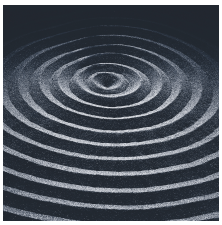
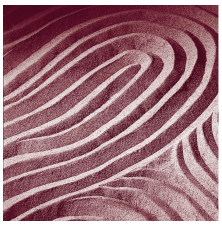
MILLER THOMSON LLP
Barristers & Solicitors
Patent & Trade-Mark Agents

Accelerator Building
295 Hagey Blvd., Suite 300
Waterloo, ON Canada
N2L 6R5
Tel. 519.579.3660
Fax. 519.743.2540
www.millerthomson.com





TORONTO VANCOUVER CALGARY EDMONTON LONDON KITCHENER-WATERLOO GUELPH MARKHAM MONTRÉAL

Is the Writing on the Wall for Sign By-laws in Canada?

Steven J. O'Melia
with John Mascarin
September 2002

IS THE WRITING ON THE WALL FOR SIGN BY-LAWS IN CANADA?

By Steve O'Melia and John Mascarin

What is the appropriate balance for municipalities to strike between preserving the rights of individuals to freedom of expression while attempting to control the proliferation of advertising signage and other forms of visual pollution? The Supreme Court of Canada recently considered this question under the *Canadian Charter of Rights and Freedoms* (the Charter)[1] in *Guignard c. St-Hyacinth (Ville)*.[2]

Background

The facts underlying the Supreme Court of Canada's decision came about only as a result of an extremely dissatisfied insurance customer. Mr. Guignard was the co-proprietor of an establishment called the Rendezvous Bar in the City of Saint-Hyacinthe. On the evening of May 9, 1996, a patron ran his automobile into a small outdoor terrace adjacent to the building. Guignard notified his insurance company of the accident the next morning and was advised that an adjuster would attend within the hour. When the adjuster had not arrived 90 minutes later, Guignard telephoned his insurer to advise that he would be commencing repairs on an urgent basis so that the bar could be ready for its usual 11:00 a.m. opening time. A representative of the insurer eventually arrived at 1:30 p.m. and took a detailed statement from Guignard. The repairs were fully completed within three days and were subsequently inspected by another representative of the insurer. The insurance company ultimately offered to settle the matter for less than one-third of the amount that Guignard claimed as his out-of- pocket expenses.

When, some three months later, the insurer had still not fully indemnified him for the repair costs, a much- chagrined Guignard erected a large sign, on the side of a different building that he owned in Saint-Hyacinthe, that read (in translation):

> Date of Incident 10/05/96
> Date of Repairs 10-13
> Date of Claim 10/05/96
>
> WHEN A CLAIM IS MADE, ONE FINDS OUT ABOUT POOR QUALITY INSURANCE
>
> COMMERCE GROUP THE INCOMPETENT INSURANCE COMPANY HAS STILL NOT INDEMNIFIED ME

This prominent sign[3] drew the attention of both the named insurance company, which sought an injunction to force its removal, and the local municipality, which had a zoning by-law that

---

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

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

3 Guignard's sign was described as a "billboard" by the Ontario Court of Appeal in its recent decision, *Vann Niagara Ltd. v. Oakville (Town)* (June 14, 2002), No. CA 36773 (Ont. C.A.), where the municipal sign by-law was also struck down on constitutional grounds.

prohibited advertising signs outside of industrial zones. The by-law defined an "advertising sign" 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. Advertising signs were prohibited unless they were located within industrial zones.

Guignard refused to take the sign down and, a month later, was charged with contravening the city's zoning by- law. He was convicted by the municipal court and was ordered to pay a $100 fine.[4] For most people, the fine would have been paid and the matter would have ended without any constitutional implications, but Guignard was not prepared to let matters rest. He appealed his conviction and fine, first to the Quebec Superior Court, and then, to the Quebec Court of Appeal.[5] 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 Guignard's constitutionally guaranteed right to freedom of expression had been contravened, this infringement was justifiable under s.1 of the *Charter* (which protects "reasonable limits prescribed by law").[6] Undaunted by his continuing setbacks, Guignard sought and obtained leave to appeal his conviction to the highest court in the country.

The Supreme Court of Canada's Ruling

The Supreme Court of Canada began its constitutional analysis by reiterating its recent high regard for the social and political importance of local governments, stressing that their powers should be given a generous construction and interpretation because of the closeness and inherent sensitivity of municipal government to the problems and concerns of the people who live and work within their community.[7] Having dispensed with this judicial nicety, the Court nevertheless proceeded to strike down the challenged provisions of the by-law.

In a relatively rare unanimous decision by a full nine-justice panel, Guignard's conviction was overturned and the impugned by-law provisions were found to be unconstitutional and incapable of being "saved" under s. 1 of the *Charter*. The Court found that, although the prevention of visual pollution and driver distraction was a pressing and substantial governmental goal, the means chosen to accomplish this goal were disproportionate to the benefit achieved and did not minimally impair the expressive rights of affected citizens, particularly those from economically disadvantaged groups.[8]

---

4 [l997] Q.J. No. 3213 (QL).

5 [l997] Q.J. No. 3213 (QL) (Sup. Ct. (Crim. Div.)); [l998] Q.J. No. 695 (QL) (Que. C.A.).

6 *Charter*, *supra* note 1.

7 *Guignard*, *supra* note 2, at para.17. See, for example, *Shell Canada Products Ltd. v. Vancouver (City)*, [l994] 1 S.C.R. 231; *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342; and *114957 Canada Ltée (Spraytech, Société d'mosage) v. Hudson (Town)* (2001), 20 M.P.L.R. (3d) 1.

8 *Guignard*, *supra* note 2, at para. 26. It is noteworthy that the Court did not embark on an examination of Guignard's individual financial means and, as the owner of several buildings, it is doubtful that he could have been characterized as coming from an "economically disadvantaged" group. Nonetheless, the relief he obtained was due in part to the fact that there were other persons, not before the Court, whose expressive rights were in theory being suppressed.

The 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"; "Purchase your insurance elsewhere than in Saint-Hyacinthe"; or even, "Don't trust the insurance company located at [insert address],'' it would have complied with the by-law while being just as visually polluting.[9]

The Supreme Court of Canada repeated its consistently-held view that, although the Charter was enacted to protect individual, and not corporate, rights and freedoms, commercial expression fell within the purview of the rights protected by s. 2(b).[10] Commercial expression included not only a corporation's right to promote its products, but a consumer's ability to share information and criticize products through communications such as "counter-advertising," which assisted in the circulation of information and the protection of society's interests just as much as advertising or certain forms of political expression.[11] Although the Court acknowledged that the by-law was not crafted with counter-advertising in mind, it found that its effect 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.[12]

Section 2(b)Analysis in the Municipal Context

The Supreme Court of Canada's initial examination of s. 2(b) rights in a municipal context occurred in *Ramsden v. Peterborough (City)*,[13] which, unlike Guignard, dealt with the right to post signs on public, as opposed to private, property. In both cases, however, the Court, in striking the balance between aesthetics and unfettered communication, came down clearly on the side of protecting postering and signage as forms of expression. In contrast, the majority position of the United States Supreme Court (in decisions such as *Members of the City Council of Los Angeles v. Taxpayers for Vincent)*[14] has been more supportive of municipal attempts to curb visual blight, even if such efforts involve broad restrictions on certain forms of communication. The Canadian resignation to the negative effects of postering was reflected in a previous judicial observation that "[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated."[15] A similar statement can likely now be made for signs on private property in non-commercial areas.

---

9 *Ibid*. at para. 29. The Quebec Municipal Court had referred favourably to this distinction, noting that the bylaw did not prohibit all forms of signs within non-industrial zones, but only those that were unnecessary to the activity carried on therein. It concluded that this demonstrated a reasonable proportionality between the measures used to limit freedom of expression and the objective of limiting visual pollution.

10 See, for example, *Ford v. Quebec (Attorney General)*, [l988] 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*, [l990] 2 S.C.R. 232.

11 *Guignard*, *supra* note 2, at para. 23.

12 *Ibid*. at para. 27

13 [l993] 2 S.C.R. 1084,16 M.P.L.R. (2d) 1.

14 466 U.S. 789 (1984).

15 *Ramsden v. Peterborough (City)* (1991), 5 O.R. (3d) 289 (C.A.).

The rigid structure of *Charter* analysis is a major obstacle to defending municipal sign regulations. Every analysis of an alleged infringement of a *Charter* right involves a two-step test. The first step is to determine whether or not a protected right of expression has been infringed. 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 S. 2(b),[16] the forms of expression that municipalities seek to control invariably fall within the protected category. Given that the sole purpose of municipal regulation is to place limits on the means of expression, applicants have had little difficulty meeting their onus of showing that there has been a prima facie infringement of their rights.

Once a breach of 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*.[17] Section 1 is the Canadian compromise provision that allows "reasonable" limits to be placed on most fundamental rights and freedoms, provided that the limits can be demonstrably justified in a free and democratic society. The difficulty from a municipal lawyer's perspective is that, once the onus has transferred, justifying limitations in a sign by-law is extremely difficult under the rigorous s. 1 test. Courts have accepted that the goal of such by- laws is important, but it is more difficult to show that there is both a rational connection between a by-law and its objective, and that the by-law is designed so as to only minimally impair expression. Typical compromise measures-such as size, location and temporal limits-can always be further reduced, and whenever a court has taken a strict approach to the requirement of minimal impairment, it has become the "deal breaker" in the effort to justify by-law restrictions. This difficulty is evident in the decision in *Guignard*, where a prohibition on only one type of sign in only a portion of the municipality still failed to meet the test of minimal impairment.

Conclusion

Most municipal sign by-laws seek to distinguish and restrict so-called third-party advertising. From an aesthetic perspective, it is one thing for a business at a particular location to erect a sign on its own property indicating its presence; it is quite another for that same business to erect many signs at numerous other locations. In the first instance, the signage is limited to the immediate property and is presumably in a business area, where signs are generally expected and accepted. In the second instance, 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 unlimited locations.

It is somewhat disappointing that the Supreme Court of Canada in Guignard failed to closely examine the merits of alternative methods of expression before finding that the by-law provisions made counter-advertising a virtual impossibility. Under the Court's prior reasoning in *Ramsden*, for example, public property (such as utility poles) within industrial zones would

---

[16] See, for example, *R. v. Keegstra*, [l990] 3 S.C.R. 697.

[17] The judicial formula for applying this second part of the two-step test was established in *R. v. Oakes*, [l986] 1 S.C.R. 103, and was further refined for freedom of expression cases in *Dagenais v. Canadian Broadcasting Corp*., [l994] 3 S.C.R. 835 and *Thomson Newspapers Co. v. Canada (Attorney General)*, [l998] 1 S.C.R. 877.

presumably still have been available for third-party postering activities.[18] Mr. Justice Iacobucci had, in Ramsden, characterized such postering as an effective and inexpensive means of communication that had been used to convey political, cultural and social information for centuries-the veritable "circulating libraries of the poor".[19] Pamphletting, another available and closely related means of expression, was dismissed by the Court in *Guignard* as "a private or virtually private" means of communication.[20]

The Court also mentioned, but did not consider in any detail, new means of communication, such as the Internet.[21] In the time period between the judicial pronouncements in *Ramsden* and *Guignard*, it has become possible for almost anyone to instantly communicate to mass numbers of people at minimal cost using the Worldwide Web. This means of expression is arguably a much more effective method of counter-advertising than posting a sign on a wall. One would hope that the continuing development of the Internet as a means of disseminating information, combined with the increasing availability of free computers in public libraries, may one day allow municipalities to reclaim greater control over the unfettered proliferation of signage.

In the interim, it is clear that the Supreme Court of Canada places a high value on postering and signage as a form of freedom of expression, and that it will continue to carefully scrutinize municipal attempts to curtail them in the name of aesthetic improvement. Such by-laws will have to be carefully crafted with a constant view to the goal of eliminating visual blight in the least intrusive manner. It would appear to be inadvisable to distinguish between different types of expression in the by-law (even if the distinction is designed to be more permissive), since this may cloud the rationale behind the restrictions.[22] In pursuing the elusive goal of minimal impairment, one may fairly wonder whether there is any permissible way to curtail the type of expression involved in *Guignard*.

In reaching its decision, the Supreme Court of Canada recognized the importance of zoning by-laws in municipal land use planning and the risk of creating acquired rights during a period in which there was a legal vacuum. It therefore suspended its declaration of invalidity for a period of six months to allow Saint-Hyacinthe an opportunity to revise its by-law.[23] Other Canadian municipalities with sign by-laws not under direct challenge will have a bit more time to examine the decision and respond to it. For many of them, the writing will be clearly "on the wall," spelling out the inevitable demise of their by-laws unless substantial amendments are made.

---

18 *Ramsden*, *supra* note 13, at para. 47.

19 *Ibid*. at paras. 33-34.

20 *Guignard*, *supra* note 2, at para. 30.

21 *Ibid*. at para. 25.

22 See note 9, *supra*. In the Supreme Court's decision, the municipality's attempt to prohibit only certain types of signs (rather than all signs) in a particular area brought the s. 1 requirements for rationality and minimal impairment into direct conflict.

23 *Guignard*, supra note 2, at para. 32.