Billboard ban allowed in part; most restrictions don't violate Charter

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One of Canada's wealthiest communities has won a partial victory in a longstanding battle to limit billboard advertising.

Having had its first bid to regulate the advertising struck down by the Ontario Court of Appeal in 2002 as unreasonably breaching a sign firm's freedom of expression as guaranteed by s. 2(b) of the Charter, the Town of Oakville, Ont. adopted a new bylaw that allowed third party billboards while imposing restrictions on where they could be erected.

Last May, an Ontario Superior Court judge found that the restrictions amounted to an effective prohibition that could not be justified under Charter s. 1 and quashed the bylaw in its entirety. But in a unanimous ruling, the Ontario Court of Appeal concluded that only a few sections of the bylaw should be quashed and that Justice Douglas Gray erred in ordering the town to permit some of the 52 billboards Vann Media Group Inc. had sought to place in heavy industrial zones.

Writing for the court, Justice Paul Rouleau observed that the advertising in question "is somewhat removed from the core of the s. 2(b) right. Third party billboards, by definition, do not involve the property owner's own right of expression. Other than the limited instances where the respondent is using the billboard to advertise its own services, the respondent in this case is acting as an intermediary between the owner of the property where the sign is erected and the entity purchasing the advertising space."

However, he said such billboards were "similar to books, newspapers and radio or television, in that they provide a medium through which messages are conveyed. Although the dominant use of billboards is to convey commercial messages, they are, on occasion, used to convey political, personal, charitable and many other types of messages."

Although he agreed with the appellant town that courts should usually pay deference to the

decisions of elected bodies, he cited R. v. Sharpe as establishing that according such deference did not relieve elected bodies of their burden to demonstrate, "through evidence supplemented by common sense and inferential reasoning, that the law meets the test set out in R. v. Oakes, [1986] 1 S.C.R. 103 and refined 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."

Justice Rouleau said that although the town had cited other objectives, among them driver safety, "it is clear that the primary justification for the impugned provisions is the preservation of Oakville's distinct visual and aesthetic character and the prevention of sign clutter."

He accepted the Town's position that the bylaw's provisions bore a rational connection to that objective but found the bylaw did not always meet the Oakes objective of minimal impairment. Although provisions barring signs within 200 metres of residential zones and setting the same setback requirements from streets as other buildings and structures struck an appropriate balance between the objectives and the right to freedom of expression, other impugned provisions failed the test.

"The Town does not appear to have recognized the cumulative impact of the remaining provisions and the extent of the resulting intrusion on the right to freedom of expression. Nor...does it appear to have considered tailoring the restrictions to reduce the intrusion in a manner that would still accomplish its goals. In these circumstances, little deference can be given to the balance struck by the Town."

He found the combined effect of the challenged provisions was "to eliminate most, if not all, commercially viable locations for third party signs outside of the residential areas in Oakville. Indeed, the evidence established that, in the whole of the Town of Oakville, only nine locations complied with the array of limits set out in the bylaw. The respondent's expert testified that only one, or at most two, of these sites were commercially viable.[...]

"To be useful, signs need to be seen. Several allowed locations are in relatively isolated parts of industrial areas of the Town where one would expect very little traffic."

As for Justice Gray's order requiring Oakville to allow Vann Media to erect billboards in E2 zones where there were outstanding applications, Justice Rouleau observed that the permits were to be issued "regardless of whether the other restrictions in the bylaw were met."

The lower court had justified the order, as a remedy pursuant to s. 24(1) of the Charter, on grounds it was the firm's second successful challenge of an Oakville sign bylaw and Vann Media shouldn't have to wait for the town to craft another bylaw.

"In my view, this approach was in error," Justice Rouleau wrote, noting that, as a general rule, courts in such circumstances should simply make a declaration of invalidity and suspend the coming into effect of the order for a given period.

Justices Robert Armstrong and Russell Juriansz concurred.

Barnett Kussner and Kim Mullin of WeirFoulds LLP in Toronto represented Oakville, while John Crossingham of Crossingham, Brady in St. Catharines acted for Vann Media.

Reasons: Vann Media Group Inc. v. Oakville (Town), [2008] O.J. No. 4567.