a complete ban on postering on *all* public property to be overbroad, in its discussion of acceptable alternatives it revealed a preference for a certain kind of free expression. The Court suggested that a more acceptable bylaw would allow postering but could include provisions detailing how long posters may stay up and could even include provisions for charging a fee for such postering.[56] The idea of charging a fee for postering seems somewhat distasteful given the Court's discussion of postering being an inexpensive yet effective method of communication.[57] Although as Moon has noted, the Supreme Court conceives of rights in an individualistic manner, meaning that it often fails to examine the social aspect of certain rights, particularly free expression.[58] In the context of free expression, the Court understands freedom as absence of interference,[59] and, perhaps more importantly, prefers that such expression not place a burden on the public or state. In *Ramdsen* this preference was evidenced by the Court's tacit acceptance that posters could pose something of a nuisance because of their potential to cause litter or aesthetic blight.

Ramsden suggests that the appropriate role of public property is to be aesthetically pleasing and to facilitate safe circulation of traffic and pedestrians.[60] The case of *Quebec Inc* built on this understanding of public

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for Whatcott to show less graphic anti-abortion photos on the grounds that they distracted drivers was found to violate Whatcott's section 2(b) rights).

56 *Ramsden, supra* note 51 at 1107.

57 *Ibid* at 1096.

58 Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on *Charter* Rights" (2002) 40:3 Osgoode Hall LJ 337 at 340 [Moon, "Justified Limits"].

59 *Ibid* at 340. This understanding is not limited to section 2(b) cases. See e.g. Carissima Mathen, "What Religious Freedom Jurisprudence Reveals About Equality" (2009) 6:2 JL & Equality 163 at 193 (noting that religious freedom cases better fit the "individual autonomy model of liberal rights" than section 15 equality claims).

60 See generally Nicholas Blomley, "Civil Rights Meet Civil Engineering: Urban Public Space and Traffic Logic" (2007) 22:2 CJLS 55 at 59 [Blomley, "Civil Rights"]; Nicholas Blomley, "How to Turn a Beggar into a Bus Stop: Law, Traffic, and the 'Function of the Place'" (2007) 44:9 Urban Studies 1697 at 1700, 1702 [Blomley, "Beggar"]. See also Zick, *supra* note 1 at 198.

property by requiring that such property be peaceful.[61] At issue in *Quebec Inc* was Montreal's bylaw against noise produced on public streets by sound equipment. The sound equipment in question was installed in the entrance of a club in downtown Montreal that featured female dancers.[62] The club challenged its conviction under the bylaw on the grounds that it violated section 2(b) of the *Charter*.[63] Although the majority of the Court found that the bylaw infringed section 2(b), they observed that Montreal did not have other effective means to monitor and control sound levels in the city[64] and hence found the bylaw to be proportional and thus saved by section 1.[65] The majority noted that Montreal included a provision in its bylaws whereby the City could authorize the "use of sound equipment . . . for special events, celebrations and demonstrations" and that the City had granted such exceptions numerous times and in a non-arbitrary manner.[66] Implicit in this commentary is the idea that disruptive forms of free expression are only allowed if the individuals in question have asked for permission and if the disruptive expression will only be temporary.

In his dissent, Binnie J. raised some questions over the majority's claim about the availability of exemptions. Justice Binnie observed that Montreal would still have wide discretion to grant or not grant permits to use sound equipment. As he put it, "[t]he use of sound equipment to communicate an otherwise unobjectionable message should not be subject to the discretion of the City's Executive Committee, especially where, as here, the criteria for the exercise of its discretion are not specified by the legislators."[67] Yet the issue for the majority was not simply the prohibition on sound equipment, but also the bylaw's goal of preventing "disruptive noise"; as such, they found it would

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61 *Quebec Inc, supra* note 20 at paras 14, 20, 22 (about peaceful enjoyment), 67 (about circulation).

62 *Ibid* at para 3.

63 *Ibid* at paras 3–6.

64 *Ibid* at paras 95–97.

65 *Ibid* at paras 90–99.

66 *Ibid* at para 90.

67 *Ibid* at para 171.

not apply to all noises made by sound equipment.[68] Although the majority described the expression at issue in *Quebec Inc* as disruptive, it was not so disruptive as to fail the historical use test.[69] The disruptive element of the expression only became relevant under the section 1 analysis. In other words, the majority seemed to leave two decisions to the City's discretion: the first being whether the noise produced was "disruptive", and the second being whether the city would allow a permit for the use of noise equipment. The balancing relevant in determining appropriate limits for free expression was therefore left almost entirely to Montreal's discretion.

What is notable about *Quebec Inc* is that the expression at issue had its origin on private property, though it spilled out onto the street. Indeed, the whole point of the expression was to attract the public. Under the logic of nuisance, municipalities like Montreal are entitled to regulate expression that originates on private property but can be seen or heard from public property.[70]

The case of *R v Guignard*[71] provides an interesting contrast to the decision in *Quebec Inc.* Like *Quebec Inc*, *Guignard* dealt with expression arising on privately owned property, though the expression took the form of a sign rather than noise produced by sound equipment. The sign at issue, despite being attached to a privately owned building, violated the City of Saint-Hyacinthe's bylaw that limited commercial signs to commercial or industrial areas. The sign expressed Guignard's displeasure with an insurance company, but his building was not located in a commercial or industrial area.[72] In *Guignard,* as in *Ramsden*, the municipal authority sought to defend its bylaw as reasonable because it prevented "visual pollution and driver distraction".[73] The bylaw failed to be saved under section 1 because the Court

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[68] *Ibid* at paras 33–34.

[69] *Ibid* at para 81.

[70] For more on municipalities' power to regulate private property, see Mariana Valverde, *Everyday Law on the Street: City Governance in an Age of Diversity* (Chicago: University of Chicago Press, 2012) at 48–77 [Valverde, *Everyday Law*].

[71] 2002 SCC 14, [2002] 1 SCR 472 [*Guignard*].

[72] *Ibid* at paras 3–4.

[73] *Ibid* at para 16.

found that by only targeting commercial expression in non-commercial areas, the bylaw was arbitrary, did not minimally impair the right to freedom of expression, and was disproportionate.[74]

What is interesting about *Guignard* is that the Court focused its attention on freedom of expression rather than on the need to regulate public spaces. Guignard may have owned his property, but, in Canada, the courts have been broadly accepting of the fact that private property is subject to strict regulation.[75] The difference in *Guignard* is not simply that his expression was located on private property, but that his expression met the Court's preferences. The Court noted that "simple means of expression such as posting signs or distributing pamphlets or leaflets, or . . . posting messages on the Internet are the optimum means of communication for discontented consumers."[76] The Court observed that the media are often too expensive for the ordinary person, whereas signs are "accessible and effective" and an "optimum means of expression".[77] The Court's comments about signs should be contrasted with its comments on the distribution of leaflets, which the Court thought would be "undoubtedly less effective".[78]

Yet when *Guignard* is read with the other jurisprudence on the access to and use of property for expression, the additional benefits of Guignard's sign becomes clear. First, by affixing a sign to his own building, Guignard bore the cost of putting it up and taking it down, and did not cause any litter for the city. As such, signs attached to buildings better fit the individualistic understanding of free expression that the Court currently has. Second, Guignard's sign seems as though it would be less intrusive than handing out leaflets: simply posting a sign leaves people free to look at it or not. Thus, *Guignard* is not about opening up a space for free expression or imposing any costs on the public.

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74 *Ibid* at paras 28–32.

75 See e.g. *Mariner Real Estate Limited v Nova Scotia (AG)* (1999), 178 NSR (2d) 294, 177 DLR (4th) 696 (CA) ("ownership carries with it the possibility of stringent land use regulation" at para 39).

76 *Guignard, supra* note 71 at para 25.

77 *Ibid* at paras 25–26.

78 *Ibid* at para 30.

The issue of opening up spaces for expression or imposing costs on the public was implicit in the Court's reasoning in the 2009 case of *GVTA*. In *GVTA*, the Greater Vancouver Transportation Authority (GVTA) refused to post advertisements produced by the Canadian Federation of Students on their buses because the GVTA's policies only allowed for commercial, not political, expression on public transit vehicles.[79] The GVTA claimed that its buses should be considered "*private* publicly owned property, to which one cannot reasonably expect access."[80] The Canadian Federation of Students alleged that this policy violated their section 2(b) right to free expression and, in a majority judgment, the Supreme Court agreed.[81]

The expressive activity at issue in *GVTA* matched the Court's preference for quiet, unobtrusive expression that does not impose costs on the public. The Court went to some lengths to disprove GVTA's argument that allowing access to advertising spaces amounted to a claim to a positive right.[82] In addition to not being a claim for a positive right, the Court found that advertisements on buses did not "[impede] the primary function of the bus . . . nor, more importantly [undermine] the values underlying freedom of expression"[83] and as such met the historical use test set out in *Quebec Inc.*[84] Yet even after the decision in *GVTA*, advertisements on the sides of a buses are a form of expression open only to those that can afford to pay for it.

Although GVTA tried to argue that its policy against political advertisements was justified because GVTA needed to provide "a safe, welcoming, public transit system",[85] the Court disagreed. In its section 1 analysis, the Court found that there was no rational connection between the need for a welcoming environment and a ban on political expression because

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79 *GVTA*, *supra* note 1 at para 1.

80 *Ibid* at para 43 [emphasis in original].

81 *Ibid* at paras 76–80.

82 *Ibid* at paras 30–36. See also Elaine Craig, "Section 2(b) Advertising Rights on Government Property: *Greater Vancouver Transportation Authority*, A New Can of Worms and the Liberty Two-Step?" (2010) 33:1 Dal LJ 55 at 61.

83 *GVTA*, *supra* note 1 at para 42.

84 *Ibid* at paras 39–47.

85 *Ibid* at para 75.

"[c]itizens, including bus riders, are expected to put up with some controversy in a free and democratic society."[86] As in *Guignard*, the limiting of the ban to a particular type of expression proved fatal to the government's claim in *GVTA*.

When it comes to access to or use of public spaces, including public property, for the purposes of free expression, the courts have developed a balancing act. This balancing should come as no surprise given that no rights are absolute and are limited by the rights of others,[87] yet in the cases examined in this Part there are some worrying trends. It is clear that the Supreme Court has an ideal type of expression in public spaces and publicly accessible property. Ideally, the expressive activity should impose no cost on the public and it should not be overly disruptive to members of the public or to the primary function of the place. Signs affixed to the publicly visible side of a privately owned building are perhaps the ideal form of expression. Yet not everyone owns a building to which they can affix signs.

By examining the section 1 analyses in these cases,[88] it is also possible to deduce some guidelines for those bodies responsible for regulating public spaces and property. The first and most obvious guideline is that total bans on expressive activity in places that meet the historical use test will generally be unacceptable. Similarly, bans on a certain category of expression—such as political or commercial expression—will also be struck down. If there is a complete ban on certain forms of expressive activity, the ban may be upheld if there is a way for the public body to grant exemptions.[89] In the context of

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86 *Ibid* at paras 76–77.

87 See *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 31 ("this Court has often repeated that no right is absolute"), [2012] 1 SCR 235; *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 62 ("[t]he ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises"), [2004] 2 SCR 551.

88 For a critique of the Court's section 1 analysis in freedom of expression cases in general, see Moon, "Justified Limits", *supra* note 58.

89 See e.g. *Quebec Inc*, *supra* note 20 at para 90 (Montreal's permit system); *Ramsden*, *supra* note 51 at 1107 (Court suggesting charging fees or preserving some space for posters). See also *Vancouver (City) v Zhang*, 2010 BCCA 450 at paras 48, 67, 9 BCLR (5th) 59 (striking down a bylaw against erecting structures on public streets as unconstitutional because it did not have a clear procedure for granting exemptions).

exemptions, however, Binnie J.'s critique in *Quebec Inc* remains powerful: exemptions have the potential to leave much to the municipality's discretion.[90] In effect, the balancing seen in the Court's section 1 analysis in these cases is not so much the balancing of the right to free expression with other rights, but the balancing of free expression with the government's power to regulate property.

When taken together, the Court's implicit guidelines for public bodies and its preferred type of expressive behaviour place a burden on individuals wishing to express themselves on public property. Members of the public are allowed to access and use public property in order to express themselves, but they must do so in a way that fits with the role of such property and they must not completely block other members of the public from accessing such property. In addition, they must be quiet and not cause any potential hazards, no matter how far-fetched those hazards might seem. It is best if the expression on public property is as unobtrusive and as impermanent as possible. Through tacit references to nuisance, property appears in the case law on free expression and works to discipline individuals by granting free expression only to those that behave themselves appropriately.

III. *BATTY* AND *WHATCOTT*: BEHAVE YOURSELF

The Supreme Court of Canada has been explicit about the need for, and desirability of, peaceful urban environments.[91] It is clear from the jurisprudence, however, that the Court takes a surprisingly restrictive view of what peaceful urban environments look like. The Court does not just mean peaceful in the sense of nonviolent, but also peaceful in the sense of quiet. In fact, according to the jurisprudence, the two have somehow become linked such that expression that is overly disruptive, either because it is noisy or because it takes over public property, is seen as problematic and undesirable. Two recent lower court decisions, *Batty* and *Whatcott*, highlight this logic with unusual clarity and illustrate the ways in which a particular vision of public property underlies the jurisprudence on using certain locations for free expression. In this section, I first provide some background to these cases

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[90] *Supra* note 20 at paras 170–71.

[91] See e.g. *Quebec Inc, supra* note 20 at para 89.

before examining how they uphold the logic of nuisance and the idea that the right to free expression is for those who behave themselves.

Batty and *Whatcott* appear as the photographic negatives of each other. *Batty* centred on whether a number of people could legitimately occupy a municipal park for the purposes of free expression. Toronto's objection to their occupation stemmed from the damage and disruption they caused to the park rather than any inherent objection to Occupy Toronto's message.[92] By contrast, *Whatcott* dealt with whether the University of Calgary could ban an individual from their campus because said individual affixed flyers to parked cars. At no stage did Whatcott ask to remain on campus indefinitely, nor did he cause any damage to campus property; the university's objection to Whatcott's presence stemmed from the "offensive" content of his flyers.[93]

Batty arose out of the actions of Occupy Toronto, a Canadian branch of the worldwide Occupy movement that began with Occupy Wall Street in the fall of 2011. Although the aims of the Occupy movement were not necessarily clear or shared between the various groups,[94] the movement is generally considered to be a response to the current and growing economic inequality.[95] In particular, the Occupy movement took issue with the large government bailouts offered to the multinational financial institutions whose practices precipitated the international economic crisis of 2008.[96] The movement argues that the current global financial system benefits a minority, hinders democracy, and is inherently unstable.[97] The Occupy movement

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92 *Batty, supra* note 12 at paras 45–49.

93 *Whatcott, supra* note 13 at para 4.

94 Of the four named occupiers in *Batty*, each gave a different explanation for the movement's origin and goals. *Batty, supra* note 12 at paras 35–36.

95 Alice Drury & Mark J Rankin, "Capitalism: A Blunt Instrument" (2012) 37 Alternative LJ 76 at 76; Sarah Kunstler, "The Right to Occupy - Occupy Wall Street and the First Amendment" (2011-2012) 39 Fordham Urb LJ 989 at 989-992; David Nugent, "Democracy, temporalities of capitalism, and dilemmas of inclusion in Occupy movements" (2012) 39:2 American Ethnologist 280 at 281.

96 For an analysis of this crisis, see generally Michael Lewis, *The Big Short: Inside the Doomsday Machine* (New York: WW Norton & Company, 2010).

97 See "The 99% Declaration" (9 August 2012), online: <www.the99declaration.org>. See also *Batty, supra* note 12 at para 27.

claims to rely on "participatory" democracy, which is arguably a response to what the movement sees as the undemocratic influence of large corporations on the political process in otherwise democratic countries.[98] The movement's preferred tactics involved the "occupation" of public areas such as parks and plazas; the occupiers would use such encampments to stage rallies and marches. Unsurprisingly, such tactics—particularly the occupation of public spaces—gave rise to a number of court cases.[99]

In contrast to the relative newness of the Occupy movement, *Whatcott* emerged from the actions of a long-standing activist, William Whatcott. *Whatcott* is but the latest case arising out of Whatcott's particular style of public protest. Whatcott uses graphic leaflets and posters to convey his views about the immorality and undesirability of both abortion and homosexuality.[100] Not surprisingly, his actions often cause offense and have resulted in numerous court cases.[101] The particular case I examine in this article centres on Whatcott's activities on the University of Calgary campus in Calgary, Alberta. In 2005, the University of Calgary used the *Trespass to Premises Act*[102] to ban Whatcott from its campus after Whatcott distributed anti-abortion pamphlets.[103] Three years later, campus security arrested Whatcott as he put anti-gay flyers on vehicles in one of the university's parking lots.[104] At trial, the court noted that Whatcott's original ban was

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98 See e.g. *ibid* at paras 8, 36.

99 See e.g. *Waller v City of New York*, 34 Misc (3d) 371, 933 NYS (2d) 541 (Sup Ct 2011); *Miller-Jacobson v City of Rochester*, 35 Misc (3d) 846, 941 NYS (2d) 475 (Sup Ct 2012); *Occupy Sacramento v City of Sacramento*, 878 F Supp (2d) 1110, 2012 WL 2839853 (Cal Dist Ct 2012); *Occupy Boston v City of Boston*, 29 Mass LR 337, 2011 WL 7460294 (Super Ct 2011); *City of London v Samede*, [2012] EWCA Civ 160, [2012] WLR(D) 41, aff'g [2012] EWHC 34 (QB).

100 See e.g. Tobi Cohen, "Whatcott defends anti-gay flyers as case lands in Supreme Court", *The [Montreal] Gazette* (12 October 2011), online: The Gazette <http://www.montrealgazette.com>.

101 See e.g. *supra* note 16.

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

103 See *Whatcott*, *supra* note 13.

104 *Ibid* at para 4.

motivated by the content of his flyers.[105] Similarly, in 2008, an unnamed individual made campus security aware of Whatcott's presence by complaining about the *content* of his flyers.[106] When campus security charged Whatcott with trespass, he argued that he had the right to be on university property under section 2(b) of the *Charter*.[107] Both at trial and on appeal, the courts considered both the original trespass notice together with its later enforcement.

Batty also dealt with the constitutionality of a trespass notice. After four weeks of continuous "occupation" in St. James Park in downtown Toronto, the city issued the protesters a trespass notice under the *Trespass to Property Act*.[108] The occupation consisted of numerous structures, including hundreds of tents, three yurts, and a tree house.[109] Ontario's trespass legislation differs from Alberta's in that, in Ontario, the rightful owners or possessors of property can declare certain behaviours to be trespass.[110] Toronto's trespass notice did not constitute an absolute ban on Occupy Toronto's use of the park; it merely sought to prevent Occupy Toronto from using the park between the hours of 12:01 a.m. and 5:30 a.m. and to prevent the protestors from erecting any structures in the park.[111] These limits are the same limits that attach to all users of Toronto's municipal parks under the City's parks bylaw.[112]

A key difference between *Batty* and *Whatcott* is how willing each court was to accept the argument that each case was really about regulating access to and use of property. From the start of his judgment in *Batty,* Brown J. framed the issue as being more about property than freedom of expression. He even opened with the lines: "How do we live together in a community?

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[105] *Ibid* at para 24.

[106] *Ibid* at para 4.

[107] *R v Whatcott*, 2011 ABPC 336 at paras 1–3, 514 AR 154.

[108] RSO 1990, c T.21 [*Trespass to Property Act*].

[109] See *Batty*, *supra* note 12 at paras 28–29.

[110] See *Trespass to Property Act*, *supra* note 108, ss 2(1)(a)(ii), 4(1).

[111] See *Batty*, *supra* note 12 at para 4.

[112] *Ibid* at para 58.

How do we share common space?"[113] and suggested that these were the real questions that Occupy Toronto posed to the world.[114] In *Whatcott*, the University of Calgary attempted to claim that it handed out trespass notices to anyone on their campus who did "anything basically that is not associated with the proper use of the property which is attending school [and] working."[115] In short, the university seemed to think that it had the right to exclude any unaffiliated person from its campus. The right to exclude is, of course, generally considered to be the *sine qua non* of private property rights.[116] Rather than answer the question of whether the University of Calgary has private property rights, *Whatcott* focuses on the university's use of "provincial trespass legislation to respond to an individual's complaint concerning the content of Mr. Whatcott's flyer."[117] As such, *Whatcott* was more about freedom of expression than property.

Somewhat confusingly, Whatcott's constitutional challenge was to the university's application of the legislation rather than the legislation itself.[118] Alberta's trespass legislation, like that of other provinces, does not differentiate between private property and public property. The slightly strained attempt to link the application of the *Trespass to Premises Act* with the actions of the university rather than the actions of the state avoids a potentially problematic outcome: linking *any* enforcement of trespass legislation to state action. In 1991, Litman argued that any attempt to enforce trespass legislation would be considered state action and in this way the *Charter*'s protections, specifically the guarantee of free expression, would be engaged.[119] Such an outcome would, of course, severely limit the

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[113] *Ibid* at para 1.

[114] *Ibid* at para 3.

[115] *Whatcott*, *supra* note 13 at para 4.

[116] See e.g. Thomas W Merrill, "Property and the Right to Exclude" (1998) 77:4 Neb L Rev 730 ("the right to exclude others is more than just 'one of the most essential' constituents of property—it is the *sine qua non*" at 730). A critique of Merrill's claim is beyond the scope of this article.

[117] *Whatcott*, *supra* note 13 at para 24.

[118] *Ibid* at para 25.

[119] Litman, *supra* note 19 at 401–06.

application of trespass legislation, as all kinds of property could become fair game for protestors.

Despite *Whatcott*'s best efforts to avoid the outcome that Litman envisaged in 1991, the Court actually uses the link between enforcement of trespass legislation with state action to further chastise the University of Calgary. In his judgment, Jeffrey J. noted that "the University is not appearing as litigant to enforce its private property rights but the Crown appearing as litigant to enforce the laws and interests of the state, armed with all the machinery of the state. Such action is subject to *Charter* scrutiny."[120] Such a statement seems redundant, as up until that point Jeffrey J's line of reasoning was that because the university's attempt to ban Whatcott constituted the "denial of a learning opportunity", there was "a direct connection between the institution's governmental mandate and the impugned activity" which meant the *Charter* applied.[121] However, this line of reasoning does not deal with the property issues raised by the University of Calgary: Does the university have private property rights or not?

The best answer that *Whatcott* can provide is maybe. Certainly, the university's characterization of how it regulates its own property is untrue. The University of Calgary's campus is clearly held out as open to the public and members of the public can and do access the campus. In fact, any member of the public is entitled to use the university's libraries or skate in the Olympic Oval, though fees may be levied for both services.[122] Of course, under Canadian jurisprudence, private property owners can hold out their property as open to the public and remain able to fully rely on provincial trespass legislation.[123]

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[120] *Whatcott, supra* note 13 at para 36.

[121] *Ibid* at para 30.

[122] University of Calgary Library, *Access Policies*, (15 April 1999), online: University of Calgary Library, <http://library.ucalgary.ca/policies/access-policies>; University of Calgary Olympic Oval, *Public Skating*, online: <http://www.oval.ucalgary.ca/10_public_skating>.

[123] In such instances *Harrison* remains good law. See *supra* notes 18 to 21 and accompanying text. See also Philip Girard & Jim Phillips, "A Certain 'Mallaise': *Harrison v Carswell*, Shopping Centre Picketing, and the Limits of the Post-war Settlement" in Judy Fudge &

The Ontario Court of Appeal had earlier grappled with the question over the nature of university property in *Queen's University*. The court noted that the university's campus was comprised of "privately owned buildings . . . as well as municipally owned public streets".[124] In short, there was nothing that necessarily set the campus apart from any other neighbourhood in the city. The Court found that although the public had an invitation to enter some of Queen's University's buildings, this invitation did not extend to all its buildings.[125] This finding proved crucial to the outcome of the case, as the Court found that striking employees could not picket in university residences as there was no standing invitation for the public to remain inside such buildings.[126]

Queen's University does not shed much light on the decision in *Whatcott*. In *Whatcott*, there was no attempt to enter any university building, nor were there any attempts to seek out confrontations with university students. One might expect that had Whatcott accessed Queen's campus rather than Calgary's, the outcome of the case would have been the same. Perhaps the only conclusion that can be drawn from the reasoning in *Whatcott* is that when institutions are acting as government, they cannot regulate their property in the same way as private property owners. Hence, on occasion, the role of the university might attach to its property and turn it from private to public.

The property issues in *Batty* were much simpler than in *Whatcott*, as St. James Park was clearly public property. Justice Brown offered a detailed description of the City of Toronto's efforts to regulate its parks fairly. The understanding of public space, and in particular public parks, as discussed by

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Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Osgoode Society for Canadian Legal History and Irwin Law, 2010) 249 at 272–73.

[124] *Queen's University*, *supra* note 22 at 719.

[125] *Ibid* at 725–26.

[126] *Ibid* at 725–26. The employees were attempting to access the exception available under Ontario's labour laws that would have allowed them to picket on private property held out as open to the public. See *supra* note 22.

Brown J. echoed C.B. Macpherson's definition of common property.[127] According to Macpherson, common property is that property from which an individual has the right not to be excluded. Macpherson understood "common property" to be a type of public property, but used the term "common" to differentiate property such as parks from the state's private property interests. Given that Macpherson included parks and streets as examples of common property, he understood government to have a role in ensuring that the right not to be excluded is upheld.[128] In *Batty*, the Court and the city clearly felt that everyone had the right not to be excluded from public parks.

The Court repeatedly described Occupy Toronto as appropriating the park and preventing others from using it.[129] Moreover, the City argued that the exclusionary effects of Occupy Toronto would continue even after the encampment ended, as the City would need to perform repairs and maintenance to the park. In particular, the City would need to erect fences to give the grass time to regrow.[130] Such a statement seems to clash with Toronto's earlier claim that it only wanted to prevent Occupy Toronto from using the park at night.[131]

In *Batty*, the City of Toronto successfully argued that its response to Occupy Toronto was justified, given the need to maintain the park and keep it open for all. Occupy Toronto attempted to argue that the public could still access and use the park during the occupation, and that even if they could not, there were other parks available.[132] The Court disagreed with both of Occupy Toronto's claims and accepted Toronto's argument that St. James Park was something of a unique "urban oasis."[133] Furthermore, as the City

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[127] *Batty, supra* note 12 at paras 14–15, 43, 45, 57, 123; CB Macpherson, "The Meaning of Property" in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 4–5.

[128] *Ibid* at 4.

[129] *Batty, supra* note 12 at paras 12, 40, 51, 94, 108, 113.

[130] *Ibid* at para 46.

[131] *Ibid* at para 50.

[132] *Ibid* at paras 39–40, 103.

[133] *Ibid* at para 25.

claimed that it only wanted to prohibit Occupy Toronto during the night and to require the protestors use the park in the same way as other users, the Court found that while the enforcement of the trespass notice would infringe the protestor's section 2(b) rights, the infringement was minimal and proportional and so was saved by section 1 of the *Charter*.[134] In short, Occupy Toronto remained able to use St. James Park, but only so long as their use complied with the City of Toronto's parks bylaws.

Perhaps the most striking difference between *Batty* and *Whatcott* is how each Court described the persons who sought to claim a violation of the right to free expression. In *Whatcott*, the Court repeatedly referenced the peaceful nature of Whatcott's actions.[135] In fact, in its section 1 analysis, the Court called the university's response disproportional given Whatcott's ready cooperation with campus security.[136] While Whatcott is repeatedly described as cooperative, the same cannot be said for Occupy Toronto in *Batty*. Although the Court does not explicitly call it a nuisance, the Occupy Toronto protest is described as noisy and smelly,[137] which are two typical examples of nuisance.[138] More importantly, Brown J.'s judgment repeatedly implies that Occupy Toronto were violent or, at the very least, threatening. The judgment, for example, quotes from the affidavit of a local resident who claimed that she felt so unsafe that, rather than walk past the Occupy encampment, she avoided it completely.[139] Occupy Toronto is also depicted as uncooperative: not only did Occupy Toronto not secure the appropriate permits from the City for their use of the park, but, by building their tree house, the protestors also breached Brown J.'s order, which he issued as part of an interim stay on the proceedings.[140]

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[134] *Ibid* at paras 75, 111, 122–24.

[135] *Whatcott*, *supra* note 13 at paras 4, 6, 36.

[136] *Ibid* at paras 44, 48.

[137] *Batty*, *supra* note 12 at paras 42, 44, 46.

[138] Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90:4 Va L Rev 965 at 997–99.

[139] *Batty*, *supra* note 12 at para 42.

[140] *Ibid* at paras 53–54.

In both cases, the Courts tacitly implied that the losing party was guilty of hypocrisy. In *Whatcott*, the Court referenced the *constitutio habita* of 1158, which "guarantee[d] the right of a travelling scholar to unhindered passage in the interest of education."[141] The Court went on to quote from the University of Calgary's commitment to freedom of expression, as discussed in the university's planning guide.[142] According to the University of Calgary, its statutory mandate included the provision of "a platform for the exchange of ideas and advancement of knowledge".[143] Hence, the university's attempt to ban Whatcott led Jeffrey J. to wonder, "Are only select viewpoints now permissible on our university campuses?"[144] Such was the apparent hypocrisy of the university that the Court did not find the "prevention of the distribution of leaflets" to "relate to an objective that was pressing and substantial".[145]

Similarly, in *Batty*, Brown J. observed that the Occupy movement did not practise what it preached. He noted that the movement claimed to want a more participatory democracy, yet they appropriated a public park without asking for permission.[146] Occupy Toronto may have claimed to be more egalitarian, but in *Batty* they are depicted as selfish and unwilling to share "their" park.[147] In addition, *Batty* repeatedly references the ideas of chaos and anarchy, suggesting that Occupy Toronto's actions had the potential to threaten the very foundations of Canadian society.[148] In *Batty*, the City of Toronto's actions appeared reasonable while Occupy Toronto seemed hypocritical and threatening, whereas in *Whatcott*, Whatcott's behaviour was never anything less than legal while the University of Calgary seemed irrational and overbearing.

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141 *Whatcott*, *supra* note 13 at para 4 (citing the trial judge's findings of fact).

142 *Ibid* at para 4. The quoted passage does not explicitly mention free expression, but it does reference the related concept of academic freedom.

143 *Ibid* at para 32.

144 *Ibid* at para 33.

145 *Ibid* at para 48.

146 *Batty*, *supra* note 12 at para 9.

147 *Ibid* at para 42.

148 *Ibid* at paras 2, 91–92.

Arguably, in both *Batty* and *Whatcott*, the Courts reached the right decision. What is striking, however, is what the cases suggest when read together. Whatcott only wanted temporary access to the University of Calgary's campus to put leaflets on cars. At no stage did he threaten or attempt to engage with university personnel. He acted in a peaceful and cooperative manner and he acted alone. There was nothing in Whatcott's behaviour that clashed with the role of a university and its property. In short, Whatcott's actions were not attention grabbing, and anyone walking past could have easily failed to notice him or his message. In contrast, Occupy Toronto proved impossible to ignore. First, they took over an entire park, built structures, and had campfires and drumming circles. Then, they refused to comply with the City of Toronto's bylaws or with Brown J.'s interim order. Even if Occupy Toronto behaved legally, they were a highly disruptive and noticeable presence, and they prevented the park from being used as a park. These two cases suggest, in keeping with the jurisprudence discussed in Part II, that so long as you are quiet, cooperative, and your behaviour does not interfere with the role of the property which you seek to access for purposes of free expression, you have a better chance of being allowed to access such property for those purposes.

IV. THE PROBLEMATIC LOGIC OF NUISANCE

Given that all *Charter* rights are limited by law and that no rights are absolute,[149] it is perhaps not surprising that some balancing of competing uses takes place when the location of the right to free expression is at issue. In the cases examined in this article, the courts use the logic of nuisance to assess whether the expression at issue is compatible with its location. In effect, the logic of nuisance results in a balancing of uses that seems to balance the public's right to continue to use and access public property with the right of free expression. As important as it is for Canadian courts to seek to balance one person's rights with another's, in the context of free expression the logic of nuisance is too restrictive. Nuisance relies heavily on the idea of peaceful enjoyment, and when applied to public property the logic of nuisance does not leave enough room for democratic discourse. This logic of nuisance runs

[149] See *supra* note 87.

counter to the Supreme Court's own observation that "[c]itizens . . . are expected to put up with some controversy in a free and democratic society."[150] More worryingly, the case law suggests a preference for expression that does not impose any burdens on the public, which has the potential to give those with private property rights stronger rights to free expression than those without them. For example, the posters in *Ramsden* were something of a nuisance, while the sign in *Guignard* was an optimum form of expression. Furthermore, in the context of publicly owned and accessible property, the logic of nuisance often defers to the *government's power* to regulate uses of public property rather than balancing actual uses. In this section, I begin with a brief discussion about the right to free expression before moving on to explore why the logic of nuisance does not leave enough room for free expression and how it relates to the balancing done under section 1 of the *Charter*.

Jamie Cameron describes the right to free expression as a test of courage for democracies.[151] She argues that the Supreme Court of Canada does not yet have a theory of free expression that "explains why [the] freedom matters and why it should be protected."[152] According to Cameron's study of the Court's freedom of expression jurisprudence, the Court has tended to uphold reasonable limits on free expression rather than protecting free expression by "a margin of about two to one."[153] Although the Court frequently mentions the importance of free expression, it would seem as though they lack the courage of their convictions and are too quick to justify limits on free expression. Moon echoes Cameron's observation about the judicial deference seen in section 2(b) claims.[154] For Moon, the problem is that the Court assumes that freedom of expression is merely a right to be free from state interference rather than recognizing the "social or relational" aspect of the right to free expression.[155] Moon argues that the social nature of

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[150] *GVTA*, *supra* note 1 at para 77.

[151] Cameron, "Reflection", *supra* note 8 at 164.

[152] *Ibid* at 194.

[153] *Ibid* at 168.

[154] Moon, "Justified Limits", *supra* note 58 at 365.

[155] *Ibid* at 340.

the right to free expression proves an awkward fit for constitutional jurisprudence, which "assumes a bright line between the protected right or interest of the individual . . . and the conflicting interests or rights of other individuals or of the collective".[156] As such, the balancing act under section 1 becomes increasingly difficult, resulting in a "broad definition" of section 2(b)'s scope coupled with a "deferential approach to limits under section 1."[157]

The jurisprudence shows that the right to free expression does not automatically grant individuals the right to access property, particularly property that the individual does not own, for the purpose of expressing themselves.[158] Nor will the Court uphold free expression where it "impos[es] on the government *a significant burden of assistance,* in the form of expenditure of public funds, or the initiation of a complex legislative, regulatory, or administrative scheme or undertaking."[159] Section 2(b) does not grant any positive rights to express oneself. The right of free expression is also vulnerable to accusations that the expression at issue is harmful, discriminatory, of no value,[160] or simply not allowed in the area where it is taking place.[161] Although Cameron has criticized the Court's contextual approach to section 2(b),[162] such an approach does recognize that free

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[156] *Ibid* at 340, 365.

[157] *Ibid* at 365.

[158] See especially *Harrison*, *supra* note 18. See also Girard & Phillips, *supra* note 123 at 257, 266.

[159] *GVTA*, *supra* note 1 at para 103 [emphasis in original]. The Supreme Court refers to the following cases as additional authority on this point: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336, 18 DLR (4th) 321; *Haig v Canada*, [1993] 2 SCR 995 at 1035, 105 DLR (4th) 577; *Native Women's Assn of Canada v Canada*, [1994] 3 SCR 627, 119 DLR (4th) 224; *Delisle v Canada (Deputy Attorney General)*, [1999] 2 SCR 989 at paras 25–26, 176 DLR (4th) 513; *Baier v Alberta*, 2007 SCC 31 at paras 20, 33, 35–36, 43, [2007] 2 SCR 673.

[160] See Jamie Cameron, "The Past, Present, and Future of Expressive Freedom under the *Charter*" (1997) 35:1 Osgoode Hall LJ 1 at 19, 60 [Cameron, "Past, Present, and Future"]; Cameron, "Reflection", *supra* note 8 at 172.

[161] See e.g. *Quebec Inc*, *supra* note 20 at paras 91, 100.

[162] Cameron, "Reflection", *supra* note 8 at 164, 172–73.

expression does not take place in a vacuum and must be balanced with other concerns.

Arguably, the right to free expression's relationship or lack thereof with property is one of the most important aspects of the right. After all, free expression has to take place *somewhere* and, as expression is an inherently social act, there is not much point to the right if it is forbidden or severely restricted in public places.[163] Of course, public places are used for more than just free expression, and, as such, the right to free expression must be balanced with other uses of public places. In the jurisprudence examined in this article, that balancing uses the logic of nuisance.

Historically, nuisance arose out of the idea that a person should use his or her property in a way that does not harm others.[164] Nuisance developed in such a way that it "offered absolute protection to plaintiffs: either the nuisance existed and an injunction was granted or courts avoided granting an injunction by deciding that no nuisance existed."[165] In short, nuisance allows for the control of others in the use of their property but also limits how an individual uses their own property: uses must not be overly disruptive to adjacent properties. Henry Smith describes the modern law of nuisance as a governance strategy because nuisance requires a balancing of rights and uses, and is a little more complex, or "higher cost", than simpler, exclusion-based regimes.[166] As true as Smith's characterization is, what must be noted is that under traditional nuisance law, the balancing of uses is a balancing between two uses that are not actually taking place on the same piece of property. When it comes to balancing different uses of public property, the different uses are often taking place on the same piece of property.[167]

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[163] See Zick, *supra* note 1 at 173.

[164] See Christopher Harvey, "History of Nuisance" in Pun & Hall, *supra* note 6, 18 at 22–25.

[165] Timothy Swanson & Andreas Kontoleon, "Nuisance" in Boudewijn Bouckaert, ed, *Property Law and Economics* (Cheltenham, UK: Edward Elgar, 2010) 161 at 161.

[166] Henry E Smith, "Exclusion and Property Rules in the Law of Nuisance" (2004) 90 Va L Rev 965 at 982; Henry E Smith, "Exclusion Versus Governance: Two Strategies for Delineating Property Rights" (2002) 31 J Legal Stud S453 at S455.

[167] See e.g. Valverde, *Everyday Law*, *supra* note 70 at 24–47 (examining the various uses and associated law for a single street corner in Toronto).

In the context of regulating the uses of public property, the logic of nuisance tends to privilege one use above others. Mariana Valverde argues, for example, that zoning legislation is a tool used by the urban middle class, who dominate urban governance, as a way to push "nuisances" such as noise and industrial concerns to discrete parts of the city far away from their homes.[168] The aim of zoning legislation is not to balance competing uses but rather to strictly delineate acceptable uses. Similarly, the historical use test employs the logic of nuisance as a threshold that requires free expression to comply with the primary uses of the property where it takes place, thus limiting the availability of public property for free expression.

When it comes to the relationship between free expression and property rights, the logic of nuisance imposes too high a standard for instances of free expression. Given that nuisance requires a balancing of rights and uses, it does echo, to some degree, the balancing of and limits to rights envisaged by section 1 of the *Charter*. However, nuisance's balancing act arose in the context of private property rights and seeks to protect those rights as far as possible. When applied to public property, the logic of nuisance might seem to recognize that the public has equal rights to public property and that these rights must be balanced with expressive rights, but it actually defers to the primary use of public property. While the Supreme Court recognizes that the primary functions of streets are for both getting from one place to another and for communication,[169] the preference of the government is clearly the former use rather than the latter.[170]

In the jurisprudence discussed in Part II, the Court adopts a deferential stance towards the public authorities' powers of regulation and carefully examines the purposes behind the allegedly unconstitutional legislation. Where the challenged regulation is found to be a law, the courts will generally find that the law meets the first part of the four-part *Oakes* test for

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[168] Mariana Valverde, "Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance" (2011) 45:2 Law & Soc'y Rev 277 at 286–87.

[169] See e.g. *Quebec Inc*, *supra* note 20 at para 67.

[170] See Valverde, *Everyday Law*, *supra* note 70 at 39–40, 42. See also Blomley, "Civil Rights", *supra* note 60 at 59 (noting that civil engineers define a good street as one which "resolves itself in favour of flow").

justifiability under section 1.[171] The decision in *Whatcott* offers an exception to this pattern, as the Alberta Court of Queen's Bench found that preventing the distribution of leaflets was not a pressing and substantial objective.[172] *Whatcott* notwithstanding, the effect of the courts' general deference to the objectives behind challenged regulations is to give the government similar rights as a private property owner to control how their property is used,[173] or, as in *Guignard* and *Quebec Inc*, to control uses of others' property that impact theirs.[174] The issue is not whether the free expression impedes the public's use of the public property at issue, or, in *Guignard*, of the adjacent public property, but whether the free expression fits with the government's regulation of the property.

The deference extended to the government does not always result in the challenged law being upheld. Where the challenged laws typically fail to be saved under section 1, if they fail, is in *how* they go about achieving the pressing and substantial objectives. In *Ramsden*, for example, the Court held that Peterborough's bylaw failed because it was overbroad, while in *GVTA*, the GVTA's advertising policy failed because was there was no rational connection between the policy and the objectives it sought to achieve.[175] Yet the kind of balancing done under section 1, as noted above,[176] leaves much to the government's discretion and does not make it clear who can access public property, and under what circumstances they can access it, for the purpose of free expression. While I agree that courts and municipalities should guard against the potential appropriation of public property seen in *Batty*, they

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171 The *Oakes* test comes from *R v Oakes*, [1986] 1 SCR 103 at 138–40, 26 DLR (4th) 200. See also The Honourable Marshall Rothstein, "Section 1: Justifying Breaches of *Charter* Rights and Freedoms" (1999–2000) 27:2 Man LJ 171 at 171–73 (describing how the *Oakes* test works), 174 (noting that very few cases fail under the first part of the *Oakes* test).

172 *Whatcott*, *supra* note 13 at para 48.

173 See *Harrison*, *supra* note 18 at 213, 216–17.

174 For a critical engagement with how the jurisprudence treats public property, see Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365.

175 See *GVTA*, *supra* note 1 at para 76.

176 See Part II, above.

should also guard against the risk of silencing free expression by privileging that which is quiet, unobtrusive, and taking place on private property. As important as it might be for the courts to ensure that any limits on free expression are in fact justifiable under the law, what is lacking from the jurisprudence is—as Cameron notes—a discussion of why free expression is important and evidence of a strong commitment to it.[177] What the jurisprudence offers, particularly the jurisprudence where the location of the expression is a key issue, is a commitment to a nuisance-free, litter-free, quiet society where we can get from A to B without being obstructed by democratic rights. The courts' preference for quiet and unobtrusive forms of free expression risks giving greater protection to the expressive rights of those individuals with the resources to meet these standards, for example, property owners, as in *Guignard*.

Ironically, the logic of nuisance used by the Supreme Court would be appropriate if the *Charter* did not exist. Without the *Charter,* the logic of nuisance would be a powerful judicial defence of the public's right to free speech because it would allow the Court to paint free expression as a reasonable use of public property. Under the common law, the public had a right to access and use certain instances of public property, and in a pre-*Charter* world the public's right of access would have arguably included the right to communicate on such property, provided such communication was peaceful.[178] The pre-*Charter* case of *Saumur v City of Quebec*[179] provides an interesting illustration of the right of individuals to communicate on public streets. In *Saumur*, the Supreme Court struck down a Quebec City bylaw that required individuals wishing to distribute pamphlets or leaflets to seek the permission of the chief of police. The majority found that the bylaw was *ultra vires* the city because the bylaw's subject matter was in the exclusive jurisdiction of the federal government.[180] The City had attempted to claim

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[177] Cameron, "Past, Present, and Future", *supra* note 160 at 4–5; Cameron, "Reflection", *supra* note 8 at 163–64.

[178] See "Public Order and the Right of Assembly in England and the United States: A Comparative Study" (1937–38) 47:3 Yale LJ 404.

[179] [1953] 2 SCR 299, [1953] 4 DLR 641 [*Saumur* cited to SCR].

[180] *Ibid* at 322, 332–34.

that its bylaw was justified on the grounds that it related to "the administration of streets", but the Court found that it granted too wide a discretion to the police chief and doubted that the bylaw's true purpose was what the City had claimed.[181] As Estey J. put it, the "[d]istribution of pamphlets and other printed matter has taken place since time immemorial and it is significant that no instance was mentioned where the distribution of such ever constituted a nuisance or an interference with the health of the people or the cleanliness of the city."[182] Such a statement offers a stark contrast to the Court's later ready acceptance of the need to prevent litter and various safety hazards as a pressing and substantial objective in *Ramsden*.[183] Yet, rather than supplement the common law right of access, the *Charter* and its subsequent jurisprudence appears to have added a restrictive gloss. Only those individuals who respect the "primary function" of that property are allowed to access it for the purpose of free expression. Similarly, the decision in *Quebec Inc* suggests that the Court is now more sanguine about leaving decisions over access to the discretion of municipal officials than they were in *Saumur*.

It is perhaps unlikely that Canadian courts will grant a blanket right of access to public property for the purposes of free expression, but there are some ways that the current situation can be improved. In *GVTA*, the Supreme Court observed that free expression can be disruptive and controversial, but that these features are not ones that must always be prevented in every situation.[184] Although in *GVTA* the Court appeared to be referring solely to the political content of the advertisements that the transportation authority refused to post, this understanding should be extended to cases similar to the other ones discussed in Part II. As evidenced by the Supreme Court of Canada's comments in *GVTA*, their concern is to avoid imposing financial or administrative burdens on the government.[185] This stance may well explain why, in *Ramsden*, the Court so readily accepted

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[181] *Ibid* at 332–33.

[182] *Ibid* at 361.

[183] *Supra* note 51 at 1105.

[184] *GVTA*, *supra* note 1 at para 77.

[185] *Ibid* at para 105. See *supra* note 209 and accompanying text.

the need to prevent litter as a pressing and substantial objective and suggested that an acceptable alternative to Peterborough's complete ban would be a fee-based system.[186] However, discarded band posters and political leaflets are hardly the only forms of litter in an urban landscape, and as most municipalities already allot a portion of their budget to dealing with litter, posters and leaflets can hardly be considered to be an excessive burden on governments. At the same time, imposing costs for accessing public spaces for the purposes of free expression could pose a burden on individuals seeking to express themselves. The social costs of free expression, whether they come in the form of litter, hurt feelings, or noisy streets, are hardly unique to free expression, and so free expression should not be silenced as a way of limiting these social costs.

The Supreme Court has recognized that streets are also used for communicative purposes, but it has not done enough to unpack this purpose and link it with its understanding of free expression. In particular, it has not done enough to preserve access to the communicative function of public property for all. The closing off of some public property, creating so-called "dead zones" of free speech,[187] and the wide discretion granted to governments in regulating access works to devalue the communicative aspects of public property. If the Court takes section 2(b) as seriously as it claims to, it must not be too quick to subordinate the right to free expression to the demands of those who wish to have peaceful, aesthetically-pleasing, and hazard-free public spaces.

V. CONCLUSION

Section 2(b) of the *Charter* grants "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication",[188] yet the jurisprudence has a tendency to subordinate this right to the primary function of the property on which it takes place. It is clear that section 2(b) does not grant a blanket right of access to or use of any

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[186] *Supra* note 51 at 1107.

[187] Slattery, *supra* note 1 at 245. *Cf.* Kanter, *supra* note 9 at 498 (arguing that the decision in *Commonwealth of Canada* would preclude free expression in a post office).

[188] *Charter*, *supra* note 1, s 2(b).

form of property, whether that property is public or private.[189] Rather, the jurisprudence has had to tease out the relationship between free expression and property rights. I have argued that this relationship is governed by the logic of nuisance, and while it is true that free expression in public places has the potential to be disruptive, the logic of nuisance privileges forms of expression that the Supreme Court has described as ineffective.[190] Furthermore, the jurisprudence also strongly suggests that those with private property rights can on some occasions silence free expression on adjacent public property,[191] or that expression located on their own property is subjected to a higher level of protection.[192]

The Supreme Court has shown itself capable of recognizing the importance of section 2(b) and protecting the rights it grants.[193] The Court has, however, allowed some instances of free expression, particularly those that take place on public property, to be viewed as nuisances and thus unworthy of robust protection. The problem with the logic of nuisance is that it "focuses on the harm suffered rather than on prohibited conduct".[194] Such a stance makes sense in the context of private law but makes little sense when Charter rights are at stake, because silencing free expression is arguably a much greater harm than the disruption to the use of public property. The harm suffered when free expression is silenced is shared by society as a whole, whereas the harm caused by "nuisances" is typically tied to particular locations.[195] Even if free expression is a nuisance, it is one which society ought to tolerate, because without free expression there can be no democracy.

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189 See generally Moon, "Access", *supra* note 1 at 339; Moon, *Constitutional Protections*, *supra* note 1 at 148–49, 171–72.

190 See *Guignard*, *supra* note 71 at para 30.

191 See e.g. the residents' comments in *Batty*, *supra* note 12 at para 42.

192 See e.g. *Guignard*, *supra* note 71 at paras 3, 34. See also *supra* at footnotes 78 to 88 and accompanying text.

193 See e.g. *GVTA*, *supra* note 1 at para 91; *Guignard*, *supra* note 71 at paras 19–20.

194 Pun & Hall, *supra* note 6 at 4.

195 I say "typically" because I am aware that pollution, which is often treated like a nuisance, cannot necessarily be tied down to particular locations. See Harvey, *supra* note 164 at 22–25; Gregory S Pun, "Public Nuisance" in Pun & Hall, *supra* note 6, 33 at 36–39.