

Court File No.

08-CV-358053 P03

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**STRATEGIC MEDIA OUTDOOR INC. AND
BEAUX PROPERTIES**

Applicants

- and -

THE CORPORATION OF THE CITY OF TORONTO

Respondent

APPLICATION UNDER Rules 14.05(3)(d), (g) and (g.1) and 38 of the *Rules of Civil Procedure*.

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the applicants. The claim made by the applicants appears on the following page.

THIS APPLICATION will come on for a hearing on a date and time to be fixed by the court, at 130 Queen Street West, Toronto, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the applicants' lawyer or, where the applicants do not have a lawyer, serve it on the applicants, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but not later than 2 days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO

OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID
MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date April 18, 2008

Issued by



Local registrar

Address of ~~130 Queen Street West,~~
court office ~~Toronto, Ontario~~

39

TO: Clerk
The Corporation of the City of Toronto
Toronto City Hall
100 Queen Street West
Toronto ON M5H 2N2

SUPERIOR COURT
OF JUSTICE
393 UNIVERSITY AVE.
10TH FLOOR
TORONTO, ONTARIO
M5G 1E6

COUR SUPÉRIEURE
DE JUSTICE
393 AVE. UNIVERSITY
10E ÉTAGE
TORONTO, ONTARIO
M5G 1E6

TO: The Attorney General of Ontario
Constitutional Law Branch
4th Floor
720 Bay Street
Toronto, Ontario M5G 2K1
fax: (416) 326-4015

AND TO: The Attorney General of Canada
3400 Exchange Tower
First Canadian Place
Box 36
Toronto, Ontario M5X 1K6
fax: (416) 973-3004

APPLICATION

1. The applicants make application for:

(a) A declaration that:

- (i) Chapter 297, as amended, and its predecessors, of the former City of Toronto Municipal Code, which regulates and prohibits the placing of signs in the former City of Toronto (the "Former Toronto Sign By-law");
- (ii) By-law 30788, as amended, and its predecessors, of the former City of North York, which regulates and prohibits the placing of signs in the former City of North York (the "Former North York Sign By-law");
- (iii) Chapter 215, as amended, and its predecessors, of the former City of Etobicoke Municipal Code, which regulates and prohibits the placing of signs in the former City of Etobicoke (the "Former Etobicoke Sign By-law"); and
- (iv) Chapter 693, as amended, of the new City of Toronto Municipal Code, which regulates and prohibits the placing of signs throughout the City of Toronto (the "New Toronto Sign By-law"),

(together, the "Sign By-laws"), are of no force and effect with respect to signs suspended wholly from and immediately in front of the wall of a building ("Fascia Signs");

- (b) The costs of this application on a substantial indemnity scale; and
- (c) Such further and other relief as counsel may advise and this honourable court permit.

2. The grounds for the application are:

- (a) The Sign By-laws should be declared invalid and of no force and effect with respect to Fascia Signs as they:
- (A) regulate and prohibit the use of land and are therefore in effect zoning by-laws which:
 - (I) require a hearing at common law in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, before depriving a property owner of his or her right to place Fascia Signs on their building;
 - (II) are *ultra vires* the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A and the *Municipal Act, 2001*, S.O. 2001, c. 25, and its predecessors; and
 - (III) must be passed, amended and varied in accordance with the provisions of the *Planning Act*, R.S.O. 1990, c. P.45, which prevails in the event of conflict with any other legislation.
 - (B) in the alternative, are by-laws regulating the business of erecting signs and therefore:
 - (I) are *ultra vires* the *City of Toronto Act, 2006* and the *Municipal Act, 2001*, as they prevent the issuance of a permit by reason only of the location of the business; or
 - (II) in the further alternative, expired on January 30, 2001, pursuant to s.24(3) of the *Savings and Restructuring Act*, 1996, S.O. 1996, c.1, Sched M; and
 - (C) are contrary to the freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* (the "Charter") and cannot be justified by s. 1 of the *Charter*.

Background

- (b) Strategic Media Outdoor Inc. ("Strategic Media") is a corporation incorporated pursuant to the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.
- (c) Strategic Media carries on the business of providing outdoor advertising, including Fascia Signs, mobile billboards and vehicle wraps throughout the City of Toronto (the "City").
- (d) Strategic Media's business depends upon obtaining permission from the City to erect Fascia Signs in locations throughout the City, including the former Cities of Etobicoke, North York and Toronto.
- (e) Beaux Properties is the owner of 25 Wellesley St. E., in the City of Toronto (the "Property").
- (f) Beaux Properties has an agreement with Strategic Media that grants permission to Strategic Media to suspend Fascia Signs on the building located on the property.
- (g) The Former Toronto Sign By-law and the New Toronto Sign By-law were passed under paragraph 146 of s. 210 of the *Municipal Act*, R.S.O. 1990, c. M.45, as amended. The Former City of North York Sign By-law and the Former City of Etobicoke Sign By-law were passed under paragraph 141 of s. 210 of the *Municipal Act*, R.S.O. 1980, Chapter 302. Both of these *Acts* authorized municipalities to pass by-laws "for prohibiting or regulating signs and other advertising devices or any class or classes thereof and the posting of notices on buildings or vacant lots within any defined area or areas or on land abutting on any defined highway or part of a highway."
- (h) Currently, the new *City of Toronto Act*, 2006, s. 8(2) grants authority to the City to pass by-laws respecting "structures, including fences and signs." An identical provision is contained in s. 11(3) of the *Municipal Act*, 2001.

- (i) The Former Toronto Sign By-law, Former North York Sign By-law and Former Etobicoke sign By-law all contain special provisions for Fascia Signs (defined as a "Wall Sign" in the Former North York By-law), despite such signs being wholly attached to buildings, the use of which is regulated by the applicable zoning by-law, and such signs being regulated by the Building Code. The Sign By-laws also distinguish between signs based upon the type of message being conveyed. For example, third party signs, being signs which market, promote and advertise a business, product or service which is not related to the business, product or service being offered on the lot on which the sign is located ("Third Party"), are severely restricted while other signs, such as business identification signs, are not.
- (j) In particular: the Former North York Sign By-law prohibits Third Party (identified as "off premise") Fascia Signs in all zones; the Former Etobicoke Sign By-law prohibits Third Party (identified as "advertising") Fascia Signs in all areas other than industrial zones, and then only with significant restrictions; the New Toronto Sign By-law prohibits all Third Party signs, and not any other signs, within 400 metres of certain highways; and the Former Toronto Sign By-law prohibits Third Party Fascia Signs in all zones except for mixed use and industrial, but then only with significant restrictions on size, location and separation distance from other such signs.

Authority to Regulate the Use of Land

- (k) It is submitted that the Sign By-laws' regulation of Fascia Signs prohibits the use of land, buildings and structures for or except for such purposes as set out in the Sign By-laws, in that they explicitly restrict the erection of Fascia Signs pursuant to land use zones, as set out in the former municipalities' zoning by-laws, and furthermore impose set-back, frontage and size restrictions in the same manner as found in zoning by-laws.
- (l) Until 1993, signs in the former City of Toronto were indeed regulated by the City's zoning by-law, and to the present date the City of Toronto administers

the Sign By-laws in the same manner as its zoning by-laws, but without the procedural safeguards which would otherwise apply.

I. Common Law Right to a Hearing

- (m) Since the decision of the Supreme Court of Canada in *Wiswell v. Winnipeg (Greater)*, [1965] S.C.R. 512, it is settled law that the decision to pass a by-law that regulates land use may be a quasi-judicial, or administrative, decision, which requires affected parties the proper opportunity to be heard and to receive adequate reasons. As discussed further below, the *Planning Act* includes significant procedural safeguards as a result of this principle. In particular, the *Planning Act* provides for a full hearing by way of an appeal to the Ontario Municipal Board. In order to ensure that a hearing does not have to take place before Council, this common law principle also resulted in the enactment of s. 61 of the *Planning Act*, to deem the passage of by-laws under the *Planning Act* to be a legislative function. Neither the *City of Toronto Act, 2006*, nor the *Municipal Act, 2001*, contain any such deeming provision.
- (n) It is submitted that, as the provisions respecting Fascia Signs contained in the Sign By-laws regulate and prohibit the use of land or buildings for the placement or erection of such signs, which significantly effects the rights of a property owner, the principles of natural justice founded in the common law dictate that the right to be heard in this context requires a full hearing.
- (o) The *Statutory Powers Procedure Act* provides in s. 3 that:
- ...this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act ***or otherwise by law*** to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision. [italics added]
- (p) Pursuant to the *Statutory Powers Procedure Act*, a hearing requires, among other things, notice (s. 6), the right to bring evidence (s. 10.1(a)), the right to

representation (s. 10), the right to cross-examine witnesses (s. 10.1(b)), and the issuance of a written decision with reasons (s. 17).

- (q) It is submitted that the five minute deputations before a sub-committee of Council, which are granted prior to the passage of a sign by-law, prior to the passage of amendments to the Sign By-laws, as well as in the event of an application for a variance to the Sign By-laws, with no cross-examination, no opportunity to reply or test any evidence submitted, no reasons for decision, and no right to appeal, does not provide a party with a sufficient opportunity to be heard before a decision is made.

II. *Ultra Vires the City of Toronto Act, 2006*

- (r) The *Planning Act* provides the general authority to the City of Toronto and other municipalities to regulate land use. It is submitted that, with certain exceptions, the *City of Toronto Act, 2006*, or the *Municipal Act, 2001* and its predecessors, do not grant authority to the City to regulate or prohibit the use of land.
- (s) While the *City of Toronto Act, 2006* and the *Municipal Act, 2001*, do grant municipalities the power to regulate signs, this authority must be interpreted to exclude the regulation of the use of land, which is governed by the *Planning Act*, and restricted to controlling the physical erection of signs.
- (t) It is settled law that a municipality may not restrict the use of land, under the guise of regulatory by-laws, so as to deprive a person of the procedural protections to which they are otherwise entitled.
- (u) As a result, it is submitted that the regulation of Fascia Signs by the Sign By-laws is *ultra vires* the powers granted by the *City of Toronto Act, 2006* and the *Municipal Act, 2001*.

III. Application of *Planning Act* Provisions

- (v) Pursuant to s. 34 of the *Planning Act*, municipalities have the authority to pass by-laws:
1. **Restricting the use of land.** - For prohibiting the use of land, for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or abutting on any defined highway or part of a highway.
 2. **Restricting, erecting, locating or using buildings.** - For prohibiting the erecting, locating or using of buildings or structures for or except for such purposes as may be set out in the by-law within the municipality or within any defined area or areas or upon land abutting on any defined highway or part of a highway.
- (w) Furthermore, land use planning authority also includes the authority to regulate the exterior design of a building, including its appearance (s. 41(4)2(d) of the *Planning Act* (and s. 114(5)2(iv) of the *City of Toronto Act, 2006*).
- (x) As a result of early court decisions which held that the regulation of land use significantly impacts the rights of property owners, and therefore there is a right to a hearing, the *Planning Act* includes provisions requiring notice, the right to review the materials submitted to a municipality, the right to be heard at a public meeting prior to a decision being made, written notice of decisions, and the right to a full hearing by way of appeal to the Ontario Municipal Board.
- (y) While it is submitted that the Sign By-laws' regulation of Fascia Signs is *ultra vires* the *City of Toronto Act, 2006* and the *Municipal Act, 2001*, in the alternative, if these Acts grant authority to regulate land use, they are in conflict with the *Planning Act* for failing to provide adequate procedural protections. Section 71 of the *Planning Act* provides that, in the event of conflict, the *Planning Act* prevails over any general or special Act.
- (z) As a result of the foregoing, the regulation and prohibition of the use of land or buildings for Fascia Signs, as contained in the Sign By-laws, must be passed

pursuant to the *Planning Act*, which will afford the applicants and others the necessary procedural protections, including the right to a full hearing by way of appeal to the Ontario Municipal Board.

Regulation of Businesses Pursuant to Municipal Act

- (aa) In the alternative, if the regulation and prohibition of Fascia Signs in the Sign By-laws is not *ultra vires* the City's authority under the *City of Toronto Act, 2006* and *Municipal Acts*, the Sign By-laws are by-laws which regulate the business of erecting signs.
- (bb) A "licence" is defined in both the *Municipal Act, 2001* and the *City of Toronto Act, 2006* as including "a permit, an approval, a registration and any other type of permission, and "licensing" has a corresponding meaning" (s. 1(1) and 3(1) respectively).
- (cc) It is submitted that the business of erecting or displaying signs is carried on in all locations where such signs are erected. As the Sign By-laws prohibit the business of erecting or displaying signs without obtaining a permit, and regulate all manner of locating, erecting and displaying signs, the Sign By-laws are business licensing by-laws.

I. Provisions Respecting Location of Business Ultra Vires

- (dd) Section 90 of the *City of Toronto Act, 2006* (and s. 153 of the *Municipal Act, 2001*) provides that the City "shall not ... refuse to grant a licence for a business under this Act by reason only of the location of the business". Rather, section 90(2) (or s.153(2)) expressly provides that the location of the business may be regulated by land use control by-laws or requirements under the *Planning Act* or other legislation.
- (ee) As the Sign By-laws prevent the issuance of a permit for Fascia Signs based solely on the location of the sign, and therefore prevent the business of erecting and displaying such signs based solely upon location, it is submitted that the

Sign By-laws are *ultra vires* the City of Toronto as they are contrary to s. 90 of the *City of Toronto Act, 2006*.

II. Deemed Expiry of Sign By-laws

- (ff) In the further alternative, it is submitted that the Sign By-laws expired on January 30, 2001 and are of no force and effect.
- (gg) Pursuant to s. 24(3) of the *Savings and Restructuring Act, 1996*, S.O. 1996, c.1, Sched. M, municipal by-laws "licensing a business" expired on the earlier of five years after the day the section came into force (being January 30, 1996) or the day the by-law was repealed by the municipality. While the current *Municipal Act, 2001* and *City of Toronto Act, 2006* no longer contain this 5 year limitation, all prior business licensing by-laws expired on January 30, 2001, unless repealed earlier. As the Sign By-laws expired, and have not been re-enacted, they are of no force and effect.

Freedom of Expression

- (hh) In addition to the foregoing, the regulation of Fascia Signs by the Sign By-laws is contrary to s. 2(b) of the *Charter of Rights and Freedoms* as it violates freedom of expression in a manner which is not justified under s. 1.
- (ii) The erection or display of signs is an activity which conveys or attempts to convey a meaning and therefore constitutes expression which falls under the scope of s. 2(b) of the *Charter*.
- (jj) Moreover, the Sign By-laws explicitly control the content of the expression of the applicants by imposing prohibitions based upon the type of message. In particular, the Sign By-laws prohibit or significantly restrict Third Party Fascia Signs, but not other Fascia Signs.
- (kk) As such, Third Party Fascia Signs, and not other Fascia signs, are virtually prohibited in most areas of the City of Toronto, without any pressing and substantial concern or rational basis for the distinction between Third Party

Fascia Signs and other signs. The restrictions in the Sign By-laws, which significantly impact the applicants, are not justified under s. 1 of the *Charter*.

- (11) Furthermore, within the boundaries of the former City of Toronto, mural Third Party signs, which are painted directly on the surface of a building, are permitted to be much larger than Third Party Fascia Signs, without any pressing and substantial concern or rational basis for the distinction. Fascia Signs are more affordable and efficient than painted murals and are easier to remove or change. Any concern respecting the impact of Fascia Signs on the building itself is addressed by the Building Code.
 - (mm) As the *Charter* is the supreme law of Canada, by virtue of s. 52(1) of the *Constitution Act, 1867*, any law that is inconsistent with its provisions is of no force or effect.
3. The following documentary evidence will be used at the hearing of the application:
- (a) The affidavit of Daniel Pitoscia;
 - (b) The affidavit of Roy Birinboim;
 - (c) The affidavit of Scott Bums;
 - (d) The affidavit of Michael Spaziani;
 - (e) The affidavit of Lionel Feldman;
 - (f) The affidavit of Gerry Forbes;
 - (g) The affidavit of Jerry Wachtel; and

- (h) Such further and other materials as counsel may advise and this honourable court permit.

April 18, 2008

Cassels Brock & Blackwell LLP

2100 Scotia Plaza
40 King Street West
Toronto, Ontario M5H 3C2

Stanley M. Makuch LSUC# 17293V

Tel: (416) 869-5977

Fax: (416) 860-6559

Signe B. Leisk LSUC#: 45455Q

Tel: (416) 869-5411

Fax: (416) 640-3218

Solicitors for the Applicants