Court of Queen's Bench of Alberta

Citation: Top v Municipal District of Foothills No. 31, 2020 ABQB 521

Date: 20200908
Docket: 1901 06503
Registry: Calgary

Between:

Gerrit Top, Jante Top,
Spot Ads Inc, Ross Martin, John Markiw, and Brian Wickhorst

Applicants

- and -

Municipal District of Foothills No. 31

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice N. Devlin

I. Introduction

[1] A vista of blue skies over golden prairies, rolling into foothills beneath the front range of the Rocky Mountains, grace the highways of southern Alberta. So too do a brace of disused semi-trailers, adorned with large vinyl advertising banners. For the Municipal District of Foothills ["Foothills"], their presence is dissonant, distracting, and degrading to the rural aesthetics that are a social and economic cornerstone of their community. In 2019, Foothills expressly banned these "vehicle signs".

[2] The Applicants own vehicle signs or host them on their land. They claim these trailers are a protected form of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and ask this Court to quash Foothills' Bylaw banning them.

[3] For the reasons that follow, I find that vehicle signs are protected by s 2(b), but that the restriction on this form of expression is a reasonable limit under s 1 of the *Charter*. Control over vision pollution, and protection of the visual environment, are legitimate and significant concerns for local governments. Banning unattractive or distracting forms of advertising is a rational means of achieving this end, and is an acceptable minimal impairment of the right where other viable options for expression are available. The balance of rights and interests in this case favours the restriction.

II. Background

[4] The presence of vehicle signs in Foothills has been a source of contention since the original, previous owners of the applicant Spot Ads began erecting, or rather parking, them along roadways in the respondent County, almost a decade ago. In 2012, Foothills functionally disallowed trailers signs by prohibiting signage that was contrary to its Land Use Bylaw, 60/2014 ["the Bylaw"]. In 2019, it further amended the Bylaw to expressly prohibit "vehicle signs" in response to their continued proliferation.

[5] Foothills contacted the Applicants and demanded removal of the signs in accordance with the Bylaw. The Applicants responded by filing this application challenging the constitutionality of the prohibition. After further correspondence between the parties, Foothills issued stop orders to those landowners who still had vehicle signs on their properties in December 2019. The Applicants applied for, and were granted, an injunction suspending enforcement of the Bylaw pending the outcome of this proceeding.

(i) The Applicants

[6] The Applicants fall into three groups, each with different interests in the disputed trailer signs. Gerrit and Jantje Top are private land owners who have displayed signs relating to abortion on their property since 2006. The signs are provided by High River Pro-Life and have been affixed to an old trailer parked along the roadside. The messages on them are expressions of the Tops' deeply held religious beliefs on abortion and their perceived moral duty to act on this issue.

[7] After being notified in February 2019 that their sign was in a prohibited form and had to be removed, the Tops discussed switching to a type of sign permitted within the County's regulatory framework, but have not taken any steps towards doing so.

[8] Spot Ads is an outdoor advertising company established in 2012. It leases commercial advertising space on the sides of semi-trailers it places on private property adjacent to roadways in Alberta, including in Foothills. Spot Ads has always operated without any Development Permits for their signs and without a business licence.

[9] Spot Ads' initial business model appears to have been premised on regulatory non-compliance. In a blustery letter to Foothills in 2013, Matthew Jerome, the then-managing partner of Spot Ads, wrote to the Manger of Enforcement in Foothills. Speaking about potential legal actions against the company's non-conforming signs, he said this:

> …we believe that we have the ability to comfortably withstand the pressure while going through this process, and that for all intensive purposes [sic] it will be impossible to get us out of business barring a major decrease in demand for outdoor advertising within your community…

[10] He went on to acknowledge the aesthetic concerns about Spot Ads' trailer signs, and assert that the company would ignore or absorb the cost of any legal orders against them:

> We would agree with you that our trailer billboards do not look good, however you must understand that our clients are driven to advertise with us only because there is no other way for them to market their perfectly legal products and services on outdoor signage which continues to be a proven and effective medium of advertising. We will continue to provide our service as best we can and will get our clients the exposure they pay for, all while accommodating any binding fine or legal order that you can arrange.

[11] The letter concluded with an implicit recognition that the trailers were a form of deliberately non-conforming, and unattractive, guerilla advertising:

> We would welcome the opportunity to sit down and discuss how we might be a part of a legitimate, good-looking outdoor advertising industry within the MD of Foothills, and help alleviate the immense demand you have created by neglecting to address the shortage in conforming options for the outdoor advertising industry.

[12] Notably, Spot Ads' current owners have sued the former owners, on the basis that they were sold an illegal business, and that the original owners knew that none of its signs were legally conforming.[1]

[13] The current owners of Spot Ads also applied to Alberta Transportation for permits to place its signs adjacent to highways, as required by the *Highways Development and Protection Regulation*, AR 329/2006. Having this provincial approval is a condition precedent for receiving a municipal Development Permit under Foothills' Bylaws: the Bylaw, s 9.24.5(i).

[14] The Ministry of Transportation denied Spot Ads' application for permits relating to its signs in Leduc County, resulting in a judicial review application before this Court. In unreported reasons, Justice Hall quashed the refusal and remitted the matter to the Ministry for re-decision.[2] The Record contains no information as to the status of Spot Ads' application or whether similar applications have been made in respect of its signs in Foothills.

[15] The Applicants Ross Martin, John Markiw, and Brian Wickhorst are "land partners" of Spot Ads who currently have (or previously had) Spot Ads' trailers on their property and get paid for permitting this. They do not have personal connections to the businesses advertised on the signs placed on their lands, but wish to continue hosting the advertising as a supplement to their agricultural income.

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[1] This lawsuit is both referenced in the materials before me, and is a matter of public record (Calgary Docket #1701-01355).

[2] ***Spot Ads Inc v Alberta (Minster of Transportation)***, Calgary Docket # 1601-0166, June 20, 2017.

III. The regulatory framework governing land use in Foothills

[16] Land use planning within municipalities typically involves the adoption of an official plan, which defines the overall vision for the municipality's development, and the enactment of a detailed set of land use bylaws to implement the plan. Among other things, land use bylaws specify the nature of permitted uses within each land use district and provide for a process to obtain development permits to authorize developments. (See generally Part 17 of the *Municipal Government Act*, RSA 2000, c M-26 ["*MGA*"]).

[17] In the case of Foothills, the overall plan is set out in the County's 2010 Municipal Development Plan ("MDP"). The Vision Statement in that document declares that:

> MD of Foothills encompasses a diverse rural landscape in which leadership and planning support a strong agricultural heritage, vibrant communities, a balanced economy and the stewardship of natural capital for future generations.

[18] Foothills' MDP states that one of its key planning principles is the preservation of the County's rural landscape. It emphasizes the importance of sustainable landscapes and states that "the long term benefits of […] aesthetically pleasing landscapes and ecologically sound habitats that ensure a wealth of biodiversity go far beyond the value of what can be achieved in short term development considerations."

[19] In this vein, the MDP identifies minimizing the visual impacts of development as one of the County's main objectives. It states: "our open spaces and spectacular scenery add a vital dimension to life in MD of Foothills and as such, development must be carefully designed to minimize the impact on the views."

[20] The *MGA* gives Foothills the jurisdiction to pursue the goals articulated in MDP. Pursuant to section 639 of the *MGA*, every municipality must enact a land use bylaw. Section 640(4)(m) states that a land use bylaw may provide for "the construction, placement or use of billboards, signboards or other advertising devices of any kind, and if they are permitted at all, governing their height, size and character." Section 640(4)(n) states that the land use bylaw may provide for "the removal, repair or renovation of billboards, signboards or other advertising devices of any kind."

(i) The impugned ban on Vehicle Signs

[21] In accordance with its authority under the *MGA*, the County passed Bylaw 46/2012, amending the Community Standards Bylaw 34/2009. The amendment prohibited the placement of any signage that are in contravention of the Bylaw. This functionally prohibited vehicles signs. On June 5, 2019, Foothills made the ban on Vehicle Signs explicit.

[22] The Bylaw defines "Vehicle Signs" in section 9.24.1 as follows:

> **Vehicle Sign**: a sign that is mounted, affixed or painted onto an operational or non-operational vehicle, including but not limited to trailers with or without wheels, Sea-cans, wagons, motor vehicles, tractors, recreational vehicles, mobile billboards or any similar mode of transportation that is left or placed at a location clearly visible from a highway.

[23] Section 9.24.10(a) of the Bylaw prohibits Vehicle Signs:

> 9.24.10 The following signs are prohibited in the County:
>
> > a. Vehicle Signs, except for signs exclusively advertising the business for which the vehicle is used, where the vehicle:
> >
> > > i. is a motor vehicle or trailer;
> > >
> > > ii. is registered and operational; and
> > >
> > > iii. used on a regular basis to transport personnel, equipment or goods as part of the normal operations of that business.
>
> […]

[24] The amendment also introduced specialized penalties for contravention of the signage portion of the Bylaw. There is no dispute that these sections of the Bylaw prohibit the Applicants' trailer signs.

(ii) Legal ways to have signs

[25] This case turns heavily on whether the ban on vehicle signs is functionally a broad-based ban on outdoor advertising, or exists amid a range of meaningful, available options for commercial and personal expression through public signage. Therefore, the availability of other options is a relevant factor in the constitutional analysis.

[26] The Bylaw sets out a list of various permissible signs for which approval may be sought. These include billboards, fascia signs attached to buildings, free standing signs, roof signs, and even portable signs: s 9.24.1. The Coordinator of Protective Services for Foothills, Darlene Roblin, provided evidence that the County has no blanket ban on outdoor advertising. She stated that Foothills welcomes appropriate proposals for commercial development that involves advertising signage:

> Vehicle Signs are prohibited in Foothills County but if a land owner chooses, they may apply for a Development Permit to allow for approval of other types of signage. Foothills County welcomes Development Permit applications from landowners seeking to erect, construct, enlarge, relocate, or alter any signs or structures for signs that adhere to the requirements as detailed in the Land Use Bylaw.

[27] Section 9.24.6 of the Bylaw requires individuals to obtain a development permit ("Development Permit") for all signs and modifications to existing signs. The Bylaw also directs that all signs must comply with applicable provincial legislation and approvals. For example, no sign shall be erected within 300m from the limit of a controlled highway without a permit from the Minister of Transportation pursuant to the *Highway Development Control Regulation*, AR 242/90.[3]

[3] This Regulation has now been replaced by the *Highways Development and Protection Regulation*, AR 326/2009, which has a similar purpose. The Bylaw and the parties' briefs refer to the old version of the regulation. Nothing turns on this.

[28] Finally, the Bylaw permits residents to make applications for exemptions from its requirements: s 4.2.

IV. Legal framework of the constitutional challenge

[29] Freedom of expression is one of the most import and fundamental rights guaranteed by the *Charter*. The language of section 2(b) is expansive and direct:

> 2. Everyone has the following fundamental freedoms:
>
> […]
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[30] The ability of citizens to communicate and receive ideas and information is the lifeblood of a free and vibrant society. The right to free expression, therefore, protects a very broad range of conduct. It protects any activity intended to convey meaning, other than through violence or other means inimical to a free society: ***Libman v Quebec (Attorney General)***, [1997] 3 SCR 569 at para 31.

[31] In ***R v Sharpe***, 2001 SCC 2 at para 21, the Supreme Court commented that freedom of expression encompasses both the traditional "core" expression of political, religious, artistic, and other personal views, as well as commercial expression and even depictions of illegal or immoral activity:

> Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.

[32] Freedom of expression extends to commercial speech, including advertising. While ads are a ubiquitous and often unloved form of expression, they remain an essential feature of our economic life, benefitting both advertisers and consumers: ***R v Guignard***, 2002 SCC 14 at paras 20-23. Commercial expression is not as closely linked to the core values of democracy and human flourishing as personal or political expression, and thus often attracts a lower level of protection in the overall balancing of rights and interests called for by section 1 of the *Ch*arter. Nevertheless, the onus is on the state to justify limits that curtail commercial messaging: ***Ford v Quebec (Attorney General)***, [1988] 2 SCR 712 at 766-767.

[33] Signs are an important and often used form of expression, both commercially and otherwise. They provide a useful and often cost-effective means of expression, and are thus important for individuals and businesses who cannot afford more expensive forms of media: ***Guignard*** at para 25; ***Ramsden v Peterborough (City)***, [1993] 2 SCR 1084 at 1096-97. Simply

put, the right to print out one's message and display it to other citizens is a basic exercise of freedom of expression, and protected by the *Charter*.

(i) Situating the infringement

[34] Foothills concedes that the Bylaw infringes the Applicants' right to freedom of expression. All *Charter* infringements are not, however, created equal. The exact nature, mechanism, and impact of the infringement on the core interests and values protected by the right must be determined and defined before undertaking the section 1 analysis or determining a remedy: ***Sharpe*** at para 181.

[35] The limit on expression in this case is content neutral and the impugned legislation has no express or oblique intention to suppress any particular message or speaker. This is important. Content-based restrictions are a uniquely dangerous species of section 2(b) infringement, for they strike at the very heart of the idea of an open marketplace of ideas: ***Irwin Toy Ltd. v Quebec (Attorney General)***, [1989] 1 SCR 927 at 968-969. Content-based restrictions on expression are permissible only within narrow limits when the protection of the disputed expression collides with other core values of democracy and self-fulfillment: ***R v Keegstra***, [1990] 3 SCR 697. That is not the sort of restriction at issue in this case.

[36] Rather, the Bylaw restricts the manner in which the Applicants can express themselves. Restrictions on forms of expression can also have serious impacts on the right, although they often are easier to justify as proportional to the objective they serve than content-based bans or blank bans on entire mediums or venues of expression. Chief Justice McLachlin's statement of the law in ***Committee for the Commonwealth of Canada v Canada***, [1991] 1 SCR 139 at 248-249 summarizes the principles that apply in this context:

> It is sometimes observed that content-neutral restrictions may be easier to justify than content-based restrictions. This follows from the fact that content-neutral restrictions are likely to be (a) more closely tied to the function or purpose of the place in question, and/or (b) less objectionable than content restrictions. Thus the balance will more often fall on the side of the state. But care must be taken to avoid the trap of acceding to limits on expression on the basis that they relate to content-neutral consequences rather than content. Denial of a particular time, place or manner of expression regardless of content may effectively mean denial of the right to communicate.

[37] In this case, the Bylaw limits expression by requiring individuals who want to erect permanent signs on their land to use a permissible form of signage and obtain a development permit where necessary. On its face, the Bylaw appears to burden expressive interests in a modest and content-neutral fashion.

[38] The key questions as to whether there is a good reason for this limit, its contours rationally fit and fulfill that purpose, the ban limits the right to communicate as little as possible, and its ultimate impacts are proportionate, are determined through the section 1 analysis.

V. Section 1 analysis

[39] Foothills bears the onus of justifying this limit on freedom of expression under section 1 of the *Charter*. To do so, it must demonstrate, through evidence, supplemented by common sense

and inferential reasoning, that the Bylaw's restriction on expression is proportional to the compelling public purpose it is said to serve: ***R v Oakes,*** [1986] 1 SCR 103 as modified by ***Dagenais v Canadian Broadcasting Corp***, [1994] 3 SCR 835 and ***Thomson Newspapers Co v Canada (Attorney General)***, [1998] 1 SCR 877.

(i) Does the Bylaw have a pressing and substantial objective?

[40] Foothills states that the objective of the Bylaw is to protect the unique aesthetic appeal of its community from visual pollution and degradation, in accordance with its MDP. This is not a shallow or contrived purpose: see ***Vancouver (City) v Jaminer***, 2011 BCCA 240 at para 1 [***Vancouver (City)***].

[41] Southwestern Alberta possesses one of the most beautiful natural landscapes in the world. These vistas are both a potent resource and the province's visual signature, gracing the provincial Shield of Arms and flag. This natural beauty is a source of pride, enjoyment, and economic benefit. Foothills' planning documents repeatedly mention this physical environment as one of the community's defining assets, and indicate that leveraging this environmental resource is a centrepiece of its long-term social and economic vision.

[42] Courts across Canada have recognized that protecting the visual environment is a legitimate basis for regulating signage, notwithstanding its expressive function. Early in its *Charter* jurisprudence, the Supreme Court held seeking to "avoid littering, aesthetic blight, [and] traffic hazards" is a pressing and substantial objective sufficient to justify an infringement of expression: ***Ramsden*** at p 1105. More recently, the Court affirmed this proposition as an obvious one, holding in ***Guignard*** at para 29 that the prevention of visual pollution is a reasonable objective when restricting outdoor visual advertising:

> …To be sure, the prevention of visual pollution is a reasonable objective.... It is easy to understand the reasons that prompt municipalities not to allow any kind of sign, in any place and at any time. It is a matter of maintaining a pleasant environment for the residents. …

[43] A chorus of appellate decisions has followed this authority and found aesthetic objectives to be pressing and substantial: see for example ***Ville de Montréal c Astral Media Affichage,*** 2019 QCCA 1609, leave to appeal to the SCC denied [***Astral Media***]; ***Ontario (Minister of Transportation) v Miracle*** (2005), 74 OR (3d) 161 (CA), leave to appeal to the SCC denied; ***Vancouver (City)***; ***Stoney Creek (City) v Ad Vantage Signs Ltd*** (1997), 34 OR (3d) 65 (CA).

[44] Indeed, the right of communities to regulate signage to protect their visual environment is a near universally recognized norm. Even under the more absolutist auspices of the American First Amendment, courts have held that "[i]t is well settled that the state may legitimately exercise its police powers to advance esthetic values": ***City Council v Taxpayers for Vincent***, 466 US 789 (1984) at 805.

[45] Citizens have a right not to be visually 'shouted at' by signs at every turn. Controlling the time, place, and volume (in all its meanings) of advertising is a core quality of life issue.

[46] The signs in question here are large. They compare in overall size to traditional highway billboards. Their visual impact is very real – indeed that is the very premise upon which they operate. As the Court observed in ***Urban Outdoor Trans Ad v Scarborough (City)*** (1999), 43 OR (3d) 673 at para 5 (SCJ), affirmed (2001), 52 OR (3d) 593 (CA): "...Billboards are the largest

and most intrusive outdoor advertising medium in the City. They are fundamentally different from other signs. They are a fixed feature and have a permanent visual impact on the cityscape." The same is true of the signs at issue in this case.

[47] Foothills does not advance traffic safety as the core purpose of their regulations, but courts have also recognized that this is a legitimate basis for limiting signage adjacent to roadways. The Bylaw in this case requires compliance with the provincial *Highway Development Control Regulation* as a precondition for development permits that raise this concern: s 9.24.5(i). I find that this is a sound supplementary basis for the limits in this case.

[48] While the Applicants question the degree of importance that can be attached to control over the visual impact of trailer-signs, they sensibly concede that it meets the requisite threshold to pass this initial stage of the section 1 analysis. I find that, both as a matter of fact and law, protection of the community's visual environment is a pressing and substantial objective sufficient to justify a limit on individual rights of expression.

(ii) Is the Bylaw rationally connected to its objective?

[49] Foothills must show that the infringement of the Applicants' expressive conduct is rationally connected to the objective of preventing aesthetic blight and preserving the rural landscape. This part of the analysis asks whether the Bylaw is "arbitrary, unfair, or based on irrational considerations": ***Oakes*** at 139.

[50] The Bylaw plainly advances the objective of eliminating vehicle signs from the visual environment. The common sense of this connection was articulated by the United States Supreme Court in its foundational case on signage restrictions, ***Metromedia, Inc v City of San Diego***, 453 US 490 (1981) at 508, where a plurality of that Court held that:

> ...If the city has a sufficient basis for believing that billboards are traffic hazards and are unattractive, then obviously the most direct, and perhaps the only, effective approach to solving the problems they create is to prohibit them...

[51] The same result has prevailed in Canada. In ***Ad Vantage Signs,*** Charron JA (as she then was) considered the constitutionality of a bylaw regulating portable or mobile signs. She concluded that the regulation of portable and mobile signs was rationally connected to the purpose of the impugned bylaw, which sought to maintain aesthetics within that municipality. She stated that even a total prohibition would be rationally connected because "[o]bviously, if all portable and mobile signs were removed in the City…the concerns sought to be addressed by the by-law would be fully answered...": ***Ad Vantage Signs*** at para 17.

[52] Similarly, in ***Astral Media***, the Quebec Court of Appeal found a rational connection between the Plateau-Mon-Royal Borough's restriction on billboards and their objective of preventing visual pollution. On this point, the Court stated at para 127:

> Ce lien est appuyé par la raison ou la logique. Le fait que les panneaux-réclames ont un fort impact visuel, qu'ils sont de grande taille et éclairés de façon permanente permet d'inférer en toute logique que leur retrait et leur interdiction contribueront à prévenir et à éliminer la pollution visuelle. La Ville n'avait pas à administrer une preuve scientifique à cet égard.

> This connection is supported by reason or logic. It can be logically inferred from the fact that billboards have a considerable visual impact and are large and permanently lit that their removal and prohibition will contribute to preventing and eliminating visual pollution. The City did not have to adduce scientific evidence in this regard.

[53] The Applicants nevertheless take issue with the rationality of the Bylaw's connection to its purpose on three fronts. First, they argue that there is no basis to find that trailers signs are any less compatible with the desired rural aesthetic than other forms of signage. Second, they contend that the Bylaw is arbitrary because Foothills does not prohibit the parking of sign-less trailers in the same locations. Finally, they submit that the urbanized, freeway-like locations where most trailer signs are placed lack the rural aesthetic qualities that underlie the ban.

a. The nature of trailer signs

[54] Foothills has singled out one form of signage as inimical to its community's aesthetic character – signs affixed to, or painted on, vehicles – most commonly disused semi-trailer units. The question thus becomes whether this legislative distinction between expressive mediums has a rational basis related to the underlying purpose. Or, in simpler terms, are vehicle signs more of an eyesore than other forms of outdoor advertising?[4]

[55] An interesting factual twist in this case is that the original management team of Spot Ads openly acknowledged that vehicle signs are aesthetically challenged. As quoted above, the company's former managing partner, writing on behalf of Spot Ads, said that, "[w]e would agree with you that our trailer billboards do not look good..." [Emphasis added.]

[56] The current owners of Spot Ads resile from this statement. They say that their trailers are neat, in good condition, and no more or less attractive than other forms of signage. While ugliness is in the eye of the beholder, it is sufficient to observe the obvious fact that Mr. Jerome's letter acknowledges: signs attached to repurposed semi-trailers are qualitatively different from purpose-built advertising signage.

[57] This difference has two roots. The first lies in the nature of semi-trailers themselves. Made of steel and rubber, semi-trailers are unreservedly utilitarian in design, and built without aesthetic concern or influence. This is not a flaw, but rather their essential nature. They visually signify industry, and are a starkly anthropogenic element in any natural landscape.

[58] The second defining feature of vehicle signs is that they are an obvious repurposing of the underlying industrial object. While the thoughtful reuse of materials is a laudable practice, these ersatz billboards engage a sense of abandonment, industrial detritus, and improvisation born of economic necessity. The sign is only affixed to the trailer because the trailer is no longer being used for its intended purpose. Irrespective of the condition of the trailer or the sign, this marriage has an intrinsically déclassé quality to it.

[59] Moreover, where trailer units are older or heavily used, their condition will be even less visually appealing. While Spot Ads is adamant that they take pride in their business and keep their vehicles in good repair and appearance, and the Record appears to bear this out, not all

[4] In determining a rational connection, I emphasize that the court can supplement the evidence provided by the parties with common sense and inferential reasoning. This was set out in *Frank v Canada (Attorney General)*, 2019 SCC 1 at para 64.

users of vehicle signs will follow the same course. Since this form of advertising was defended as providing a cost-effective medium, it may rationally be inferred that economics will push providers to use older, less valuable, and inevitably more worn trailers as the substrata for their signs. It would be untenable to attempt a regulatory distinction between clean and attractive trailers and more worn ones, and unrealistic to ask already burdened municipalities to get into the business of assessing the visual appeal of individual vehicles.

[60] Ultimately, this Court is not called upon to judge a beauty contest between signage materials. These aesthetic considerations serve a more limited purpose – allowing the court to find that real, meaningful differences exist between vehicle signs and other media that provide a rational basis for the differential treatment accorded them.

[61] I find that a blanket rule covering this entire class of signs is a rational and non-arbitrary means by which to protect of the visual environment.

b. Does Foothills' inconsistent approach to semi-trailers render the Bylaw arbitrary?

[62] The Applicants also attack the Bylaw as arbitrary on the basis that the same trailers that are made unlawful by the Bylaw would be legal if parked at the same roadside locations without a sign affixed to them. They point out that the County's bylaws permit multiple disused trailers to be parked on a property, right beside very roadways the Bylaw is said to protect. This inconsistency, they contend, undermines Foothills' claim that the trailers constitute an unacceptable aesthetic blight.

[63] This argument has some force. It is curious that Foothills' regulatory regime permits the parking of unregistered vehicles, potentially in derelict condition, adjacent to major scenic routes through the region. However, the *Charter* does not insist on perfect regulatory coherence for a measure to pass muster under section 1; the measure need only be reasonable and demonstrably justified: ***Hutterian Brethren of Wilson Colony v Alberta***, 2009 SCC 37 at para 37. The real question is whether the inconsistency shown by the claimant undermines the legitimacy of the impugned law by shining light on an oblique motive for it, or demonstrating that its proclaimed purpose is not truly pressing. Neither is the case here.

[64] First, trailers with and without signs are not equivalent. A disused trailer is a lump of metal. A trailer with a sign on it is a shout-out to passers-by; its object is to catch the eye and garner attention. That is the very *raison d'être* of outdoor advertising. On the scale of visual pollution, the two are not equal.

[65] Moreover, the County retains the authority to enforce clean-ups of unsightly properties, which would extend to herds of unused trailers, under the Bylaw and the Community Standards Bylaw. Section 9.3.1 of the Bylaw requires properties to be maintained in an orderly fashion. Pursuant to section 9.3.2, properties that are considered "unsightly" will be dealt with and enforced under the Community Standards Bylaw. Section 6(c) of the Community Standards Bylaw sets out that properties that exceed the permissible number of unregistered vehicles, including trailers, will be considered unsightly. This confirms that, while there is no explicit ban on trailers without signs, these are still regulated in accordance with the County's objective of preserving the rural landscape.

[66] Second, there was no evidence before the court that disused trailers without signs proliferate to any degree in scenic roadside locations, or indeed anywhere other than appropriate storage locations. There is no basis to conclude sign-less trailers are a problem that the County is ignoring. Indeed, Foothills states that, in implementing the Bylaw, it sought a balance between regulating unsightly Vehicle Signs and respecting the interests of landowners who may have trailers on their property for their intended and proper purposes.

[67] The law requires that municipal governments be given leeway to deal with local problems, such as protection of the streetscape, because they are sensitive to the experiences of the public who live and work in their communities: ***Guignard*** at para 17; ***Nanaimo (City) v Rascal Trucking Ltd,*** 2000 SCC 13 at para 35.

[68] Therefore, the alleged legislative gap in the County's control over trailer-based blight does not suggest that protection of the visual environment is not truly a pressing and substantial purpose, nor that the Bylaw advances that purpose in an arbitrary or irrational way. That said, there is tension in the divergent approaches to signs and sign-less trailers. Foothills may wish to address this gap so that it is not vulnerable, on a different record, to the suggestion that its real agenda is limiting expression rather than rounding-up unsightly vehicles.

c. Is prohibiting Vehicle Signs on 'urbanized' thoroughfares necessary?

[69] The Applicants argue that all of its trailer signs are parked along Highway No. 2, principally in the more urbanized areas of Foothills, which they say is not a scenic route "placed in a picturesque county setting" as compared to other stretches of highway in Alberta. They argue that it is not rational to prohibit vehicle signs in every part of the County to promote rural aesthetics when "the high-speed, multi-lane freeways that run through the County are decidedly not "rural" in nature". The Applicants say the onus is on Foothills to demonstrate that roadside signage along major routes is incompatible with maintaining a rural character in the County.

[70] A municipality cannot be faulted for wanting to enhance the roadway on which most travellers encounter and experience its community. That is rational. These are fundamentally different locations than the "unremarkable industrial zones" over which Oakville's restrictive signage bylaws were found to be overbroad: ***Vann Niagara Ltd v Oakville (Town)*** (2002), 60 OR (3d) 1 at para 26, section 1 conclusions reversed on appeal, 2003 SCC 65 [***Vann Niagara***]; ***Vann Media Inc v Oakville (Town)***, 2008 ONCA 752 at paras 1, 22, 51-52 [***Vann Media***]. The ban on the placement of trailer signs in these areas is rationally connected to the Bylaw's stated purposes.

[71] The question of whether a limited number of trailer signs, in a limited number of locations could be permitted without undermining the aims of the Bylaw is a question of minimal impairment. I turn to that aspect of the section 1 analysis next.

(iii) Does the Bylaw minimally impair the right to freedom of expression?

a. The meaning of minimal impairment

[72] Where the need to curtail or regulate *Charter*-protected activity has been established, the state remains under an obligation to minimize the extent of the infringement. Over time, the Supreme Court has interpreted this requirement pragmatically, eschewing an 'absolute

minimum' approach in favour of a more nuanced analysis that recognizes the exigencies of social policy-making. This prevailing approach to minimal impairment was articulated by Chief Justice McLachlin in ***Sharpe*** at paras 96-97:

> This Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: …
>
> This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry -- one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: … [Emphasis added.]

[73] Applied to the ban on vehicle signs, the question therefore is not whether *any* vehicle signs could be allowed to exist in Foothills. The *Charter* does not ask Courts to count trailers and decide whether one, two, or ten could exist without polluting the visual environment 'too much'. Rather, 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.

b. Outdoor advertising in the Canadian legal landscape

[74] The jurisprudence suggests that many more people want to put up outdoor advertising than want to look at it. This fundamental tension has played out in cases across the country as municipalities have limited, often drastically, the type, size, number, and location of third-party signage[5] that is permitted. These limits have, for the most part, been upheld as consistent with the minimal impairment requirement: ***Vann Niagara*** at paras 56-61.

[75] ***Vann Niagara*** is a quietly definitive case. At the Ontario Court of Appeal, the majority struck down both the municipality's blanket ban on third party advertising and its ban on billboards larger than 80 square feet, holding the restrictions to be intrinsically linked. Macpherson JA agreed that the total prohibition of off-site outdoor advertising was disproportionate and could not be saved under section 1. That unanimous conclusion was not

[5] "Third party" advertising refers to all off-site ads a business might seek to purchase, such as a billboard on the other side of town or a trailer beside the highway, as distinct from signage erected at a business's premises.

appealed. However, he dissented in respect of the size limitation, which he would have upheld. This aspect of the case went before the Supreme Court on further appeal by the municipality.

[76] The Supreme Court unanimously adopted Macpherson JA's reasons in a brief endorsement, making it the law of the land: 2003 SCC 65. This outcome has two significant impacts on the regulation of outdoor advertising in Canada. First, the Supreme Court endorsed the principle that municipalities will be afforded significant leeway to determine what specific levels of regulation are right for their community.

> …The case authorities clearly establish that municipal regulation of the display of signs, including size restrictions, usually does not offend the minimal impairment component of the *Oakes* test… (***Vann Niagara*** at para 61)

[77] Second, the Supreme Court upheld the restriction limiting billboards to 80 square feet. By comparison, the sides of a conventional semi-trailer range in size from 624 to 742 square feet. This limit on size was accepted as minimally impairing despite excluding virtually all of Vann Media's billboards. If overlaid on Foothills' restrictions, it would ban not only vehicle signs of any sort, but all comparably sized alternatives to them.

[78] The limits on outdoor advertising found to pass constitutional muster in ***Vann Niagara*** were far more restrictive than Foothills' Bylaw, despite the fact they were enacted to protect a bedroom community of the GTA, not a scenic rural municipality.

[79] Notably, neither the Supreme Court, nor the Court of Appeal decision it endorsed, engaged in micro-management of the municipality's chosen size limit. As the court stated in ***Nanaimo (City) v Northridge Fitness Centre Ltd***, 2006 BCPC 67 at para 59: "[i]f the impugned bylaw is within the range of reasonable alternatives, and it is not overly broad, it will meet the standard of minimal impairment..."

[80] The Québec Court of Appeal reached a similar conclusion in ***Astral Media*** when considering a blanket ban on billboards in an architecturally significant borough of Montréal. The court concluded at paras 139-146 that the myriad of other opportunities for advertising in the modern era, together with the dominantly third-party commercial nature of the ads, rendered this broad-based proscription of an entire medium of signage proportional. This ban covered all billboards, irrespective of their medium.

[81] Similarly, in ***Ad Vantage Signs*** at para 22, the Ontario Court of Appeal held that a total ban on mobile or portable signs, irrespective of size, may be justified in a community of elevated historical or aesthetic character.

> ...Obviously, the community interest is different in a heritage community than it is in a busy, urban centre. <u>In some communities, even a total prohibition of mobile and portable signs may well be justified</u>. ...[Emphasis added.]

[82] That judgment followed the same court's decision in ***Nichol (Township) v McCarthy Signs Co*** (1997), 33 OR (3d) 771 (CA) upholding a total ban on third party advertising in a rural municipality. In that case, the Court of Appeal stated at para 11 that:

> …The commercial interests of any land owner with respect to advertising any business activity carried out on the owner's property is protected. There is a proportionality between the effects of the measures which limit the right and the objective of the By-law. The effect of the limitation is not to prevent all

> expression, but rather to require that such expression relate to a particular location in order to advance the legitimate objective of protecting the scenic characteristics of the rural community... [Emphasis added.]

[83] Only restrictions that amount to an express or disguised total ban on third-party advertising have been found not to meet the section 1 criteria: ***Ad Vantage Signs*** and ***Vann Media***. It was on this basis that the Ontario Court of Appeal severed as unconstitutional those parts of Oakville's revised sign bylaw that eliminated "most, if not all, commercially viable locations for third party signs": ***Vann Media*** at para 46. Similarly, in ***Ad Vantage Signs*** at paras 21-23, the Court of Appeal rejected a total ban on certain kinds of signage on the basis that neither safety nor aesthetic concerns had been factually proven to justify such a complete restriction.

[84] Likewise, in ***Ramsden*** the Supreme Court struck down a municipal bylaw that prohibited all postering on public property. This sweeping prohibition deprived citizens of access to one of the more affordable and effective forms of individual expression. The Supreme Court found that there were alternatives to a total ban including regulating the size of posters, place of their location, and length for which they could be posted. Given the availability of these alternatives, the court held at para 45 that the bylaw did not impair the right as little as reasonably possible.

[85] In summary, the Canadian jurisprudence on regulation of outdoor advertising recognizes protection of the visual environment as a pressing concern and grants municipalities considerable leeway is determining what is the right level of permissible signage in their community. It will countenance sharp restrictions on the size of permitted signs and even a total prohibition in select locations that have elevated historic or natural significance. It has not, however, found blanket bans on third-party advertising, or actual or *de facto* total bans on outdoor display advertising, to be proportionate or justifiable absent special circumstances.

c. A total ban or a narrow limit on manner of expression?

[86] The parties offered two competing conceptions of the Bylaw, each aligned with one of the trendlines in the jurisprudence. The Applicants characterize the Bylaw as a complete prohibition, akin to the ban on posters held to be unconstitutional in ***Ramsden***, or the functional bans on third party advertising in Vann Media's long running battle with the town of Oakville: ***Vann Niagara*** at paras 33 and 35; ***Vann Media*** at paras 44 and 46; ***Ad Vantage Signs*** at paras 16 and 22. They argue that a total ban on vehicle signs is not required to maintain the rural appearance of the County and that a complete ban on a form expression is more difficult to justify than a partial ban or a ban on a time, place or manner of expression: ***Ramsden*** at 1106.

[87] In contrast, Foothills contends that the Bylaw creates a narrow restriction, targeting one specific, problematic manner of expression, leaving intact a vast array of expressive opportunities. This, they argue, satisfies their onus to demonstrate that the Bylaw is carefully tailored to ensure that section 2(b) rights are impaired no more than reasonably necessary: ***Frank v Canada (Attorney General)***, 2019 SCC 1 at para 66.

[88] I find that the ban on vehicle signs in this case is not analogous to the postering ban in ***Ramsden***. Factually, vehicle signs are a sub-class of large billboards. In banning them, Foothills has restricted one particular manner of signage. This limit would be more analogous to a ban on

posters that are edged with high-reflective tape making them more distracting and unsightly, rather than a ban on posters altogether.

[89] More importantly, on this Record, many alternative options for expression remain open, including those indicated at section 9.24.1 of the Bylaw, such as billboard signs, fascia signs, roof signs, etc.

[90] This case is most similar to ***Vancouver (City)***. There, the British Columbia Court of Appeal considered a bylaw that prohibited all commercial billboards on rooftops. The court characterized the limit on expression as a ban on a single type of large-scale signage. It found that this limit on the place and manner of expression was different in kind from a ban on an entire medium of expression, such as the postering prohibition in ***Ramsden***. Upholding the limit as proportional, the Court of Appeal said at para 34:

> …the real crux of this case [lies] in the fact that there really was no viable, and less intrusive, alternative open to the City if it wished to restore the skyline of Vancouver to a clutter-free state. Roof-top signs, which by their nature must be large in size, significantly detract from the appearance of the skyline no matter where the building is located.…if one wished to restore the beauty of Vancouver's skyline, the prohibition of roof-top signs was the only realistic way to do so. In the overall scheme, moreover, the prohibition is a relatively minor infringement on free expression since many types of signs are still permitted at many locations on and around buildings and other structures, or as free-standing structures, throughout Vancouver. [Emphasis added.]

[91] This reasoning applies directly to the case at bar. Foothills' evidence demonstrates, and I accept as a fact, that residents in Foothills have the ability to apply for signage in a great array of forms and locations, including normal billboards and mobile signs. On the Record before me, the impugned Bylaw does not constitute a *de facto* total ban on outdoor advertising. Foothills has satisfied me that the Bylaw is a limit on one form of billboard; not a restriction of an entire means of expression.

[92] The Record is also devoid of evidence that any of the Applicants have considered or attempted to use other forms of signage. None of the Applicants have ever applied for a development permit to erect a permanent commercial sign. While Foothills bears the legal burden throughout to show that its limitation on vehicle signs is proportionate, its evidence of all the available alternatives has shifted the tactical burden back to the Applicants to refute that these options are real. Their failure to attempt to use conforming alternatives, or any alternatives at all, places them on weak footing to argue that the Bylaw is overbroad.

d. Minimal impairment does not require a carve-out along major highways in the municipality

[93] The availability of alternative forms of signage also answers the Applicant's argument that some trailers signs could be allowed along the urbanized sections of Highway 2 without much impact on the visual environment. Nothing in this Record suggests that the Bylaw prohibits applications to erect normal signage, consistent with the County's standards, in these locations. Foothills' reasons for banning vehicle signs are sound and advance important values. Requiring that this form of advertising be allowed in some of the most highly trafficked areas of the community would undermine those objectives.

[94] Finally, permitting vehicle signs along the main arterial route through Foothills would invite an over proliferation in those locations, magnifying the problems they pose, as well as creating further practical difficulties in regulating their allocation.

[95] A future case may consider whether the availability of reasonable alternate forms of signage in Foothills is illusory and amounts to a shadow-ban such as was found in ***Vann Media***. See also, for instance, ***Toronto (City) v Quickfall*** (1994), 16 OR (3d) 665 (CA), where Toronto's bylaw against postering made an exception for postering "with lawful authority" or by "consent", but the evidence demonstrated that no process for obtaining consent to poster had ever existed.

[96] None of which is to say that the Bylaw stands or falls on the basis of unlimited availability of other signage. As ***Vann Media*** demonstrates, Foothills might well enact more restrictive overall sign laws. If they do, the constitutionality of these measures will be for a future court to assess.

[97] On the Record before me, however, I find that Foothills has proven that numerous alternative forms of signage exist and that the restriction on this form of advertising is within the reasonable range of minimally impairing options available to it.

(iv) Proportionality

[98] The final stage of the *Oakes* test requires balancing the salutary and deleterious effects of the impugned Bylaw. The question before the Court is whether there is proportionality between the overall effects of the *Charter* infringing measure and the objective of the Bylaw: ***Frank*** at para 76, citing ***Oakes*** at 139. This is the final, overall balance spoken of in ***Sharpe.***

[99] In the case of outdoor display advertising, acts of expression always come at the cost of visual peace for other members of the community. The law recognizes that our visual environment is a resource all citizens are entitled to enjoy, and that it can and should contain personal and commercial messages of a quantity and quality that do not despoil it. By analogy, regulation in this area seeks to hold the line between being occasionally spoken to and constantly shouted at. Insisting that large roadside signs are modest in number, and are as complimentary to the overall nature and aesthetics of the community as possible, is a constitutionally appropriate balance.

a. This medium is not the message

[100] At this final stage I also consider whether, and to what extent, the prohibition on this specific form of expression interferes with the core values protected by section 2(b). The chosen medium of expression may be an intrinsic part of the message being conveyed. In other cases, it may be an adjunct to the message, making expression possible or expanding its ability to reach the desired audience. And in some instances, the medium has little connection to the expression at all. That is the case here.

[101] I find that the ban on vehicle signs as a medium does not in any way compromise or infringe the underlying messages being conveyed. Freedom of expression does not protect the parking of trailers, the strapping of vinyl onto steel, or the ability to make money off one's land. It protects the message on the sign. Advertisers chose vehicle signs not because they better convey the message or are part of the message. Rather, they are favoured because they are said to cost less than conventional signs of similar size.

b. The alleged cost-effectiveness of vehicle signs does not tip the balance

[102] The Applicants emphasize that vehicle signs are uniquely affordable, again akin to postering. They have not, however, provided any evidence as to the costs associated with vehicle signs as compared to other forms of signage, nor why the costs are lower. The only evidence as to costs was provided by Foothills, which set out the fees associated with Development Permits. All signs have a $100 filing fee. Personal signs have a $200 application fee and commercial signs have a $525 application fee.

[103] While the financial accessibility of expression is an important consideration, reasonable expenses associated with ensuring that one's expressive act does not mar the visual environment for all other citizens do not infringe the right: ***Ramsden*** at pp 1096-1097 and 1107; ***Guignard*** at paras 25-26, and 30-31. Rather, that is the epitome of a reasonable balance.

[104] Free expression does not guarantee cheap expression. The right does not guarantee use of the most financially expedient mode of expression where that financial advantage is linked to the very characteristics of the medium that have given rise to the need for regulation. As I have concluded above, the lower cost of vehicle signs appears to be a product of regulatory non-compliance and the use of materials that are visually polluting. That is not the type of accessibility that advances *Charter* values.

c. Freedom of expression does not create property rights

[105] Land use is a notoriously, and justifiably, regulated sphere. Coherent municipal planning and land use regulation are essential to the long-term wellbeing of our communities: see ***R v Pinehouse Plaza Pharmacy Ltd***, [1991] 2 WWR 544 (Sask CA); ***Halifax v Wonnacott***, [1951] 2 DLR 488 (NSSC) at 505. It must balance the rights, interests, and quality of life of all an area's residents. The extent and stricture of local rules on signage are open to constitutional challenge, and municipalities must justify the limits they place on expressive activity. The right of individual citizens, like the Tops, to express important personal messages, within the bounds of justified limits, will be zealously guarded. The law, however, has evolved past the point of sustaining any suggestion that a freedom of expression claim exempts land owners from engaging with the collective norms and regulatory processes of their community.

(v) Conclusion on proportionality

[106] The Tops argue that their desire to express a message concerning abortion puts them in a similar overall position to the claimant in ***Guignard*** – namely individuals who wish to send a message from their home about something deeply important to them. For now, however, the similarity ends there. In ***Guignard***, the municipality used an otherwise sensible limit on commercial advertising to tell Mr. Guignard that he was banned from expressing a message airing a profound grievance with a company because it included the company's name. This muzzled an ordinary citizen for no good reason. The overbreadth of the signage restrictions became a functional ban on criticizing corporations, and was struck down as an unjustified limit on free expression.

[107] By contrast, Foothills has never told the Tops that they may not display signs proclaiming their views on abortion. Indeed, in the course of the hearing, Foothills suggested that there may be several compliant ways in which they could do so. Foothills is simply asking them to use a

sign that complies with local land use regulations. That is a reasonable ask. On this Record, there is no evidence that compliance would increase the cost, or reduce the efficacy, of the Tops' expression to a degree that would cause constitutional concern.

[108] The impact on Spot Ads, and its advertisers, is that they may not be able to display their ads as largely and as cheaply as they would like. I appreciate that this may pose a serious financial challenge to the company, but that appears to be a function of its genesis as a purveyor of 'guerilla advertising'. The advertisers, and their audiences, whose section 2(b) rights underwrite this challenge, will have to make due with the myriad of other forms of available expression. This includes signs in other forms, albeit potentially smaller and/or more expensive. The elected municipal government's decision to place a higher social and economic premium on a more unpolluted visual environment is a legitimate one, and a proportional balance of rights and interests under section 1 of the *Charter*.

[109] And lastly, for the land owners, the Bylaw's deleterious impact is that they will be unable to generate revenue from vehicle signs, limiting their land-lease income. The ability to do unsightly things to one's land in exchange for money is far removed for the core value of section 2(b). The specific and general benefits of allowing agricultural land owners to supplement their income may be an economic factor Foothills considers on future development applications. On balance, however, this limited negative impact on a small number of individuals is outweighed by the benefit of the Bylaw to the entire community.

VI. Conclusion

[110] Overall, I find that the limit on the right to freedom of expression is not disproportionate to the benefit that the Bylaw secures for Foothills and its residents. The limit is justified in a free and democratic society.

VII. Remedy

[111] The application is dismissed. In respect of the Tops, whose impacted expression is core to their section 2(b) rights, and who have effectively been caught up in a commercial regulation dispute, enforcement of the Bylaw is stayed for four months from the release of this judgment to allow them an opportunity to identify and implement alternative signage. I encourage Foothills to work cooperatively with them in this endeavour.

Heard on the 26th day of February, 2020.
Dated at Calgary, Alberta this 8th day of September, 2020.

N. Devlin
J.C.Q.B.A.

Appearances:

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for the Applicants

Sean Fairhurst and Emily Shilletto
for the Respondent