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And No More Shall We Shout: Noise By-Laws, Freedom of Expression and a Montréal Sex Club

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My partner and I recently attended a rock concert in Toronto. The band was Iceland's hottest (!) new group. We were seated in the balcony at the very side, slightly behind the proscenium – not the most coveted seats, although they afforded an incredible view of the inner workings of the band. The seats were also less than 10 feet from the left-hand bank of nine loudspeakers suspended from the stage gantry – speakers whose purpose was to fill the concert hall with noise. I didn't have a sound meter, but from our vantage point, during its peaks, the noise level must have been close to 120db.[i]

That night, as we left the concert and walked through a normal Saturday night street scene in Toronto, a Harley Davidson motorbike accelerated past in a deafening roar. It was physically painful. From the sidewalk where we were standing, as the bike passed us (again, probably no more than 5 feet away at its closest point), my guess would be that the noise level coming out of the exhaust was close to 140db. The bike put Iceland's rock stars to shame.

Noise is a complex phenomenon. Like most of us living today, I believe that I am subject to a lot more noise than previous generations.[ii] The urban soundscape is now filled with a cacophony of different sounds: from leaf blowers to car alarms to the staccato sounds of car horns triggered by keyless ignition systems. At the same time, however, noise is a conditioning phenomenon: after frequent exposure, the brain becomes conditioned and stops treating noise as a warning signal. So, unlike our ancestors who relied on hearing to sense danger, we treat noise

as largely benign. This brain adaptation also means that most of us are not even aware of long-term changes in noise levels; we can get used to chainsaws, automobile horns, construction equipment, car alarms, and the like.

The complexity is also due to noise being very personal. That motorcycle offended me: not only did the noise hurt, but my post-concert reflective space felt violated. On the other hand, the Harley Davidson driver no doubt loves and cherishes the noise of his unmuffled V-Twin. Those who hate rock music might, at best, find a loud Icelandic rock group annoying, but possibly irritating or even downright painful. Is the big difference between the exhaust noise and the music a question of consent? I was prepared for an evening of rock music; I did not expect to have to endure the bleat of a Harley V-Twin at 5 feet. Moreover, do we fully consent to much of the noise around us? Is noise something that makes us truly human? And is the noise we create a form of self-fulfillment, linked to our freedom of expression? Subjectivity is crucial to understanding noise and its control.

Governments have not allowed noise control to fall on deaf ears. The U.S. federal government, for example, far ahead of its time, enacted the *Noise Control Act of 1972*.[iii] Other countries have also enacted anti-noise by-laws.[iv] Because noise is localized, some cities have also responded. In 1994, the City of Montréal attempted to deal with troublesome noises by enacting a bylaw dealing with the control of noise in the metropolitan area.[v] The By-law became the subject of litigation. Eventually, the case, known as *Montréal (City) v. 2952-1366 Québec Inc.* ("*Montréal*")[vi] reached the Supreme Court of Canada. This short comment will, after providing a brief case summary, focus almost entirely on the Court's s. 2(b) analysis. It is left to others to comment on the approach to s. 1.

1. The Case

2952-1366 Quebec Inc. operated a club, Chateau du Sexe (the "Club"), located on a main thoroughfare in downtown Montréal. In order to attract customers and compete with a similar establishment on the same street, the Club installed speakers outside of the building, which broadcast a play-by-play of the goings on inside. On May 14, 1996 a police officer on patrol in downtown Montréal charged the Club under articles 9(1) and 11 of the By-law, which reads:

> 9. In addition to the noise referred to in article 8, the following noises, where they can be heard from outside are specifically prohibited:
> (1) Noise produced by sound equipment, whether it is inside a building or installed or used outside;…
> 11. No noise specifically prohibited under articles 9 or 10 may be produced, whether or not it affects an inhabited place.

The Club appeared before the Montréal Municipal Court. It argued that in enacting the provision the City had exceeded its delegated power to control nuisances and that the provisions constituted an unjustifiable infringement on its right to freedom of expression guaranteed under section s. 2(b) of the *Canadian Charter of Rights and Freedoms*.[vii] The Municipal Court ruled that the City had not exceeded its jurisdiction and that the By-law did not restrict the guaranteed right.[viii] The Club appealed. At the Superior Court, the conviction was overturned on the grounds that the provision did in fact violate the right to freedom of expression as protected by the *Charter*.[ix] That decision was upheld by a majority of the Quebec Court of Appeal.[x] Fish J.A. (as he then was), in his majority reasons, held that the City had not adequately established that the specific noise compromised peace and order and therefore unjustifiably violated a right to freedom of expression. Chamberland J.A., in dissent, argued that the provisions were in fact a reasonable and demonstrably justifiable limit on the right to freedom of expression as the City had no other way to eliminate noise pursuant to its legitimate authority to ensure peace and

public order and to regulate nuisances. The City appealed.

The Supreme Court of Canada concluded, in a 6-1 decision, that the By-law was a reasonable limitation on the right to freedom of expression. McLachlin C.J. and Deschamps J., writing for the majority, based their conclusion on a contextual reading of the concerned provision followed by a constitutional analysis in which they articulated a revised approach to freedom of expression in public spaces. In a stinging sole dissent, Binnie J. criticized the majority decision for its application of a method of contextual analysis generally reserved for crafting constitutional remedies and rarely, if ever, used for statutory interpretation. In his opinion the By-law was *ultra vires* the City as it infringed on freedom of expression and was not saved by s. 1. Even if it were to be held *intra vires* Binnie J. found that it would constitute an unreasonable exercise of the City's delegated legislative power.

Both judgments agree that in order to properly ascertain what the legislation is attempting to protect against, the court must engage in a process of contextual interpretation. This will be based not only on an analysis of the specific wording of the clause but also on the broader context. While both the majority and dissent agreed that the prohibition in article 9(1) infringed on the guarantee of freedom of expression, they parted company on the application of the contextual analysis and the *Oakes*[xi] test for reasonable limits on guaranteed rights under s. 1 of the *Charter*.[xii]

(a) The Jurisdictional Issue

The first step for the majority was to determine the purpose of the By-law. A brief review of the history of anti-noise legislation in Quebec initiated the discussion.[xiii] This revealed that previous laws were enacted to combat noise in order to "preserve the peaceful nature of public

spaces."[xiv] The notion of "disruption" was found to be the common theme contained within the entire By-law. Reading this theme into article 9(1), the majority held that the provision contained an implicit recognition that any disruptive noise that negatively influences enjoyment of the environment can be restricted. The majority concluded that the provision was focused on noise emanating from the specified sources – in this case the loudspeakers – and this could be differentiated from environmental noise. This purposive and contextualized approach resolved, for the majority, the explicit ambiguity of article 9(1). In intention and scope, it fell within the City's delegated authority to regulate and define nuisances.

Justice Binnie, in contrast, argued that the impugned article was not ambiguous at all. He highlighted three general categories of anti-noise legislation: (i) prohibition of noise exceeding objective measurable limits; (ii) prohibition by subjective criteria; and (iii) prohibition by source. In his view the majority had converted article 9(1) from a category (iii) prohibition into category (ii) by reading too much into the By-law. The City's intention, as exemplified in the strict wording of the By-law (and as argued by counsel to the City) was to regulate noises by source (a category (iii) prohibition).[xv] To Binnie J. it was evident that, based on a grammatical reading of the provision, the lawmakers intended to impose a general ban on all noise whether a nuisance or not. The lack of precision in article 9(1), compared to other provisions, was a blatant decision to create an unambiguous but sweeping and all-encompassing clause.[xvi] By adding the words "in addition" at the beginning of article 9, the lawmakers were attempting to chart a new direction for the fight against noise pollution – imposing a source-based ban without assessing the quality or impact of the noise emanating from that source. The broad language of article 9(1) led him to conclude that it was *ultra vires* the City as "noise" in itself is not a nuisance. The City's right to define and/or prohibit nuisances was not unlimited and generally requires noise by-laws to have

expressly specified, quantitative or qualitative, limits.

(b) The Constitutional Issue

Both the majority and dissent agreed that article 9(1) infringed s. 2(b) (Binnie J. simply agreeing with the majority on this point).[xvii] The majority began its constitutional analysis by applying the test for freedom of expression set out in *Irwin Toy v. Quebec (Attorney General)*.[xviii] This requires examining whether: (i) noise has expressive content; (ii) the method or location of that expression excluded it from protection; and (iii) the By-law infringes on that protection in either purpose or effect. They concluded that, regardless of its message, the noise had expressive content as expressive activity is not precluded from protection simply by virtue of its message.[xix]

For the second part of the test the Court scrutinized the place where the noise was emitted. At issue was the scope and extent of the street as public space. The majority then set out a series of guidelines to assist in determining the type of public space that attracted s. 2(b) protection. For them, in determining whether restricting expression would undermine the values of democratic discourse, truth finding, and self-fulfillment, history and actual function of a place must be considered.[xx] The historical use of a place provides an indication as to whether protecting expression in that venue has, in the past, supported the core values. Assessing the actual function of a place would highlight if, while being public in nature, it is essentially a private place. If so, the right to free expression should be attenuated. At the core of this analysis is the question of whether free expression in any place would undermine the values the guarantee is intended to advance.[xxi] The Court's intention in expanding on this point was to "provide a preliminary screening process" that would limit to a certain degree the broad protection enabled by the courts within a s. 2(b) analysis.[xxii] Applying the analysis to the facts, the majority held that

a busy Montréal street did not exclude the noise from s. 2(b) protection.[xxiii]

Finally, the Court found that the ban on the specified noise infringed freedom of expression by restricting expression that promoted the values of self-fulfilment and human flourishing, both of which are well-known purposes underlying the free expression guarantee.[xxiv]

Disagreement arose, however, over whether article 9(1) could be saved as a reasonable and demonstrably justifiable limit prescribed by law under s. 1 of the *Charter*. The majority argued that the City's objective, namely the fight against noise pollution, was both pressing and substantial. In the two-pronged proportionality test from *R. v. Oakes*,[xxv] they found that the limit on noise emanating from sound equipment was rationally connected to the objective. Noise pollution can be limited by a city in order to maintain the quality of public space. The measure was also found to impair the guaranteed freedom in a reasonably minimal way. A number of reasons were given. First, the majority was hesitant to interfere with elected officials' discretion in dealing with what was deemed to be a serious social issue. Secondly, regulating degrees of loudness, a solution presented as an alternative to the impugned legislation, would not adequately balance the need to allow businesses to maximize commercial expression with the public's desire for peaceful streets. This was bolstered by the City's submissions that there were no other practical ways to deal with the problem. Finally, the City, in a (strange) submission, argued that any over-inclusiveness in the By-law could be corrected by the judicious use of prosecutorial discretion.

Binnie J. accepted neither the proposition that there were any limits in the relevant provision that were properly "prescribed by law", nor that article 9(1) was a "[proportionate] response to the legitimate problem of noise pollution."[xxvi] A provision should be either of no force and effect (hence unconstutional) or it should justifiably limit a right (constitutional) – it

could not be made effective with a warning to prosecutors to exercise discretion in the application of the impugned provision. The City's argument, according to Binnie J., was dangerous.

In addition, Binnie J. took issue with the majority's contention that the Club could advertise its business through other means in order to avoid contravening the By-law. He argued that Montréalers have a right to freedom of expression which includes the right to utilize their own preferred mode of communication. They are entitled to challenge a law that limited their preference of communication especially if that law infringed on their rights to a degree that was entirely disproportionate to the City's objective.[xxvii]

Although stirring, in the end Binnie J.'s judgment was a lone, and futile, shout. The majority allowed the By-law to stand.

The decision is the first Canadian case of which we are aware that deals with the constitutionality of anti-noise by-laws. Although both the majority and dissent do devote some time to an overview of urban noise regulation in Quebec, there is, in my view, a conspicuous omission of science in the decision. A proper understanding of the science of noise and its control is fundamental to analysing how sound might legitimately affect freedom of expression. The next section is a brief attempt to redress that.

2. A Short Primer On Noise and Noise Pollution[xxviii]

As mentioned, noise is a very complex phenomenon. In part, this is due to the difficulty of measuring it. Noise is usually measured in decibels (dB) on a scale from zero to 120 dB (theoretically, there is no upper limit; practically it is around 140 dB). The scale begins at zero, which was set to correspond roughly to the least powerful sound wave a very sensitive ear can

hear, set at a pressure of 2/10,000 of a microbar. The human ear is able, however, to perceive a huge range of sounds beyond that level. As a result, the decibel scale is logarithmic, so as to accommodate the complete range of over a million different audible sound pressures, from 2/10,000 to 200 microbars (one million discrete steps). A 20 dB increase on the scale is therefore equivalent to a ten-fold noise level increase. Ambient room noise is usually between 50-60 dB on the A scale (see below); aural discomfort occurs at about 120 dBA and the threshold of pain is generally accepted as 140 dBA.

The complexity of measurement is accentuated by the fact that there are a number of different decibel scales. The standard form of measurement is the decibel "A" scale, or dBA. The A scale tries to replicate the way the human ear hears – less sensitive to very low frequencies and very high frequencies. It does this by weighting high and low frequencies differently in a precise manner. Other scales include the B scale, the Perceived Noise Level scale, the Effective Perceived Noise Level scale, the Noise Criterion Level scale, and the Speech Interference Level scale. All of the different scales attempt to combat specific problems that invariably occur in quantifying sounds. Each is something of a compromise. To be precise, therefore, proper noise level measurements must indicate the scale that is used.

Not only is it important to specify the scale, it is almost meaningless to identify specific levels of sound without stating the distance from the source of the noise. Because sound can be directional and ambient, it can fill an entire room or project directionally from a specific source, because it can occur in short bursts or continuously, and it may dissipate differently depending on direction and the medium it is traveling through, there is no point in trying to understand noise levels without relating them to the location of a sound meter. Normally, sound pressure levels drop off about six decibels for every doubling of distance. As an example, an electric

shaver can register 75 dBA at 2 feet; at 20 feet, the same razor sound is only 55 dBA, which is about 25% of the original loudness level. Distance, therefore, can have significant effects on perceived loudness.

Finally, there are the subjective elements of sound, mentioned earlier. To a listener's ears, the same sound can vary depending on his or her location relative to the sound source. Under identical conditions on a different day, the listener can perceive a completely different sound level. And since noise control can also occur without actual noise reduction – by changing the design parameters of buildings, road and subway rights-of-way, for example – the policy choices expand considerably. There is thus a large human element at play.

All this means that noise control is an incredibly complex mix of science and art. When it intersects with freedom of expression, the problems of analysis multiply. It is no wonder that both legislatures and courts have a difficult time with it. The Supreme Court is to be commended for trying, but it is unfortunate that it did not have the benefit of more scientific information on noise (or, if it did, it is regrettable that it did not refer to it at all in its judgment).[xxix]

3. Did the Court Get it Right?

Ever since the beginning of s. 2(b) jurisprudence, the Supreme Court of Canada has been careful not to stake out much judicial territory in regards to the *Charter's* commandments of freedom of thought, belief, opinion and expression.[xxx] The analytical framework for a s. 2(b) analysis, carved out by Dickson C.J. in *Irwin Toy*, has remained virtually intact. The test, as it has stood for almost 20 years now, is to establish whether the activity is expressive; if it is, then to assess whether the expressive activity takes an unprotected form in which case there is no breach of s. 2(b) (violence being a common example of an unprotected form). If the form is

protected, then the question is whether the governmental response infringes upon expression in purpose or in effect. If the purpose is infringing, the analysis shifts immediately to s. 1; if the effect is to infringe, then the three rationales of free expression – as an instrument for democratic government, an aid to the search for truth and the marketplace of ideas, and a tool for individual self-fulfillment and autonomy – must be engaged or else the legislative provision or equivalent is deemed not to offend s. 2(b). The test seems relatively complex, but since the Court has defined expressive activities to encompass almost any form of human endeavour (an activity is "expressive if it attempts to convey meaning"[xxxi]) virtually all of the work in freedom of expression cases occurs at the s. 1 stage.

Arguably, this broad interpretation of s. 2(b) has not been overly problematic. The biggest challenge the Court has faced so far has been determining the scope of expression in the areas of hate literature, pornography and commercial speech. All of these involve some form of direct, natural or unadorned human activity (however distasteful): in speech or song – the natural human voice; in painting or drawing – the artistry of the human hand; in commercial advertising – the wit, wisdom and saleability of human-invented signs and typefaces. There has been little conceptual difficulty in determining these to be expressive forms of activity.

What about expression that is less directly "human-centred," or that requires technology to produce? Where the medium and the message are both connected and distinct? As was noted, article 9(1) of the By-law in *Montréal* was just such a provision. The starting point, for these situations, is the Court's decision in *Ford v. Québec (AG).*[xxxii] In it, the court rejected a distinction between a message and its medium, at least for language. As the Court noted:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. …That

> the concept of "expression" in s. 2(b) of the Canadian Charter …goes beyond mere content is indicated by the specific protection accorded to "freedom of thought, belief [and] opinion" in s. 2. …That suggests that "freedom of expression" is intended to extend to more than the content of expression in its narrow sense. …It has already been indicated why that distinction is inappropriate as applied to language as a means of expression because of the intimate relationship between language and meaning.[xxxiii]

Then, in *Irwin Toy*, the Court seemed to take a slightly different tack, recognizing that shouting may be a form of communication severable from content:

> "Expression" has both a content and a form, and the two can be inextricably connected. …In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. …how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.[xxxiv]

Finally, in *Committee for the Commonwealth of Canada v. Canada*[xxxv] Lamer J. added the criterium of location – where the expression occurs can affect the analysis of whether freedom of expression is breached:

> The fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are always circumscribed by the rights of others. … In my view, if the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s. 2(b).[xxxvi]

But since these cases, the Court has not addressed the issue further (or, it has not really had the opportunity to do so) as none of the intervening cases have been concerned with the medium of communication. *Montréal*, however, was such a case. It provided the Court with an opportunity to revisit its analytical approach to s. 2(b), at least as it relates to specific places and forms of communication. That opportunity was only half taken.

(a) The Good News: A Renewed Appreciation of Context

The majority in *Montréal* continued the Court's tradition of treating s. 2(b) broadly, but they did add something new – a rejuvenated understanding of the relevance of the manner and place of communication in an analysis of expression. The discussion centred on appropriate uses of public spaces while the method of communication was unfortunately given short shrift (as will be discussed). The Court refined its approach from *Commonwealth*:

> Expressive activity should be excluded from the protective scope of s. 2(*b*) only if its method or location clearly undermines the values that underlie the guarantee. … [I]n determining what public spaces fall outside s. 2(*b*) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(*b*)….
>
> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered: (a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression. [xxxvii]

This is a new, and in some aspects, welcome approach. For one, the test is expressly broadened to include the method of communication as well as location. As the majority notes, "the evidence does not establish that the *method* and location at issue here…impede the function of city streets."[xxxviii] Secondly, the majority takes the view that expressive activity in public spaces can be prohibited without offending s. 2(b). Later on they comment that "[the test] reflects the reality that some places must remain outside the protected sphere of s. 2(b). People must know where they can and cannot express themselves and government should not be required to justify every exclusion or regulation of expression under s. 1."[xxxix] In other words, there may be occasions where it is not necessary to resort to s. 1 in order to save regulations restricting expression. The

long-standing view that most, if not all, the heavy lifting in freedom of expression analysis is done at the s. 1 stage has been firmly modified. Any lingering doubts about the importance of context in expression cases, left over from the lack of unanimity in *Commonwealth*, have been laid to rest.

(b) The Not-So-Good news: More Factors and a Missed Opportunity

Two aspects of the decision remain a disappointment. The first is a now almost mundane complaint about the growing use of "factor" analysis in the Court's constitutional jurisprudence. For example, there has been no lack of criticism to s. 15 after the *Law* test and its dignity factor analysis.[xl] It relies heavily on trying to weigh and balance different, and sometimes contradictory, factors. There is now a similar requirement for s. 2(b) where location is in issue: the need to review a place's historical and actual function, and whether "other aspects of [a] place"[xli] might engage freedom of expression values. The difficulty with any factor analysis is assessing how to weigh each one. The Court seems to understand and prepare itself for this eventuality, noting that "some imprecision is inevitable".[xlii] But is this good enough? How does one go about assessing the historical and actual function of a place? To take just two examples arising from the case itself: what if the historical and actual functions of a place are diametrically opposed? Should governments be able to regulate this form of expression because the "government function require[s] privacy" or not regulate because there is a historical precedent of free expression?[xliii] Or, as a second example, is rude behaviour now controllable in a courtroom or legislative houses, because it amounts to "other aspects of a place" not subject to constitutional protection? Without additional guidance as to how these factors are to work, lower courts will more than likely end up with decisions that are all over the map, requiring further

Supreme Court intervention to clarify. It is an inherent problem in any form of factor analysis that judicial discretion and subjectivity tend to predominate over principled analysis.

The second, and more fundamental problem is a growing unease I have with the lack of sophistication in the basic s. 2(b) analysis. It is no doubt true that expression should be protected and governments should have to justify encroachments on it. It is also correct, in my view, to continue to respect the three underlying values related to the purpose of freedom of expression. However, it may be time to take a fresh look at whether other principles should inform the idea of expression, and whether manner and form of expression (or, to use the language of the Court, the "method or location") are, in some situations, distinguishable from expression itself. *Montréal* provided a perfect opportunity to engage in this debate on the specific issue of amplification. That opportunity was squandered.

Noise, as has been shown, is sometimes only peripherally connected with expression. If there is any "expression", it is often not direct human expression. In the case of a rock concert or a club promoting its operations remotely through a loudspeaker, the expression begins as a human voice, but the soundwave is then electronically processed and reconstructed as amplified sound. In the case of a Harley Davidson motorcycle, the "expression" comes from the workings of an internal combustion engine.[xliv]

The initial reason for conjoining form and content in *Ford* was in the context of a language dispute. As the Court in that case noted, any distinction between form and content is "inappropriate *as applied to language* as a means of expression."[xlv] That argument holds considerable weight. No one would want freedom of expression to exist in one language but not in another. But there have been few reminders in subsequent cases of the need to keep the two together. The passage from *Ford*, above, has not been repeated since.[xlvi] In *Irwin Toy* the Court

mentions the "inextricable connection" between form and content but then proceeds to acknowledge that the two can be disconnected.[xlvii] On a very limited number of occasions, therefore, has the Court admonished against artificially separating the medium and message. In other words, the distinction, specifically announced in *Ford* in the context of language, has not been applied in other areas, and has certainly not been part of a broader debate on expression in sound amplification.

Amplification changes expression simply by its nature as a "medium". It is not equivalent to earlier concerns, since dismissed, as to whether commercial labeling,[xlviii] advertising,[xlix] or banning advertisements directed at children,[l] are expressive. Neither should it be thought of as simply accentuating what a person standing on a soapbox should be entitled to say. Amplified sound is much more. It is equivalent to asking whether the same man-on-a-soapbox rules regarding expressive content should apply to Superman standing on a tower of mega-size detergent boxes. It is only peripherally an issue about freedom of expression; more likely, it is a question of freedom to expand expression beyond normal human agency. In any event, there is no doubt that it is something requiring a full discussion in the context of a s. 2(b) analysis. It goes to the heart of what is "expression," deserving of much more than the Court's conclusion that "[i]t is clear that noise emitted by loudspeakers from building onto the street can have expressive content."[li] There is a larger question at stake when one is considering whether a city could suppress a noise like the 140dBA Harley, but leave famous rock groups alone. It will now have to wait for another suitable case.[lii]

Moreover, as mentioned in the introduction, part of the analysis of noise, as a form of expression, requires a consideration of consent. One would think that consent should form part of any discussion involving context. Acoustical engineers define noise as "any unwanted sound"[liii]

What could be more contextual than that! If a person does not like a sound, therefore, the scientific literature considers that to be noise. In any event, the Court did not consider whether anti-noise by-laws need to be more tailored for purposes of s. 2(b). Loud advertising might be supportable in a late night, sex club area like St. Catherine's street but not in the leafy district of Outremont.

There may be another chance soon – although given the Court's trepidation to stray outside the basic facts of a case, this may be overly optimistic. A case from the Ontario Court of Appeal, *Vann Niagara Ltd. v. Oakville (Town of)*[liv] has been given leave to appeal to the Supreme Court. The case concerns a municipal sign bylaw prohibiting billboard signs within the town's borders. Again, the issue is whether the by-law infringes expression. It is another case where the medium and the message are not necessarily connected. Like amplification, is it possible to imagine that at some point, the size of a sign (like the volume of sound) becomes more important than the message contained therein? We live in a world where extravagant excess is fashionable: Super-size meals, booming car stereos played with the windows down (whose main purpose, therefore is to promote the owner's prowess, not to listen to music), and now billboards that use full-scale school buses or multi-storey video images (again, not so much as to promote a product as to promote the size and scale of the manufacturer). If Marshall McLuhan knew, in 1964, what his legacy would produce, he may well have thought that because the medium is the message, the medium will become louder or larger at the expense of the message. It is hoped that the Court realizes the need to engage in some of these ideas about the nature of expression itself, rather than rely almost exclusively on the straitjacket of s. 1.

Conclusion

People are annoyed, distracted and probably kept awake at night because of noise. Cities

would be more pleasant places to live if there was less noise. For a very large part of the population, noise is the most serious of pollutants. The consequences may not be as serious as an outbreak of *e. coli* in the water supply, but the impacts of excessive noise are more immediate on more people. Noise causes annoyance, and for many people, can have a serious and detrimental effect on sleep. It is an effect that is more immediate and identifiable than breathing polluted air, having contaminated streams or lakes or living shorter lives because of low-level contaminated foodstuffs.

At the same time, cities are now international competitors in the world economy. Events such as the Olympics and large-scale theatre spectacles, or destination architecture, are sought after by cities in open competition. High-level bargaining and diplomacy are required for this task, so that cities now have dedicated departments of commerce, tourism and trade working full time on the politics and pursuit of these "mega" events. The billions of dollars generated, controlled and/or distributed by organizations like the International Olympic Committee gives it the global clout to interfere, not just with State governments, but city ordinances and bylaws. It seems reasonable to expect that a city may decide to control noise as a result of some of these possible external factors.[lv] In the end, the Supreme Court in *Montréal* did allow the By-law to stand because of s. 1 of the *Charter*. I believe the conclusion is good – it is only the lack of a deeper analysis of s. 2(b) that disappoints.

Cities themselves have an increasingly large impact upon national identity, as well as being a popular forum for its expression. Although early concerns about globalisation focused on the loss of the independent nation-state versus the global Leviathan, this has been proven to be overly simplistic.[lvi] The new globalization model sees economic power shifting in both directions: to the global and local levels simultaneously. As Thomas Courchene coins it, the new

process is one of "glocalization", noting that nation states are now "too large to tackle the small things in life and too small to address the large things".[lvii] Cities are thus required to develop local statehood, so as to engage in international competition with other cities, while also expanding capacity to deliver local services, some of which are targeted at attracting foreign tourism and investment. Creating the climate for this occurs in many ways, one of which is to design and implement policies that distinguish one city from another. The city "branding" becomes crucial to this success. Cities are slowly transforming into commodities.

The City, therefore, becomes an expression in itself. Seen in this way, a quiet city is, conceptually, little different from an amplified noise. In a sense, neither are what should pass for "expression" or "expressive activity". Both are symbols. But if one is a collective of like-minded people wanting quiet, and the other is a technological process involving electrons, which is really the more human?

ENDNOTES

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[i] This is a very popular, but incorrect, method of stating noise levels. See Part 3, below, for an explanation.

[ii] At least, I feel that there is more noise now, but this is largely impressionistic. It is not clear whether there is any objective evidence of increased noise. Despite many claims that noise is getting worse, and despite the fact that there is a very good chance that it is, there are no accurate measurements of city noise *as a whole*, nor are there longitudinal studies to indicate change over time. See Harris, infra note 28.

[iii] Pub. L. No. 92-574, 86 Stat. 1234 (codified as amended at 42 U.S.C. § 4901-4918). Although the Act is still on the books, it subsequently lost all support when Ronald Reagan took office and cut all funding to its oversight agency, the Office of Noise Abatement. The Act is now effectively worthless. For a good overview, see Charles W. Schmidt, "Noise That Annoys: Regulating Unwanted Sound" (2005) 113 Environmental Health Perspectives A42.

[iv] Britain's *Noise Act 1996* (U.K.), 1996, c. 37, s. 4 allows for fines in response to noise violations exceeding permitted levels of noise or emitted from devices not approved in the Act. The Act is only to take effect in a particular locale if local authorities opt-in (s. 1). In 1998 the European Commission created the EU Noise Expert Network whose goal is to help European countries develop noise policies. In India, legislators added the *Noise Pollution (Regulation and Control) Rules, 2000* to section 3 of the *Environment, (Protection) Act, 1986* (India), 1986, No. 29; these rules regulate the noise levels in certain areas and establish "zones of silence" in others (i.e. near hospitals).

[v] City of Montreal, By-law R.B.C.M. C. B-3, *By-law concerning noise*, (1994) [By-law].

[vi] [2005] 3 S.C.R. 141**,** 258 D.L.R. (4th) 595, 2005 SCC 52 [*Montréal* cited to S.C.R.].

[vii] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982 c.11 [*Charter*].

[viii] [1999] J.Q. 2890 (M.C.).

[ix] [2000] J.Q. 7289 (S.C.).

[x] [2002] R.J.Q. 2986, 217 D.L.R. (4th) 674, 167 C.C.C. (3d) 356, [2002] J.Q. 3376 (C.A.).

[xi] *Infra* note 25.

[xii] *Supra* note 6 at paras. 82-85, 166-67.

[xiii] *Ibid.* at para.18.

[xiv] *Ibid.* at para. 22.

[xv] *Ibid.* at para. 103.

[xvi] *Ibid.* at para. 117.

[xvii] *Ibid.* at para 166.

[xviii] *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 557 [*Irwin Toy* cited to S.C.R.].
[xix] *Supra* note 6 at para 58.
[xx] *Ibid.* at para. 74.
[xxi] *Ibid.* at para 75-77.
[xxii] *Ibid.* at para 79.
[xxiii] *Ibid* at para. 58.
[xxiv] *Ibid.* at para 84.
[xxv] [1986] 1 S.C.R. 103.
[xxvi] *Supra* note 6 at para. 167.
[xxvii] *Ibid.* at para. 174.
[xxviii] Much of this part comes from Cyril M. Harris, ed., *Handbook of Acoustical Measurements and Noise Control*, 3rd ed (New York: McGraw Hill, 1991). It is obviously an extremely basic discussion about sound. One would have hoped for much more detailed and complete submissions to the Court on the science of sound.
[xxix] Whereas the Supreme Court of Canada did not refer to scientific knowledge on sound, the Quebec Superior Court has done so in a class action case involving noise at a railroad yard: see *Paquin c. Cie de Chemin de fer Canadien Pacifique* (2004) IIJ Can 11397 at paras 59 and 97 (Sup. Ct) rev'd (2005) QCCA 1009 (IIJ Can) (C.A.).
[xxx] Although each of these fundamental freedoms may be distinct, for purposes of this paper it will be assumed that expression is sufficient to enclose all three concepts. As an interesting aside, it should be noted that the Court has been reluctant to express any opinion on the differences between the four – as expression is the form of activity that manifests itself publicly, it is much more likely to be the one that is regulated or controlled by government, and visible and open to public scrutiny and censure.
[xxxi] *Supra* note 18 at 968. See also *Rocket v. Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 244 [*Rocket*]; *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 729, 826 [*Keegstra*]. (Dickson C.J.'s glib example of parking a car as a potential form of expressive activity in *Irwin Toy* has always provided the lodestone for me for what could be considered "expressive"). In fact, the most radical addition to the definition was allowing "threats of violence" to be characterized as "expression" - see *Keegstra* at 733.
[xxxii] [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [*Ford* cited to S.C.R.]
[xxxiii] *Ibid.* at paras. 40, 42.
[xxxiv] *Supra* note 18 at paras. 41, 53.
[xxxv] [1991] 1 S.C.R. 139 [*Commonwealth*].
[xxxvi] *Ibid.* at paras. 19, 22. Note that not all judges agreed with Lamer J.'s analysis of time, manner and place restrictions being read into s. 2(b) – L'Heuruex-Dubé J. expressly rejected this idea and put this analysis into s. 1.
[xxxvii] *Supra* note 6 at paras. 72, 74.
[xxxviii] *Ibid.* at para. 66. See also para. 68.
[xxxix] *Ibid.* at para. 79.
[xl] *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.R. 497, 170 D.L.R. (4th) 1. For criticism, see e.g. Peter W. Hogg, *Constitutional Law of Canada*, (Scarborough: Carswell, 2004 Student Edition) at section 52.7(b); Don Stuart, *Charter Justice in Canadian Criminal Law, 3rd ed.* (Scarborough: Carswell, 2001) at pg. 38-39, 437-440; Sheilah Martin,

"Balancing Individual Rights to Equality and Social Goals" (2001) 80 Cdn. Bar Rev. 299; June Ross, "A Flawed Synthesis of the Law" (2000) 11 Constitutional Forum 74.
[xli] *Supra* note 6 at para 74.
[xlii] *Ibid.* at para. 78.
[xliii] *Ibid.* at paras. 75, 76.
[xliv] As an interesting aside, there has been an attempt to "trade-mark" the sound of a Harley Davidson engine. This was, thankfully, short-lived. See *Harley-Davidson Trademark Registration*, U.S. Patent & Trademark Office, February 1, 1994. After six years of legal proceedings and no resolution, Harley Davidson abandoned its application.
[xlv] *Supra* note 31 at para. 42 [emphasis added].
[xlvi] See *supra* note 32 and accompanying text. A Quicklaw search of *Ford* revealed 41 instances where the SCC has either distinguished, mentioned, explained, followed or cited in dissent *Ford*. None of these referred to the excerpted passage.
[xlvii] See *supra* note 18 at paras. 41, 53.
[xlviii] *R.J.R. Macdonald v. Canada*, [1995] 3 S.C.R. 199.
[xlix] *Rocket*, *supra* note 30.
[l] *Supra* note 18.
[li] *Supra* note 6 at para. 58.
[lii] This issue has not arisen in Canada -- a brief search of both Quicklaw and the Lexis databases did not reveal any Canadian case analysing the nature of electronically enhanced expression – an interesting fact in itself, given the prevalence of amplified sound in contemporary society. There have been a smattering of U.S. cases – see *Daley v. Sarasota (City)*, 752 So.2d 124, 25 Fla. L. Weekly D617 (Fla. App. 2 Dist. Mar 8, 2000); *Ward v. Rock Against Racism*, 491 U.S. 781, 110 S.Ct. 23, 106 L.Ed.2d 636 (1989) (it is acceptable to have restrictions on the time, manner and place of speech (in this case, amplified music), as long as they are content-neutral, narrowly tailored to serve a significant governmental interest and leave other communication options open). See also, Mark A. Gruwell, "The First Amendment Strikes Back: Amplified Rights" (2002) 31 Stetson L. Rev. 367 for a basic discussion of the *Daley* case.
[liii] See Harris, supra note 28.
[liv] (2002), 60 O.R. (3d) 1, leave to appeal to S.C.C. granted, [2003] 3 S.C.R. 158, [2003] S.C.J. No. 71, 2003 SCC 65.
[lv] The U.S. has a national competition for quiet cities. Memphis has been acclaimed as the Quietest City and openly promotes this as a reason for visiting: see www.superpages.com/cities/cp/tn/memphis.
[lvi] See Saskia Sassen, *Globalization and Its Discontents*, (New York: The New Press, 1998) at ix (Foreword by Anthony Appiah).
[lvii] Thomas Courchene, "Glocalization: The Regional/International Interface" (1995) 18 Canadian J. Regional Science 3.