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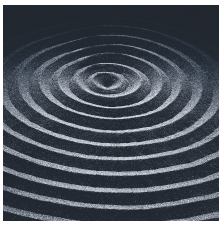

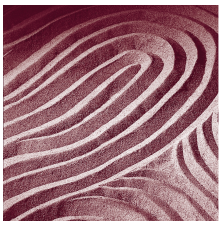

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Freedom of Expression and Sign By-Laws in Canada- Where are we now?

Steven J. O'Melia
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FREEDOM OF EXPRESSION AND SIGN BY-LAWS IN CANADA - WHERE ARE WE NOW?

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Introduction

Municipalities in Canada have the legal authority to prohibit and regulate signs and other advertising devices on public and private property within their geographic boundaries. They must do so, however, without unreasonably infringing on the constitutionally guaranteed right of all individuals to freedom of expression. In the twenty years since that right was enshrined within the *Canadian Charter of Rights and Freedoms* (the "Charter")[1], Canadian courts have struggled to find the appropriate balance between the protection of free expression and the municipal objective of controlling the unfettered proliferation of signs.

In the past year, there have been two key decisions released by leading Canadian courts, *Guignard c. St-Hyacinthe (Ville)*[2] and *Vann Niagara Ltd. v. Oakville (Town)*[3] – that seem to have "raised the bar" in this area and significantly restricted the ability of municipalities to effectively regulate through sign by-laws.. This paper reviews the judicial consideration of municipal sign by-laws in Canada in the post-Charter era and the way in which such by-laws have been able to co-exist with the constitutionally protected right of free expression. It also comments upon whether or not a coherent and predictable approach has been achieved and the possible impact of these recent decisions on that balance.

Legislative History

Municipalities in most Canadian provinces have long had the authority to prohibit and regulate signs and other advertising devices on public and private property. In Ontario, the first statutory reference to such a power appeared in the *Municipal Institutions Act*, 1873 (Ont.), c. 48, s. 379(21), which stated that municipalities could pass by-laws:

> 379(21) For preventing the injuring or destroying of trees or shrubs planted or preserved for shade or ornament; and the defacing of private or other property by printed or other notices;

This section was modified by the *Municipal Act*, R.S.O. 1897, c. 223, s. 547(4) to delete; the association with trees and shrubs, so that the provision read

> 547(4) For preventing the defacing of private or other property by printed or other notices.

In 1913, the provision was further modified by the *Municipal Act*, 1913 (Ont.), c. 43, to a form closer to the present statutory language:

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

2 (2002), 209 D.L.R. (4th) 549; 27 M.P.L.R. (3d) 1 (sub nom. *R. v. Guignard*).

3 (2002) 60 O.R. (3d) 1; 214 D.L.R. (4th) 307 (C.A.).

> 399(57) For prohibiting or regulating the erection of signs or other advertising devices, and the posting of notices on buildings or vacant lots.

In 1937, the provision was again renumbered and the words, "within any defined area or areas or on land abutting on any defined highway or part of a highway", were appended thereto.[4] The authority for Ontario municipalities to prohibit and regulate signs has survived in substantially the same form up to the present date[5] and municipalities in other provinces have been granted similar powers by their respective legislatures.[6]

The Impact of the Charter

The enactment of the Charter by the British Parliament as part of the patriation of Canada's constitution in 1982 caused a fundamental shift in Canadian legal thinking. Superimposed on a mature, pre-existing legal system, the Charter (and the rest of the Constitution of Canada) is the supreme law of the land and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect.[7]

Prior to the introduction of the Charter, there was no direct constitutional limitation on the extent to which a municipality could prohibit or regulate signs. Although such by-laws were on rare occasions struck down as being *ultra vires* intrusions into areas not within the legislative competence of municipalities,[8] they were seldom subject to challenge and Canadian courts for the most part showed them a great degree of deference. In the post-Charter era, there is now a broad spectrum of potential challenges to sign by-laws.

The list of rights and freedoms guaranteed by the Charter is set out under several broad headings: fundamental freedoms, democratic rights, mobility rights, legal rights and equality rights. The enumerated list of fundamental freedoms parallels the values protected by the First Amendment to the Constitution of the United States of America and reads as follows:

> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> (c) freedom of peaceful assembly; and
>
> (d) freedom of association.

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4 S. 405, para. 54, R.S.O. 1937, c. 266.

5 The *Municipal Act*, R.S.O. 1990, c. M. 45, s. 210, para. 146.

6 See, for example, the *Municipal Act* (B.C.) s. 579(3); the *Municipal Act* (Manitoba) s. 324; the *Land Use Planning and Development Act* (Quebec) s. 113(14); and the *Municipalities Act* (Newfoundland) s. 225.

7 The *Constitution Act, 1982* (supra note 1), s. 52.

8 See, for example, *McKay v. The Queen*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532 and *Re Millard and Borough of Etobicoke*, [1968] 1 O.R. 56, 65 D.L.R. (2d) 414 (H.C.J.), where municipal sign restrictions affecting political signs were found to be unlawful intrusions into the conduct of elections.

It is under Charter s. 2(b) that the Canadian jurisprudence considering municipal sign by-laws has developed.

The rights and freedoms protected under the Charter are not absolute. Section 1 of the Charter provides that they are, "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." As a result, every analysis of an alleged infringement of a Charter right entails a two-step process. The first step is to determine whether or not a protected right, such as freedom of expression, has been infringed. If an infringement is found, it is then necessary to determine if it can be justified, or "saved", under s. 1.

While Canadian courts have determined that some expression (such as hate literature, defamation or perjury) is outside of the core values that are fully protected by Charter s. 2(b),[9] the forms of expression that municipalities seek to control invariably fall within the protected category and affected persons have generally had little difficulty meeting the onus placed on them to show that there has been a *prima facie* infringement of their Charter rights.

Once a breach of Charter s. 2(b) has been identified, the onus shifts to the municipality to justify the breach employing the analysis that has evolved under s. 1 of the Charter.[10] The underlying presumption is that an infringement of a guaranteed right or freedom should not be permitted unless the governmental authority seeking to do so can bring itself within the exceptional criteria contemplated by s. 1.

The first part of the Charter s. 1 test is to show that the objective which is sought to be obtained is "of sufficient importance to warrant overriding a constitutionally protected right or freedom".[11] It would be inconsistent with the concept of a free and democratic society to permit constitutional protections to be violated in pursuit of trivial objectives. The objective must be pressing and substantial in order to be deemed to be of sufficient importance.

If a sufficiently significant objective is recognized, the governmental body invoking s. 1 must then show that the means chosen to limit the guaranteed right are reasonable and demonstrably justified through a form of proportionality test. The Court set out in its decision in *R. v. Oakes*[12] what it viewed to be the three important components of such a proportionality test:

- The measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations.

- The means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question.

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9 See for example *R. v. Keegstra*, [1990] 3 S.C.R. 697.

10 The judicial formula for applying this second part of the two-step test was established in *R. v. Oakes*, [1986] 1 S.C.R. 103 and was further refined for freedom of expression cases in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *Thomson Newspapers Co. v. Canada {Attorney General),* [1998] 1 S.C.R. 877, among other decisions.

11 *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at para. 139.

12 *Supra*, note 10.

- There must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objectives sought to be obtained.

The Supreme Court in *Oakes* and other decisions has recognized that, given the wide range of rights and freedoms guaranteed by the Charter, some limits will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures are inconsistent with the principles of a free and democratic society. However, in all instances the Charter s. 1 test has proven to be a formidable hurdle for governments to clear in the defence of their legislative enactments.

The Jurisprudence Prior to 2002 - Where Were We?

It is against the above legislative and jurisprudential background that Canadian courts have considered how the constitutionally guaranteed right to freedom of expression affects the traditional power of municipalities to control signs within their boundaries. Prior to this year, a number of Charter challenges to sign by-laws had reached the highest level of provincial courts of appeal but just one of those appeals had been further considered by the Supreme Court of Canada. As is apparent in the summary of that case law set out below (beginning with the Supreme Court and then progressing across the country from west to east), even in the post-Charter era the majority of leading pre-2002 decisions had tended to support municipal attempts to exercise control over signs.

The Supreme Court of Canada

As noted above, the Supreme Court of Canada had considered the constitutionality of a municipal sign by-law on only one occasion prior to this year – the Court's decision in *Ramsden v. Peterborough (City)*.[13] In that case, the Court declared to be unconstitutional portions of a municipal by-law that purported to ban all postering on public property, which was a common provision in municipal by-laws of the time.

The named litigant, who had been convicted of affixing posters to wooden utility poles in order to advertise an upcoming performance of his musical group, was assisted by earlier, non-municipal decisions of the Supreme Court. The Court had previously established the principle that, although the Charter was enacted to protect individual, and not corporate, rights and freedoms, commercial expression was included in the forms of expression protected by s. 2(b).[14] The Court had also found, within a federal context, that postering on some public property was a form of protected expression.[15]

The Supreme Court of Canada (and, before it, the Ontario Court of Appeal)[16] agreed with Ramsden's argument that the absolute prohibition of his desired form of expression contained within Peterborough's by-law did not meet the proportionality component of the Charter s. 1 test.

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[13] [1993] 2 S.C.R. 1084.

[14] See, for example, *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232.

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

[16] (1991), 5 O.R. (3d) 289 (C.A.).

The Court found that the total ban, while rationally connected to the goals of avoiding littering, aesthetic blight, traffic hazards and hazards to those persons whose employment required them to climb utility poles, was not a minimal impairment of the protected right. The Supreme Court adopted the view of the majority of the Ontario Court of Appeal that "[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated."[17]

In addition to its decision in *Ramsden*, the Supreme Court declined leave to hear appeals in the *Jaminer* and *Canadian Mobile Sign Association* cases set out below.[18] The absolute right of appeal to the Supreme Court in civil matters was eliminated in 1975,[19] and it is not unusual for leave to be refused in cases that do not have broad national significance. The Court does not give reasons when it grants or denies leave to appeal and a denial of leave does not necessarily mean that the Court believes that the lower court decision was correctly decided. However, it has been noted that in practice a refusal of the Court to grant leave is often perceived as some measure of approval of the lower court decision.[20] Since both of the sign by-law cases where leave was refused had been decided in favour of the municipality, it was natural that municipalities generally had taken some comfort that the Supreme Court was not offended by the restrictions contained in those by-laws.

British Columbia

The Province of British Columbia can lay claim to some of the most beautiful natural areas in Canada. It is also home to some of the more restrictive municipal sign by-laws that are designed to preserve that beauty. The City of Vancouver has one of those by-laws.

Concerns about the increasingly deleterious visual effect of billboards arose in Vancouver in the 1960's. In response, the Province amended the City's Charter[21] in 1972 to allow the City to require by special by-law the removal of any sign that had been legally non-conforming for more than five years. This amendment complemented an already strong prospective authority to prohibit and regulate signs by allowing the City to phase out existing signs that had been "grandfathered" under the existing by-law. The theory behind the five-year grace period was that this would allow most sign owners to honour their existing contractual obligations before their sign had to be removed.

The City used its powers to enact, among other restrictions, prohibitions against roof-top signs within certain commercial zones in the City. Roof top signs were defined as any sign that extended above the roof line of the nearest building. These signs were seen as particularly harmful to views of the surrounding mountains and natural landscape. The area in which this restriction applied was broadened over the years until it amounted to a virtual prohibition of this type of sign. The City's by-laws continued to permit a wide variety of other signs, including wall-mounted and free-standing billboards, in specified areas and subject to certain requirements.

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17 *Ibid*., p. 294.

18 *Infra*, notes 22 and 35, respectively.

19 S.C. 1974-75-76, c. 18.

20 Bushnell, "*Leave to Appeal Applications to the Supreme Court of Canada*" (1982) 2 Supreme Court Law Review 479.

21 *Vancouver Charter*, S.B.C. 1953, c. 55.

The constitutionality of the prohibition of roof-top signs became an issue in *Vancouver (City) v. Jaminer*.[22] In that case, the City brought a legal action against the owner of a building for the removal of a roof-top sign that had been brought back into use many years after its lawful authority had expired. In support of its finding in favour of the municipality, the presiding justice referred favourably to an earlier decision of the British Columbia Supreme Court in which it had upheld a similar provision in the City of Prince George's by-law and ordered the removal of the shell of a car from the roof of an auto body repair shop (the car qualified as a roof-top sign under that by-law's very broad definitions). In reasoning that reflected the vestiges of the deferential approach to sign by-laws, the Court in *Prince George* had stated:

> It is obvious that in a municipality it is desirable, if not necessary, to regulate the erection of signs on private property. The alternative is potential chaos and a visually unappealing community. Just how to achieve the desired result is a matter best left to the wisdom of those elected to the municipal government. Any criticism of or change in the local law should normally take place in the democratic process. The courts should be cautious about striking down a small part of a comprehensive municipal by-law which deals with a matter of obvious concern and which is largely a matter of local preference. That preference is subject to frequent review within the democratic process.[23]

In upholding the finding that the by-law provisions were a lawful exercise of Vancouver's municipal authority, the Court of Appeal even questioned the wisdom of the City's concession that the prohibition on roof-top signs was a *prima facie* infringement of the sign owners' freedom of expression, commenting as follows:

> With respect, I suggest that the discussion in the case at bar might have more appropriately and more expeditiously taken place at this stage - i.e. at the threshold of s. 2(b). The city's concession necessitates a less direct treatment that lends more significance to the case than it deserves. However, because of the concession, the chambers judge's analysis was directed entirely to the question of whether under s. 1 of the Charter, the limit on free speech said to be implicit in the prohibition of roof-top signs was demonstrated to be "justified in a free and democratic society" - an *Oakes* analysis.[24]

The Court proceeded to conduct the *Oakes* analysis and concurred with the lower court's finding that it had been satisfied in the circumstances. In dealing with the question of minimal impairment, the Court stated that:

> I view the real crux of this case as lying in the fact that there really was no viable, and less intrusive, alternative open to the City if it wished to restore the skyline of Vancouver to a clutter-free state. Roof-top signs, which by their nature must be large in size, significantly detract from the appearance of the skyline no matter where the building is located. … if one wished to do restore the beauty of Vancouver's skyline, the prohibition of roof-top signs was the only realistic way to do so.[25]

Finally, the Court noted that the impugned prohibition was content-neutral and it could not be suggested that the by-law in general was enacted in order to restrict free speech.

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22 [1999] B.C.J. No. 2843 (B.C.S.C.); upheld on appeal at [2001] B.C.J. No. 615 (B.C.C.A.).

23 *Prince George (City) v. A.F.N. Holdings Ltd.*, [1986] B.C.J. No. 2729 (B.C.S.C.).

24 *Jaminer, supra* note 22, at para. 15.

25 *Ibid*, para 34.

The Supreme Court of Canada dismissed the defendants' leave to appeal application, without reasons, on September 20, 2001.[26]

The Prairie Provinces

The leading sign by-law cases from the three prairie provinces come primarily from Alberta.

The decision of the Alberta Court of Queen's Bench in *Edmonton (City) v. Forget*[27] was an early public property postering case that struck down that City's absolute prohibition against postering on public utility poles. The judgment preceded the Supreme Court of Canada's decision in *Ramsden* and was cited favourably therein.

In *R. v. 718916 Alberta Ltd.*,[28] the defendant company was charged with contravening the City of Calgary's "Temporary Signs on Highways By-law" by placing a sign on or within a traffic island or median. The by-law prohibited signs in certain locations on roads classified as major streets or expressways by the City's transportation system by-law.

In arguing its appeal from an acquittal at the trial level court, the Crown conceded that the relevant provisions restricted freedom of expression but contended that they could be saved under s. 1 of the Charter. The temporary signs by-law was part of a comprehensive system of sign regulation in the City and, viewed as a whole, placed few restrictions on where temporary signs could be placed. The Court noted that such signs were permitted on all residential and collector roads and on 85 percent of all major roads and concluded that the *Oakes* test had been satisfied, that the trial judge had erred in concluding otherwise, and that a conviction should be entered.

In *R. v. 388923 Alberta Ltd.*,[29] the accused corporation had been convicted of violating provisions of the City of Edmonton's land use by-law that prohibited portable signs. The conviction was overturned on appeal to the Queen's Bench. On further appeal, the Alberta Court of Appeal found that the City had presented little or no s. 1 evidence to justify its clear legislative infringement of the Charter.[30] The Appeal Court characterized the by-law definitions and limitations as being overly broad and, in the absence of an evidentiary basis in support of their justification, was unwilling to find that they were proportional to the goals sought to be achieved.

Finally, in *R. v. Pinehouse Plaza Pharmacy Ltd.*,[31] the Saskatchewan Court of Appeal upheld a City of Saskatoon by-law that prohibited ancillary users of buildings within certain zones from posting exterior signs. Such businesses were limited to advertising their presence using lettering painted on a door or window visible from outside the building that was no larger than 16 centimetres (approximately 6 inches) in height. The defendant pharmacy was a permitted use ancillary to a medical clinic and sought to advertise its business by way of an illuminated

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26 [2001] S.C.C.A. No. 278.

27 74 D.L.R. (4th) 547 (Alta. Q.B.).

28 [2000] A.J. No. 1666 (Alta. Q.B.).

29 [1995] A.J. No. 980 (Alta. C.A.).

30 *Ibid*, para 18.

31 [1991] S.J. No. 47; 4 M.P.L.R. (2d) 1 (Sask C.A.).

outdoor sign. The Court found that, within the overall scheme of the City's land use by-law, the restriction represented a reasonable limit on freedom of expression.

Ontario

The Province of Ontario has by far the largest body of appellate decisions dealing with the constitutionality of municipal sign by-laws. The Court of Appeal for Ontario, in addition to being the initial appellate court to issue a decision in *Ramsden*, had considered challenges to municipal sign by-laws on six other occasions prior to this year.

The decision in *Toronto (City) v. Quickfall*[32] dealt with another absolute ban on postering within municipal roadways. The Supreme Court of Canada's decision in *Ramsden* was released after this appeal was argued and before the decision was released. After inviting the parties to make further submissions on the impact of that intervening decision, the Court found that the reasoning in *Ramsden* was dispositive of the issues before it and overturned the convictions under Toronto's by-law.

In *Nichol (Township) v. McCarthy Signs Co.*,[33] the Court of Appeal upheld a by-law that prohibited signs that did not relate to the business or lawful activity carried out on the property on which the sign was located. The by-law frustrated the appellant's wish to erect advertising billboards on private property along rural roads in the area. In a relatively brief decision, the Court found that even though the by-law amounted to a complete ban on third party signs, the Township's objectives of preventing aesthetic blight, distractions to operators of motor vehicles and disturbances to the natural setting of the municipality had been achieved in a reasonable and proportionate manner.

The Court's decisions in *Stoney Creek (City) v. Ad Vantage Signs Ltd*.[34] and *Canadian Mobile Sign Association v. Burlington (City)*[35] both dealt with the regulation of portable or mobile signs and were heard together. The decisions, which were also released on the same day, resulted in a "split decision" for the affected municipalities.

Stoney Creek's by-law largely prohibited portable signs, allowing them only for service stations, contractors and new businesses. The expressive prohibition was directed principally at this type of sign, and the by-law was permissive of many alternative forms of signage. The City's representative had conceded on cross-examination that the stated purposes of the by-law – to address concerns about traffic hazards and public safety – could be effectively met by regulating the manner in which portable and mobile signs could be used. Insofar as aesthetics were concerned, the Court noted that the burden of proof was on the municipality and that it had presented no evidence to this effect beyond the general assertion that mobile signs are considered unsightly by the public.

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32 (1994), 16 O.R. (3d) 665; 111 D.L.R. (4th) 687, (C.A.).

33 (1997), 33 O.R. (3d) 771 (C.A.).

34 (1991), 149 D.L.R. (4th) 282 (Ont. C.A.).

35 (1997) 149 D.L.R. (4th) 292 (Ont. C.A.).

The Court declared the challenged prohibitions to be invalid, but left open the possibility that a complete ban on mobile signs might be defensible in other circumstances if there was a sufficient evidentiary basis, stating:

> The prevention of aesthetic blight will be of varying importance, depending on the particular character of the community. Obviously, the community interest is different in a heritage community than it is in a busy, urban centre. In some communities, even a total prohibition of mobile and portable signs may well be justified. However, in the absence of any evidence as to the particular needs in the City of Stoney Creek, I am unable to find that the means chosen by the respondent minimally impair the appellants' rights or that they are proportional to this stated objective.[36]

In coming to an opposite result on the City of Burlington's by-law, which prohibited the use of portable signs except for three 15-day periods per year, prohibited the illumination of such signs and required that they be located on private property and refer only to activities on that property, the Court found that the restrictions fell short of an absolute ban and were a balanced approach to regulation:

> Without drawing any distinction between signs on public property and private property, viewing the by-law as a whole, on the material before us we are of the opinion that the means chosen by the City of Burlington to achieve its stated objective in dealing with the problems created by the use of portable signs, unlike those in Stoney Creek, are proportionate to the objective and only minimally impair the appellants' rights. This by-law cannot be said to operate so as to generally or effectively prohibit the use of such signs.[37]

The Supreme Court of Canada dismissed the Sign Association's application for leave to appeal the *Burlington* decision on March 19,1998.[38]

In *Urban Outdoor Trans Ad v. Scarborough (City)*,[39] the Court upheld a numerical cap that had been placed on third party billboard signs. The by-law, which permitted the continued growth of such signs at a controlled pace until a cap of 344 signs was reached, was the result of a two-year consultative process in which even segments of the sign industry acknowledged the deleterious effects of an unlimited expansion of their business. The Court held that the limitations rationally balanced the commercial interests of the sign companies and were a proportional response to achieve the City's objectives of protecting its streetscapes.

The decision in *Beaumier v. Brampton (City)*,[40] involved a challenge by a political candidate who wished to place her election signs on the City's boulevards. The City had responded to the *Ramsden* decision by erecting approximately 70 "poster sleeves" within its road system while maintaining a prohibition elsewhere. No permit or prior permission was required to use the sleeves. Interestingly, the judge deciding the original application found that the applicant had not demonstrated and infringement of her Charter s. 2(b) rights and that a section 1 analysis was unnecessary. However, the Court went on to find that even if a s. 2(b) breach was assumed, the municipality's objective had been accomplished by the least restrictive means and it was not the

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36 *supra*, note 34.

37 *Supra*, note 35.

38 [1997] S.C.C.A. No. 551.

39 (2001), 52 O.R. (3d) 593 (C.A.).

40 [1999] O.J. No. 4407 (C.A.), upholding [1998] O.J. No. 1303.

duty of the court to infer other possibly less-restrictive means. The Court of Appeal, in a four sentence endorsement, agreed with the lower court's section 1 analysis and therefore found it unnecessary to deal with the remainder of the judgment.

Quebec

The most significant litigation on municipal sign by-laws to come out of Quebec is the series of decisions in *Guignard c. St-Hyacinthe (Ville)*,[41] which culminated at the Supreme Court of Canada.[42] The Supreme Court's decision, which is discussed in more detail below, overturned the concurring decisions of three levels of the Quebec court and seems to represent a further incursion into municipal authority in this area.

The Atlantic Provinces

There have been few reported sign by-law cases emerging from the four easternmost provinces of Canada. The sole reported sign by-law case in which the *Ramsden* decision has been referenced was the decision of the Nova Scotia Supreme Court in *New Glasgow (Town) v. MacGillivray Law Office Inc*.[43] The basis for that decision was an application brought by the Town of New Glasgow that sought to compel the removal of a sign erected on the premises of a law office that also advertised the services of a neighbouring restaurant. The Town's by-laws prohibited third party signs, which were defined as signs that advertised businesses situate on other properties, in the downtown core zone. The offending sign was also larger than the maximum size that was permitted in the core area.

The Court referred to the Irwin Toy decision in support of its finding that effect of the Town's by-law was to restrict advertising, which was a constitutionally-protected form of expression. In line with similar decisions across the country, the Court readily found that the goals of the by-law, which were to maintain an aesthetically pleasing environment, minimize adverse impacts on adjacent properties and promote pedestrian and vehicular safety, were pressing and substantial.

The Court went on to find that the limiting measures in the by-law were rationally connected to the objectives and were not arbitrary. The Court commented favourably on the fact that the Town had been divided into different zones for regulatory purposes, with a broad range of permissible signs and varying restrictions depending on the zone. The Court concluded that the means chosen by the Town to accomplish its objectives were proportionate to those goals and affected the defendants' freedom of expression in a minimal fashion.

The decision was ultimately considered, and upheld, at the appeal court level[44] just ten days before the release of the Supreme Court of Canada's decision in *Guignard*. Unfortunately, the constitutional issues do not appear to have received a full airing, with the Court of Appeal noting rather brusquely that the appellants, "had not advanced any coherent submission in support of their position" but had merely made "reference, without analysis, to various cases." Notwithstanding the Court of Appeal's dim view of the arguments presented, one may wonder

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41 *Infra*, notes 46, 47 and 48.

42 *Supra*, note 2.

43 [2001] N.S.J. No. 465.

44 Appeal dismissed by the Nova Scotia Court of Appeal, [2002] N.S.J. No. 58.

whether the result could have been different if the *Guignard* decision had been available for its consideration as it was for its Ontario counterpart in *Vann Niagara*.

Summary of Pre-2002 Caselaw

Although not completely cohesive, it is arguable that the body of court decisions released prior to this year could be distilled to a few basic principles:

- *Sign by-laws were a prima facie infringement of the right of free expression*: It was either conceded or found in almost all cases that, by their very nature, municipal sign by-laws impinged upon the constitutionally protected right of freedom of expression. Municipalities therefore had to be prepared to defend their by-laws by satisfying the onus placed on them to meet the *Oakes* s. 1 test.

- *The regulation of signs was a pressing, and substantial goal*: In conducting the s. 1 review courts generally accepted, often without argument, that the goal of sign by-laws was of substantial importance. The constitutionality of sign by-laws was therefore determined solely on the basis of the rational connection and minimal impairment components of the *Oakes* test.

- *Postering on public property could not be absolutely prohibited*: The Supreme Court's decision in *Ramsden* resolved any inconsistency that may have existed on this point between provincial courts of appeal. Postering was seen as particularly worthy of protection because of its traditional use as a method of communication by economically disadvantaged groups.

- *Total prohibitions of any kind would be difficult to defend*: Even very restrictive time, place and manner restrictions would generally be upheld if they did not amount to a *de facto* prohibition. There was arguably some uncertainty as to difference between a place restriction (roof-top signs in *Jaminer*) and the prohibition of a type of sign (portable signs in Ad Vantage Signs).

- *Municipal regulation had to be directed at the form and not the content of signs*: The objectives repeatedly cited in defence of sign by-laws were aesthetics and traffic safety, which were negatively affected by the form but not the content of signs. In order to maintain the rational connection between the objectives and the limiting measures it was important that sign by-laws be content-neutral.[45]

To the above list could perhaps be added the additional observation that challenges to municipal sign by-laws stood a good chance of being dismissed in every province but Ontario.

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[45] Content neutrality is now statutorily required by s. 99 of Ontario's new *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, with the exception of regulations governing advertising devices for adult entertainment businesses.

The *Guignard* and *Vann Niagara* Decisions - Where Are We Now?

As noted above, the decisions this year of the Supreme Court of Canada and the Court of Appeal for Ontario in *Guignard* and *Vann Niagara*, respectively, seem to have taken the principles established in previous sign by-law litigation to a new level.

The Guignard Decision

The facts underlying the *Guignard* decision were rather novel. Roger Guignard was the co-proprietor of a tavern located in the City of St. Hyacinthe. A patron ran into the bar's outdoor terrace and Mr. Guignard made a claim under his property insurance for the costs of the necessary repairs. The insurer's suspicions were apparently aroused by its inability to conduct an inspection of the damages prior to the repairs being started, a notation in the police report that estimated the damages to be less than the cost that was claimed, and the possibility that Guignard was not at arms-length with the company that did the repairs. Whatever the reasons, the insurer refused to fully indemnify Guignard and he became a highly dissatisfied customer.

When, after several months of discussions, Guignard had still failed to receive what he felt was owing to him, he erected a large sign on the side of his building that outlined the details of his dispute and referred to his insurance company (in translation) as ``incompetent" or "ineffectual". The prominent sign drew the attention of both the named insurance company, which sought an injunction to force its removal, and the local municipality, which commenced a prosecution under its zoning by-law.

The City of St. Hyacinthe's zoning by-law permitted advertising signs only within industrial zones. "Advertising sign" was defined as a sign that indicated the name of a company and drew attention to a business, product or service carried on, sold or offered at a location other than the property on which the sign was placed.

Mr. Guignard was convicted by the Quebec Municipal Court and was ordered to pay a $100 fine.[46] He appealed his conviction and fine, first to the Quebec Superior Court[47] and then to the Quebec Court of Appeal.[48] Each time, the Quebec courts determined that the relevant provisions of the zoning by-law were valid exercises of municipal authority and that the by-law had been breached. Each time, the courts also found that, although Mr. Guignard's constitutionally guaranteed right to freedom of expression had been contravened, this infringement was justifiable under s. 1 of the Charter. Guignard sought and was granted leave to appeal his conviction to the highest court in the country.

In overturning Guignard's conviction and striking down the challenged portions of the by-law, the Supreme Court of Canada found that although the stated municipal goals of lessening visual pollution and driver distraction were pressing and substantial, the means chosen to accomplish those goals were disproportionate to the benefit achieved and did not minimally impair the expressive rights of affected citizens.

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46 [1997] Q.J. No. 3213 (QL).

47 [1997] Q.J. No. 3213 (QL) (Sup. Ct. (Crim. Div.)).

48 [1998] Q.J. No. 695 (QL) (Que. C.A.).

The Supreme Court was troubled by what it characterized as the arbitrary nature of the by-law provisions that restricted only advertising signs in non-industrial areas. Writing for the Court, Mr. Justice LeBel noted that if Guignard's sign had simply stated, "Don't trust insurance companies", or "Don't trust the insurance company located at this address", or "Purchase your insurance elsewhere than in Saint-Hyacinthe", it would have complied with the by-law and yet it would have remained just as visually polluting. Interestingly, the Quebec Municipal Court had referred favourably to this distinction, noting that because the by-law did not prohibit all forms of signs within non-industrial zones but only those that were unnecessary to the activity carried on therein, this demonstrated a reasonable proportionality between the measures used to limit freedom of expression and the objective of limiting visual pollution.

The Court found that commercial expression included not only a corporation's right to promote its products, but a consumer's ability to share information and criticize products, referring to such communications as "counter-advertising" that assisted in the circulation of information and the protection of society's interests just as much as advertising or certain forms of political expression. Although the Court acknowledged that the city's by-law was not crafted with the goal of prohibiting counter-advertising, it found that the effect of the by-law was to make it practically impossible for individuals to post signs criticizing the practices, products or services of a company unless they could buy or lease land within an industrial zone.

The Vann Niagara Decision

The decision of the Court of Appeal for Ontario in *Vann Niagara*[49] is the second important sign by-law decision to be released this year. The decision arose from a challenge to portions of the Town of Oakville's by-law by a company in the billboard business. Oakville prohibited all third party signs in the municipality, which were defined as signs that directed attention to products, goods, services, activities or facilities which were not the principal products, goods, services, activities or facilities provided on the premises upon which the sign was located. The by-law also capped the size of billboard signs at 80 square feet, which was less than the challenger's desired billboard dimension of 200 square feet.

On the original application, the Ontario Superior Court of Justice found that the applicant corporation had not established a sufficient evidentiary foundation to prove that the proposed form of expression was protected by Charter s. 2(b) and dismissed the application on that basis.[50] The Court went on to find that even if there had been a violation of Charter s. 2(b), it was justifiable under the *Oakes* test because the means chosen to accomplish the municipal objective, although not the absolutely least intrusive, fell within a reasonable range and ought to be given deference.

On appeal, the decision was overturned, with MacPherson J.A. dissenting in part. The majority of the Court of Appeal found that the prohibition of third party signs constituted a limit on the content of expression, the restriction on the size of signs limited the form of expression, and that together the two sections had the complementary effect of preventing the applicant's desired form of commercial expression. The Court disagreed with the lower court's view of the

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[49] *Supra*, note 3.

[50] (2001) M.P.L.R. (3d) 183.

evidentiary foundation and found that, as commercial expression was a form of protected expression, the applications judge had erred in finding that a prima facie infringement of Charter s. 2(b) had not been demonstrated. The onus therefore shifted to the Town to defend its by-law.

In overturning the lower court decision in its entirety, the Court of Appeal found that the area limitation of 80 square feet was not just a restriction on the size of a sign, but was the prohibition of a type of sign namely, billboards, at least as defined by Vann Niagara Ltd. The Court distinguished its earlier decision in *Nichol Township* (which had endorsed such a prohibition) by noting that the township in that instance was a rural, agricultural community that had received requests to erect signs in scenic areas whereas Oakville, or at least parts of it, consisted of "unremarkable industrial areas". All three members of the Court felt bound by the decision in *Guignard* insofar as the prohibition of third party advertising was concerned.

In a vigorous dissent, MacPherson J.A. disagreed that the two challenged provisions were complementary. He characterized them as two separate and completely independent parts of the by-law relating only to form and content, respectively. While he was prepared to concede that the prohibition on third party signs did not withstand the Supreme Court of Canada's reasoning in *Guignard*, he did not agree that a restriction on the dimensions of a sign infringed the right to freedom of expression in an unconstitutional manner.

Leave is currently being sought to appeal the portion of the *Vann Nia*gara decision that struck down the municipal limits on the size of billboards. The Court of Appeal's unanimous finding against the total prohibition of third party signs was not appealed, presumably because the impugned provision was almost identical to the by-law struck down in *Guignard*.

Commentary

Most municipal sign by-laws seek to control the size of signs and to distinguish and to control the locations of third-party advertising. Quantitatively, excessive signage can be controlled by restricting a business at a particular location to erecting a sign on its own property indicating its presence. If that same business is permitted to erect many signs at numerous other locations, the potential for the unchecked proliferation of signs is virtually unlimited. One need only consider the visual blight caused by election signs on a periodic basis to imagine what cities and towns would look like if all businesses could erect an unlimited number of permanent signs at an unlimited number of locations.

The difficult aspect of these recent decisions, from a municipal perspective, is that neither municipal by-law constituted an absolute prohibition and both left much room for expressive activity. In *Guignard*, only one type of sign was prohibited within only a portion (albeit a large portion) of the municipality. In *Vann Niagara*, the prohibition on third party signs was absolute but only a very large upper limit had been imposed on the size of signs that were otherwise legal. It might have been expected that the by-law provisions would have withstood judicial scrutiny given the preceding body of case law.

Canadian courts have in other contexts become increasingly sensitive to the important role that local governments play in perceiving and reflecting the desires and preferences of their inhabitants. It is therefore a bit incongruous that they appear to be retreating from this general trend in this one specific area after almost a decade of deferential decisions.

The American Contrast

Balancing the regulation of signs with the imperative of free speech is not a new concept for American municipalities. The First Amendment to the U.S. Constitution, which provides in part that "Congress shall make no law ... abridging the freedom of speech …", was enacted well before Canada became a country and there is a wealth of American decisions dealing with constitutional limits on sign by-laws.

While American courts have clearly established that signs are a form of speech that is subject to constitutional protection, they have generally been deferential to municipal attempts to curb visual blight even if such efforts involve broad restrictions on this form of communication.

For example, the majority position of the United States Supreme Court in the landmark decision, *Members of the City Council of Los Angeles v. Taxpayers for Vincent*[51] actually upheld that City's complete ban on postering on public property. It was Justice Brennan's dissent that was referred to favourably by the Supreme Court of Canada in *Ramsden*. Similarly, the U.S. Supreme Court in *Metromedia, Inc. v. City of San Diego*[52] held that that City's absolute prohibition of third party advertising signs did not offend the First Amendment. This latter decision is also in contrast with the approach of the Supreme Court of Canada as evidenced in *Guignard*. There are other lower court American decisions upholding by-laws that completely prohibit portable signs[53] and strictly control the size of signs[54], although not all such by-laws have received favourable judicial treatment.

The American cases generally begin by examining whether or not a municipal sign by-law is content-neutral. While not all by-laws containing content distinctions violate the First Amendment, it is more difficult to defend such by-laws, particularly if those distinctions have the effect of favouring commercial over non-commercial speech. As noted by the U.S. Supreme Court in *City of Ladue v. Gilleo*:

> [There are] two analytically distinct grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs. One is that the measure in effect restricts too little speech because its exemptions discriminate on the basis of the signs' messages. ... Alternatively, such provisions are subject to attack on the ground that they simply prohibit too much protected speech. ... While surprising at first glance, the notion that a regulation of speech may be impermissibly underinclusive is firmly grounded in basic First Amendment principles.[55]

The Court in *Ladue* declared unconstitutional an underinclusive municipal ordinance that permitted some residential lawn signs, such as "for sale" signs, while prohibiting others, such as the petitioner's desired anti-war sign.

Similar to their Canadian counterparts, American courts will examine sign by-laws to determine if they are narrowly tailored to serve a compelling state interest. However, the American cases seem to place a greater emphasis on examining whether or not there are still alternative means to

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51 466 U.S. 789 (1984).

52 453 U.S. 490 (1981).

53 *Harnish v. Manatee County*, 783 F. Supp 1535 (11th Cir. 1986).

54 *Outdoor Systems, Inc. v. City of Mesa*, 997 F. 2d 604 (9th Cir. 1993).

55 512 U.S. 43.

communicate the desired information, which has led to some of the more deferential decisions referred to above. Finally, U.S. courts have developed a "traditional public forum" analysis[56] and governmental attempts to regulate communication in such venues will be subjected to a higher level of scrutiny. This type of analysis is reflected to some degree in the Supreme Court of Canada's heightened concern for the traditional, inexpensive means of communication used by economically disadvantaged groups. However, American courts seem to differ in their approach by requiring a more solid evidentiary basis to be established in each instance before a public forum is found to exist.

Current Municipal Landscape

In the course of preparing this paper, the author reviewed copies of existing sign by-laws from over 40 municipalities within the Province of Ontario, representing most major municipalities in the Province and a substantial majority of affected residents. While it is difficult to draw general conclusions across such a diverse range of regulatory instruments, the following was noted:

- Large municipalities with greater legal and financial resources had in most cases produced very extensive and detailed sign regulation by-laws, in some cases amounting to hundreds of pages of regulation.
- Many, but not all, by-laws contained detailed postering provisions that seemed to respond to the issues raised in *Ramsden*.
- Some by-laws contained fee provisions to defray the cost of administering the by-law as had been contemplated in *Ramsden*.
- Notwithstanding the *Ramsden* decision, some by-laws continued to prohibit the posting of signs within municipal rights-of-way.
- Almost all by-laws sought to regulate the maximum size of signs in one form or another.
- Some by-laws completely prohibited mobile signs.
- Some by-laws completely banned flashing illuminated signs.
- Some by-laws completely prohibited roof-top signs.
- Some by-laws prohibited signs painted on the exterior walls of buildings.
- Many by-laws contained virtually complete bans on signs in residential areas.

A number of the municipal solicitors that were contacted advised that their municipality's by-law was under review and that they would be awaiting the Supreme Court's disposition of the leave to appeal application in the *Vann Niagara* case before deciding if it would be amended. It would

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[56] See for example *Cornelius v. NAACP*, 473 U.S. 788 and *City of Seattle v. Mighty Movers, Inc.* (Wash. Ct. of Appeals, 2002).

be extremely useful to those municipalities if the Supreme Court of Canada would not only grant leave to appeal, but render a decision that will establish broad principles on the limits to which sign by-laws may encroach upon the Charter s. 2(b) right to freedom of expression.

Conclusion

The decisions released this year in *Guignard* and *Vann Ni*agara are a wakeup call for Canadian municipalities that may have formed unrealistic assumptions about their ability to regulate signs because of prior court decisions and the Supreme Court's denial of leave to appeal in the *Jaminer* and *Canadian Mobile Sign* cases. The cumulative impact of these recent decisions, if left undisturbed, will place significant practical limitations on the ability of municipalities to control the proliferation of signs in the manner to which they have been accustomed. If, in effect, the Supreme Court of Canada has decided that the proliferation of signs is an unavoidable price to be paid for protecting freedom of expression, it needs to set this out in unambiguous terms so that municipalities may follow its lead rather than attempting to meet an illusory target.

To date, each time the Supreme Court has granted leave to appeal in municipal sign by-law cases it has subsequently declared the impugned by-laws to be unconstitutional. While the Court's reasoning in these cases has been instructive, it has been focused on circumstances where the constitutional rights of perceived or imputed "underdogs" were at stake. It would therefore be extremely useful for the Court to articulate its reasoning in a broader manner and the facts underlying *Vann Niagara*, together with its forceful dissenting opinion, provide an ideal opportunity for the Court to give national direction to municipalities as to how far their authority in this area extends.