COURT OF APPEAL OF ALBERTA

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APPLICANTS:	GERRIT TOP, JANTE TOP, SPOT ADS INC, ROSS MARTIN and JOHN MARKIW
STATUS ON APPEAL:	APPELLANTS
RESPONDENT:	MUNICIPAL DISTRICT OF FOOTHILLS NO. 31
STATUS ON APPEAL:	RESPONDENT
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Appeal from the Decision of
The Honourable Mr. Justice N. Devlin
Dated the 8th day of September 2021
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PART 1 – FACTS

A. Overview

1. This appeal is about the constitutionality of a municipal bylaw that limits freedom of expression by prohibiting a category of signs. The core issue is whether the Respondent's elimination—and not mere regulation—of a means of expression is proportionate to the resulting infringement on the free expression rights of those who use that means.

2. The Appellants seek to express their views, both personal and commercial, on a particular type of roadside sign: those attached to transport truck trailers. The impugned bylaw of the Respondent is a complete prohibition on this type of sign. The impetus for the ban is the Respondent's objective of creating pleasing rural aesthetics that it says are incompatible with these signs.

3. Entirely prohibiting a particular type of roadside sign is not rationally connected to the Respondent's objective, as it permits other, similar types of signs. It also is not minimally impairing of freedom of expression because there are several less intrusive means available to effectively address the Respondent's aesthetic concerns. Lastly, a total ban on signs attached to trailers is disproportionate to the purported benefits achieved by the ban.

4. Signs are, and have been, recognized by the courts of this country as a central feature of a free society that permits open communication between citizens. Marginal, subjective gains in aesthetics are not somehow so important that overriding free speech to the point of entirely removing an especially effective, accessible, and favoured form of expression is justified.

B. The Parties

5. The Appellants, Gerrit and Jantje Top (the "Tops"), are resident landowners of the Respondent municipality. Since 2006, the Tops have had a trailer on their private property, viewable from Highway No. 2, with a sign attached to each side.[1] These signs express the

[1] Affidavit of Jantje Top at para 6 **[Extracts of Key Evidence (EKE) TAB 1]**.

Tops' moral and political convictions and opinions regarding abortion and include information for women with unplanned pregnancies about how to access support services.[2]

6. The Appellant 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 within the Respondent municipality. 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.[3]

7. The Appellants, Ross Martin and John Markiw, are also resident landowners that have had trailer signs on their properties since 2012 and 2017 respectively.[4]

8. The Respondent, Municipal District of Foothills No. 31 (the "County"), is a large municipal district south of and adjacent to Calgary.

C. Key Material Facts

9. The County has several major roadways running through it. Within its borders are the southern end of Macleod Trail and Deerfoot Trail, a long stretch of Highway No. 2 (a multi-lane, divided freeway), a stretch of Highway No. 2A that runs south through Okotoks and Aldersyde to High River, and the entirety of Highway No. 7.

10. Since the 1990s, County resident landowners with land 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").[5]

11. 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.[6] In 2018, the Tops' Trailer Sign was

[2] Affidavit of Jantje Top at paras 5 and 6, Exhibits "B" and "C" **[EKE TABs 1, 1B, and 1C]**.
[3] Affidavit of Josh Laforet **[EKE TAB 2]**.
[4] Affidavit of John Markiw at para 4 **[EKE TAB 6]**; Affidavit of Ross Martin at para 4 **[EKE TAB 5]**.
[5] Affidavit of Brian Wickhorst at para 4 **[EKE TAB 3]**.
[6] Affidavit of Jantje Top at paras 5-6, Exhibit "B" **[EKE TABs 1 and 1B]**.

upgraded to include a new sign on either side of the trailer. One side states, "CANADA HAS 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".[7]

12. In or around 2012, Spot Ads began operating an advertising business in the County.[8] Resident landowners subsequently began placing Spot Ads Trailer Signs on their property.[9]

13. About the same time, in 2012, the County introduced various bylaw provisions prohibiting Trailer Signs.[10] 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.[11]

14. In February 2019, the 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.[12] Spot Ads was also contacted in February 2019, with a similar demand to remove all the company's Trailer Signs in the County.[13] 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, the County prohibits all signs attached to the sides of trailers. In June 2019, the County amended its Land Use Bylaw to clarify the prohibition against Trailer Signs in the County and to increase the associated penalties.[14] The relevant provision,

[7] Affidavit of Jantje Top at para 7, Exhibit "C" **[EKE TABs 1 and 1C]**; Supplemental Affidavit of Jeremy Graf at para 4, Exhibit "L" **[EKE TABs 8 and 8L]**.
[8] Transcript of questioning on the Affidavit of Josh Laforet at page 5, line 26 - page 6, line 10 (Laforet Transcript) **[EKE TAB 15]**.
[9] Affidavit of John Markiw at para 4 **[EKE TAB 6]**; Affidavit of Brian Wickhorst at para 4 **[EKE TAB 3]**; Affidavit of Ross Martin at para 4 **[EKE TAB 4]**.
[10] Transcript of Questioning on the Affidavit of Darlene Roblin at page 11, lines 3-7 (Roblin Transcript) **[EKE TAB 13]**.
[11] Roblin Transcript at page 14, line 10 – page 15, line 6 and page 24, line 25 – page 25, line 12 **[EKE TAB 13]**.
[12] Affidavit of Jantje Top at para 8, Exhibit "D" **[EKE TABs 1 and 1D]**.
[13] Affidavit of Josh Laforet at para 10, Exhibit "B" **[EKE TABs 2 and 2B]**.
[14] Affidavit of Darlene Roblin at paras 4, 6, 7, Exhibits "A", "B", and "C" **[EKE TABs 10, 10A-C]**.

which is the subject of the within constitutional challenge, is section 9.24.10(a) of the Land Use Bylaw. It states that 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")[15]

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…[16]

17. The County's Land Use Bylaw is enacted under the statutory authority of the *Municipal Government Act* (*MGA*) section 640,[17] which states that "[e]very municipality must pass a land use bylaw".[18] The *MGA* was amended in December 2020 to remove the provisions mentioned by the learned chambers judge at paragraph 20 of his reasons.[19] Now the applicable section 640(1.1) of the *MGA* states:

> (1.1) A land use bylaw may prohibit or regulate and control the use and development of land and buildings in a municipality, including, without limitation, by
>
> (a) imposing design standards,
> (b) determining population density,
> (c) regulating the development of buildings,
> (d) providing for the protection of agricultural land, and
> (e) providing for any other matter council considers necessary to regulate land use within the municipality.[20]

[15] Affidavit of Darlene Roblin, Exhibit "B" at page 100 **[EKE TAB 10B]**.
[16] Affidavit of Darlene Roblin, Exhibit "B" at page 98 **[EKE TAB 10B]**.
[17] *Municipal Government Act*, RSA 2000, c M-26 ("*MGA*").
[18] *MGA* s 640.
[19] *Top v Municipal District of Foothills No. 31*, 2020 ABQB 521 at para 20 (the "Decision").
[20] *MGA* s 640(1.1).

18. On February 26, 2020, the Appellants' Originating Application to strike the Bylaw as an unjustified limitation of their *Charter* section 2(b) right to freedom of expression was heard. On September 8, 2020, Justice Devlin dismissed the Appellants' Originating Application (the "Decision"), which is the subject of this appeal.

PART 2 – GROUNDS OF APPEAL

19. The Appellants appeal the Decision on the following grounds:

    a. The learned chambers judge erred in law in failing to meaningfully and substantively consider and balance the personal and political expression of Gerrit and Jantje Top and engaged only in a substantive analysis of the commercial expression of Spot Ads;

    b. The learned chambers judge erred in law in determining that the Bylaw is rationally connected to the County's objective of maintaining rural aesthetics such that the Bylaw's limitation of freedom of expression as protected by section 2(b) of the *Charter* is capable of being saved by section 1 of the *Charter*;

    c. The learned chambers judge erred in law in determining that the Bylaw minimally impairs freedom of expression such that the Bylaw is capable of being saved under section 1 of the *Charter*; and

    d. The learned chambers judge erred in law in determining that the benefits of the Bylaw are proportionate to the deleterious effects of the Bylaw's limitation of freedom of expression such that the Bylaw is capable of being saved by section 1 of the *Charter*.

PART 3 – STANDARD OF REVIEW

A. The Applicable Standard of Review is Correctness

20. The standard of review applicable for all of the above grounds of appeal is correctness, as they are all errors of law or errors of mixed fact and law where the legal question is readily extricable.

21. For questions of law, the standard of review is correctness.[21] The Supreme Court of Canada recognized that "[m]atters of mixed fact and law lie along a spectrum".[22] Regarding some errors, the legal question can be extracted from the factual question and be subject to the correctness standard as an error of law. This occurs when "an incorrect [legal] standard" is applied or there has been "a failure to consider a required element of a legal test, or similar error in principle."[23]

PART 4 – ARGUMENT

A. The learned chambers judge failed to meaningfully and substantively consider and balance the personal and political expression of the Tops

22. Thirty-six years ago, in *R v Big M Drug Mart*[24], Justice Dickson elaborated on the definition of freedom and expressed it in terms of the *absence of coercion or constraint* by the state:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.[25]

23. Freedom of expression is one of the fundamental freedoms articulated in the *Charter* under section 2. Indeed, "[i]t is difficult to imagine a guaranteed right more important to a democratic society".[26] *Charter* protections exist to act as a bulwark against the long arm of government. Due to its importance as a fundamental value in our society, any government

[21] *Housen v Nikolaisen,* 2002 SCC 33 at para 8, [2002] 2 SCR 235 ("*Housen*").
[22] *Housen* at para 36.
[23] *Housen* at para 36.
[24] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 1985 CanLII 69 (SCC) ("*Big M Drug Mart*").
[25] *Big M Drug Mart* at para 95.
[26] *Edmonton Journal v Alberta (Attorney General),* [1989] 2 SCR 1326 (Cory J.) at para 3, 1989 CanLII 20 (SCC) ("*Edmonton Journal*").

interference with freedom of expression "must be subjected to the most careful scrutiny" and "calls for vigilance".[27]

24. The Supreme Court of Canada has "long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*", including freedom of expression.[28] According to the Supreme Court, "an activity by which one conveys or attempts to convey meaning will *prima facie* be protected by s. 2(b)."[29] All three of the core values underlying freedom of expression, self-fulfillment, truth-finding, and democratic discourse, are engaged by the content of the Tops' sign and the fact such content is caught by the overly wide net cast by the Bylaw. The Tops' Trailer Sign goes to the core of freedom of expression, and it is therefore more difficult to justify an infringement under section 1.[30]

25. The learned chambers judge failed to give full weight to the section 2(b) rights of Gerrit and Jante Top. He recognized that the Tops' "impacted expression is core to their section 2(b) rights" yet commented that they "have effectively been caught up in a commercial regulation dispute".[31] The Decision reflects a minimization of the strong *Charter* protection of freedom of expression and the values that underlie this protection and too readily upholds the Bylaw's limitation of the Tops' section 2(b) rights under section 1 of the *Charter*.

[27] *R v Sharpe*, 2001 SCC 2 at para 22, [2001] 1 SCR 45 ("*Sharpe*"); *Little Sisters Book & Art Emporium v Canada (Minister of Justice),* 2000 SCC 69 at para 36, [2000] 2 SCR 1120 ("*Little Sisters*").
[28] *Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, [2009] 2 SCR 295 at para 27, 2009 SCC 31 (CanLII) ("*Greater Vancouver*").
[29] *Greater Vancouver* at para 27.
[30] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 75, [2002] 2 SCR 522; see also *Irwin Toy Ltd. v Quebec (Attorney General*), [1989] 1 SCR 927 at p 976, 1989 CanLII 87 (SCC); *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 at para 74, [2005] 3 SCR 141.
[31] The Decision at para 111.

B. The learned chambers judge erred in law in finding the Bylaw rationally connected to the County's objective of maintaining rural aesthetics

26. The first part of the proportionality test under section 1 requires an analysis of whether the measures taken to achieve the objective are rationally connected to that goal. The measures cannot be "arbitrary, unfair or based on irrational considerations".[32]

27. Applied to the context of this case, the relevant question is whether the complete prohibition of Trailer Signs achieves the County's objective ***in a manner that is not arbitrary or unfair***. Obviously, reason and logic point to the removal of signage generally contributing to the reduction of non-natural features and therefore the elimination of all Trailer Signs is, *prima facie*, rationally connected to improved rural aesthetics.[33] However, the analysis does not end there.

28. The fact is, the County permits conventional billboard signs, both on paper and in practice, that are not meaningfully distinguishable from Trailer Signs.[34] Unless there is evidence or a solid basis in reason, logic, and common sense to demonstrate that Trailer Signs are objectively and measurably different from billboard signs, as the two types of signs relate to rural aesthetics or obstruction of the countryside, it is arbitrary and unfair to permit conventional billboards while entirely outlawing Trailer Signs. A law that is arbitrary and unfair is not rationally connected to its objective.

29. The evidence from the Appellants is that the actual Trailer Signs that are the subject of this case are functionally equivalent to billboard signs regarding the relevant aesthetic characteristics of the two types of signs. The County has provided no evidence to refute this or to substantiate its assertion that Trailer Signs are more aesthetically unpleasing than conventional billboard signs as it relates to the County's rural aesthetics objective. Without a

[32] *R v Oakes*, [1986] 1 SCR 103 at para 74, 1986 CanLII 46 (SCC) ("*Oakes*").
[33] *Stoney Creek (City of) v Ad Vantage Signs Ltd.*, (1997), 34 OR (3d) 65 (CA) at para 17, 1997 CanLII 561 (ON CA) ("*Ad Vantage Signs Ltd*"); The Decision at para 51.
[34] Affidavit of Darlene Roblin Exhibit "B" **[EKE TAB 10B]**; Roblin Transcript at page 12, lines 21 – 23, 26 **[EKE TAB 13]**; Supplemental Affidavit of Ross Martin at para 3, Exhibit "D" **[EKE TABs 5 and 5D]**; Appeal Record Part 3, Hearing Transcript at pages 18-19 (Hearing Transcript).

supporting record, the County's repeated assertions of complaints from residents is meaningless.

30. The learned chambers judge erred in law in finding the Bylaw to be rationally connected to its objective by virtue of reason, logic, and common sense. The ability of government and the court to rely on reason, logic and common sense, where appropriate, is not a blank cheque for first instance judges to make findings of fact contrary to the record before them.[35] The actual evidence before the learned chambers judge does not support a finding of meaningful, non-arbitrary distinctions between Trailer Signs and conventional billboard signs. Instead of exercising judicial restraint and taking the evidentiary record as it was, the learned chambers judge makes a number of unsupported factual findings in paragraphs 58-59 of the Decision.

31. Notwithstanding the learned chambers judge's statement that "ugliness is in the eye of the beholder" and that he "is not called upon to judge a beauty contest between signage materials," he proceeds to do just that by providing his own subjective assessment of the visual appeal of Trailer Signs as a category of signage.[36] It is an error of law to ground his finding that the Bylaw is rationally connected in the factual findings made in these two paragraphs. This is compounded by his failure to assess the actual Trailer Signs in the record in favour of theoretical Trailer Signs of his own making.

32. Insofar as the learned chambers judges' observations of Trailer Signs in paragraph 57 of the Decision are supported by reason, logic and common sense, and therefore accurate, these observations do not distinguish Trailer Signs from conventional billboards (which themselves are no less "anthropogenic" than Trailer Signs), nor is there any attempt by the learned chambers judge to do so. As such, nothing turns on these factual findings and it is an error of law to rely on them to support a finding that the Bylaw is not arbitrary.

33. The Trailer Signs are no more objectively distracting than conventional billboards (they do not "shout" at passing motorists anymore than conventional billboards). They do not rise any higher off the ground than permitted billboard signs do, are not brighter than permitted

[35] *Frank v Canada (Attorney General),* 2019 SCC 1 at paras 59-64, [2019] 1 SCR 3 ("*Frank*").
[36] The Decision at paras 56-60.

billboard signs (they are not illuminated), and are not substantially larger in overall size than permitted billboards. Individually, Trailer Signs do not "obscure visibility of the natural landscape" to any significant degree and no more than permitted conventional billboard signs.[37] The only physical difference between the two is that the Trailer Signs have more depth or are thicker than conventional billboards and have wheels underneath. But, absent any evidence or explanation from the County as to why this is anything more than a difference without a distinction, this feature of Trailer Signs does not meaningfully distinguish the Trailer Signs from conventional billboards such that it is rational to prohibit one but permit the other.

34. Ultimately, there is no basis in the record or in logic, reason or common sense for the learned chamber judge's finding that "signs attached to repurposed semi-trailers are qualitatively different from purpose-built advertising signage."[38] There is no evidence that any of the Trailer Signs in use at the time of the comment made by Mr. Jerome in his 2013 letter were still in use in 2019. The evidence before this Court, both in the form of several pictures of the Trailer Signs and sworn testimony to the attractiveness of the Signs, are in every relevant way aesthetically equivalent to the conventional billboard signs the County permits.[39]

C. The learned chambers judge erred in law in determining that the Bylaw minimally impairs freedom of expression

35. The key question under the minimal impairment stage of the section 1 analysis is: does the Bylaw impair the right of free expression only minimally?[40] To answer this question, a court must consider whether the Bylaw is reasonably tailored to its objectives and whether the

[37] Affidavit of Darlene Roblin at para 8 [**EKE TAB 10**]; Supplemental Affidavit of Ross Martin at para 3, Exhibit "D" [**EKE TABs 5 and 5D**].

[38] The Decision at para 56.

[39] Affidavit of Josh Laforet at para 12 [**EKE TAB 2**]; Affidavit of Warren Cole paras 4-7, Exhibits "A" and "B" [**EKE TABs 9A and 9B**]; Affidavit of Ross Martin para 4 [**EKE TAB 4**]; Affidavit of John Markiw at para 4 [**EKE TAB 6**]; Affidavit of Brian Wickhorst at para 5, Exhibit "A" [**EKE TABs 3 and 3A**]; Affidavit of Jeremy Graf Exhibit "G" [**EKE TAB 7G**]; Supplemental Affidavit of Jeremy Graf Exhibit "L" [**EKE TAB 8L**].

[40] *Sharpe* at para 95.

Bylaw impairs free expression no more than is reasonably necessary. In this regard, the Bylaw must fail. It is blunt and goes too far.

36. In *RJR-MacDonald*[41] Justice McLachlin, as she then was, stated:

> At the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, 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. 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[.] **On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.**
> …
> **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**.[42]

37. In this case, much turns on whether the County's prohibition on all Trailer Signs should be considered a "total ban" or only a "partial ban". If only a partial ban, the Bylaw is arguably minimally impairing. If a total ban, the Bylaw must fail as a result of impairing freedom of expression more than is reasonably necessary.

38. The relevant question, then, is whether the Bylaw is a total ban because it prohibits the entire category of Trailer Signs, or only a partial ban because it only prohibits one class of the category of outdoor advertising. The correct question to ask is the former. However, the learned chambers judge asked the wrong question by asking whether the bylaw is a total ban on outdoor advertising.[43] If the wrong question is asked, a wrong result will ensue. By framing the issue as a question of whether the bylaw was a prohibition on all outdoor advertising, which it clearly is not, the learned chambers judge takes a less than generous and

[41] *RJR-MacDonald Inc. v Canada (Attorney General)*, [1995] 3 SCR 199, 1995 CanLII 64 (SCC) ("*RJR-MacDonald*").

[42] *RJR-MacDonald* at paras 160-163 [Emphasis added].

[43] The Decision at paras 25 and 88-91.

purposive view of freedom of expression and asks the wrong question by wrongly classifying the Bylaw. This is an error of law.

39. In *Ramsden v Peterborough (City)*, a prohibition on the placing of any posters on utility poles was considered a "total ban" because it outlawed the narrow category of posters, not the much broader category of all outdoor advertising.[44] Posters, like Trailer Signs, are only one form of outdoor advertising, yet the Supreme Court did not uphold the ban on all posters as minimally impairing because other forms of outdoor advertising were available. Indeed, to do so would belie a robust conception of freedom of expression.[45]

40. A proper understating of the concept of a total ban, as it has been defined and applied in the relevant case law, makes it clear the Bylaw is a total ban, not a partial ban. In cases such as *Canadian Mobile Sign Association v Burlington (City),*[46] *Nanaimo (City) v Northridge Fitness Centre Ltd.*,[47] *Whitehorse (City) v Wharf on Fourth Inc.*[48] *Nichol (Township) v McCarthy Signs Co. Ltd.*,[49] and *R v 718916 Alberta Ltd.*[50] 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.

41. The court in *Stoney Creek (City of) v Ad Vantage Signs Ltd*:[51]

> [R]efused 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

[44] *Ramsden v Peterborough (City),* [1993] 2 SCR 1084 at para 45, [1993] SCJ No 87 ("*Ramsden*").
[45] Hearing Transcript at pages 29-30.
[46] *Canadian Mobile Sign Association v Burlington (City),* [1997] OJ No 2870 at paras 3, 13, 19, 34 OR (3d) 134.
[47] *Nanaimo (City) v Northridge Fitness Centre Ltd*, 2006 BCPC 67 at paras 57, 61, [2006] BCJ No 441.
[48] *City of Whitehorse v Wharf on Fourth Inc*, 2004 YKTC 28 at paras 4, 5, 27, 31, [2004] YJ No 27; Hearing Transcript at page 29.
[49] *Nichol (Township) v McCarthy Signs Co Ltd,* [1997] OJ No 2053 at para 12, 33 OR (3d) 771.
[50] *R v 718916 Alberta Ltd*, [2000] AJ No 1666 at paras 74-75, 290 AR 89.
[51] *Ad Vantage Signs Ltd*.

> (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.[52]

42. There are at least five less intrusive alternatives that the County has failed to explain as to why they, alone or in tandem, do not ***substantially*** achieve the objective of maintaining rural aesthetics and therefore do not impair freedom of expression more than is ***reasonably necessary***. A reasonable range of constitutionally-defensible solutions does not include an outright prohibition when several alternatives are available to the County to permit Trailer Signs within parameters.

43. The first, and perhaps most obvious, alternative is regulating the number of Trailer Signs permitted on any one property or in any one area, or to regulate the minimum permissible distance between each trailer.[53] The County already regulates the number of permissible trailers ***without*** signs on properties.[54] This would reduce the overall number of Trailer Signs and prevent the clustering of Trailer Signs, which appears to be at the core of the County's concerns.[55]

44. The second alternative is a size regulating scheme. This could involve limiting the size of the sign, the trailer it is affixed to, or both, and the height from the ground the sign is permitted to be. Most transport truck trailers are of a similar large, standard size. However, some trailers are shorter in length and therefore smaller in overall size. The Tops' sign is affixed to one such trailer. If, for example, the Bylaw only disallowed larger trailer signs, but permitted trailer signs of the size of the Tops' sign, it would be a partial ban, not a total ban.

45. A third alternative is regulating the condition of Trailer Signs such that the problem of "ugly" or "run-down" trailers, or the signs that are affixed to them, can be addressed. The standards applied to conventional billboards could serve as a benchmark, considering the County

[52] *Vann Niagara Ltd 2002* at para 30.
[53] Hearing Transcript at page 29.
[54] Affidavit of Darlene Robin Exhibit "B" [**EKE TAB 10B**]; Roblin Transcript at page 22, line 23 – page 24, line 4 [**EKE TAB 13**]; The Decision at para 65.
[55] Affidavit of Darlene Robin at para 8 [**EKE TAB 10**].

obviously does not consider billboards, if regulated, to be incompatible with maintaining rural aesthetics. The County has the ability to deal with unsightly properties under the community standards bylaw.[56] If a Trailer Sign was truly unsightly and did not meet "design standards" (as anticipated under the *Municipal Government Act*[57]), then the County could regulate such signs.

46. Fourth is regulating the location of Trailer Signs, such that they are only permitted in the select few areas of the County that posses a decidedly less rural character. If the Bylaw disallowed Trailer Signs alongside most roadways in the County, but not all, it would be less than a total ban.

47. The 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 less travelled, narrow country roads, and the more densely-populated east, with its large towns and multi-lane freeways.

48. The Trailer Signs are only placed alongside Highways No. 2 and the eastern end of No. 7, between Okotoks and Highway No. 2.[58] Not surprisingly, these represent the busiest stretches of highway in the County and are therefore ideal places to situate a sign, because they are the best locations to convey a message to as 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.[59] Such busy highways are not "scenic routes" placed in a picturesque country setting with no industry or urban development visible, such as Highways No. 22 (Cowboy Trail) and No. 549 might reasonably be characterized. These last two highways are in the western half of the County and are less-travelled rural 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 minimally impairing to prohibit Trailer Signs in every part of the County, or along every highway, to

[56] Roblin Transcript at p 21, lines 16-19 [**EKE TAB 13**].
[57] *MGA* s 640(1.1)(a) .
[58] Affidavit of Darlene Roblin Exhibit "F" [**EKE TAB 10F**].
[59] Hearing Transcript at pages 4-5.

promote rural aesthetics. The high-speed, multi-lane freeways that run through eastern portions of the County are not "rural".

49. Fifth, the County could regulate the content of Trailer Signs. If the Bylaw only disallowed third-party advertising and/or commercial content on Trailer Signs, but permitted non-commercial content such as the personal and political content of the Tops' sign, it would be less than a total ban. This would align with the acknowledgement that expressive content which goes to the core of what section 2(b) of the *Charter* protects attracts more constitutional protection, and is of more value to those residing in and travelling through the County.[60] Considering such signs would produce no financial benefit for the originators of the content or those hosting the sign on their property, the consideration of the affordability of Trailer Signs is even more important in this context.

50. The County could even use a combination of the above alternative means of regulation, provided the cumulative impact was not to produce, in effect, a total ban on Trailer Signs.

51. The learned chambers judge relies heavily on the BC Court of Appeal decision in *Vancouver (City)*,[61] in which a prohibition on rooftop signs was upheld as a justified infringement of freedom of expression.[62] But this reliance is unfounded as this case is readily distinguishable from the present case. A ban on signs placed on rooftops is first only a partial ban on the location of signs, not a total ban on an entire category of signs. It is mitigated by the fact the same types of signs placed on rooftops could be placed in many other locations. Further, the objective in that case was a clutter-free skyline for which it is reasonably necessary to require the removal of all rooftop signs. Here, the objective is maintaining rural aesthetics, which is more broad and less defined and, in any event, can be achieved without totally banning an entire category of sign from ***all*** locations in the county. The Vancouver skyline is uniform, whereas Foothills County is not.

[60] *Greater Vancouver* at paras 7, 80.
[61] *Vancouver (City) v Jaminer*, 2001 BCCA 240,198 DLR (4th) 333 ("*Vancouver (City)*).
[62] The Decision at paras 90-91.

52. The County could choose to permit and regulate the Trailer Signs. It does so for trailers without signs.[63] The County has instead arbitrarily chosen to outright prohibit Trailer Signs and has done so without satisfying its burden to provide evidence in support of a prohibition or an explanation as to why less intrusive alternatives are inadequate. The County has failed to satisfy the justification test under section 1 of the *Charter*, which, as this Court recently affirmed, always lies with the state actor, not rights-holding citizens.[64] Insofar as the learned chambers judge misapplied the test by finding that the Applicants must meet a "tactical burden" to show that other outdoor signage were not "real" options,[65] he erred in law not merely through erroneous categorization, but in a manner similar to Bokenfohr J. in the lower court decision that was the subject of the appeal to this Court in *UAlberta Pro-Life*.[66]

53. The County has not put forth evidence or explanation that a partial ban on Trailer Signs is not an effective alternative regarding its aesthetic goals. Only a partial ban, or, in other words, the ***regulation*** of Trailer Signs, as opposed to the ***prohibition*** of Trailer Signs, is a "reasonable impairment" of freedom of expression.[67] Government "is entitled to pursue its objective, but in doing so, it must impair the rights of Canadians as little as possible."[68]

D. The learned chambers justice erred in law in determining that the benefits of the Bylaw are proportionate overall to the deleterious effects of the Bylaw's limitation of freedom of expression

54. The final stage of the proportionality analysis is the final balancing measure: where the salutary effects of the Bylaw are weighed against the deleterious effects. To pass this stage, the salutary effects of the Bylaw must outweigh the deleterious ones. This analysis ultimately involves "difficult value judgments".[69] The Court must consider questions around the

[63] Affidavit of Darlene Robin Exhibit "B" [**EKE TAB 10B**]; Roblin Transcript at page 22, line 23 – page 24, line 4 [**EKE TAB 13**]; The Decision at para 65.
[64] *UAlberta Pro-Life v Governors of the University of Alberta*, 2020 ABCA 1 at paras 159-169 ("*UAlberta*"); see also *Ad Vantage Signs Ltd* at para 20.
[65] The Decision at paras 92.
[66] *UAlberta* at paras 166-169.
[67] *RJR-MacDonald Inc* at para 163; *Frank* at para 66.
[68] *Canada (Attorney General) v JTI-Macdonald Corporation*, 2007 SCC 30 at para 42, [2007] 2 SCR 610 ("*JTI-Macdonald*").
[69] *R v K R J*, 2016 SCC 31 at para 79, [2016] 1 SCR 906 ("*R v K R J*").

societal importance of free expression and the values it protects, and the importance of the particular aesthetic concerns of the County. One of the core purposes of the proportionality analysis is to prevent "uphold[ing] a severe impairment on a right in the face of a less important objective".[70]

55. In *JTI-Macdonald Corp.*, the Supreme Court explained the last step of the section 1 analysis as follows:

> The final question is whether there is proportionality between the *effects* of the measure that limits the right and the law's *objective*. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?[71]

56. More recently, Justice Karakatsanis, writing for a majority of the Supreme Court, stated:

> At this final stage of the proportionality analysis, the Court must "weig[h] the impact of the law on protected rights against the beneficial effect of the law in terms of the greater public good" (*Carter*, at para. 122). This final stage is an important one because it performs a fundamentally distinct role. As a majority of this Court observed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877:
>
> > The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed… . The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [para.125]
>
> …
>
> It is only at this final stage that courts can transcend the law's purpose and engage in a robust examination of the law's impact on Canada's free and democratic society "in direct and explicit terms" (J. Cameron, "The Past, Present, and Future of Expressive Freedom Under the *Charter*" (1997), 35 *Osgoode Hall L.J.* 1, at p. 66). In other words, **this final step allows courts to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society.**[72]

[70] *JTI-Macdonald Corporation* at para 46.
[71] *JTI-Macdonald Corporation* at para 45.
[72] *R v K R J* at paras 77-79 [emphasis added].

57. While it may be true that not all *Charter*-rights infringements are created equal, it is also true that not all government objectives and their supposed benefits are created equal.[73] It cannot be, in a society that expressly acknowledges how vital free expression is for maintaining a free, peaceful and prosperous way of life, that the aesthetic desire to never see a particular type of sign while driving around the County is somehow equal in value and importance as free expression. Such a state of affairs would be at odds with the political heritage of this country and conflict with constitutional jurisprudence. Accepting that the maintenance of rural aesthetics is a "pressing and substantial objective" does not entail that the effects of an overly-aggressive measure to achieve that objective is proportionate with the benefits of the objective.

58. This is precisely the error the learned chambers judge engaged in such that he found the Bylaw to be proportionate—that the desire to maintain rural aesthetics by eliminating a category of roadside sign is of equal importance and value to that of free expression. This can be seen in how dismissive he is of the landowners' expressive rights, the Tops' expressive rights, and the increased financial cost of other types of signs such as conventional billboards, all while elevating, without any supporting evidence, time, place and volume limitations on signage to that of a "core quality of life issue".[74]

59. The learned chambers judge's erroneous approach to proportionality, which is precipitated by his less than generous and purposive view of free expression, is most obvious at paragraph 45 of the Decision, where he misstates the law by saying that citizens somehow have a "right" not to be "shouted at" by signs. There is no such individual right recognized in law in this country, nor should there be. In fact, the Supreme Court has explicitly determined the law to be the opposite: that citizens have the right to see signs because they have the right, protected by the constitution, to view expression, and they have the right to look away if they do not like what they see.[75] Citizens, through their local governments, may give effect to a desire to

[73] The Decision at para 34.
[74] The Decision at paras 45, 108-109.
[75] *Edmonton Journal* at para 10; see also *Sharpe* at para 21; *R v Vice Media Canada Inc.*, 2018 SCC 53, [2018] 3 SCR 374.

see less of something, but that desire is subject to the legally-protected right of others to both display and see the thing that others would prefer not to see.

60. Even if there was some basis for the proposition that a total ban on Trailer Signs ***more perfectly*** achieves the maintenance of rural aesthetics than a partial ban, any marginal gain over that achieved by the less intrusive alternatives is disproportionate to the further impairment of freedom of expression over that of permitting but regulating Trailer Signs.

61. As the cornerstone of a free and democratic society, freedom of expression must be regarded as harbouring more inherent worth as a fundamental value than aesthetics. The former is a necessary aspect of a society worth living in and is appropriately a constitutionally-protected right. The latter is a luxury and not a legally-protected right. Trading demonstrable gains in aesthetics for a balanced infringement of freedom of expression in the form of a partial ban on signs may be acceptable. Trading further marginal and speculative gains in aesthetics for a total ban on a category of signs is not.[76] As the Supreme Court affirmed in *Ramsden*, "as between a total restriction of this important right and some litter, **surely some litter must be tolerated**."[77]

62. No proportionality analysis on the facts of this case could be complete without considering the lack of demonstrated community support for the County's aesthetic objections to Trailer Signs. The County, similar to the municipality in *Ad Vantage Signs Ltd.*,[78] relies only on the general, unsupported contention that the prohibition of an entire category of signs is justified because of "complaints".[79]

63. The County has failed to provide any evidence or record of the "complaints" referred to by the County's affiant.[80] 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

[76] Hearing Transcript at page 33.
[77] *Ramsden* para 46 [emphasis added].
[78] *Ad Vantage Signs Ltd* at para 22.
[79] Affidavit of Darlene Roblin at para 7 [**EKE TAB 10**]; Supplemental Affidavit of Darlene Roblin at para 3 [**EKE TAB 11**].
[80] Roblin Transcript at page 13, lines 3-17 [**EKE TAB 13**].

what the complainant(s) have requested the County do about whatever they have complained about. Absolutely nothing is known about the purported complaints alluded to. The learned chambers judge's failure to address this issue contributed to his error in law in finding the Bylaw to be proportionate.

64. In *Ad Vantage Signs Ltd.,* Charron J.A., as she then was, found that the impugned bylaw in that case was not proportionate due to an "absence of any evidence as to the particular needs" of the municipality, and because "no evidence was presented beyond the general assertion that [the prohibited signs] are considered unsightly by the public".[81]

65. 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. They are similar to conventional billboards as far as quality, appearance, and effectiveness, but are the optimal means of expression due to their lower cost and practicality.[82]

66. As in *Ramsden*, the benefits of the County's prohibition on Trailer Signs are limited "while the abrogation of the freedom is total, thus proportionality between the effects and the objective have not been achieved."[83]

PART 5 – RELIEF SOUGHT

67. The Appellants respectfully request that the appeal be allowed, the decision of the learned chambers judge be set aside, and the following relief be granted:

    a. A Declaration pursuant to section 52(1) of the *Constitution Act*, 1982 that the Bylaw infringes section 2(b) of the *Charter*, is not saved by section 1 and is therefore void and of no force or effect;

    b. Costs, both on appeal and at the lower court; and

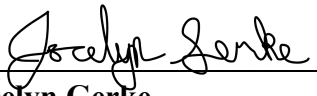
[81] *Ad Vantage Signs Ltd* at para 22.
[82] Affidavit of Josh Laforet at paras 3 and 4 [**EKE TAB 2**]; Affidavit of Warren Cole at paras 3 and 4 [**EKE TAB 9**]; Affidavit of Jantje Top paras 5 and 6 [**EKE TAB 1**].
[83] *Ramsden* para 46 [emphasis added].

c. Such further and other relief as this court deems just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 1st day of April 2021

Estimate of time required for the oral argument: 45 minutes.

James Kitchen
Counsel for the Appellants



Jocelyn Gerke
Counsel for the Appellants

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27	*Municipal Government Act,* RSA 2000, c M-26