

Trespass trumps freedom of speech

By **Stephen Thiele**

Law360 Canada (July 17, 2024, 11:16 AM EDT) -- In a democracy, it is common for people to air their opposing views publicly through debate or protests. Unsurprisingly, the war in the Gaza Strip has caused large groups of people to gather in opposition to the war and to change the policies of corporations or institutions who, through investments, directly or indirectly support the war effort. In some cases, these gatherings have turned into encampments and occupations on parts of university campuses. While protesters have proclaimed that their occupations are protected by freedom of speech, the occupation of private property to the exclusion of the lawful owner and other permitted users constitutes a trespass.



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In *University of Toronto (Governing Council) v. Doe*, 2024 ONSC 3755, the court determined, on a motion for an interlocutory injunction, to remove pro-Palestinian protesters from the front campus of the University of Toronto, that the law of trespass trumped the alleged right of the protesters to occupy this part of the university's property to the exclusion of the university and other users of the front campus.

In this case, after enduring weeks of occupation of the front campus by the protesters and failing to reach a negotiated settlement to the protests and occupation, the University of Toronto issued a Notice of Trespass requesting the protesters disassemble their encampment and leave. However, the protesters refused to obey the Notice and the police refused to enforce it without the sanction of a court order.

Accordingly, the university was required to seek an injunction to have the protesters' encampment removed.

Supported by a fulsome court record, the university raised three arguments in favour of removal. The university submitted that (i) the encampment was violent, (ii) the encampment was associated with anti-Semitic language and slogans, such as the phrases "from the river to the sea" and "glory to the martyrs" and the word "intifada" and (iii) the encampment constituted a wrongful appropriation of university property because it deprived other members of the university community and the public, including tourists, from being able to use the front campus.

With respect to the third argument, the university showed that the protesters had essentially appropriated control over the front campus and controlled who was allowed to use this portion of the university's property through "gate teams," "marshals" and "onboarding" teams. The protesters also had "greeters" who questioned any visitor who wanted access to the front campus. Those who declined to answer the questions posed by the greeters were denied entry.

In defending against the injunction, the protesters relied on the rights of freedom of expression and freedom of association as found in the *Canadian Charter of Rights and Freedoms*. The protesters argued that the purpose of their encampment and occupation was to shed light on the university's investment policies and practices and that their protests were peaceful and free of hatred.

To obtain an interlocutory injunction, a moving party is generally required to establish that there is a serious issue to be tried, that the moving party will suffer irreparable harm and that the balance of convenience favours the granting of the injunction. However, since the university was seeking the

removal of the protesters from its property or a mandatory injunction, the university was required to establish that it had a *prima facie* case.

With respect to the conduct of the protesters and whether their slogans constituted hatred, the court found that the university had not established a strong *prima facie* case. However, with respect to trespass, the court held that under both the *Trespass to Property Act* and the common law the university had met the first element of the tripartite injunction test. The actions of the protesters were unlawful.

Although there is a strong presumption in favour of granting injunctive relief where a defendant is found to have committed a trespass, without the need to consider irreparable harm or whether the balance of convenience favours the granting of an injunction, the motion judge in this case considered all three parts of the general injunction test.

With respect to irreparable harm, the motion judge found that the university had incurred expenses in connection with the protest that were unrecoverable and had suffered some irreparable reputational damage.

With respect to the balance of convenience, the motion judge concluded that the university suffered greater harm as a result of the protest and occupation than the protesters whose freedom to protest was not being absolutely prohibited by the university. While the university sought to remove the encampment, it took the position that the protesters could still voice their opposition to the war and the investment policies of the university on its grounds. The protesters simply could not camp on the grounds between 11 p.m. and 7 a.m.

The motion judge also found that the front campus was intended to be used as a public space for the entire university community and that the university, as the owner of the front campus, had the right to decide how this part of the university was to be used.

The motion judge reasoned that if the university were deprived of the ability to determine how its property could be used, then a brutal free-for-all would be the end result because if the protesters could just take the front campus to the exclusion of others, nothing prevented a stronger group from forcibly taking over the front campus from the protesters for another cause.

In connection with the protesters' contention that an injunction would impinge on their rights to freedom of expression, the motion judge explained that their own conduct was inconsistent with this right because the only people they allowed onto the front campus were those who agreed with their beliefs.

Lastly, the motion judge found that the law did not recognize the inconvenience that might be suffered by the protesters as a result of their trespass.

With respect to the protesters' reliance on the Charter, the motion judge found that it did not apply because the protesters had failed to deliver the requisite notice to the attorneys general and because, in any event, the Charter does not apply to protect trespass.

In the alternative, the motion judge found that even if the Charter did apply and the rights of protesters were infringed, the common law and statutory law of trespass constituted reasonable limits prescribed by law.

This was a powerful decision as shortly following its release other universities took steps to initiate legal proceedings against similar protests on their property and/or struck agreements with protesters to leave university property peacefully. In other jurisdictions, police and private security were engaged to remove encampments from university properties.

Overall, the key takeaway from this case is that the law of trespass will protect property owners against the unlawful occupation of their lands and allow for the removal of encampments.

However, it remains to be seen whether this decision will have significance beyond encampments established on private property and be applicable to unlawful encampments established in public parks.

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