

Date: 20010927
Docket: S.P. 06188

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: *New Glasgow (Town) v. MacGillivray Law Office Inc.*, 2001 NSSC 164]

BETWEEN:

TOWN OF NEW GLASGOW

Applicant

- and -

MACGILLIVRAY LAW OFFICE INCORPORATED,
MACGILLICUDDY'S RESTAURANT INC. and
JAMIE FRANK MACGILLIVRAY

Respondents

DECISION

HEARD BEFORE: The Honourable Justice John M. Davison

PLACE HEARD: New Glasgow, Nova Scotia

DATES HEARD: September 27, 2001

DECISION DATE: September 27, 2001 (Orally)

WRITTEN RELEASE: November 15, 2001

COUNSEL: David F. Wallace, Q.C. for the Applicant
Jamie MacGillivray for the Respondents

DAVISON, J.: (Orally)

[1]The Town of New Glasgow (the Town) makes application pursuant to s.266 of the *Municipal Government Act*, 1998 S.N.S. c.18 directing the removal of a ground sign erected at 152 Provost Street in New Glasgow. It is alleged that the erection of the sign violates the Town of New Glasgow's Municipal Planning Strategy and Land Use By-law. Section 266(3) of the *Municipal Government Act* provides:

(3) The Supreme Court may hear and determine the matter at any time and, in addition to any other remedy or relief, may make an order

(a) restraining the continuance or repetition of an offence in respect of the same property;

(b) directing the removal or destruction of any structure or part of a structure that contravenes any order, regulation, municipal planning strategy, land-use by-law, development agreement or statement in force in accordance with this Part and authorizing the municipality or the Director, where an order is not complied with, to enter upon the land and premises with necessary workers and equipment and to remove and destroy the structure, or part of it, at the expense of the owner;

(c) as to the recovery of the expense of removal and destruction and for the enforcement of this Part, order, regulation, land-use by-law or development agreement and for costs as is deemed proper,

and an order may be interlocutory, interim or final.

[2]The respondents' position is that the by-laws are a violation of the rights of the respondents under s. 2(b) of the *Charter of Rights and Freedoms* and the violation is reasonably and demonstrably justifiable within the meaning of s. 1 of the *Charter*. The application was supported by two affidavits of Gary Rankin who is the Chief Administrative Officer of the Town of New Glasgow. The affiant states that in the records of the Town, MacGillivray Law Office Inc. is the owner of 152 Provost Street, New Glasgow, Nova Scotia and that the alleged offending sign was erected in November 2000 and it advertises the law office business of

MacGillivray Law Office Inc. and the restaurant business of MacGillicuddy's Restaurant Inc. One of the respondents is Jamie Frank MacGillivray who is acting as the counsel for the corporate respondents.

[3]The affidavit indicates that Mr. MacGillivray was advised that a development permit was required to permit the erection of the sign, and that would not be granted under the Land Use By-law since the sign was a third party sign in that it was situate on property and advertising businesses situate on other properties. The second affidavit of Mr. Rankin would indicate that Mr. MacGillivray advised that he would not remove the sign and that he was further advised that the sign offended the Town's Land Use By-law in that it was erected without a development permit. The sign also exceeded an area that was permitted by the downtown core zone and the sign was a third party sign which was not permitted in the downtown core zone.

[4]The subsequent affidavit of Mr. Rankin would indicate that he has made a search of the Registry of Deeds and has been advised that there have been conveyances of land and that the relevant land is now owned by MacGillivray Properties Ltd., a company incorporated on December 5, 2000.

[5]The properties are located within the downtown core (C-1) zone pursuant to the Town of New Glasgow's Municipal Planning Strategy and Land Use By-law. The sign consists of two faces and the maximum area for such a sign under the by-laws is 50 square feet. The sign exceeds that area.

[6]There is no dispute that the respondents admit that the ground sign offends the by-laws in that it was erected without a development permit, it has two sign faces which exceed in area that is permitted in the downtown core zone, and it is a third party sign which is not permitted in the downtown core zone. In view of these admissions and in view of not wishing to infringe on the time of counsel, I will not take the time to repeat the wording of the by-laws.

[7]The issues are whether or not the provisions of the by-laws offend s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and if they do infringe on the respondents' freedom of expression, are the limits imposed demonstrably justified pursuant to s. 1 of the Charter.

[8]It is clear from *Irwin Toy Ltd. v. Quebec A.G.*, [1989] 1 S.C.R. 927 that advertising is a form of expression and falls within the scope of s. 2(b) of the Charter.

[9]I refer to *Nichol (Township) v. McCarthy Signs Co.*, [1997] 33 O.R.(3d) 771 which is a decision of the Ontario Court of Appeal and which has facts and issues similar to the proceeding before me. In that case the by-laws prohibited the erection of a sign without a permit and stipulated that a sign had to relate to the property on which it was located. In that case the respondent Town conceded that the by-law limited freedom of expression, but the Court of Appeal determined the by-law constituted a reasonable limit on freedom of expression under s. 1 of the *Charter*.

[10]The objective of the by-law in that case is similar to the objective in the proceeding before me. It was to reduce the proliferation of billboard advertisement and to prohibit distraction to motorists.

[11]Under the heading, “signs”, in the New Glasgow Planning Strategy, it is said that signs can have a significant impact upon the esthetic character of the Town. In some circumstances, signage can be distracting and poses safety concerns to both pedestrians and vehicular operators. In an attempt to maintain an esthetically pleasing environment and minimize adverse impacts on adjacent properties and reduce safety concern, some degree of control over signage will be undertaken by the Town. There is also a reference in the Land Use By-law under paragraph 3.6.1 which is headed “Purpose”. The reference reads:

The purpose of the following sign regulations is to:

- (a) support a commercial use as ability to attract a solid customer base; and
- (b) maintain the character of the Town by minimizing the adverse impacts of signs on adjacent properties and the street scape;

[12]As stated, the objectives of the by-laws in the *McCarthy Sign* case are similar to the objectives of the by-laws in this proceeding, and are found to be pressing and substantial. The opinion of the court was the limiting measures of the by-law were rationally connected to the objective. It was determined that the means used

by the township to achieve its goal through the by-law was reasonable and proportionate to the infringement of the appellant's right of freedom of expression.

[13]Reference is also made to the *R. v. Pinehouse Plaza Pharmacy Ltd.* (1991), 62 C.C.C. (3d) 321, and in that case the Saskatchewan Court of Appeal stated:

There can be no doubt of the need for such a policy in an urban industrial society. Regulation of land use to ensure the health, welfare and general well-being of the inhabitants is of primary importance.

[14]In my view there is no question that in a municipality it is desirable to regulate the erection of signs both from the point of view of the safety of motorists and pedestrians and from the point of view of maintaining the attractiveness of a community. The by-laws in this case, I find, are both pressing and substantial.

[15]The issue turns to whether the limiting measures of the by-law are rationally connected to the objective, and I agree with the comments of the solicitor for the applicant Town, as contained in his written brief, that the limiting measures of the by-law are rationally connected to the objective. The by-law serves to restrict overly large advertisements by regulating the size of signs and to reduce the proliferation of signs by prohibiting those not relating to the property on which they are located or to a business or activity lawfully conducted thereon. Further, the restrictions on the size of the signs are not arbitrary. Most importantly, there is an overall development plan in place which organizes the Town into different zones, with varying restrictions on signs, depending on the zone.

[16]I find that the restrictions on the freedom of expression rights are rational as they are based on preserving and facilitating the Town's planning goals.

[17]I find that the by-laws also have minimal impairment on the rights of the respondents. It does not completely prohibit signs and permits a large range of signs with certain restrictions upon size in specific areas in accordance with its objectives. The restrictions regulate how and where the signs can be placed and does not prevent advertising, but only limits it.

[18]When we look at the *Charter*, s. 1 reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[19]The onus of proving that a limit on a right or freedom guaranteed by the *Charter* is reasonable and demonstrably justified in a free and democratic society, rests upon the party seeking to uphold the limitation. In that respect, I refer to *R. v. Big M Drug Mart Limited*, [1985] 1 S.C.R. 295.

[17] To establish a limit on a *Charter* right as reasonable and demonstrably justified in a free and democratic society, two separate criteria must be met. First, the objective of the measure responsible for limiting the *Charter* right or freedom must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, and second, the means chosen to achieve the objective must be reasonable and demonstrably justified when considered under a form of proportionality test which requires the Court to balance the interests of society and those of the individuals and groups whose rights have been violated. See *R. v. Oakes*, [1986] 1 S.C.R. 103.

[20]The primary objectives of the by-law are to develop and maintain a distinct aesthetic character of the downtown core zone, minimize adverse impacts on adjacent properties and reduce safety concerns such as distractions that affect both pedestrian and vehicular traffic.

[21]I agree with counsel for the Town that unrestricted advertising signs would quickly present problems to the Town.

[22]I find that these objectives are a matter of pressing and substantial concern. They ensure the orderly development of commercial land use by prohibiting overly large billboard type signs and by reducing the proliferation of signs with the requirement that the signs relate to the property on which they are located.

[23]In *R. v. Pinehouse Plaza Pharmacy Ltd. (supra)* the Saskatchewan Court of Appeal said:

... Sign restrictions facilitate the preservation of the primary/ ancillary use distinctions. They are an important means of carrying out city planning objectives and preserving zone use. Sign restrictions for ancillary uses can be regarded as an

integral part of the pressing and substantial objective of orderly city development through urban planning ...

The Court also said:

... There can be no doubt of the need for such a policy in an urban industrial society. Regulation of land use to ensure the health, welfare and general well-being of the inhabitants is of primary importance.

[24]A single judge of the British Columbia Supreme Court in *Prince George (City) v. A.F.N. Holdings Ltd.* (1986), B.C.J. No. 2729 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.

[25]One must look at the proportionality test with reference to the comments of Dickson C.J.C. in *R. v. Oakes*, [1986] 1 S.C.R. 103 where he said at p. 138:

Some limits on rights and freedoms protected by the Charter 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 which impose the limit trench upon the integral principles of a free and democratic society.

[26]His comments were referred to in *R. v. Edwards Books and Art et al.*, [1986] 2 S.C.R. 713, LaForest J. stated at p. 794:

176 Let me first underline what is mentioned in the Chief Justice's judgment, that in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan*, supra, at p. 524 calls "the practical living facts" to which a legislature must respond. That is especially so in a field of so many competing pressures as the one here in question.

...having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

178 In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. Of course, what is reasonable will vary with the context. Regard must be had to the nature of the interest infringed and to the legislative scheme sought to be implemented.

[27]The operation of the flexible standard of review can be seen in *R. v. Jones*, [1986] 2 S.C.R. 284 where it was found that compulsory certification of school curriculum violated s. 2(a) of the *Charter* which sets out everyone has the freedom of religion, but the court held the denial was reasonable and described the infringement of certification as a “minimal intrusion”. The court stated at p. 299:

To permit anyone to ignore (the requirement for certification) on the basis of religious conviction would create an unwarranted burden on the operation of a legitimate legislative scheme to assure a reasonable standard of education.

[28]The limiting measures of the by-law are rationally connected to the objective and it effectively addresses unrestricted use of available space in a way that maximizes the effective use of signs. Any restrictions on the defendant’s freedom of expression are rational as they are based on preserving and facilitating the Town’s planning goals and they are of benefit to the other citizens of the community.

[29]The seriousness of a *Charter* violation is determined by the extent and degree to which a limiting measure entrenches upon integral principles of free and democratic society. See *R. v. Oakes, supra*. One looks at the degree or extent the violation offends the basic purpose of the *Charter* and one looks at the extent or degree to which the violation offends the purpose of the *Charter* right infringed.

[30]The general purpose of the *Charter* has been described in many ways. It has been said to regulate the relationship between an individual and government and to restrain government action and to protect the individual (*Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986]

2 S.C.R. 573). It has been said the purpose is “to protect individuals from unjustified state intrusion upon their privacy” (*Hunter v. Southam*, [1984] 2 S.C.R. (pg. #).

[31]In this proceeding any restriction on the respondents’ freedom of expression are rational and is based on preserving and facilitating the planning goals of the Town.

[32]The by-law regulates the relations various citizens of the Town have with each other and has little connection with the relationship between individuals and government.

[33]I agree with counsel for the Town that the by-law uses a means which least affects the defendants freedom of expression while still achieving its objectives and which objectives are a benefit for the community. It is not a complete prohibition of signs. It lists signs which are permitted in all zones and for which no permit is required. The by-law permits a broad range of signs and merely places certain restrictions on specific zones in accordance with the objectives. Primarily restrictions regulate how and where signs can be displaced and those limitations do not prevent advertising in the downtown core zone.

[34]There has to be applied the proportionality test which involves an analysis of the means chosen to achieve a legislative objective in light of the benefit to society and the adverse impact upon the respondents in this application.

[35]I refer to *Canadian Mobile Sign Association v. Burlington (City)*, [1997] O.J. No. 2870, a decision of the Ontario Court of Appeal which found that sign restrictions which were similar to those in this proceeding were proportionate to their objectives. This case involved a challenge to a municipal by-law regulating the use of portable signs. The court found that the means chosen by the City to achieve its stated objective in dealing with the problems created by the signs were proportionate to the objectives since the right of the appellant in that proceeding was only minimally impaired and the by-law did not operate to completely prohibit such signs.

[36]In *Nichol (Township) v. McCarthy Signs Co.* , (*supra*) the Ontario Court of Appeal found that the limits on the rights and freedoms guaranteed by section 2(b) were demonstrably justified pursuant to s. 1 of the *Charter*. In that case, it was

found that the objective of the by-law was pressing and substantial and its effect had the purpose of reducing proliferation of advertisements adjacent to a highway, and they found that the limiting measures to the by-law was rationally connected to the objective. They also found that the means used by the Town to achieve its goal were reasonable and proportionate to any infringement to the right of freedom of expression and that there was proportionality between the effects of the measures which limit the right and the objective of the by-law. The commercial interest of the land owner in advertising was protected, and the limitation did not prevent all expression, but only required that such expression relate to a particular location in order to advance the legitimate object of protecting the scenic characteristics of the community.

[37]I find that there was proportionality between the effects of the measures limiting the respondents' freedom of expression and the objective of the by-law. It really only required that any limitation did not prevent all expression, but only that relating to a location in order to advance the objective of protecting the community.

[38]I am of the opinion that limits on the rights and freedoms guaranteed by s. 2(b) of the Charter are demonstrably justified pursuant to s. 1 of the Charter.

[39]The application is allowed and an order will issue pursuant to s. 266(3) of the *Municipal Government Act* directing the respondents to remove the ground sign. If not removed within 15 days, the Town can enter upon the land and remove the sign at the expense of the respondents.

[40]Costs will be awarded at \$1,500 against all respondents.

J.