October 30, 2020

Freedom of Expression & Protecting the Visual Environment

By: Lisa Silver

Case Commented On: *Top v Municipal District of Foothills No. 31*, 2020 ABQB 521 (CanLII)

The legal environment is primarily constructed by written or spoken words. Lawyers write, submit, and file documents, and through their daily work, create a language of the law. Sometimes written laws impact the visual world. Such a law was at issue in the recent decision of Justice Nicholas Devlin in *Top v Municipal District of Foothills No. 31*, 2020 ABQB 521 (CanLII). In that case, the Municipal District (MD) Bylaw prohibited the use of signage on trailers, a continuing problem in the rural setting of the Foothills County. Other types of signage were permitted but it was the aesthetically unpleasing trailer signs, parked along the side of the roadways, which were a matter of contention. Justice Devlin agreed the law limited free expression under section 2(b) of the *Charter* but was a reasonable limit under section 1 of the *Charter*, considering the municipality's pressing and substantial objective to protect the "visual environment" from "visual pollution" (at para 3). Although raised to justify the *Charter* violation, the idea that the visual environment is a value to be protected is intriguing. In *Top*, expression and the visual intersect, as the written law provides a platform for the perfect view. This post will explore this intersection and whether the legal landscape can or should protect the visual one.

"Visual pollution" is a phenomenon experienced globally. According to Benjamin Richardson, in his article on corporate responsibility and aesthetics (see Benjamin J Richardson, Green Illusions: Governing CSR Aesthetics, 2019 36 Windsor Yearbook on Access to Justice 3, 2019 CanLIIDocs 3741), municipal legislation containing visual pollution assists in "restricting intrusive advertising" (at 34). Richardson references São Paulo, Brazil, and its "Clean City" law abolishing billboards, which obstructed the architecturally unique beauty of the City. According to the Mayor of São Paulo, the legislation's impact was immediate and provided the community with "a great sense of relief" (See Andrew Downie's article "São Paulo Sells Itself" from February 8, 2008 in *Time* magazine).

Similarly, in *Top*, the legislation has a certain image to uphold. Through the law, the MD preserves an image of the community corresponding to its singular location and inviting natural environment (at paras 18 to 19). The law does not ban signs absolutely but permits the curation of those objects in accordance with municipal criteria such as size of signage and placement. But there is more at stake in *Top* beyond municipal control over an authorized vision of its own self. Justice Devlin, in discussing the pressing and substantial objective of the law under section 1, propounds the citizens' "right to not be visually 'shouted at' by signs at every turn" (at para 45). The law is not just about aesthetics but is also about messaging or "volume (in all its meanings) of advertising" (at para 45). Volume, "in all of its meanings," references both quantity and quality (see definition of volume at Merriam-Webster online) of the message.

As with many free expression cases, the violation of the right is easily found. Justice Devlin identifies the importance of communication of ideas and the "very broad range of conduct" it can include (at para 30). Such conduct includes commercial expression such as advertising, which tends to attract "a lower level of protection in the overall balancing of rights and interests" being less directly connected to core values of personal or political expression (at para 32). Justice Devlin also recognized that signs can be include personal and commercial messaging (at para 33). For instance, the applicants, Gerrit and Jantje Top, placed trailer signage on their property with non-commercialized content relating to their deeply held religious beliefs on abortion and the right to life (at para 6). The other applicants had a clear financial purpose connected to the vehicle signage. The Bylaw restricts both kinds of messaging; personal and commercial. This is an important aspect to the challenge. Commercial expression may attract a lower level of protection under section 1, but here the Bylaw is also interfering with personal expressive activity, a core value.

Justice Devlin, before entering into the section 1 analysis, situated the infringement or contextualized it by defining the "exact nature, mechanism, and impact of the infringement on the core interests and values protected by the right" (at para 34). This "principled and contextual approach" to section 1 (*R v Sharpe*, 2001 SCC 2 (CanLII)) ensures the analysis is not conducted in a "vacuum" (*Sharpe* at para 154). A contextualized analysis delineates the scope of the *Charter* right, tethering it to the rights and values at risk from the infringement. It informs each stage of the *Oakes* analysis. In situating the infringement, Justice Devlin found the limit to be "content neutral" with no "express or oblique" intention to target any one individual or any one message (at para 35).

By finding the restriction "content neutral," Justice Devlin found the law did not restrict the content of the message, merely the form (at paras 35 to 36). Yet, quality or degree of visual loudness of the message requires more than a numeric counting; it is a subjective assessment that is informed by the message itself. The law depicted in the *Top* case may appear facially neutral but may in fact be prohibiting a form of messaging that is inextricably connected to content through the quality of that message. A visually loud message emblazoned on a trailer located 300 metres from the road could be viewed as an entire package of expression, communicating through words and image. The law, rather than burdening "expressive interests in a modest and content-neutral fashion," may effectively deny "the right to communicate" as cautioned by the then Chief Justice Beverley McLachlin in *Commonwealth of Canada v Canada*, 1991 CanLII 119 (SCC), [1991] 1 SCR 139 (at para 26 and see *Top* at paras 36 to 37).

In Justice Devlin's view, contrary to Marshal McLuhan's admonishment that the medium is the message, the medium is not the message in the *Top* case (at paras 100 to 101). There may be instances where the chosen medium is an integral part of the message, but in *Top* the vehicle sign ban does not "compromise" the message (at para 101). Freedom of expression in this case protects the message on the sign not the "parking of trailers, the strapping of vinyl onto steel, or the ability to make money off of one's land (at para 101). This may be so for the commercial advertisers, but whether this can completely respond to the extent to which the ban interferes with "core values" protected by section 2(b), may not be so for the Tops, who are not expressing commercial messages (at para 101). In fact, Gerrit and Jantje Top have displayed pro-life signs

on an "old trailer parked along the roadside" for 13 years before being advised of their non-compliance with the 2012 vehicle sign prohibition (at para 4 and 6). For them, the power of the communication and the effectiveness of the expression may depend upon the medium.

It is in this context, both the commercial and personal, that the nature of the expressive activity and the impact of the infringement on the core right and values protected ought to be viewed. The Supreme Court of Canada confronted the issue of "visual pollution" and advertising in *R v Guignard*, 2002 SCC 14 (CanLII). Justice Devlin referenced this decision in finding "signs are an important and often used form of expression" (at para 33) and is protected under the *Charter*. In *Guignard*, the Court unanimously agreed Mr. Guignard's right to "counter-advertise" his criticism of the services of an insurance company was protected expression under section 2(b) and the bylaw prohibiting the sign outside of an industrial zone was not saved by section 1. Mr. Guignard's opinion was not commercial expression but was, like the Applicants in *Top*, messages of personal belief. As the then Chief Justice McLachlin explained in *Guignard*, "signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages" (at para 25). Forceful messages on signs attached to unused trailers may be loud, ugly and unwanted but they provide "a public, accessible and effective" form of expressive activity (*Guignard* at para 25). A law that deprives a person "of the only means of expression that are truly accessible" to them, can have a "major impact" on the "ability" of the person "to engage in the expressive activity" (*Guignard* at para 26).

In the proportionality section of the decision, Justice Devlin properly finds that contrary to the Bylaw in issue, the law in *Guignard* was clearly directed to content, being a ban on messages found on signs that included business names (at para 106). He specifically finds that the Tops are not precluded from displaying their beliefs on signs. Rather they simply must do so in line with the land use regime. Justice Devlin had no evidence before him that the Tops were precluded from personal messaging on the basis of cost barriers in that regime or that land use compliance would detract from the message (at para 107).

This finding still leaves open the question of accessibility. The law bans trailer signs but requires a development permit for such approved signage. The Foothills County development permit regime involves an extensive application process including a fairly modest three hundred dollar fee. This application fee must be accompanied by a detailed site plan. The process also involves circulation of the application to area landowners and advertisement in local media. There are appeal processes as well. The sign permit regime, directed more toward commercial advertisement, is not compatible with the desire to communicate personal messages. The otherwise unusable trailers provided "simple means" of 'do it yourself' communication (*Guinard* at para 25) designed to "to convey a message, to inform, to influence, to convince" (*RJR-MacDonald Inc. v Canada (Attorney General)*, 1991 CanLII 8218 (QC CS) at para 97). It is in this context that the balancing done under section 1 should be conducted.

Leaving aside this contextual concern, in determining whether the infringement is justified under section 1, Justice Devlin meticulously applies the *Oakes* test. An *Oakes* analysis focuses on two criteria that must be met for a limit on a *Charter* right to be justified under section 1. First is the threshold consideration of whether the objective of the restriction is "pressing and substantial" (*Top* at paras 40 to 48). Should the first criteria be established, the court then enters into a

balancing assessment to determine whether the manner in which the objective is fulfilled is proportionate. There are three parts to the proportionality analysis; rational connection to the objective, minimal impairment of the right and proportionality between the effects of the measure and the objective. The proportionality criteria are "both normative and contextual" as it requires a balancing of societal interests with those of the individual (*Frank v Canada*, 2019 SCC 1 (CanLII) at para 38). It is the government who bears the onus under section 1 (*Top* at para 39).

As discussed earlier, the objective, which has been at the heart of many *Charter*-compliant municipal bylaws, is the protection of "the unique aesthetic appeal of the community" (at paras 40 to 44). Justice Devlin remarks on this right to regulate signage to protect the visual environment as "a near universally recognized norm" (at para 44). There are other municipal bylaws which support this contention. Take for instance littering laws or bans on graffiti. Of course, littering has no known artistic value and graffiti arguably does. Again, contextually, laws that "protect the visual environment" cannot be viewed as one homogeneous bundle of visual environment laws; each raises their own unique issues that may result in differing *Charter* outcomes.

The Bylaw in *Top* flows from section 639 of the *Municipal Government Act*, RSA 2000, c M-26, providing for land use laws pertaining to "billboards, signboards or other advertising devices of any kind" (at para 20). This description strongly signals advertisement as the core regulated content. Section 9.24.1 of the Bylaw lists permissible signs, which all suggest mechanisms for advertising (at para 26). Moreover, Foothills County "welcomes appropriate proposals for commercial development" involving signage through applications for development permits (at para 26). All of this leads to a commercial purpose of the legislative scheme with the additional benefit of ensuring a consistent aesthetic appearance.

Under the proportionality discussion, Justice Devlin reviewed whether the law is rationally connected to the objective. The Applicants advanced vigorous arguments on this prong of the analysis (at para 53). The one argument of interest is the MD's inconsistent approach to trailers. There is no general prohibition against vehicle trailers, only a prohibition of a vehicle trailer with a sign. In terms of protecting the visual environment, a disused trailer and a disused trailer with a sign both interfere with the "pressing and substantial" objective of preserving the visual environment. Justice Devlin finds, however, that the two trailers are not equivalent (at para 64). A trailer with a sign is "a shout-out to passers-by" and on "the scale of visual pollution," while a "lump of metal" is not as egregious visually as a loud message (at para 64). It is again the content of the sign which appears to be the difficulty. If that is so, the Bylaw is directly interfering with that content in both objective and effect.

This brings the argument to minimal impairment issues. Here, Justice Devlin frames the issue as follows: "the question is whether prohibiting this form of signage impairs the right of citizens to communicate with one another more than reasonably necessary in the broader overall context of available expression" (at para 73). The Bylaw impacts one form of expression (vehicle signs) but permits others as long as those other forms of sign expression is approved through the MD's land use regime (at para 91). The question must take into account this scenario; that signage requires a land development process, for which the trailer signs did not previously require. In this broader

overall context, personal use under the MD land use regime may be restricted through the Bylaw ban.

In the final proportionality balancing of the costs and benefits of the Bylaw, Justice Devlin suggests the Bylaw holds the line between being "occasionally spoken to and constantly shouted at" (at para 99). The visual environment as a "resource" includes, according to Justice Devlin "visual peace" (at para 99). This concept, as attractive as it may be, engages a conversation beyond this decision. The concept suggests that community members have a right to visual "quiet" enjoyment of their pastoral environment. Certainly, we have and expect municipal bylaws on aural noise. There is nothing more irritating than being awoken in the early hours by a lawnmower. In *Top*, we experience a different kind of nuisance in the form of visual "noise" caused by ocular nuisance. Yet, societal norms praise the concept of "beauty" residing in the "eye of the beholder." Freedom of expression includes the visual. We express our opinions and beliefs using words and images. Indeed, a catchy phrase can attract our eye. Similarly, a private interest message may repel. To what extent our *Charter* protects this and values "visual peace" is a conversation that does not end with the trailer signs in the *Top* decision.

The bottom-line is that *Charter* rights are not absolute and are subject to section 1 limits where justified. The reality is that what we see when we look out a window or walk through the park is controlled by the law. Urban dwellers are subject to a myriad of laws that control visual space. Municipalities dictate everything from building height restrictions to the cutting of our grass. In New York City (NYC), the skyline is carefully pruned to ensure the NYC image projects, even from the top of the Empire State Building. Condominium owners are often required by their own bylaws to project a neutral image to the outside world through monochrome window coverings. Neighborhoods often want to convey a "look" or a mark of distinction (see Cliff-Bungalow – Mission land use development in Calgary). It is a matter of community and a matter of good taste.

In *Top*, the desire to project an image went beyond the neighbourhood. It encompassed, like the NYC skyline, a curated vision of what the foothills ought to be; a magical vista of mountains, rolling hills and big prairie sky. To achieve this image, to preserve this image and, most importantly, to enforce this image, the municipality created a law banning the ugly – rusty and unkempt trailers with loud messages. Whether the alternative, the land development regime, provides the perfect view and the perfect balance between the right to express and the right to be free from visual noise will be apparent in that application for signage driven by the personal desire to express.

This post may be cited as: Lisa Silver, "Freedom of Expression & Protecting the Visual Environment" (October 30, 2020), online: ABlawg, http://ablawg.ca/wp-content/uploads/2020/10/Blog_LS_Top.pdf