



When Laws Collide?

Assessing the effects of the Charter of Rights and Freedoms on trespass law

By Elliott Goldstein

Do trespass notices violate the Charter of Rights and Freedoms?

ANo! In *R. v. Asante-Mensah*² the Court of Appeal for Ontario ruled that a trespass notice under Ontario's *Trespass to Property Act* (TPA)² does not violate an individual's right to "liberty."

All legal decisions are based on specific facts and this case is no exception. However, space restrictions do not permit a complete recounting of all facts of this case, which should be read in its entirety.³ The bare facts are as follows:

Asante-Mensah is a taxi driver who "persistently flouted an airport regulation prohibiting the picking up of passengers by those who do not hold a permit to do so [a practice known as 'scooping']. As a last resort, the airport authorities served him with a notice under the (Ontario) TPA prohibiting him from entering on the property of Pearson International Airport."

When Asante-Mensah failed to comply with the TPA notice, he was arrested by an airport inspector. A scuffle ensued and the accused was charged with assault with intent to resist arrest.

At trial, the accused argued successfully that the inspector, acting as a private citizen, had no lawful authority to use force in effecting the arrest and that he was justified in defending himself from the force the inspector used (that is, the accused had the right to resist). The Crown appeals from this finding, which resulted in the accused's acquittal on that charge.

At trial, Asante-Mensah was convicted of escaping lawful custody because the trial judge found the TPA notice and the manner of its enforcement against him did not infringe the accused's Charter rights to "liberty" (under section 7) and the right not to be arbitrarily detained or imprisoned (section 9). The accused appeals from this finding.

Both appeals were heard by the Ontario Court of Appeal (OCA). The OCA

agreed with the trial judge who ruled "... if the accused's liberty was implicated by the trespass notice, the deprivation of his liberty was in accordance with the principles of fundamental justice."

The OCA acknowledged that the TPA notice in this case amounted to an unqualified prohibition from "entering upon the premises" of the airport. However, the accused had been charged with trespassing (on airport premises) on 22 different occasions prior to the issuing of the restrictive TPA notice.

The accused testified at trial that he knew at all times that his conduct was contrary to the law

Furthermore, the accused testified at trial that he knew at all times that his conduct was contrary to the law and he had no intention of altering his conduct. The accused believed the law should be altered! Therefore, the OCA concluded there was no validity to the Defence argument that a less restrictive prohibition should have been directed to the accused.

Also, there was no evidence presented at trial that the accused went to the airport for other purposes (for example, to take a flight, to meet arriving family or friends, or to shop at airport stores). The trial record showed that the only reason the accused attended at the airport was to carry out his activities as a "scooper." The OCA held that the TPA notice, which deprived the accused's liberty, did so in accordance with the principles of fundamental justice because it was specifically tailored to the scooper problem.

The OCA also agreed with the trial judge that a conditional notice (under section 4 of the TPA — for example, limited permission to enter for non-commercial purposes — would have been ineffective in relation to the accused because of his "persistence and resourcefulness to escape detection." The OCA agreed that the only way to ensure the accused's compliance was to ban him at the gate of the premises.

The accused's appeal against his conviction for escaping lawful custody was dismissed and the matter remitted back to the trial judge for sentencing.

On the second charge of intent to resist arrest, the Court of Appeal concluded that the inspector had lawful authority to use reasonable force in effecting a lawful arrest pursuant to section 9 of the TPA. The OCA ruled "... the right to use reasonable force is an incident of the statutory power of arrest. In our respect-

ful view, the trial judge erred in concluding that the inspector lacked the legal authority to exercise reasonable force in order to the effect the arrest, and the Crown's appeal should be allowed and a conviction entered on the assault with intent to resist arrest charge."

The OCA did not, however, address the question of "What is reasonable force?" This is because there was no allegation that the inspector used unreasonable force.

The Asante-Mensah case also dealt with section 9 of the Charter, which provides that "everyone has the right not to be arbitrarily detained or imprisoned." The OCA disagreed with the Defence argument that "section 9 of the TPA authorized an arbitrary detention because there are no criteria by which a citizen can judge whether to effect an arrest." Instead, the OCA agreed with the trial

judge's analysis, as follows:

"The trespass statute authority to arrest is actually quite narrow in scope and application. The jurisdiction to arrest relates to a single offence — trespass. The citizen must see the subject actually on the premises in circumstances of trespass addressed by section 2 of the Act. Unlike the Criminal Code scheme, the arresting party, pursuant to section 9, must have reasonable and probable grounds to believe the offence is being committed. Such a state of belief includes both subjective belief and an ob-


jectively reasonable component for the arresting party's conclusion: *Storrey v. The Queen* (1990), 53 C.C.C. (3d) 316 (S.C.C.) at 323-4 per Cory J. Lastly, the arrestee is to be promptly transferred to the custody of a police officer."

In conclusion, the Asante-Mensah case points out the importance of knowing the law and the limits it imposes upon us all. ❁

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Author's Notes


- 1 Section 7 of the Canadian Charter of Rights and Freedoms states the following: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
- 2 *R. v. Asante-Mensah*, [Oct. 1, 2001] Ontario Judgments No. 3819 (Ont. C.A.). All quotations are from this case unless otherwise indicated.
- 3 R.S.O. 1990, c. T.21. (Other provinces have similar legislation with similar, if not identical, wording.) This notice prohibits a person from entering upon property.
- 4 Please contact the author at elgold@rogers.com if you wish to receive a copy of this case.



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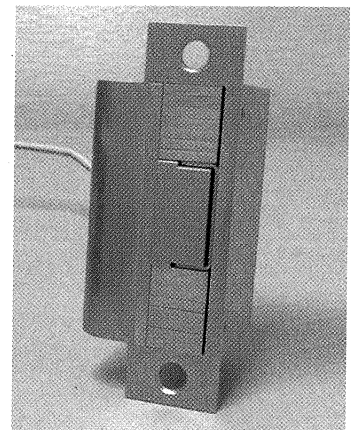
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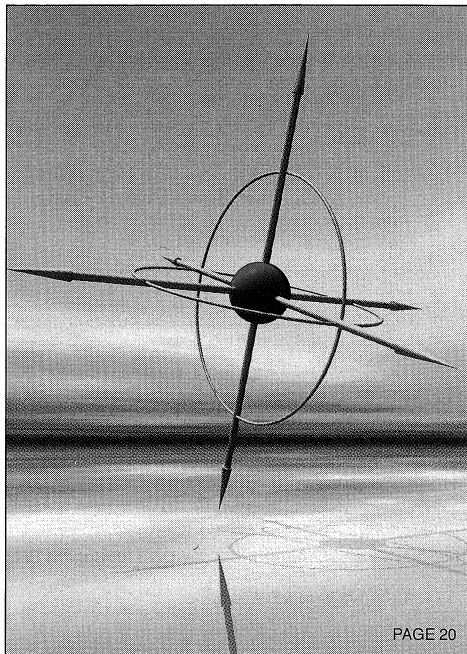
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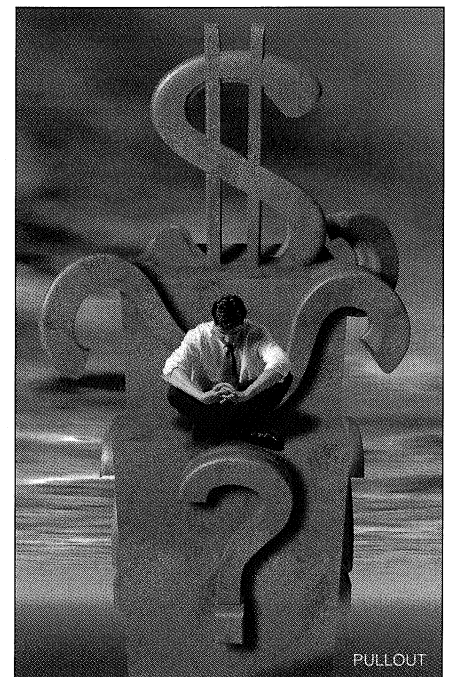
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