TAB 4

Urban Outdoor Trans Ad, a Division of Slaight Communications Inc. et al. v. Corporation of the City of Scarborough*

[Indexed as: Urban Outdoor Trans Ad v. Scarborough (City)]

Court of Appeal for Ontario, Abella, Laskin and Rosenberg JJ.A.
January 31, 2001

Charter of Rights and Freedoms — Freedom of expression — Municipal by-law regulating signs and billboards — Limits contained in by-law reasonable limits on freedom of expression under s. 1 of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law — Taxation — Indirect tax — Municipality enacting sign by-law imposing annual fee for billboards — Annual fee valid as fee — Savings and Restructuring Act, S.O. 1996, c. 1, Schedule M, s. 10 — Municipal Act, R.S.O. 1990, c. M.45, s. 210(146).

Municipal law — By-laws — Validity — Sign by-law — Charter of Rights and Freedoms — Freedom of expression — Municipal by-law regulating signs and billboards — Limits contained in by-law reasonable limits on freedom of expression under s. 1 of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Municipal law — By-laws — Validity — Ultra vires — Sign by-law — Taxation — Indirect tax — Fee — Municipality enacting sign by-law imposing annual fee for billboards — Annual fee valid as fee — Savings and Restructuring Act, S.O. 1996, c. 1, Schedule M, s. 10 — Municipal Act, R.S.O. 1990, c. M.45, s. 210(146).

In 1993 and 1994, there was a proliferation of new billboard signs in the former City of Scarborough. After consultations with the community and the outdoor sign industry, in May 1997, the City passed By-law 25110, which amended the comprehensive sign by-law, By-law 22980. Among other things, the amended sign by-law introduced an annual fee for third party signs, that is, advertising signs having no connection with the premises where they are placed. The by-law also set a maximum number of third party signs for the municipality based on a population formula coupled with the qualification that no more than 20 new sign permits would be issued each year. The applicants, three corporations engaged in the outdoor advertising business and an industry association, among other things, challenged the annual fee and the cap on the number of signs as illegal. They contended that the annual fee was invalid as not authorized by the *Municipal Act* and that it was illegal as a tax that was beyond the municipality's authority to pass as a matter of constitutional law. Further, they challenged the limit on the total number of signs and the limit on the number of new signs annually as contrary to s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* (freedom of expression). MacPherson J. struck down portions of the by-law, but he held that the annual fee was valid and that the limits on the number of signs were contrary to s. 2(*b*) of the *Charter* but saved by s. 1 of the *Charter*. The applicants appealed.

Held, the appeal should be dismissed with costs.

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* Vous trouverez traduction française de la décision ci-dessus à la p. 607, *post*.

MacPherson J. was correct in concluding that the annual fee was not authorized by s. 210(146) of the *Municipal Act* but that it was authorized by s. 220.1(2) of the *Municipal Act*, which allows a municipality to charge a fee for a large variety of services. There was no inconsistency between the two provisions of the *Municipal Act* because they could stand together. There was nothing in s. 210(146) to indicate that the legislature intended it to be the exclusive statutory authority for the regulating of signs or the charging of fees.

The annual fee was a fee and not a tax. A feature of a tax is that it is designed to raise revenue for general public purposes. A fee, however, is intended to raise funds to pay for a specific service. This feature was present here. The funds raised from the annual fees imposed under the by-law were directed to the administrative costs of the sign section of the City and they did not go into the City's general revenues. The fee was modest and the amounts collected did not cover the total expenses for the City's sign section. The evidence showed that there was a nexus between the annual fees charged and the services provided.

The provisions in the by-law that set a maximum on the total number of signs based on population and that set an annual maximum on the issuance of new permits for signs were contrary to s. 2(*b*) of the *Charter* but were saved by s. 1 of the *Charter* as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

Cases referred to

Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, 85 B.C.L.R. (2d) 257, 109 D.L.R. (4th) 46, 160 N.R. 249, [18] 18 M.P.L.R. (2d) 1 (*sub nom. Kirkpatrick Sand & Gravel Co. v. Maple Ridge (District)*); *Canadian Mobile Sign Assn. v. Burlington (City)* (1997), 227 N.R. 199*n* (S.C.C.) 34 O.R. (3d) 134, 149 D.L.R. (4th) 292, 45 C.R.R. (2d) 229, 46 M.P.L.R. (2d) 14 (C.A.), [Leave to appeal refused (1998), 50 C.R.R. (2d) 376*n* (S.C.C.)]; *Eurig Estate, Re*, [1998] 2 S.C.R. 565, 40 O.R. (3d) 160*n*, 165 D.L.R. (4th) 1, 231 N.R. 55, 23 E.T.R. (2d) 1 (*sub nom. Eurig Estate v. Ontario Court (General Division), Registrar*); *New Brunswick (Finance Minister) v. Simpson-Sears*, [1982] 1 S.C.R. 144, 39 N.B.R. (2d) 407, 130 D.L.R. (3d) 385, 41 N.R. 489, 103 A.P.R. 407; *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, 29 O.R. (3d) 320*n*, 137 D.L.R. (4th) 449, 201 N.R. 81, 35 M.P.L.R. (2d) 1, 4 R.P.R. (3d) 1; *Pacific National Investments Ltd. v. Victoria (City)* (2000), 193 D.L.R. (4th) 385, 2000 S.C.J. No. 64 (S.C.C.); *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1, 187 N.R. 1, 31 C.R.R. (2d) 189, 100 C.C.C. (3d) 449, 62 C.P.R. (3d) 417; *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 34 O.R. (3d) 65, 149 D.L.R. (4th) 282, 45 C.R.R. (2d) 220, 117 C.C.C. (3d) 409, 47 M.P.L.R. (2d) 145 (C.A.); *Toronto Railway v. Paget* (1909), 43 S.C.R. 488

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*)
City of Toronto Act, 1997, S.O. 1997, c. 2
City of Toronto Act, 1997, No. 2, S.O. 1997, c. 26
Constitution Act, 1867, s. 92
Interpretation Act, R.S.O. 1990, c. I.11, s. 10
Municipal Act, R.S.O. 1990, c. M.45, ss. 210(146), 220.1 [en. S.O. 1996, c. 1, Schedule M, s. 10]
Savings and Restructuring Act, 1996, S.O. 1996, c. 1

Authorities referred to

Hogg, *Constitutional Law of Canada*, vol. 2, looseleaf
Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992)

APPEAL of a judgment of MacPherson J. (1999), 43 O.R. (3d) 673 (S.C.J.) about the validity of a municipality's sign by-law.

Christopher J. Williams and *Sandra Barton*, for appellants.
Jonathan C. Lisus and *Christopher Wayland*, for respondent.

The judgment of the court was delivered by

[1] ROSENBERG J.A.: — The appellant sign companies provide large billboards on which companies can advertise their products. In 1993 and 1994, there was, to quote one of the appellants, an "overnight explosion" of outdoor signs in the former City of Scarborough.[1] The sign companies went to the City for a solution and, for example, the appellant Mediacom Inc. recommended that restrictive measures be adopted to control the number of billboards that could be erected in any one year. After two years of study and consultation with all interested parties, including the appellants, the City adopted By-law 25110 to deal with the problem. The appellants were not happy with the solution and brought an application to quash the by-law. They were largely successful. However, the applications judge, MacPherson J., upheld some parts of the by-law. The appellants now appeal from that judgment. They argue that the by-law is beyond the powers conferred on the City by the *Municipal Act*, R.S.O. 1990, c. M.45, that it is an impermissible form of indirect taxation, and that the cap on the number of new billboards infringes freedom of expression as protected by the *Canadian Charter of Rights and Freedoms*.

[2] I largely agree with the reasons of MacPherson J. and would dismiss the appeal with costs.

The Facts

[3] The appellant sign companies, Urban Outdoor Trans Ad, Mediacom Inc. and Omni Outdoor Ontario Limited Partnership, are corporations engaged in the outdoor advertising business. The appellant, Outdoor Advertising Association of Canada, is an industry association of over 40 companies engaged in the design,

1 The former City of Scarborough is now part of the City of Toronto by virtue of the *City of Toronto Act, 1997*, S.O. 1997, c. 2 and the *City of Toronto Act, 1997 (No. 2)*, S.O. 1997, c. 26. These statutes provide that all the by-laws of the former municipalities became by-laws of the City of Toronto and continue in full force and effect for the geographic area to which they applied on December 31, 1997, unless otherwise repealed or amended.

construction and acquisition of sites for the purpose of all forms of outdoor advertising. The sign companies provide third-party billboard signs of various sizes and types. Third-party signs advertise a product or service not undertaken at the location of the sign. Advertisers contract for use of the sign face as part of a national advertising campaign directed at an identified population.

[4] As set out in the agreed statement of facts, billboards (the type of signs in issue in this appeal) are "the largest and most intrusive 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. They can dominate surrounding structures and thereby change urban plans and existing cityscapes." Further, "Billboard signs are designed to maximize their contrast with their physical surroundings in order to enhance their visual impact. While billboards can add colour, vitality, and diversity to areas of the city, they can also be unattractive and overwhelming, and can detract from the city's image. Their proliferation can dominate the skyline, block scenic vistas, intrude into residential areas, and give the impression of clutter."

[5] Between 1993 and 1994, as a result of a "turf war", there was a significant increase in new billboard signs of all types in Scarborough (50 new signs were erected during this period, as compared to an average of three to nine third-party billboard signs erected in a typical previous year). The city viewed this proliferation of signs, and the significant increase in the use of illegal portable signs, as a significant threat to the integrity of Scarborough's urban plan. These events also prompted a high level of public complaints.

[6] The appellant Mediacom recommended that restrictive measures be adopted. There has never been any agreement or discussion between the sign companies with respect to self-regulating the number of new signs. The appellants recognized that "an explosive growth in billboard signs within a narrow time frame is not beneficial to the community or the outdoor sign industry."

[7] As a result, the City of Scarborough began a review of its policy respecting outdoor signs, including third-party billboard signs. The city undertook an extensive consultation process before enacting the challenged by-law. In the words of the agreed statement of facts, the city "aimed to establish a carefully tailored regulatory scheme which would be responsive to the needs of the Sign Industry as well as the concerns voiced by the public and community groups about the impact billboard signs were having in changing the face of the streetscape".

[8] The senior vice-president of the appellant Mediacom made the following submission to the City on August 28, 1996:

> [*W*]*e do understand Council's decision to implement a cap. You only have to call around to neighbouring municipalities to gain an understanding of explosive growth in our industry over the past few years.* Municipalities have responded with caps, moratoriums and bans on billboards as an immediate response to this growth. *We agree that such growth is neither beneficial to our industry or the community.*
>
> . . . . .
>
> Mediacom has been in the business since 1904. We have taken 92 years to build our markets. *A new company arrives in Ontario* [Gould] *a few years ago and builds over 1,000 panels in the GTA in a very short span of time. This explosive growth impacts all municipalities and the industry as a whole.* Of course residents, politicians and interest groups are concerned. What is normally achieved over a long period of time as the community grows is replaced with an *overnight explosion.*

(The emphasis is in the Agreed Statement of Facts)

[9] Prior to the enactment of the challenged by-law, the City regulated signs through the comprehensive sign by-law, By-law 22980, passed pursuant to s. 210(146) of the *Municipal Act*, R.S.O. 1990, c. M.45. Under this by-law, the City charges sign companies a fee for issuing permits for new signs. The fee varies depending on the size of the sign face. The appellants do not object to this fee.

[10] The Sign Section of the City's Buildings Division administers and enforces the comprehensive sign by-law. The Section regulates all forms of signage, postering and other forms of outdoor advertising. Almost one-half of the Section's operations are directly related to illegal sign activity. There is no suggestion that the appellants are involved in illegal sign activity. The Section deals with the issuance of permits for new signs and inspects signs for compliance with the by-law and any other applicable legislation. All fees received in connection with signs are remitted to the City and are placed in one of two specifically assigned sign accounts. These funds are kept separate from general revenue accounts and are used to cover the operation of the Sign Section. The Sign Section has always operated at a deficit and thus most of the costs of its operation were paid from general revenues. The fee charged for issuing permits for new signs is sufficient only to cover the costs of the application process and the initial inspection to approve the plans.

[11] As part of its mandate, the Sign Section inspects all signs, including the third-party billboards. The sign companies inspect their signs and receive no benefit from the Sign Section inspections of their own signs.

[12] On May 13, 1997, the City passed By-law 25110, which amended By-law 22980 under the authority of s. 220.1 of the *Municipal Act*. Section 220.1 was enacted by the province as part of the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1. As a result of By-law 25110, sign companies are charged an annual fee for each third-party billboard sign of $100 per face for ground-mounted signs and $200 per face for roof mounted signs. The appellants object to this annual fee.

[13] The by-law also establishes that a maximum number of third-party signs will be permitted in the city by reference to a formula based upon population. Under the formula, the number of signs is currently capped at 344. Until the cap is reached, no more than 20 new sign permits will be issued annually. Under the by-law, the new sign permits were to be issued based upon an "auction". The applications judge struck down this part of the by-law and it is not an issue in this appeal. The appellants object to the cap, which the applications judge found to be valid.

The Legislation

[14] Section 210(146) of the *Municipal Act* provides for the passage of by-laws by municipal councils relating to the regulation of signs and other advertising devices. In particular, s. 210(146)(*a*) and (*b*) provide as follows:

> 146. For prohibiting or regulating signs and other advertising devices . . .
>
> (*a*) A by-law passed under this paragraph may specify a time period during which signs or other advertising devices in a defined class may stand or be displayed in the municipality and may require the removal of such signs or other advertising devices which may continue to stand or be displayed after such time period has expired.
>
> (*b*) A by-law passed under this paragraph may require the production of the plans of all signs or other advertising devices to be erected, displayed, altered or repaired and provide for the *charging of fees for the inspection and approval of such plans and for the fixing of the amount of such fees and for the issuing of a permit certifying to such approval* . . .

(Emphasis added)

[15] Section 220.1 of the *Municipal Act*, which was added by the *Savings and Restructuring Act, 1996*, provides as follows:

> 220.1(2) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,
>
> (*a*) for services or activities provided or done by or on behalf of it;
>
> (*b*) for costs payable by it for services or activities provided for done by or on behalf of any other municipality or local board; and
>
> (*c*) for the use of its property including property under its control.

(3) No by-law under this section shall impose a poll tax or similar fee or charge, including a fee or charge which is imposed on an individual by reason only of his or her presence or residence in the municipality or part of it.

. . . . . .

(6) A by-law under this section may provide for,

(*a*) fees and charges that are in the nature of a direct tax for the purpose of raising revenue;

. . . . . .

(*d*) fees and charges that vary on any basis the municipality or local board considers appropriate and specifies in the by-law, including the level or frequency of the service or activity provided or done, the time of day or of year the service or activity is provided and whether the class of persons paying the fee is a resident or non-resident of the municipality;

[16] The applicable provisions of the Constitution are the following:

Constitution Act, 1867

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . . . . .

2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.

Canadian Charter of Rights and Freedoms

1. 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 as can be demonstrably justified in a free and democratic society.

2. Everyone has the following fundamental freedoms:

. . . . . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of press and other media of communication;

The Issues

[17] The appellants challenge the validity of that part of the by-law imposing an annual fee on the following bases:

(1) Section 210(146) of the *Municipal Act* is the exclusive statutory authority for imposition of fees relating to signage and it does not authorize the annual fees.

(2) Even if the City were entitled to resort to s. 220.1 of the *Municipal Act*, the annual fee is prohibited as an indirect tax.

(3) Even if the City were entitled to resort to s. 220.1 of the *Municipal Act*, the annual fee is an impermissible poll tax.

[18] The appellants challenge the validity of that part of the by-law imposing a cap on the number of third-party billboards as infringing freedom of expression as guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms.*

Analysis

(1) *Authority for charging the annual fee*

[19] The applications judge found that the annual fee is not authorized by s. 210(146) of the *Municipal Act*. I agree. That provision allows for the enacting of by-laws for prohibiting or regulating signs that may require the production of plans of all signs and provide for the "charging of fees for the inspection and approval of such plans and for the fixing of the amount of such fees and for the issuing of a permit". The annual fee does not come within the terms of s. 210(146). However, I also agree with the applications judge that s. 220.1 authorizes the annual fee imposed under the by-law.

[20] The appellants make two submissions respecting s. 220.1. First, they submit that s. 210(146) and s. 220.1 are inconsistent and that s. 210(146) alone, being the more specific legislation dealing with signs, is the sole authority for legislating in relation to signs, including the charging of fees for signs. Second, they submit that as a matter of statutory construction, s. 220.1 was not intended to deal with charging fees for signs. They submit that s. 220.1 was intended to deal with circumstances where there was no existing authority to charge fees for municipal services.

[21] There is a presumption that the legislature did not intend to make contradictory enactments and thus the test for finding an inconsistency between two pieces of legislation is a stringent one. As was said by Anglin J. in *Toronto Railway v. Paget* (1909), 42 S.C.R. 488 at p. 499, "It is not enough to exclude the application of the general Act that it deals somewhat differently with the same subject-matter. It is not 'inconsistent' unless the two provisions cannot stand together." Sections 210(146) and 220.1 are not inconsistent in this sense. They are not contradictory and can stand together. Section 210(146) allows the municipality to charge fees for the initial approval and inspection process. Section 220.1 allows the municipality to charge fees for a broader range of services.

[22] Similarly, I cannot find that s. 210(146) was intended to be a complete code for the imposition of fees for signage. There is

nothing in s. 210(146) to indicate that the legislature intended it to be the exclusive statutory authority for regulating signs or the charging of fees. On the other hand, s. 220.1, as enacted by the *Savings and Restructuring Act, 1996*, is framed in the broadest possible terms. It applies "despite any Act" and authorizes the municipality to pass by-laws imposing fees "on any class of persons . . . for services or activities provided" by it.

[23] Section 10 of the *Interpretation Act*, R.S.O. 1990, c. I.11 provides that every Act is deemed to be remedial and "shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit". This broad purposive approach applies to municipal statutes: *Pacific National Investments Ltd. v. Victoria (City)* (2000), 193 D.L.R. (4th) 385, [2000] S.C.J. No. 64 at para. 35. The City submits that s. 220.1 was enacted against the background of cuts to transfer payments and downloading from the province to the municipalities. In such an environment, the municipalities required additional powers to raise revenue and the legislature intended to give them such a power over and above the specific powers previously set out in the *Municipal Act*. There is much to be said for this submission. In any event, I agree with the applications judge that "there is nothing to signal that municipal regulation of signs by implication excludes municipal fees, charges or taxes imposed on the sign industry."

[24] I would not give effect to this ground of appeal.

(2) *Fee or tax?*

[25] In the alternative, the appellants submit that the annual fee is an indirect tax. They submit that as such it cannot be authorized by s. 220.1 of the *Municipal Act* and is *ultra vires* the City because the legislatures and the municipalities can only impose direct taxes under the *Constitution Act, 1867*. The applications judge found that the annual fee was, indeed, a fee not a tax. He also held that if he was wrong and the annual fee is a tax, it was an indirect tax. However, he also held that the by-law was saved as ancillary to a valid regulatory scheme of land use planning per *Allard Contractors Ltd. v. Coquitlam (District)*, [1993] 4 S.C.R. 371, 85 B.C.L.R. (2d) 257.

[26] I agree with the applications judge that the annual fee imposed by the by-law is a fee and not a tax.

[27] In determining whether a levy is a tax or fee the courts have applied a four-part test. A levy will be found to be a tax if it is:

(1) enforceable by law;

(2) imposed under the authority of the legislature;

(3) levied by a public body; and

(4) intended for a public purpose.

[28] The applications judge found that the first three elements were satisfied but that the annual fee was not intended for a public purpose. The appellants challenge this latter finding. The City argues that the applications judge correctly found that the annual fee was not intended for a public purpose but that he erred in finding that it was enforceable by law.

[29] The City submits that the annual fee is not "enforceable by law" because the fees are not compulsory. The sign companies voluntarily engage in this activity. They have created an industry and receive a benefit from the City's regulation of that industry. The City contrasts the position of the sign companies with that of an executor seeking to probate a will and required to pay probate fees, which was the problem considered in *Re Eurig Estate*, [1998] 2 S.C.R. 565 at p. 577, 165 D.L.R. (4th) 1. In that case, the court held that while an individual might arrange his or her affairs to minimize the need for probate, a "practical compulsion usually exists for the executor to obtain probate in order to comply with his or her legal obligations". Thus, it was held that the probate fees were enforceable by law.

[30] I cannot accept the position of the City. The business of the sign companies is the erection and maintenance of billboards and the sale of the space. To remain in that business in the City of Scarborough, they are compelled to pay the annual fees. In fact, as I read the by-law, they are compelled to pay the annual fee even if they "voluntarily" choose not to sell the space to advertisers. The by-law simply provides that billboards "located in the municipality shall be subject to an annual fee". In my view, the annual fee is enforceable by law.

[31] However, I agree with the applications judge and the City that the annual fee is not "intended for a public purpose". The applications judge relied upon an excerpt from P. Hogg, *Constitutional Law of Canada*, Vol. 2, looseleaf (Toronto: Carswell, at p. 30-18), where the author explains that levies such as licence fees and registration fees can be supported as fees rather than taxes, "if they bear a reasonable relation to the cost of providing the service". Such charges are not taxes "because their purpose is to defray expenses, not to raise revenue". He goes on to say:

> Even if a charge proves to be too high and produces a surplus of revenue which is available for general governmental purposes, the charge will still

> not be characterized as a tax so long as the court is satisfied that it is not a colourable attempt to levy an indirect tax. In other words, the Legislature is permitted "reasonable leeway" in fixing its charges for services.

[32] The applications judge also relied upon a passage from *Re Eurig Estate*, at p. 578 S.C.R., where Major J. held:

> Another factor that generally distinguishes a fee from a tax is that a nexus must exist between the quantum charged and the cost of the service provided in order for a levy to be considered constitutionally valid.

[33] The applications judge then considered at some length the evidence, some of which I have reviewed above. He relied upon the fact that the funds raised from the annual fees are directed in their entirety to the administrative costs of the Sign Section and do not go into the City's general revenues. He was satisfied that the evidence showed that the annual fees were intended to raise funds to pay for a specific service provided by the City through the Sign Section. The Sign Section engages in a wide range of activities that benefit not only the community generally but also the sign industry by, for example, checking for illegal signs. The evidence also showed that there was a nexus between the annual fees charged and the services provided. The fees are relatively modest and defray only a minor part of the Sign Section's total expenses.

[34] The position of the appellants is that the applications judge took too broad a view of the evidence. They argue that the annual fees are intended to defray in a general sense the administrative costs of running the Sign Section rather than relating to a specific and identifiable service, such as the fee associated with the initial permit under the old by-law. They argue that the annual fees are intended to be used for the public services provided by the Sign Section that benefit the community generally, rather than the person paying the fee. In that sense, it is like the charges found to be taxes in *Re Eurig Estate*, where the evidence showed that the probate fees were intended to defray the costs of administration of courts generally rather than the granting of the probate in question.

[35] I have not been persuaded that the applications judge erred in his conclusion. The probate levy considered in *Re Eurig Estate* varied directly with the value of the estate although the cost of granting letters probate did not vary with the value of the estate. The result was an absence of a nexus between the levy and the cost of the service, indicating that the levy was a tax and not a fee: *Re Eurig Estate* at p. 579 S.C.R. The fees imposed by the by-law in this case are entirely different and do not vary depending on the value of the particular sign locations. Further, like the applications judge, I place particular emphasis on the fact that the fees

are relatively modest when compared to the entire budget of the Signs Section. While the total expenses of the Sign Section were $439,634 for 1997, the annual billboard fees totalled only $65,000. It was open to the applications judge to find that there was a nexus between these fees and the services provided to the sign companies in the way of inspection, investigation of illegal signage, industry and business liaison and customer service. These services benefit the sign industry in particular although they also provide an incidental benefit to the community at large.

[36] In view of my conclusion that the annual fee does not constitute a tax, I do not need to consider the submission by the appellants that it amounts to impermissible poll tax. I also need not consider the alternative holding by the applications judge that if the fees were taxes, they were a valid indirect tax as ancillary to a valid regulatory scheme of land use planning. However, I should not be taken as agreeing that if the fees were taxes, they were indirect taxes. There is much to be said for the City's argument that if they were taxes they were direct taxes. In dealing with the much larger fees associated with the auction for new permits, the applications judge found that it was common sense that the general tendency would be for the sign companies to pass on to their consumers the fees they pay to the City. Accordingly, he held that the fees collected through the auction process constituted an indirect tax. However, it is not apparent to me that the evidence would support a similar finding with respect to the modest annual fees.

[37] In *Ontario Home Builders' Assn. v. York Region Board of Education*, [1996] 2 S.C.R. 929, 137 D.L.R. (4th) 449, Iacobucci J. considered the question of direct and indirect taxes at some length. At p. 969 S.C.R., he adopted the following test for whether taxes are direct or indirect:

> Taxes are either direct or indirect. A direct tax is one which is demanded from the very person who, it is intended or desired, should pay it. *Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another: such as the excise or customs.* The producer or importer of a commodity is called upon to pay tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price.

(Emphasis added)

[38] Iacobucci J. held that generally a land tax is considered to be a direct tax whether it is an annual, recurring assessment, or a one-time charge. As he said at p. 976 S.C.R., "Although land owners, like everyone, may wish to pass on their tax burden to someone else or otherwise avoid taxation, this desire or ability does not transform the direct nature of the tax into an indirect

one." A land tax can, in some circumstances, be treated as an indirect tax. Thus, in *Ontario Home Builders' Assn.*, Iacobucci J. found, at p. 978, that the education development charges involved "cling as a burden to new buildings when they are brought to market" and thus constituted indirect taxation.

[39] The annual fees involved in this case, if not fees, are similar to a land tax and, in my view, would more properly be considered to be direct taxation. The annual fee is paid in relation to permanent fixtures within the City. It is not tied to the number of times that the billboard space is sold to an advertiser. The annual fee is not targeted at any commodity. These billboards are used as part of national advertising campaigns. The fees do not cling as a burden to these advertising campaigns. There was no evidence that the annual fee was demanded from the sign companies in the expectation and intention that they could indemnify themselves at the expense of these national advertisers. The fact that the companies might attempt to recoup the fee in their overall pricing structure did not make it an indirect tax. See *New Brunswick (Finance Minister) v. Simpson-Sears*, [1982] 1 S.C.R. 144 at pp. 161-62, 39 N.B.R. (2d) 407, and P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) at pp. 743-44.

(3) *Freedom of expression*

[40] The applications judge held that while the overall cap of 344 signs and the annual cap of 20 new signs violate s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, the violations could be saved as reasonable limits under s. 1 of the *Charter*. I agree with the application judge's analysis and conclusion. He held that the agreed statement of facts demonstrated that the objectives of the sign by-law were pressing and substantial. He relied upon the facts that while there had never been any agreement between the sign companies with respect to self-regulation, prior to the 1993 "turf war" there were only modest increases in the number of signs. However, in 1993 and 1994, 50 new billboards were erected. The City perceived this development as a significant threat to the integrity of the City's urban plan and [it] resulted in a high level of public complaints. It is one of the agreed statements of facts that an explosive growth in billboard signs within a narrow time frame "is not beneficial to the community or to the outdoor sign industry". It was also of some interest that one of the appellants had called for restrictive measures to control the explosive growth in Scarborough.

[41] I also agree with the applications judge that the proportionality test under s. 1 of the *Charter* was met. A cap is an obvi-

ous means of controlling the harm from explosive growth and is thus rationally connected to the objective of the by-law.

[42] I am also satisfied that the minimal impairment component of the proportionality test was met. As McLachlin J. held in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at p. 342, 127 D.L.R. (4th) 1, while the law must be carefully tailored so that rights are impaired no more than necessary, the tailoring process "seldom admits of perfection and the courts must accord some leeway to the legislator". Thus, if the law "falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement". The appellants suggest that time, place and manner restrictions would meet the City's objectives and thus the cap does not minimally impair the freedom of expression. I do not agree. The problem presented by the billboards is not simply one of time, place and manner but [of] the number of signs.

[43] This court was presented with somewhat similar problems in the companion cases of *Canadian Mobile Sign Assn. v. Burlington (City)* (1997), 34 O.R. (3d) 134, 149 D.L.R. (4th) 292 (C.A.) (Leave to appeal to the Supreme Court of Canada refused (1998), 50 C.R.R. (2d) 376*n*, 227 N.R. 199*n*) and *Stoney Creek (City) v. Ad Vantage Signs Ltd.* (1997), 34 O.R. (3d) 65, 149 D.L.R. (4th) 282 (C.A.). Both cases dealt with the regulation of portable or mobile signs. In the latter case, this court struck down a by-law that generally prohibited such signs subject to certain narrow exceptions. However, this court upheld the City of Burlington by-law that regulated time, place, manner and number of mobile signs. The court held at pp. 137-38 O.R., pp. 295-96 D.L.R. as follows:

> Without drawing any distinction between signs on public property and private property, viewing the by-law as a whole, on the material before us we are of the opinion that the means chosen by the City of Burlington to achieve its stated objective in dealing with the problems created by the use of portable signs, unlike those in *Stoney Creek*, are proportionate to the objective and only minimally impair the appellants' rights. *This by-law cannot be said to operate so as to generally or effectively prohibit the use of such signs.*
>
> As we noted earlier, the by-law was developed as a result of information received from many sources. It represents a rational attempt to strike a balance between the right of businesses to identify themselves and convey messages and the right of the public to establish and maintain standards of aesthetics and to deal with the safety concerns of motorists and pedestrians.
>
> *While the appellants would like Burlington to allow more portable signs for longer periods of time, the evidence would indicate that the regulation in this respect is reasonable. It was designed pursuant to a formula which allows each business in a multi-unit facility wishing to use a portable sign a fair opportunity to do so.* The restriction on off-site advertising requiring portable

signs to be located on the property to which the sign relates also appears reasonable and justified. The signs overload street blocks with advertising information and thus increase traffic hazards and contribute to the clutter and aesthetic blight which the by-law aims to reduce.

(Emphasis added)

[44] Similar considerations apply to the by-law involved in this appeal. The by-law does not completely prohibit billboards and allows for an orderly expansion of 20 more signs annually until the cap is reached. The by-law was developed as a result of a two-year consultation process and represents a rational attempt to strike a balance between the interests of the community and the commercial interests of the sign companies. In my view, it meets the minimal impairment part of the proportionality test.

[45] Finally, the by-law meets the third part of the proportionality analysis in that there is a proportionality between the deleterious and the salutary effects of the measures. The deleterious effects of the limitation, a restriction on the number of billboards to advertise products for profit, do not outweigh the legislative objectives of protecting the face of the streetscape and the City's urban plan.

Disposition

[46] Accordingly, I would dismiss the appeal with costs.

Appeal dismissed with costs.

Urban Outdoor Trans Ad, a Division of Slaight Communications Inc. et al. c. Corporation of the City of Scarborough*

[Répertorié : Urban Outdoor Trans Ad c. Scarborough (City)]

Cour d'appel de l'Ontario, les juges Abella, Laskin et Rosenberg
31 janvier 2001

Charte des droits et libertés — Liberté d'expression — Règlement municipal portant sur les enseignes et les panneaux d'affichage — Restrictions prévues par le règlement municipal constituant une limite raisonnable à la liberté d'expression au sens de l'article premier de la Charte — Charte canadienne des droits et libertés, article premier, par. 2b).

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* Version française réalisée par le Centre de traduction et de documentation juridiques (CTDJ) à l'Université d'Ottawa.