March 23rd, 2010

Defining Art in the Commons: The Case of Building Owners and Graffiti in Edmonton

By Carmen Gustafson

Cases Considered:

O & M Investments Ltd. v. Edmonton (City), 2010 ABQB 146

Graffiti, or street art, is hardly new and neither is the debate around whether it is a public nuisance or art in the commons, as was shown in *O & M Investments Ltd. v. Edmonton (City)*. Graffiti is likely one of the world's most contentious art forms, perhaps in part due to the subjective nature of art appreciation but also due to the renegade qualities of the installation of a piece. In *O & M*, a building owner contested an order issued by the City of Edmonton's Community Standards Branch to "[r]emove all graffiti on any structures on the property that are visible to any surrounding property" (at para. 3). The order referred to graffiti that had been applied to a large wall facing a vacant lot in what can best be described as a mixed-use neighbourhood (see map here and in "street view", move around to the west side of the building to observe the graffiti).

The graffiti was alleged to offend section 9(1) of the *Community Standards Bylaw* which states that "[a] person shall not cause or permit a nuisance to exist in respect of any building on land they own or occupy." Section 9(2) goes on to define "nuisance" with respect to a building as:

> a building showing signs of a serious disregard for general maintenance and upkeep, whether or not it is detrimental to the surrounding area, some examples of which include:
>
> . . .
>
> (a.1) any graffiti displayed on the building that is visible from any surrounding property.

Following an unsuccessful appeal of the original order to the Community Standards and License Appeal Committee, the building owner appealed the decision of that Edmonton City Council Committee to the Court of Queen's Bench on the basis that the Committee's decision was patently unreasonable. (See section 548 of the *Municipal Government Act*, R.S.A. 2000, c. M-26.) The appeal to the Court of Queen's Bench was also unsuccessful.

The building owner had raised three points on the appeal to the Court. One of those was that what he observed on the wall was art, not graffiti. Art, of course, is not regulated by the bylaw. Justice Brian Burrows found that the issue had not been properly raised with the Committee. Justice Burrows acknowledged (at para. 12) that the transcript of the Committee hearing contains four references to a possible distinction between art and graffiti. For example, in his opening statement to the Committee, the building owner's agent stated "I have talked to officials at City Hall, who have told me graffiti and art would be decided by the City of Edmonton, what is graffiti and what is art" (at para. 12). Nevertheless, Justice Burrows held that "it was reasonable for the Committee not to deal with a point that was never raised" (at para. 17).

Unfortunately, it therefore appears that the Committee did not wrestle with the distinction between what is graffiti and what is art, a question fraught with intriguing property entitlement issues. This case is particularly interesting because it is the owner of the building who is arguing for it to be viewed as art. The *Community Standards Bylaw* does not appear to be concerned with his entitlement to the use and enjoyment of his property. Rather, it is concerned with the commons — the very place where graffiti artists practice their trade — and the visibility of buildings showing signs of disrepair from vantage points on surrounding property. Thus, a potential interpretation of the role of the City officer enforcing the Bylaw is that of a sidewalk art critic who determines what is a nuisance and what is art.

The problem with the Bylaw's approach to dealing with unsightly premises, which neither the Committee nor the Court tackled, is that it overrides the autonomy of the property owner — the art collector if you will — to decide whether to protect the expressions left by anonymous artists. Whether the artist owns the art or the building owner owns the art or the passerby who derives enjoyment from viewing it from a public place owns the art, the fate of the art comes down to a regulatory classification by the state. Lumped into the Bylaw's section 9 that forbids a building owner from permitting graffiti to remain on their building are other examples of nuisances: damage, rot or deterioration within the building, leaks due to improperly treated surfaces, missing or broken windows and shingles, and holes in the building. As detriment to the surrounding area is not necessary to elicit a response from the City, the provision grants a broad liberty to the City's officer in determining "infractionary nuisances." It can hardly be a comparable offense to view the graffiti on your building as worthy of being left intact for others to enjoy as it is to allow your premises to exist in an obvious and continuing state of degradation. It is offensive to the collective nature of the commons to devalue graffiti in this way.

Regardless of whether the canvas is private (homes and businesses) or state-owned (transit and institutions), the hallmark of graffiti art is that the intended patron is free to critique the work from a communal place, be it the sidewalk, a square or a park. Street art provides for free what the commercial art industry profits from and puts beyond the reach of many to own. Street art is attractive, accessible and decidedly not for sale. Graffiti flourishes in cities around the world despite its illegality and efforts at its eradication. Due to its illegality, the craft is largely anti-authoritarian; it flies in the face of city councils, a disapproving public and property owners. It

owes popularity to its countercultural nature and messages that speak to the disillusioned, the oppressed, youth, and those involved in the struggle for a world where they author the rules. It is a method of production by the labourer-artist that does not subjugate them to the power of the state and the market. Graffiti art is the production of capital that remains common property and sheds its classness. This serves to enrich the existence of, rather than to exploit, the labourer (Karl Marx, "Bourgeois Property and Capitalist Accumulation" in C.B. Macpherson, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, [1843] 1978)).

In Bristol in the United Kingdom, the local council has had to struggle with how they should respond to works created by the world-renowned yet anonymous street artist Banksy. Banksy's art has appeared throughout the city for many years, at one time on the side of a council owned building. In some cases, public pressure has dissuaded the council from ordering the removal of certain works. Private owners of buildings where this art has popped up have also argued for the right to keep it intact despite attempts at its removal. Some other cases have seen the public vote to preserve pieces. In effect, the council has decided that art prevails (sometimes) over the illegal act of vandalism or nuisance where Banksy is concerned. It seems that the Edmonton City Council, in contrast, declines to define the bounds of public art.

The purpose of the *Community Standards Bylaw* in Edmonton is to "regulate the conduct and activities of people on privately owned property and immediately adjacent areas in order to promote the safe, enjoyable and reasonable use of such property for the benefit of all citizens of the City": section 1 of the *Community Standards Bylaw* 14600. In the *O & M* decision, the court reasoned that despite the building owner's inquiries into the distinction between art and graffiti, the Committee was not unreasonable in not considering this issue. By so deciding, the Court accepts that the City's Bylaw enforcement employees have the ability to discern between graffiti and art and may do so in a way that, if not unreasonable, is perceptively arbitrary. The Bylaw gives the power to the City Manager to order graffiti, but, by definition, not art, removed, yet it fails to define graffiti within the bylaw. In effect, by ordering the piece removed from the building in question, the City did decide that this work was not art in its eyes. In doing so, the state interfered with two things: the right of the private property owner's enjoyment of the art and the ability for graffiti to be enjoyed by citizens in the commons. Whether it was a patently unreasonable decision of the City to fail to define art or graffiti was an issue dismissed in this case, but it would have served to enlighten the debate surrounding graffiti art and its existence in the commons of our cities, a debate that is not going to disappear soon.