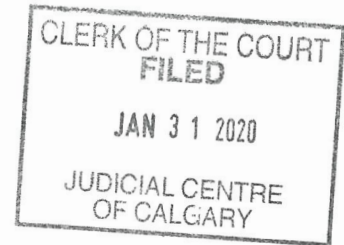


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COURT

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

CALGARY

APPLICANTS

GERRIT TOP, JANTJE TOP, SPOT ADS INC., ROSS
MARTIN, JOHN MARKIW and BRIAN WICKHORST

RESPONDENT

MUNICIPAL DISTRICT OF FOOTHILLS NO. 31

DOCUMENT

FACTUM OF THE APPLICANTS

PARTY FILING
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JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

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COURT FILE NUMBER 1901-06503

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANTS GERRIT TOP, JANTJE TOP, SPOT ADS INC., ROSS MARTIN, JOHN MARKIW and BRIAN WICKHORST

RESPONDENT MUNICIPAL DISTRICT OF FOOTHILLS NO. 31

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PART 1: OVERVIEW

1. This case is about the constitutional rights of individuals, especially landowners, to effectively communicate their messages to the public through their chosen means of expression. The *Canadian Charter of Rights and Freedoms* (“*Charter*”) protects against local governments infringing this right unless it can be demonstrated that such impairment is justified in a free and democratic society.
2. The Respondent County (the Municipal District of Foothills No. 31, referred to herein as “Foothills County” or “the County”) has imposed a complete prohibition on a particular type of roadside sign, namely, signs attached to transport truck trailers. The County’s sole justification for its arbitrary prohibition of this type of expression is its claim that trailer signs are ugly, and that preventing landowners from using such signs to communicate with the public is necessary to preserve the “aesthetics” of the County.
3. Entirely prohibiting a particular type of roadside sign is not minimally impairing of freedom of expression as protected by section 2(b) of the *Charter*, nor is it rationally connected to the County’s objective, as the County permits other, similar types of signs. Signs are, and have been, recognized by courts as a central feature of a free society that permits open communication between citizens. The complete prohibition of one of the most effective and affordable categories of signs is a serious infringement of *Charter*-protected free expression and is grossly disproportionate to the purported benefits of better aesthetics.

PART 2: THE PARTIES

4. The Applicants Gerrit and Jantje Top are Foothills County resident landowners. Since 2006 the Tops have had a trailer on their private property, viewable from Highway No. 2, with a sign attached to each side. The signs express the Tops’ moral and political convictions and opinions regarding abortion and include information for women with unplanned pregnancies about how to access support services. There is nothing unlawful about the expression on the Tops’ sign.

5. The Applicant Spot Ads Inc. (“Spot Ads”) is a local business that leases advertising space on the sides of transport truck trailers placed on private property adjacent to roadways in Alberta, including in Foothills County. Spot Ads provides affordable space for small and medium sized businesses to express advertising and various other messages to the public, while also providing income to landowners.
6. The Applicants Ross Martin, John Markiw and Brian Wickhorst are Foothills County resident landowners. Mr. Martin and Mr. Wickhorst currently have Trailer Signs on their property, while Mr. Markiw did prior to December 2019.
7. The Respondent is a municipal district directly south of Calgary. Within its borders are the southern end of Macleod Trail and Deerfoot Trail, a long stretch of Highway No. 2, a stretch of Highway No. 2A that runs south through Okotoks and Aldersyde to High River and the entirety of Highway No. 7. The large towns of Okotoks and High River are also within the County’s borders.

PART 3: THE FACTS

8. Foothills County has several major roadways running through it. For example, Highway No. 2, which runs north-south through Foothills County connecting Calgary and southwestern Alberta, is a multi-lane, divided freeway.
9. Since the 1990s, resident landowners of Foothills, whose land is adjacent to a highway, have been attaching signs to the sides of transport truck trailers and placing those trailers at the edge of their property, so they can be viewed easily from the highway, thereby communicating effectively to a large number of people the message or advertisement contained in the sign (the “Trailer Signs”).¹
10. In 2006, Gerrit and Jantje Top placed a pro-life-themed Trailer Sign on a property they own on the east side of Highway No. 2, south of High River.² In 2018, the Tops’ Trailer Sign was upgraded to include a new sign on either side of the trailer. One side states, "CANADA HAS

¹ Affidavit of Brian Wickhorst at para 4.

² Affidavit of Jantje Top at paras 5-6, Exhibit “B”.

NO ABORTION LAWS" and lists the website "weneedalaw.ca". The other side shows a picture of a young woman with the text "PREGNANT? NEED HELP? YOU ARE NOT ALONE" and lists the website "CHOICE42.COM".³

11. In or around 2012, Spot Ads began operating an advertising business in Foothills County.⁴ Resident landowners subsequently began placing Spot Ads Trailer Signs on their property.⁵
12. About the same time, in 2012, Foothills County introduced various bylaw provisions prohibiting Trailer Signs.⁶ Beyond the issuance of three violation tickets in 2014, of which the outcome is unknown, there is no evidence the Trailer Sign prohibition was ever enforced with penal sanctions prior to late 2019.⁷
13. In February 2019, Foothills County contacted the Tops, demanding the removal of their pro-life Trailer Sign from their private property, citing the bylaw that (at that time) prohibited Trailer Signs.⁸ Spot Ads was also contacted in February 2019, with a similar demand to remove all the company's Trailer Signs in the County.⁹ No other action was taken against the Tops' or Spot Ads' Trailer Signs until November 2019.
14. On May 9, 2019, the Tops and Spot Ads filed an Originating Application challenging the constitutionality of the Trailer Sign prohibition as an unjustified infringement of section 2(b) of the *Charter*.
15. Through its Land Use Bylaw, Foothills County prohibits all signs attached to the sides of trailers. In June 2019, Foothills County amended its Land Use Bylaw to clarify the prohibition

³ Affidavit of Jantje Top at para 7, Exhibit "C"; Supplemental Affidavit of Jeremy Graf at para 4, Exhibit "L".

⁴ Transcript of questioning on Affidavit of Josh Laforet at page 5, line 26 - page 6, line 10 [Laforet Transcript].

⁵ Affidavit of John Markiw at para 4; Affidavit of Brian Wirkhorst at para 4; Affidavit of Ross Martin at para 4.

⁶ Transcript of questioning on Affidavit of Darlene Roblin at page 11, lines 3-7 [Roblin Transcript].

⁷ Roblin Transcript at page 14, line 10 – page 15, line 6; page 24, line 25 – page 25, line 12.

⁸ Affidavit of Jantje Top at para 8, Exhibit "D".

⁹ Affidavit of Josh Laforet at para 10, Exhibit "B".

against Trailer Signs in the County and to increase the associated penalties.¹⁰ The relevant provision, which is the subject of the within constitutional challenge, is section 9.24.10(a) of the Land Use Bylaw. It states:

The following signs are prohibited in the County:

- i. 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. (the “Bylaw”)¹¹

16. The term “Vehicle Sign” is defined in the Land Use Bylaw at section 9.24.1 as:

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...¹²

17. No enforcement of the Bylaw proceeded, following its adoption in June, until mid-November 2019, when the County issued demand letters to Spot Ads, the Tops and various other landowners. Penal enforcement measures were undertaken by the County in early December. The County threatened to attend at landowners’ property and forcibly remove the Trailer Signs commencing December 24, 2019.¹³

18. In response, the Applicants brought an application for injunctive relief suspending the enforcement of the Bylaw, which was granted by this Court on December 20, 2019.

¹⁰ Affidavit of Darlene Roblin at paras 4, 6, 7, Exhibits “A”, “B”, and “C”.

¹¹ Affidavit of Darlene Roblin, Exhibit “B” at page 100.

¹² Affidavit of Darlene Roblin, Exhibit “B” at page 98.

¹³ Affidavit of Ross Martin at paras 7-8, Exhibits “B”; Affidavit of Jeremy Graf at paras 11-13, Exhibits “G”, “H”, and “I”.

19. The Applicants now seek to strike the Bylaw as an unjustified limitation of their *Charter* section 2(b) right to freedom of expression. They wish to use Trailer Signs placed on private property to effectively communicate to the public, be it through informing the public regarding matters of public policy, expressing opinions, offering support or advertising local products and services.

PART 4: APPLICABLE LAW

20. The fundamental Canadian right of freedom of expression is celebrated and constitutionally protected in section 2(b) of the *Canadian Charter of Rights and Freedoms*, which states:

Everyone has the following fundamental freedoms:

freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

21. Section 1 of the *Charter* states:

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.

22. Section 52(1) of the *Constitution Act, 1982* states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

PART 5: ARGUMENT

FREEDOM OF EXPRESSION

23. Freedom of expression “has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years.”¹⁴ As the Supreme Court of Canada has found, “[i]t is difficult to imagine a guaranteed right more important to a democratic society

¹⁴ *Christian Heritage Party v City of Hamilton*, 2018 ONSC 3690 at para 39, [2018] OJ No 5105.

than freedom of expression.”¹⁵ Indeed, “[f]reedom in thought and speech... are the essence of our life.”¹⁶ Due to its importance as a fundamental value in our society, any government interference with freedom of expression “must be subjected to the most careful scrutiny” and “calls for vigilance.”¹⁷ To summarize the jurisprudence, “[t]he vital importance of freedom of expression cannot be overemphasized.”¹⁸

24. In the case at bar, the free expression rights of landowners, businesses and the public are engaged. Freedom of expression protects not only those who are speaking, but also the rights of members of the public to receive information, ideas and opinions, including the Applicants’ messages on the Trailer Signs.¹⁹ The expressive rights of the Tops are engaged, as the Trailer Sign on their property contains their own expression. The expressive rights of landowners with Spot Ads’ Trailer Signs on their property are also engaged by the Bylaw, because these landowners participate actively in approving (or not) the content of the communication that is displayed on their land.²⁰ The expressive rights of Spot Ads, and the businesses, service providers and professionals that advertise with Spot Ads are engaged because it is their expression that appears on the Trailer Signs.

25. Roadside signs containing personal or political messages to the public and commercial advertising are common along Alberta’s roadways. The ubiquitous presence of signs is a hallmark of free societies such as Canada. Communication with one’s fellow citizens is part of the lifeblood of democracy.

¹⁵ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 (Cory J.) at para 3, [1989] 2 RCS 1326 [*Edmonton Journal*]. (**TAB 5**)

¹⁶ *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at para 78, [1991] 1 RCS 139, quoting *Boucher v The King*, [1951] SCR 265 at page 288 [*Committee for the Commonwealth of Canada*]. (**TAB 4**)

¹⁷ *R v Sharpe*, 2001 SCC 2 at para 22, [2001] 1 SCR 45 [*Sharpe*] (**TAB 16**); *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at para 36, [2000] 2 SCR 1120. (**TAB 9**)

¹⁸ *Committee for the Commonwealth* at para 95, quoting *R v Kopyto* (1987), 24 OAC 81 at pp 90-91, 62 OR (2d) 449. (**TAB 4**)

¹⁹ *Edmonton Journal* at para 10 (**TAB 5**).

²⁰ Laforet Transcript at page 27, line 27 – page 28, line 6.

26. Not everybody will like every sign they see. Some signs are personally perceived to be ugly, ill-designed or abrasive. Some people may not like a given sign because of its content or because they do not enjoy seeing signs in a given location. However, those who “do not like an idea or an image ...are free to argue against it or simply turn away”.²¹

27. The importance of signs to the functioning and preservation of a free and democratic society has been noted by the Supreme Court of Canada:

In *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, this Court stressed the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources. Signs, which have been used for centuries to communicate political, artistic or economic information, sometimes convey forceful messages. Signs, in various forms, are thus a public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns. (See *Ramsden*, at pp. 1096-97; see also *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 198.)²²

28. Commercial expression such as advertising signs, notwithstanding being of lesser importance than, for example, political expression, is nonetheless protected by section 2(b) of the *Charter*. The Supreme Court of Canada has found that “commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising.”²³ The value attached to commercial expression “derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information.”²⁴ Advertising is therefore “protected by s. 2(b) since it foster[s] informed economic choices”.²⁵

29. The expression that appears on the Trailer Signs and is caught by the Bylaw is not limited to commercial advertising. The Bylaw also catches political and personal expression that engages the core underlying values of freedom of expression, specifically, the values of democratic

²¹ *Sharpe* at para 21. (TAB 16)

²² *R v Guignard*, 2002 SCC 14 at paras 25-26, [2002] 1 SCR 472 [*Guignard*]. (TAB 15)

²³ *Guignard* at para 23. (TAB 15)

²⁴ *Guignard* at para 21 (TAB 15); see also *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, at para 59, 54 DLR (4th) 577. (TAB 6)

²⁵ *Guignard* at para 22. (TAB 15)

discourse and self-fulfillment.²⁶ The infringement caused by the Bylaw is therefore of a serious nature and “must be subjected to the most careful scrutiny”.²⁷

TEST FOR INFRINGEMENT OF FREEDOM OF EXPRESSION

30. To determine if the Bylaw infringes section 2(b) of the Charter, “three questions must be asked”:

- a. Do the Trailer Signs have expressive content that brings them within the *prima facie* protection of section 2(b)?;
- b. If so, does the method or location of the expression remove that protection?;
- c. If the expression is protected by s. 2(b), does the Bylaw infringe that protection, in either in purpose or effect?²⁸

31. The first branch of the test is met: the Trailer Signs contain expressive content. Indeed, the very purpose of the Trailer Signs is to convey messages to the public, be it commercial advertising, political expression, personal opinion or information about free services.²⁹

32. The second part of the test is met as well. The Trailer Signs are not excluded from the protection of section 2(b) of the *Charter* by virtue of their location or method of communication. Expression will be protected unless protecting it in a particular location would undermine the three core values underlying free expression.³⁰ In no way do roadside signs, including commercial advertising signs, undermine such values. On the contrary, the Trailer

²⁶ Affidavit of Jantje Top at paras 4-7, Exhibit “B” and “C”; Affidavit of Darlene Roblin at para 15, Exhibit “G” (Exhibit “G” of Darlene Roblin’s affidavit contains various pictures of signs throughout the County. One of these is of a federal election sign for a candidate for MP associated with a national political party in the federal election riding in which Foothills County is situated); Roblin Transcript at page 24, lines 5-18; *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 75, [2002] 2 SCR 522. (TAB 20)

²⁷ Sharpe at para 22. (TAB 16)

²⁸ *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 at para 37, [2009] 2 SCR 295 [*Greater Vancouver Transportation Authority*] (TAB 7); *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2 at para 38, [2011] 1 SCR 19 [*Canadian Broadcasting Corporation*]. (TAB 1)

²⁹ *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 at para 41, [1989] SCJ No 36. (TAB 8)

³⁰ *Canadian Broadcasting Corporation* at para 37. (TAB 1)

Signs align with the core underlying values of self-fulfillment and democratic discourse. Expression is protected on both private property and on the public property it is communicated through when that property is in the nature of a public roadway, as it is in this case.³¹

33. The third aspect of the test is also met. The effect of the Bylaw is to prohibit a particular type of roadside sign which is an especially effective means of expression because such signs are affordable and efficient at conveying information, ideas and opinions to the public.³² The alleged purpose of the Bylaw may be to “maintain the rural county aesthetics” and “protect the rural character” of the County,³³ but the effect of the Bylaw is to limit freedom of expression.

SECTION 1 JUSTIFICATION ANALYSIS

34. To determine the constitutional validity of the Bylaw, this Court must engage the *Oakes* test, which the Supreme Court of Canada summarized at paragraph 64 of *Canadian Broadcasting Corp. v Canada (Attorney General)*:

The test developed by Dickson C.J. in *Oakes* is well known. When a protected right is infringed, the government must justify the limit by identifying a pressing and substantial objective, demonstrating that there is a rational connection between the objective and the infringement of the right, and showing that the chosen means interferes as little as possible with the right and that the salutary effects of the measure outweigh its deleterious effects.³⁴

35. The objective of the Bylaw is not rationally connected to the infringement. The means chosen by the County, a complete prohibition, do not interfere as little as possible with the *Charter* freedom at stake, and there is a lack of overall proportionality between the purported benefit of the Bylaw and the severe impact on freedom of expression.

36. The County states that the objective of the Bylaw is to “maintain the rural county aesthetics” and “maintain the natural beauty of the rural landscape”.³⁵ It is not clear such an objective is

³¹ *Committee for the Commonwealth of Canada* at paras 152, 155, 225 (**TAB 4**); *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at paras 61, 66-68, [2005] 3 SCR 141. (**TAB 10**)

³² Affidavit of Warren Cole at paras 3-4, 6-7, Exhibits “A” and “B”; Affidavit of Josh Laforet at para 4.

³³ Affidavit of Darlene Roblin at para 8.

³⁴ *Canadian Broadcasting Corporation* at para 64. (**TAB 1**)

³⁵ Affidavit of Darlene Roblin at para 8.

as pressing and substantial as “the prevention of visual pollution” or “avoiding... aesthetic blight”.³⁶ Nonetheless, the Applicants do not contest that such an objective may meet the required threshold.

Rational Connection

37. The implication of identifying the objective of a *prohibition* on Trailer Signs as maintaining “rural county aesthetics” and “the natural beauty of the rural landscape” is that the existence of *any* Trailer Signs along *any* of the major highways in the County somehow frustrates that objective. Indeed, the County claims it is “*impossible*” to achieve this objective if resident landowners place Trailer Signs on their properties.³⁷ However, the evidence supports the conclusion that there is no rational connection between the prohibition of Trailer Signs on the side of a major highway and rural aesthetics.
38. First, the County prohibits signs attached to the side of trailers, but does not prohibit trailers with no signs attached to them being placed along highways.³⁸ If the purpose of the Bylaw is rural aesthetics, it is irrational to prohibit Trailer Signs visible from a highway, but not trailers themselves. Removing a sign from the side of a trailer does not make the trailer more visually appealing or rural in character, nor does it “obscure visibility of the natural landscape” any less. Like in *Guignard*, the Bylaw is arbitrary.³⁹ If the same signs attached to trailers in the County were instead attached to a billboard, they would be permitted.
39. Second, it is not at all clear how the Trailer Signs are any more incompatible with “rural” aesthetics than other types of roadside signs which the County permits.

³⁶ *Guignard* at para 29 (TAB 15); *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084 at para 40, 106 DLR (4th) 233.

³⁷ Affidavit of Darlene Roblin at para 8.

³⁸ Affidavit of Darlene Robin Exhibit “B”; Roblin Transcript at page 22, line 23 – page 24, line 4.

³⁹ *Guignard* at para 29. (TAB 15)

40. The pictures of the Trailer Signs put before this Court by the County do not accurately reflect the actual appearance of the Trailer Signs.⁴⁰ The fact is, the Trailer Signs are clean and attractive and in good repair.⁴¹
41. Despite its stated concern about natural beauty and rural aesthetics, Foothills County permits “billboard signs” in the County, which are similar to the Trailer Signs in size and appearance.⁴² The Trailer Signs do not rise high off the ground, and no higher than a permitted billboard sign does, and therefore do not, as the County claims, “obscure visibility of the natural landscape” to any significant degree and no more than a billboard sign.⁴³ Further, on the eastern side of Highway No. 2A between Aldersyde and High River, there is a sign many times larger than the Trailer Signs.⁴⁴ It is unknown if the County has received complaints about these signs, as it has claimed it has received about Trailer Signs.⁴⁵ It is not rational to completely prohibit one type of sign in the name of aesthetics, while permitting other, similar types of signs that differ very little in appearance.
42. Third, Foothills County has an uneven distribution of population and spans a large and diverse geographic area, ranging from very rugged and very rural foothills territory in the west, complete with scores of low-volume, narrow country roads and the more densely-populated east, with its large towns and multi-lane freeways. The Trailer Signs are only placed alongside Highways No. 2 and the eastern end of No. 7, between Okotoks and Highway No. 2.⁴⁶ Not surprisingly, these represent the busiest stretches of highway in the county, and are therefore the best places to situate a sign, because they are the best locations to convey a message to as

⁴⁰ Affidavit of Darlene Roblin Exhibit “G”.

⁴¹ Affidavit of Josh Laforet at para 12; Affidavit of Warren Cole paras 4-7, Exhibits “A” and “B”; Affidavit of Ross Martin para 4; Affidavit of John Markiw at para 4; Affidavit of Brian Wickhorst at para 5, Exhibit “A”; Affidavit of Jeremy Graf Exhibit “G”; Supplemental Affidavit of Jeremy Graf Exhibit “L”.

⁴² Affidavit of Darlene Roblin Exhibit “B”; Roblin Transcript at page 12, lines 21 – 23, 26; Supplemental Affidavit of Ross Martin at para 3, Exhibit “D”.

⁴³ Affidavit of Darlene Roblin at para 8; Supplemental Affidavit of Ross Martin at para 3, Exhibit “D”.

⁴⁴ Supplemental Affidavit of Ross Martin at para 6, Exhibit “G”.

⁴⁵ Affidavit of Darlene Roblin at para 7; Supplemental Affidavit of Darlene Roblin at para 3.

⁴⁶ Affidavit of Darlene Roblin Exhibit “F”.

many people as possible. These particular highways are major, high-speed thoroughfares that connect the towns of High River and Okotoks to Calgary, and the preceding to the rest of southern Alberta.

43. Such busy highways are not “scenic routes” placed in a picturesque county setting with no industry or urban development visible, such as Highways No. 22 (Cowboy Trail) and No. 549 might reasonably be characterized. These highways are in the western half of the County and are less-travelled country roads from which motorists may enjoy the mountain views and rolling hillside that is characteristic of the western portion of the County. It is not rationally connected to prohibit Trailer Signs in every part of the County, or along every highway, to promote rural aesthetics, as if all of the roadways in the County are “rural” in nature. The high-speed, multi-lane freeways that run through the County are decidedly not “rural” in nature.
44. The County seems to indicate that roadside signs are a uniquely urban phenomenon and that rural distinctiveness can only be maintained by banning Trailer Signs. But the onus is on the County to demonstrate roadside signage along major routes is incompatible with maintaining a rural character in the County. This Court can take judicial notice that roadside signage is common along high-traffic highways, especially ones that lead to major cities such as Calgary, or connect those cities to other major cities.

Minimal Impairment

45. In order to pass this part of the *Oakes* test, a law must “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.”⁴⁷
46. Applied to the context of freedom of expression, a minor limitation on section 2(b) rights, such as placing certain conditions on a particular means of expression, is potentially justifiable in the face of demonstrably pressing competing policy goals. But a complete prohibition is unlikely to pass muster, not least because such an extreme measure is rarely required to meet

⁴⁷ *Sharpe* at para 96. (TAB 16)

the stated goal. Such is the case at bar. Even assuming a rational connection, a total ban on Trailer Signs is not required to maintain the rural characteristic of Foothills County.

47. As McLachlin J. noted (as she then was) in *RJR-MacDonald Inc. v Canada (Attorney General)*:

As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban: *Ramsden v. Peterborough (City)*, supra, at pp. 1105-06; *Ford v. Quebec (Attorney General)*, supra, at pp. 772-73. The distinction between a total ban on expression, as in *Ford* where the legislation at issue required commercial signs to be exclusively in French, and a partial ban such as that at issue in *Irwin Toy*, supra, is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. ... **A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective.**⁴⁸

48. The Supreme Court in *R v Guignard* found that the sign prohibition in that case was:

[N]ot a reasonable solution as among the solutions normally available to a government within the latitude it has to make these judgments. The by-law severely curtails Guignard's freedom to express... It forces him to use advertising methods that presuppose the availability of adequate financial resources."⁴⁹

49. In *Vann Niagara Ltd. v Oakville (Town)*,⁵⁰ the Ontario Court of Appeal, struck down as an unjustified limitation of section 2(b) of the *Charter* a bylaw that prohibited all "third-party signs", defined as "any sign which directs attention to products, goods, services, activities or facilities which are not the principal products, goods, services, activities or facilities provided on the premises upon which the sign is located".⁵¹ The Court of Appeal determined that the bylaw failed the *Oakes* test because it was not minimally impairing or proportionate.⁵² The

⁴⁸ *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199 at para 163, [1995] SCJ No. 68 [emphasis added]. (TAB 18)

⁴⁹ *Guignard* at para 30. (TAB 15)

⁵⁰ [2002] OJ No 2323, 214 DLR (4th) 307 [*Vann Niagara Ltd.* [2002]]. (TAB 22) The part of this ruling relied on by the Applicants was not appealed to the Supreme Court of Canada: *Vann Niagara Ltd. v Oakville (Town)*, 2003 SCC 65 at para 1, [2003] SCJ No 71. (TAB 23)

⁵¹ *Vann Niagara Ltd.* [2002] at para 9. (TAB 22)

⁵² *Vann Niagara Ltd.* [2002] at paras 65-68 [emphasis in the original]. (TAB 22)

Court specifically noted that the Supreme Court of Canada struck down the challenged law in *R v Guignard* “because it infringed on a *property owner’s right* to erect a sign”.⁵³

50. Following the above case, the Town of Oakville tried again to restrict roadside signs, a second challenge was brought, and again the Ontario Court of Appeal weighed in. In *Vann Media Inc. v Oakville (Town)* (2008),⁵⁴ the Court of Appeal struck down several of the challenged provisions because they were not minimally impairing of freedom of expression.⁵⁵ In that case, as in the case at bar, the Respondent municipality did not:

[R]ecognize the cumulative impact of the remaining provisions and the extent of the resulting intrusion on the right to freedom of expression. Nor... does it appear to have considered tailoring the restrictions to reduce the intrusion in a manner that would still accomplish its goals. In these circumstances, little deference can be given to the balance struck.⁵⁶

51. In *R v Ad Vantage Signs Ltd.*,⁵⁷ the Respondent municipality, as in the case at bar, put forward aesthetics as a purpose for its bylaw prohibiting mobile signs. Foothills County, similar to the municipality in that case, relies on the general, unsupported contention that the prohibition on Trailer Signs is justified because of “complaints”.⁵⁸ However, the County is either unwilling or unable to provide this court any evidence or record of the “complaints” referred to by the County’s affiant.⁵⁹ Absolutely nothing is known about the purported complaints alluded to. Charron J.A., as she then was, found at paragraph 22 of *R v Ad Vantage Signs Ltd.*:

In so far as the need to maintain aesthetics is concerned, no evidence was presented beyond the general assertion that mobile signs are considered unsightly by the public. The prevention of aesthetic blight will be of varying importance, depending on the particular character of the community. Obviously, the community interest is different in a heritage community than it is in a busy, urban centre. In some communities, even a total prohibition

⁵³ *Vann Niagara Ltd.* [2002] at para 66. (TAB 22)

⁵⁴ 2008 ONCA 752 [2008] OJ No 4567 [*Vann Media Inc.* [2008]]. (TAB 21)

⁵⁵ *Vann Media Inc.* [2008] at paras 42-55, 67. (TAB 21)

⁵⁶ *Vann Media Inc.* [2008] at para 44. (TAB 21)

⁵⁷ [1997] OJ No 2869, 34 OR (3d) 65 (*Ad Vantage Signs Ltd.*). (TAB 14)

⁵⁸ Affidavit of Darlene Roblin at para 7; Supplemental Affidavit of Darlene Roblin at para 3.

⁵⁹ Roblin Transcript at page 13, lines 3-17.

of mobile and portable signs may well be justified. **However, in the absence of any evidence as to the particular needs in the City of Stoney Creek, I am unable to find that the means chosen by the respondent minimally impair the appellants' rights or that they are proportional to this stated objective.**⁶⁰

52. Charron J.'s ruling in that case was later favourably commented on by the Court of Appeal in *Vann Niagara Ltd.* (2002), including the fact that the sign prohibition in that case was justified by the fact that other types of signs were permitted:

In [*Ad Vantage Signs Ltd.*], Charron J.A. refused to accept the city's contention that because the by-law that permitted many other types of signs, including billboards, it struck a fair balance between individual's rights and the community's interest in pursuing its legitimate goals (which were virtually identical to the goals of the by-law in this case). Charron J.A. held that regulation of the size, number, and location of the mobile signs would achieve the legislative purpose equally as effectively as the total prohibition. Since the city failed to show that the by-law minimally impaired the right to freedom of expression, Charron J.A. declared the by-law invalid.⁶¹

53. In contrast, in cases such as *Canadian Mobile Sign Association v Burlington (City)*,⁶² *Nanaimo (City) v Northridge Fitness Centre Ltd.*,⁶³ *Whitehorse (City) v Wharf on Fourth Inc.*⁶⁴ *Nichol (Township) v McCarthy Signs Co. Ltd.*,⁶⁵ and *R v 718916 Alberta Ltd.*⁶⁶ the sign-limiting bylaws being challenged as an infringement of freedom of expression were upheld first, because they did not catch non-commercial expression and, second, because they were not complete prohibitions on commercial expression, but rather regulating provisions that only placed conditions on the relevant signs.

54. The Bylaw is further not minimally impairing because it not only catches commercial expression, but **any** expression that appears on a Trailer Sign, including political and personal expression which goes to the core of the protection of section 2(b). Unlike commercial

⁶⁰ *Ad Vantage Signs Ltd.* at para 22 [emphasis added]. (TAB 14)

⁶¹ *Vann Niagara Ltd.* [2002] at para 30. (TAB 22)

⁶² [1997] OJ No 2870 at paras 3, 13, 19, 34 OR (3d) 134. (TAB 2)

⁶³ 2006 BCPC 67 at paras 57, 61, [2006] BCJ No 441. (TAB 11)

⁶⁴ 2004 YKTC 28 at paras 4, 5, 27, 31, [2004] YJ No 27. (TAB 23)

⁶⁵ [1997] OJ No 2053 at para 12, 33 OR (3d) 771. (TAB 12)

⁶⁶ [2000] AJ No 1666 at paras 74-75, 290 AR 89. (TAB 13)

expression, which does not benefit from the same level of section 2(b) protection, expression which invokes the core values underlying freedom of expression demands a high degree of protection.⁶⁷

55. The Bylaw prohibits Trailer Signs, such as the Tops' signs and political campaign signs, which further the core values of self-fulfillment and democratic discourse.⁶⁸ This was also a fatal flaw of the bylaw impugned in *R v Guignard*.⁶⁹ The Bylaw in this case is overbroad and goes far beyond what is reasonably necessary to achieve the County's objective of aesthetics.

56. Trailer Signs are an especially effective, affordable and accessible means of expression and communication with the public in Foothills County, both for advertising purposes and for purposes of personal and political expression. In fact, much of the expression contained in the Trailer Signs would not be reproduced on any other types of roadside sign due to cost.⁷⁰ The onus is on the County to demonstrate that equally accessible and effective means of roadside expression alternative to Trailer Signs is available in the County.⁷¹

57. By entirely prohibiting such signs, the Bylaw does not minimally impair freedom of expression and is therefore not a justified limitation of section 2(b) of the *Charter*.

Overall Proportionality

58. The Supreme Court of Canada recognizes that the analysis of the fourth part of the *Oakes* test takes a wholesome view of the deleterious effects of the bylaw, stating in *Canadian Broadcasting Corp. v Canada (Attorney General)*:

The first three stages of the *Oakes* analysis are anchored in the assessment of the impugned law's purpose. "Only the fourth branch takes full account of the 'severity of the deleterious effects of a measure on individuals or groups'" (*Hutterian*, at para. 76). At this

⁶⁷ *Greater Vancouver Transportation Authority* at paras 7, 80. (TAB 7)

⁶⁸ Affidavit of Jantje Top at paras 4-7, Exhibit "B" and "C"; Affidavit of Darlene Roblin at para 15, Exhibit "G"; Roblin Transcript at page 24, lines 5-18.

⁶⁹ *Guignard* at para 24, 29-31. (TAB 15)

⁷⁰ Affidavit of Josh Laforet at para 3; Affidavit of Warren Cole at para 3.

⁷¹ *Vann Media Inc.* [2008] at para 52. (TAB 21)

stage, therefore, it is necessary to assess the consequences of the impugned measure (*Toronto Star*, at para. 50).⁷²

59. In *Ramsden v Peterborough (City)*, the Supreme Court of Canada, in considering the challenged bylaw that both infringed freedom of expression⁷³ and was a “total ban”⁷⁴, stated:

the benefits of the by-law are limited while the abrogation of the freedom is total, thus proportionality between the effects and the objective have not been achieved. While the legislative goals are important, they do not warrant the complete denial of access to a historically and politically significant form of expression. I would agree with the majority of the Ontario Court of Appeal, p. 294, on this point that ‘[a]s between a total restriction of this important right and some litter, surely some litter must be tolerated.’⁷⁵

60. Similarly, in *R v Guignard*, the Supreme Court of Canada weighed the repercussions of the bylaw on freedom of expression versus the benefit to the municipality and identified that:

[t]he impact of the by-law on Guignard's freedom of expression is disproportionate to any benefit that it secures for the municipality. In this respect, we have seen that posting signs is an optimum means of expression for individuals (see *Ramsden*, at p. 1102). By limiting that means of expression, the by-law amounts to a serious and unjustified infringement of a form of expression that has been commonly used for a long time and is closely connected to the values underlying the protection of freedom of expression.⁷⁶

61. There are similar concerns about the prohibited Trailer Signs being the optimum expression for advertisers. Since conventional roadside billboard signs are a prohibitively high cost, Trailer Signs allow advertisers to purchase advertising to inform the public at a reduced cost that is feasible for their business. They have the similar quality, appearance and effectiveness of conventional billboard signs but are the optimal means of expression.⁷⁷

⁷² *Canadian Broadcasting Corporation* at para 87. (TAB 1)

⁷³ *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084 at para 39, [1993] SCJ No 87 [*Ramsden*]. (TAB 17)

⁷⁴ *Ramsden* at para 40. (TAB 17)

⁷⁵ *Ramsden* at para 46. (TAB 17)

⁷⁶ *Guignard* at para 31. (TAB 15)

⁷⁷ Affidavit of Josh Laforet at paras 3 and 4; Affidavit of Warren Cole at paras 3 and 4; Affidavit of Jantje Top paras 5 and 6.

62. Likewise, Mr. and Mrs. Top are able to express their personal beliefs and create democratic discourse through this avenue. As landowners with a trailer, this avenue is the optimal and chosen means for them to express themselves regarding abortion. This is evidenced by the fact they have had this trailer sign since 2006.⁷⁸
63. Trailer Signs have been demonstrated to be a highly chosen means of expression because they are accessible financially and exceedingly effective at communicating to the public. The prohibition of this entire category of sign is excessively disproportionate to claims about rural aesthetics, regarding which there is no evidence from members of the community.
64. There is no evidence of how many complaints have been received, the nature of the complaints, who the complaints originated from, whether the complaints all originate from the same person, what particular Trailer Sign(s) the complaints are about, or what the complainant(s) have requested Foothills County to do about whatever they have complained about. Foothills County residents undoubtedly complain about any number of things.⁷⁹ Mere allusions to unproduced complaints about Trailer Signs do not remotely justify prohibiting landowners from using such signs as their chosen means of exercising their constitutional right of free expression on their land.
65. Aesthetics is not unimportant. The appearance of the area where one lives undoubtedly contributes to human flourishing. But it cannot be reasonably contended that mere aesthetics contributes to human flourishing nearly as much as the foundational human right of free expression.⁸⁰ When the two come into conflict, they are not on the same footing. Only a serious, fully articulated and supported aesthetics concern, which is absent in this case, is capable of justifying a limitation on freedom of expression, and then only to the degree that is necessary.

⁷⁸ Affidavit of Jantje Top at paras 5 and 6.

⁷⁹ Roblin Transcript at page 13, lines 19-21.

⁸⁰ Ramsden at para 46. (TAB 17)

PART 6: RELIEF SOUGHT

66. A declaration pursuant to section 52(1) of the *Constitution Act, 1982* that section 9.24.10(a) of the Foothills County Land Use Bylaw unjustifiably infringes section 2(b) of the *Charter* and is therefore void and of no force or effect;
67. Further, a declaration that section 9.24.10(a) of the Foothills County Land Use Bylaw infringes section 1(d) of the *Alberta Bill of Rights*, RSA 2000 c A-14;
68. An Order extending the injunction granted by Poleman J. to the date of release of this Court's decision in the within matter, if necessary;
69. Costs; and
70. Such further and other relief as this Honourable Court deems just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 31st day of January 2020:



James Kitchen

Jocelyn Gerke
Student-at-Law

Counsel for the Applicants

Table of Authorities to the Factum of the Applicants

- TAB 1. *Canadian Broadcasting Corporation v Canada (Attorney General)*, 2011 SCC 2, [2011] 1 SCR 19
- TAB 2. *Canadian Mobile Sign Association v Burlington (City)*, [1997] OJ No 2870, 34 OR (3d) 134.
- TAB 3. *Christian Heritage Party v City of Hamilton*, 2018 ONSC 3690, [2018] OJ No 5105
- TAB 4. *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, [1991] 1 RCS 139
- TAB 5. *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, [1989] 2 RCS 1326
- TAB 6. *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577
- TAB 7. *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31, [2009] 2 SCR 295
- TAB 8. *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, [1989] SCJ No 36
- TAB 9. *Little Sisters Book & Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120
- TAB 10. *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141
- TAB 11. *Nanaimo (City) v Northridge Fitness Centre Ltd*, 2006 BCPC 67, [2006] BCJ No 441
- TAB 12. *Nichol (Township) v McCarthy Signs Co Ltd*, [1997] OJ No 2053, 33 OR (3d) 771
- TAB 13. *R v 718916 Alberta Ltd*, [2000] AJ No 1666, 290 AR 89
- TAB 14. *R v Ad Vantage Signs Ltd*, [1997] OJ No 2869, 34 OR (3d) 65
- TAB 15. *R v Guignard*, 2002 SCC 14, [2002] 1 SCR 472
- TAB 16. *R v Keegstra*, [1990] 3 SCR 697, [1990] 3 RCS 697
- TAB 17. *R v Sharpe*, 2001 SCC 2, [2001] 1 SCR 45
- TAB 18. *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084, [1993] SCJ No 87
- TAB 19. *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, [1995] SCJ No 68

- TAB 20.** *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522
- TAB 21.** *Vann Media Inc. v. Oakville (Town)*, 2008 ONCA 752
- TAB 22.** *Vann Niagara Ltd. v Oakville (Town)*, [2002] OJ No 2323, 214 DLR (4th) 307
- TAB 23.** *Vann Niagara Ltd. v Oakville (Town)*, 2003 SCC 65, [2003] SCJ No. 71
- TAB 24.** *Whitehorse (City) v Wharf on Fourth Inc*, 2004 YKTC 28, [2004] YJ No 27