Citation: *City of Whitehorse v. Wharf on Fourth*, 2004 YKTC 28
Date: 20040423
Docket: 03-07140
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: Her Honour Judge Maltby

The City of Whitehorse
Plaintiff

v.

Wharf on Fourth Inc.
Defendant

Appearances:
James A. Van Wart — Counsel for the Plaintiff
James Tucker — Counsel for the Defendant

REASONS FOR JUDGMENT

[1] The defendant, Wharf on Fourth Inc., is charged with contravening subsections 8.5.3 and 8.3.7 of the City of Whitehorse Zoning Bylaw 97-42. The defendant does not contest that it is in violation of the subsections of the Bylaw but has challenged the constitutionality of subsections 8.5.3 and 8.3.7 pursuant to s. 2(b) of the *Charter of Rights and Freedoms*.

[2] The facts are, briefly, these: Wharf on Fourth Inc. is a small store located on Fourth Avenue in Whitehorse, Yukon, approximately two kilometers from where the sign in question is located on Second Avenue. In June 2002, the previous owners were issued a development permit to operate a fish and chips stand at the Second Avenue location. Shortly thereafter they erected a sign approximately 12’ x 8’, mounted on posts 22 feet high, with the words “The Wharf on Fourth”. After some delay, a development permit was allowed for the sign as it

stated that that location was the site of a future fish and chips stand as set out in the June development permit. In December 2002, the present owners, Judy and Mark Richardson, purchased the Wharf on Fourth Inc. The development permit expired. The new owners were notified that the billboard had to come down as it was in violation of s. 8.3.7 of the Zoning Bylaw unless it was their intention to proceed with the fish and chips stand. The Richardson's submitted an application for another development permit but then withdrew it. However, they refused to remove the sign when so requested by the City.

[3] The City concedes that subsections 8.3.7 and 8.5.3 of the Bylaw limit the freedoms of the defendant protected under s. 2(b) of the *Charter* but submit that the infringement is justified under s. 1 of the *Charter*.

[4] Section 8.3.7 of the Bylaw states:

> Billboard signs are not permitted anywhere within the City of Whitehorse with the exception of those under the jurisdiction of the Government of Yukon on the Alaska Highway and Klondike Highway.

[5] "Billboard" is defined in s. 2 of the Bylaw as:

> a general advertising, freestanding sign that advertises goods, products, facilities and services, or directs viewers to a different location from where the sign has been installed.

[6] Both counsel agree that there is an error in the drafting of that section and that it should read:

> a general advertising, freestanding sign that advertises goods, products, facilities <u>or</u> services <u>and</u> directs viewers to a different location from where the sign has been installed.

[7] Subsection 8.5.3 of the Bylaw states:

> all signs shall be related to the principle use or uses of the site and serve to identify the name of the business and advertise the products or services offered.

[8] I have considered the following cases in preparation of judgment in this matter:

1. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.
2. *RJR Macdonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199.
3. *Guignard v. City of Saint-Hyacinthe*, [2002] S.C.J. No. 16.
4. *Vann Niagara Ltd. v. Oakville (Town),* [2002] O.J. No. 2323 (C.A.).
5. *Vann Niagara Ltd. v. Oakville (Town),* [2003] S.C.J. No. 71.
6. *New Glasgow (Town) v. MacGillivray Law Office Inc.,* [2001] N.S.J. No. 465 (S.C.).
7. *New Glasgow (Town) v. MacGilivray Law Office Inc.,* [2002] N.S.J. No. 58 (C.A.).
8. *Township of Nichol v. McCarthy Signs Co. Ltd.,* [1997] O.J. No. 2053 (C.A.).
9. *Prince George (City) v. A.F.N. Holding Ltd.*, [1986] B.C.J. No. 2729 (S.C.).
10. *Ontario (Minister of Transportation) v. Miracle*, [2003] O.J. No. 2239 (S. Ct. of Jus.).
11. *Libman v. Quebec (Attorney General),* [1997] 3 S.C.R. 569.

Section A: 2(b) of the *Charter*

[9] The City concedes that the two subsections limit the freedoms of the defendant protected by s. 2(b) of the *Charter* which states:

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

[10] It is apparent that the sign serves as an advertisement and the contexts of expression subject to protection under the *Charter* is purely commercial in that it directs viewers to attend the defendant's store. The context of expression subject to limitation is relevant to the standard of scrutiny applied under s. 1 of the *Charter*. "Commercial expression" is at the lower end of the scale of expression protected under the *Charter*. As a consequence, the City's burden under s. 1 of the *Charter* is subject to substantially more relaxed scrutiny as compared to the context of the core form of an expression such as political expression. The commercial expression in the case at bar can be distinguished from the "counter-advertising" as set out in the case of *R. v. Guignard*, [2002] 1 S.C.R. 472.

Section B: Section 1 of the *Charter*

[11] Section 1 of the *Charter* states as follows:

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

[12] The defendant's freedoms are prescribed by law pursuant to ss. 5 and 289(1) of the *Municipal Act*, R.S.Y. 2002 c. 154 and the Bylaw.

[13] In determining whether limitation may be justified under s. 1 of the *Charter*, the Supreme Court of Canada said in *Libman v. Quebec, supra,* as follows:

> The analytical approach developed by the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103, serves as a guide for determining whether an infringement can be justified in a free and democratic society. Certain clarifications were made regarding the third step of the proportionality test in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Thus, the Court must first ask whether the objective the statutory restrictions seek to promote responds to pressing and substantial concerns in a democratic society, and then determine whether the means chosen by the government are proportional to that objective. The proportionality test involves three steps: the restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions.
>
> The Attorney General must show that the statutory restrictions can be justified under s. 1 of the Canadian *Charter.* The standard of proof to be used is the civil standard, namely proof on a balance of probabilities (Oakes, supra, at p. 137). Scientific proof is not required to meet this standard: "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view" (RJR-Macdonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at p. 133).

[14] In *Guignard, supra*, para 28, the Supreme Court of Canada states in relation to justification:

> In Sharpe, supra, McLachlin C.J. summarized the onus imposed on the public authority under s. 1 of the Charter as follows. To justify the intrusion on free expression, a government must demonstrate, through evidence supplemented by common sense and inferential reasoning, that the impugned law meets the tests set out in R. v. Oakes…….

[15] My task is to determine whether the limitations of subsections 8.3.7 and 8.5.3 imposed on the defendant meet each of the standards set out in the analytical approach developed by the Supreme Court of Canada. The City must show first, that its objective in passing the sign bylaw is pressing and substantial; second, that the bylaw is rationally connected to that objective; third, that the bylaw minimally impairs the right to freedom of expression; and finally, that there is proportionality between the effects of the bylaw.

[16] **1. Is the objective of the sign bylaw pressing and substantial?** It is apparent and admitted by the City that the purpose of the impugned subsections is to reduce the proliferation of billboards. This achieves four objectives as explained below and the purpose of each objective is pressing and substantial. The first objective is to ensure orderly land use and development and to meet the requirements of section 277 of the *Municipal Act,* which reads:

> The purposes of this Part and the bylaws under this Part are to provide a means whereby official community plans and related matters may be prepared and adopted to
>
> a) achieve a safe, healthy and orderly development and use of land in patterns of human activities in municipalities;
> b) maintain and improve the quality, compatibility, and use of the physical and natural environment in which the patterns of human activities are situated in municipalities; and
> c) consider the use and development of land and other resources in adjacent areas without infringing on the rights of individuals, except to the extent that is necessary for the overall greater public interest.

[17] The second objective is to maintain the attractiveness of the community and achieve the purposes set out in subsections 1.2.1(b) and (c) of the Bylaw, which state as follows:

> This Bylaw is to provide for orderly, economic, beneficial, and environmentally sensitive development in the City having regard for the following objectives:
>
> …
>
> (b) to provide a comfortable community, with a variety of settings, for residents;
>
> (c) to maintain and enhance a community character complimentary to the surrounding natural environment.

[18] These objectives are similar to those set out in the *Township of Nichol v. McCarthy Signs Co. Ltd., supra, Vann Niagara Ltd. v. Oakville (Town), supra,* and *New Glasgow (Town) v. MacGilivray Law Office Inc., supra*.

[19] The third objective is to enhance the commercial, recreational, industrial and institutional services to residences and visitors as set out in subsection 1.2.1(d) which states:

> This Bylaw is to provide for the orderly, and official common environmentally sensitive development, for the city having regard for the following objectives:
>
> …
>
> (d) to serve as a center for a wide range of commercial, recreational, industrial and institutional services to residents and visitors.

[20] This is similar to the *New Glasgow (Town) v. MacGilivray Law Office Inc., supra,* case.

[21] The fourth objective is to adhere to results of public consultation, including requests to limit the use of billboards, and to conform with the official community plan as set out in subsection 1.2.1(a): “to implement the official community plan”.

[22] The defendant concedes that the objective of the sign bylaw is pressing and substantial. It was important, however, in my opinion, to outline the background of the objectives of the sign bylaw.

[23] **2. Is the sign bylaw rationally connected to the objective?** First, ensuring orderly land use and development is maximized by the effective use of signs as set out in subsections 8.3.7 and 8.5.3, similar to the *New Glasgow (Town) v. MacGilivray Law Office Inc., supra,* case. The second objective, that of maintaining the attractiveness of the community, has been discussed in a number of the cases that I have reviewed including the ones relating to *New Glasgow (Town) v. MacGilivray Law Office Inc., supra, Township of Nichol v. McCarthy Signs Co. Ltd., supra, R. v. Oakes*, *supra*, *Prince George (City) v. A.F.N. Holding Ltd.*, *supra*, and the *Ontario (Minister of Transportation) v. Miracle* case, *supra*. All those communities, and including Whitehorse, have expressed a concern about the visual blight of excessive signage and the pressing need for a bylaw to limit signage to some extent to preserve the surrounding natural environment. Those of us with enough grey hairs to recall the days when billboards and signs assaulted one's vision everywhere recognize the strides that have been made by many municipalities to reduce the clutter on streets and highways. The bylaws in the above municipalities are in contrast to the *Guignard v. City of Saint-Hyacinthe, supra*, situation where the bylaws there were found not to be effective as a barrier to the potential proliferation of signs in the municipality and therefore not rationally connected to the objective of preventing aesthetic blight. That is not the case here.

[24] The case at bar can also be distinguished from the *Vann Niagara Ltd. v. Oakville (Town), supra,* because of the differences between Oakville and Whitehorse. In that case, Borin J.A. distinguished the *Township of Nichol v. McCarthy Signs Co. Ltd., supra,* case by determining that a prohibition of billboards could not be rationally connected to maintaining the character of the community in a city like Oakville that had a population of 142,000 with a sizable

industrial economy. Whitehorse has a population of approximately 19,000 people and virtually no industrial economy. The 2002 Official Community Plan which was filed as an exhibit in these proceedings, shows that the Whitehorse economy consists mainly of government service, wholesale and retail and related service industries with only three percent primary and one percent manufacturing industry. This is analogous with the small municipalities of Nichol and New Glasgow where limiting the location of signage was found to be rationally connected to the objective of maintaining the aesthetic character of the community. Tourism plays a vital role in the economy of Whitehorse. One of the main factors that draws tourists to this region is the aspect of wilderness adventure and the scenery. It does not take a giant leap of logic to see how a proliferation of signs would distract from that reputation.

[25] Thirdly, the bylaws, as set out, do enhance the commercial recreational, industrial and institutional services to residents and visitors by minimizing the number of signs in certain areas of the community in order to reduce the clutter and confusion associated with excessive signage. This provides effective direction for viewers as it ensures that signs predominately identify on-site use. There is also the safety factor – driver distraction – an issue that arises on a busy road such as Second Avenue, where this sign is located, cluttered with signs.

[26] Fourthly, I have heard in evidence and in submissions about the city's process of public consultation that resulted in a request to limit the use of billboards. This public consultation adheres to the city's Official Community Plan. Contrary to the defendant's submissions, I find the public consultation was not only sufficient, but also extensive. There were public meetings to discuss all aspects of zoning in which a number of citizens made either oral presentations or sent correspondence. Many of these meetings and forums were televised. There was significant involvement by the Whitehorse Chamber of Commerce which represents businesses such as Wharf on Fourth Inc. It was only after the public consultations and meetings that recommendations were made to the elected city

council who then considered them and eventually adopted the bylaws. All these factors are convincing evidence that the sign bylaw is rationally connected to the objective.

[27] **3. Does the sign bylaw minimally impair the right to freedom of expression?**

The defendant submits that the *RJR Macdonald Inc. v. Canada (Attorney General), supra,* case stands for the proposition that the standard of justification for a bylaw which constitutes a complete ban on the form of expression is high. This may very well be the case but it is not relevant to the case at bar. The Whitehorse Bylaw does not constitute a complete ban on billboards. There is an exception for areas under the jurisdiction of the Government of Yukon on the Alaska Highway and Klondike Highway. This is modified in s. 8.3.9 which states:

> Billboard signs along the Alaska Highway and Klondike Highway within the City of Whitehorse shall be subject to sign-free zones as indicated on the map attached to this Bylaw's Appendix B. Council may upon application permit a billboard sign in the sign-free zone, subject to approval of the Highway Signs Regulations.

[28] In fact, the defendant has a billboard sign along the Alaska Highway within the City of Whitehorse. Therefore, the case at bar can be distinguished from the *RJR Macdonald Inc. v. Canada (Attorney General), supra,* case.

[29] The Supreme Court of Canada (in *Libman v. Quebec (Attorney General), supra,* at para. 58) has indicated that the standard of minimal impairment is not measured to a nicety:

> The impairment must be "minimal", that is, the law must be carefully tailored so that the rights are impaired no more that necessary. The tailoring process seldom admits perfection and the courts

> accord some leeway to the legislature. If the law falls within the range of reasonable alternatives, the courts will not find it overboard merely because they can conceive of an alternative which might better tailor objective to infringement.

[30] The Supreme Court of Canada has also indicated in *Guignard v. City of Saint-Hyacinthe, supra,* that deference is given to municipal governments:

> This court has often reiterated the social and political importance of local governments. It is stressed that their powers must be given a generous interpretation because their closeness to the members of the public who live or work on their territory make them more sensitive to the problems experiences by those individuals.

[31] In *Township of Nichol v. McCarthy Signs Co. Ltd., supra,* case, the Ontario Court of Appeal determined that a bylaw of a total prohibition of third-party signs minimally impaired the freedoms protected by s. 2(b) of the *Charter* as did the Supreme Court of Nova Scotia in the *New Glasgow (Town) v. MacGilivray Law Office Inc., supra,* case. In the *Vann Niagara Ltd. v. Oakville (Town), supra,* case, the Ontario Court of Appeal struck down the bylaw that prohibited third-party signs as it more than minimally impaired the s. 2(b). That case can be distinguished here as Whitehorse has a significantly smaller population and less industrialized economy than Oakville and therefore has a stronger rationale for limiting the proliferation of billboards. As well, the Whitehorse bylaw does not prohibit a type of sign but limits where the signs may be located. Similar to *New Glasgow (Town) v. MacGilivray Law Office Inc., supra,* and *Township of Nichol v. McCarthy Signs Co. Ltd., supra*, I find that the defendant's freedom of expression was minimally impaired by subsections 8.3.7 and 8.5.3 as the defendant has a variety of means and in fact has used a variety of means to exercise its commercial expression, of which signage is only one. The defendant has signs elsewhere including on their own property as well as along the Alaska Highway and on bus benches. They also avail themselves of other methods of advertising.

[32] Further, one has to keep in mind that these subsections are merely parts of a larger scheme that are set out in s. 8 that gives a variety of means by which a business may exercise its commercial expression through signage.

[33] **4. Is there proportionality between the effects and objectives of the sign bylaw?**
The objectives of the bylaw have been stated above and are considered by the citizens of Whitehorse to be important ones.

[34] Do those objectives outweigh the significance of the infringement suffered by the defendant? The objective of reducing the proliferation of billboard signs for all the reasons stated above have been demonstrated to have resulted from the consultation and a democratic process. There is a saying, "you can't please all the people all the time" and that is never more true than when one looks at a bylaw such as this. However, the evidence discloses that the City attempted through their democratically elected council and with the assistance of committees consisting of council members and various community members, to reasonably implement the wishes of the various stakeholders in the community. The comments of Low, L.J.S.C. in *Prince George (City) v. A.F.N. Holding Ltd.*, *supra*, at page two, are relevant:

> It is obvious that in the municipality it is desirable, if not necessary, to regulate the erection of signs on private property. The alternative is potential chaos and a visually unappealing community. Just how to achieve the desired results is a matter best left to the wisdom of those elected to the municipal government. Any criticism of or change in the local law should normally take place in the democratic processes. Courts should be cautious in striking down a small part of the comprehensive municipal bylaw which deals with the matter of obvious concern and which is largely a matter of local preference. That preference

> is subject to frequent review within the democratic process.

[35] There was evidence presented that the defendant believes if the sign is removed, the store will suffer significant financial loss. I found the evidence on that point to be weak, based on conversations with newcomers to the store. Mrs. Richardson agreed that she uses other forms of advertising, including other signs. There are many other businesses represented by the Chamber of Commerce, and citizens of Whitehorse who are in favour of the bylaw. The City through their Director of Operations said in evidence that the City wished to be fair to all the businesses in town and could not allow one business to put up a sign contrary to the bylaw without allowing others to do the same. I agree that is fair. However, I assume the City is also as fair in its enforcement and prosecution of these same bylaws.

[36] In balancing the interests of society and those of the defendant whose rights were violated, I find that in this case there is proportionality between the effects and objectives of the sign bylaw.

[37] In summary, having heard the evidence presented by both the City of Whitehorse and the defendant, and heard lengthy submissions both written and oral by counsel accompanied by affidavits, documents and authorities, I am persuaded by the position taken by the City. I find that:

1. Subsections 8.3.7 and 8.5.3 of the bylaw limit the commercial expression of the defendant, which is a freedom protected under s. 2(b) of the *Charter*.
2. The limitation of the defendant’s freedom of commercial expression is justified pursuant to s. 1 of the *Charter*.
3. The limitation is a result of a scheme set out in s. 8 of the bylaw that legitimately regulates signage in the community.

4. Section 8 and subsections 8.3.7 and 8.5.3 of the bylaw meet the objectives set out in s. 1.2 of the Bylaw, the *Municipal Act*, and derive from public consultation.
5. Subsections 8.3.7 and 8.5.3 minimally limit the defendant's rights by restricting where it locates signs to advertise its business. Section 8 provides for various opportunities to advertise with signs throughout Whitehorse.
6. The bylaw is a product of a democratic process and an attempt by the City to satisfy the interests of various stakeholders.

[38] Therefore, I find that the defendant, Wharf on Fourth Inc., has committed two offences as charged. The offences are ones to which the *Kineapple* principle applies and I direct that after the 30 day appeal period that a judicial stay of proceedings be entered on Count 1.

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Maltby T.C.J.