Ramsden *v.* Peterborough (City), [1993] 2 S.C.R. 1084

The Corporation of the City of Peterborough *Appellant*

v.

Kenneth Ramsden *Respondent*

and

The Attorney General of Canada,
the Attorney General for Ontario,
the Attorney General of British Columbia,
the Corporation of the City of Toronto
and the Canadian Civil Liberties Association *Interveners*

Indexed as: Ramsden *v.* Peterborough (City)

File No.: 22787.

1993: June 1; 1993: September 2.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Freedom of expression -- Postering -- Municipal by-law banning posters on public property -- Whether postering a form of expression -- If so, whether protected by s. 2(b) -- If infringement

of s. 2(b), whether justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

This appeal concerned the constitutional validity of a municipal by-law prohibiting all postering on public property. The issue was whether the absolute ban on such postering infringed the *Charter* guarantee of freedom of expression, and if so whether that infringement was justified under s. 1 of the *Charter*.

The accused advertised upcoming performances of his band on two occasions by affixing posters to hydro poles contrary to a city by-law banning posters on public property. On both occasions, he was charged under the by-law. The accused, while not denying the offences, took the position that the by-law was unconstitutional because it was inconsistent with the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

A Justice of the Peace found that the by-law did not violate the *Charter* and convicted the accused. The appeal to Provincial Court, which was dismissed, was based on the agreed facts that postering on utility poles can constitute a safety hazard to workers climbing them, a traffic hazard if placed facing traffic, and visual and aesthetic blight contributing to litter if left too long. A majority of the members of the Court of Appeal found that the by-law infringed the accused's freedom of expression and was not justifiable under s. 1 of the *Charter*. The constitutional questions in this Court queried if the by-law limited the right guaranteed by s. 2(*b*) of the *Charter*, and if so, whether such limits were demonstrably justified under s. 1.

Held: The appeal should be dismissed.

In determining whether postering falls within the scope of s. 2(*b*), it must first be decided that it constitutes expression, and if so, whether postering on public property is protected by s. 2(*b*). The second step requires a determination of whether the purpose or effect of the by-law is to restrict freedom of expression.

Postering conveys or attempts to convey a meaning, regardless of whether it constitutes advertising, political speech or art. The first part of the s. 2(*b*) test is satisfied.

Postering on public property, including utility poles, clearly fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(*b*). No persuasive distinction existed between using public space for leaflet distribution and using public property for the display of posters. The question was not whether or how the speaker used the forum, but whether that use of the forum either furthered the values underlying the constitutional protection of freedom of expression or was compatible with the primary function of the property.

The by-law was aimed at the consequences of the particular conduct in question and was not tied to content. On its face, it was content-neutral and prohibited all messages from being conveyed in a certain manner and at certain places. The purpose of the by-law -- avoiding the consequences associated with postering -- was "meritorious". The absolute prohibition of postering on public

property, however, prevented the communication of political, cultural and artistic messages and therefore, infringed s. 2(*b*).

The objective of the by-law was pressing and substantial and the total ban was rationally connected to these objectives. By prohibiting posters entirely, litter, aesthetic blight and associated hazards were avoided. The complete ban on postering, however, did not restrict expression as little as is reasonably possible. The by-law extended to trees, all types of poles, and all other public property. Worker safety was only affected when posters were attached to wooden utility poles and traffic safety was affected only where posters were displayed facing roadways. Many alternatives to a complete ban exist. Proportionality between the effects and the objective was not achieved because the benefits of the by-law were limited while the abrogation of the freedom was total. While the legislative goals were important, they did not warrant the complete denial of access to a historically and politically significant form of expression.

Cases Cited

Considered: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; **referred to**: *Re Forget* (1990), 74 D.L.R. (4th) 547; *New Brunswick Broadcasting Co. v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Fink v. Saskatoon (City of)* (1986), 7 C.H.R.R. D/3431; *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984).

Statutes and Regulations Cited

By-law No. 3270 of the City of Peterborough, ss. 1 [am. by By-law No. 1982-147], 2.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).

Provincial Offences Act, R.S.O. 1980, c. 400.

Saskatchewan Human Rights Code, S.S. 1979, c. S-24.1.

United States Constitution, First Amendment.

Authors Cited

Cameron, B. Jamie. "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports under Section 2(b) of the *Charter*" (1992), 2 *Media & Communications L. Rev.* 91.

Kanter, Michael. "Balancing Rights Under Section 2(b) of the Charter: Case Comment on *Committee for the Commonwealth of Canada v. Canada*" (1992), 17 *Queen's L.J.* 489.

Stacey, Robert. *The Canadian Poster Book: 100 Years of the Poster in Canada*. Toronto: Methuen, 1979.

APPEAL from a judgment of the Ontario Court of Appeal (1991), 5 O.R. (3d) 289, 85 D.L.R. (4th) 76, 50 O.A.C. 328, 7 C.R.R. (2d) 288, 7 M.P.L.R. (2d) 57, allowing an appeal from a judgment of Megginson Prov. Ct. J. dismissing an appeal from conviction of breach of municipal by-law by Jacklin J.P. Appeal dismissed.

Jonathan H. Wigley and *Robert A. Maxwell*, for the appellant.

Peter F. Jervis and *Kirk F. Stevens*, for the respondent.

Yvonne E. Milosevic, for the intervener the Attorney General of Canada.

Lori Sterling, for the intervener the Attorney General for Ontario.

Angela R. Westmacott, for the intervener the Attorney General of British Columbia.

Andrew Weretelnyk, for the intervener the Corporation of the City of Toronto.

Neil Finkelstein and *George Vegh*, for the intervener the Canadian Civil Liberties Association.

//*Iacobucci J.*//

The judgment of the Court was delivered by

IACOBUCCI J. -- This appeal concerns the constitutional validity of a municipal by-law prohibiting all postering on public property. The issue is whether the absolute ban on such postering infringes the *Charter* guarantee of freedom of expression, and if so whether that infringement is justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.

I. Background

As a means of advertising upcoming performances of his band, the respondent, on two occasions, affixed posters on hydro poles in contravention of By-law No. 3270 of the city of Peterborough. On both occasions, the respondent was charged under the *Provincial Offences Act*, R.S.O. 1980, c. 400, with an offence under the by-law. The respondent did not deny committing the offences but took the position that the by-law was unconstitutional because it was inconsistent with s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The respondent was convicted by a Justice of the Peace who found that the by-law did not violate the *Charter*.

The respondent appealed to the Provincial Court on an agreed statement of facts. The parties agreed that postering on utility poles can constitute a safety hazard to workers climbing them and a traffic hazard if placed facing traffic. The parties also agreed that abandoned posters or those left for an unreasonable length of time may constitute visual and aesthetic blight and contribute to litter. The respondent's appeal to the Provincial Court was dismissed. His further appeal to the Court of Appeal was allowed by a majority of the members of the court who found that the by-law infringed the respondent's freedom of expression and was not justifiable under s. 1 of the *Charter*. Accordingly, the respondent's convictions were set aside and acquittals were entered.

On appeal to this Court, Chief Justice Lamer stated the following constitutional questions:

1. Do ss. 1 and 2 of the Corporation of the City of Peterborough By-law 3270 (as amended by By-law 1982-147) limit the right guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to question 1 is yes, are such limits demonstrably justified pursuant to s. 1 of the *Charter*?

II. Relevant Legislative Provisions

In 1937, the city of Peterborough enacted By-Law No. 3270. In its original form, it read as follows:

> 1. No bill, poster or other advertisement of any nature whatsoever shall be placed on or attached to or caused to be placed on or attached to any tree situate on any public street, highway or thoroughfare within the limits of the City of Peterborough or any pole, post, stanchion or other object which is used for the purpose of carrying the transmission lines of any telephone, telegraph or electric power company situate on any public street, highway or thoroughfare within the limits of the City of Peterborough.

In 1982, s. 1 of the by-law was amended by By-law No. 1982-147 as follows:

> 1. No bill, poster, sign or other advertisement of any nature whatsoever shall be placed on or caused to be placed on any public property or placed on or attached to or caused to be placed or attached to any tree situate on any public property within the limits of the City of Peterborough or any pole, post, stanchion or other object which is used for the purpose of carrying the transmission lines of any telephone, telegraph or electric power company situate on any public property within the limits of the City of Peterborough. [Emphasis added.]

Section 2 of the by-law reads as follows:

> 2. Every person who contravenes this by-law is guilty of an offence and liable upon summary conviction to a penalty not to exceed Two Thousand Dollars ($2,000.00) exclusive of costs for each and every such offence.

Canadian Charter of Rights and Freedoms

> **1**. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> ...
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

III. Judgments Below

A. *Provincial Offences Court* (Jacklin J.P.)

In his defence, the respondent took the position that the posting of advertisements was a medium of communication, and that the prohibition set out in By-law No. 3270 infringed his guaranteed freedom of expression under s. 2(*b*) of the *Charter*. The prosecution contended that the purpose of the by-law was not to limit expression but rather was concerned with aesthetic considerations, the safety of workers, traffic safety, and garbage collection. Jacklin J.P. found the impugned by-law to be neutral on the issue of the content of advertising. In his opinion, the city's interests were "sufficiently substantial" to justify adequately the prohibition against the placing of posters on public property. Moreover, he found that the effect of the prohibition was no greater than necessary given the availability of alternative means of advertising. Accordingly, Jacklin J.P. concluded that the respondent's freedom of expression had not been infringed. The

respondent was found guilty of the charges and fined $25 for the first infraction and $100 for the second.

B. *Provincial Court* (Megginson Prov. Ct. J.)

Megginson Prov. Ct. J. did not accept that freedom of "other media of communication" should be elevated to a separate and distinct constitutionally protected freedom. Rather he interpreted it to merely be a facet of "freedom of thought, belief, opinion and expression". In his opinion, s. 2(*b*) is directed towards protecting against "censorship of content, substance or form of expression (by whatever means)". However, he did not accept that freedom of expression included a correlative obligation on the part of a property owner to afford "cost-free advertising" to a commercial interest by permitting any person to "post advertising material upon portions of that property as a `medium of communication', simply because objects on that property are physically susceptible of having such material displayed thereon or affixed thereto". In his opinion, advertising is a cost of carrying on business and must be borne by persons utilizing the facilities generally made available in our society for that purpose. By-law No. 3270 was not seen by Megginson Prov. Ct. J. as censoring expression, but merely imposing "a total prohibition on the use of property for certain purposes, in the perceived public interests of safety, avoidance of `visual blight', and economy of `housekeeping costs' (such as removal and garbage collection)". Accordingly, he found no inconsistency between the by-law and s. 2(*b*) of the *Charter*. The respondent's appeal was therefore dismissed.

C. *Court of Appeal for Ontario* (1991), 5 O.R. (3d) 289

1. Majority Reasons (Krever J.A., Labrosse J.A. concurring)

Krever J.A. noted at p. 291 that "whereas the original by-law proscribed the placing of posters on trees on a public street or on poles carrying transmission lines on any street, the by-law as amended prohibits the placing of posters on *any* public property". According to Krever J.A., it was this enlargement of the scope of the prohibition, or its absolute nature, which rendered it vulnerable to constitutional attack on freedom of expression grounds.

In Krever J.A.'s opinion, at pp. 291-92, there was no doubt that advertising an artistic performance was an act of communicating information. "In informing the public, or those members of the public who read the [respondent's] posters, of a coming musical performance the posters conveyed a meaning. It was therefore protected by s. 2(*b*) of the *Charter*." Citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Krever J.A. observed that the commercial character of the expression in question did not remove it from the category of constitutionally protected expressive activity.

While he did not accept that the purpose of the by-law was to limit free expression, he nonetheless found that it had such an effect. He did not see how it could be said that a total prohibition of postering on public property could fail to have the effect of restricting that sort of expressive activity. In this regard, he noted at p. 292:

> I read *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 ... as holding that, although s. 2(*b*) does not confer a right to use all government property for expressive purposes, prohibiting

> expression at, in or on all public property does offend s. 2(*b*). It is also authority for the proposition that the government's stewardship or even ownership of public property does not entitle the government to prohibit absolutely access to all public property for the purpose of communicating information.

In considering whether the by-law could be justified under s. 1, he found that the objective of preventing safety hazards to workers climbing utility poles and the prevention of traffic hazards could not justify an absolute prohibition on all public property. However, he accepted, at p. 293, that the city's interest in preventing "visual and aesthetic blight" was a serious social problem from both a cost and appearance perspective and therefore was of sufficient importance to override a *Charter* right. In his opinion, there was undoubtedly a rational connection between the prohibition and the objective of preventing visual blight. However, By-law No. 3270 failed the proportionality test because it did not impair the *Charter* right as little as possible and the infringement of the right outweighed the legislative objective. Krever J.A. commented at p. 294:

> That a value judgment is required is obvious and, in making it and in addressing the second and third stages, one must, I believe, stress the importance our society, and reflecting our society's views, our courts, attach to the interest of freedom of expression. I do not understand how it can be thought that the absolute prohibition with respect to all public property impairs the *Charter*-protected right of freedom of expression as little as possible. As between a total restriction of this important right and some litter, surely some litter must be tolerated. It would be a very different matter if the by-law purported to regulate where "postering" was permitted and where it was forbidden. But to enjoin a traditional form of expression in such absolute terms can hardly impair the right as little as possible. My reasoning with respect to the third stage is similar, as is my conclusion. The severe nature of the infringement of the right of freedom of expression outweighs the by-law's objectives.

Krever J.A. therefore found that the City had not met its burden of justifying the limitation. In so doing, he also noted the decision in *Re Forget* (1990), 74 D.L.R. (4th) 547 (Alta. Q.B.), in which McFadyen J. also found constitutionally invalid a similar by-law prohibiting the affixing of posters on utility poles. Krever J.A. accordingly found By-law No. 3270 constitutionally invalid and allowed the appeal, thereby setting aside the convictions and directing acquittals on both counts.

2. Dissenting Reasons (Galligan J.A.)

Galligan J.A. did not accept the respondent's assertion that the judgment of this Court in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, supported the view that freedom of expression includes the right to use public property to affix posters. He distinguished that case on the basis that it did not consider the provision in the airport regulations concerning the prohibition on placing or attaching things to airport property but only considered those portions of the by-law dealing with the right to conduct business or advertise at airports. Moreover, he stated that this Court's conclusion that in certain circumstances individuals have the right to use government property for the purpose of expressing themselves was not meant to extend to allow for the affixing of posters on public property. In his opinion, this Court's reasons should be interpreted as allowing for the use of public property in the sense of resorting to a particular location and not in the sense of making use of something as a means or instrument. In this regard, he noted at p. 298:

> My reading *of Dorval Airport* [*Committee for the Commonwealth of Canada v. Canada*] leads me to conclude that the issue decided by the Supreme Court of Canada was that if a person is at a location on public property to which the public has a general right of access, freedom of expression permits the direct communication of views to others by discussion, by distribution of written material or by carrying placards. The attaching of posters to public property is a very different use of public property because it is using that property as part of one's means of expression. The Supreme Court of Canada did not say that freedom of expression encompasses the right to use public property as a means or instrument of one's expression.

Galligan J.A. further reviewed the decision of Thurlow C.J. in *New Brunswick Broadcasting Co. v. Canadian Radio-television and Telecommunications Commission*, [1984] 2 F.C. 410 (C.A.). In that case, it was argued that the CRTC's direction limiting the renewal of certain television broadcasting licences violated s. 2(*b*). Thurlow C.J. found that s. 2(*b*) does not include the right to use someone else's property or public property noting that it does not give anyone the right to use "someone else's printing press to publish his ideas" (at p. 426). While acknowledging that Thurlow C.J.'s comments have to be read in light of *Committee for the Commonwealth of Canada*, Galligan J.A. nevertheless held at p. 299 that they still applied when the word "use" is used in the sense of making use of public property as part of one's means of expression. In this sense, he disagreed with the conclusion of McFadyen J. in *Re Forget, supra* that freedom of expression includes the right to attach posters to public property.

Therefore, Galligan J.A. did not accept that there was any infringement of the respondent's freedom of expression and would have dismissed the appeal. The by-law, in prohibiting the attachment of posters to objects on public property, did not prevent the respondent from doing anything encompassed within his freedom of expression. In this regard, Galligan J.A. stated at p. 299:

> In the case at bar, what the [respondent] did was make use of certain public property as part of his means of expressing himself. While he clearly has freedom to express himself on public streets, he was doing more than that. He was using public property as part of his means of expression. It is now settled that his freedom of expression permitted him to advertise his group's performances by having posters carried through the streets, by handing out handbills or communicating verbally with persons on the streets. But when he decided to use utility poles as a method of keeping his message in place, he made them part of the means by which he expressed himself. In my opinion, *Dorval Airport* does not say that freedom of expression encompasses any such activity.

IV. Issues

The issues raised on this appeal are whether an absolute ban on postering on public property infringes freedom of expression, and if so whether that infringement is justified under s. 1.

V. Analysis

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

Under *Irwin Toy, supra*, there are two basic steps in the s. 2(*b*) analysis. First, one must determine whether the activity at issue falls within the scope of s. 2(*b*). This first step is itself a two-part inquiry. Does postering constitute expression? If so, is postering on public property protected by s. 2(*b*)? Under the second step of the s. 2(*b*) analysis, one must determine whether the purpose or effect of the by-law is to restrict freedom of expression.

1. Does Postering Constitute Expression?

Under *Irwin Toy*, *supra* at pp. 968-69, the first question to be asked in a case involving s. 2(*b*) is whether the activity conveys or attempts to convey a meaning. This is an easy inquiry in the present case, and indeed the appellant city of Peterborough has properly conceded that the respondent was engaging in expressive activity through the use of posters to convey a message. In the Court of Appeal, Krever J.A. held at pp. 291-92 that "[i]n informing the public, or those members of the public who read the [respondent's] posters, of a coming musical performance the posters conveyed a meaning". Postering has historically been an effective and relatively inexpensive means of communication. Posters have communicated political, cultural and social information for centuries. In *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, this Court held that a law requiring public signs and posters to be printed only in French violated s. 2(*b*). Implicitly, this decision held that public signs and posters are a form of expression protected by s. 2(*b*). Regardless of whether the posters concerned constitute advertising, political speech or art, it is clear that they convey a meaning. Therefore, the first part of the s. 2(*b*) test is satisfied.

2. Is Postering on Public Property Protected by s. 2(b)?

The second question in the s. 2(*b*) inquiry is whether postering on public property falls within the scope of s. 2(*b*). In *Committee for the Commonwealth of Canada* there were three separate approaches articulated as to the appropriate standard to be applied to determine whether expressive activity falling *prima facie* within s. 2(*b*) and occurring on public property is constitutionally protected. While these approaches have been subject to some criticism, (see, for example, Michael Kanter, "Balancing Rights Under Section 2(b) of the Charter:

Case Comment on *Committee for the Commonwealth of Canada v. Canada*" (1992), 17 *Queen's L. J.* 489; B. Jamie Cameron, "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports under Section 2(b) of the *Charter*" (1992), 2 *Media & Communications L. Rev.* 91), in my view it is neither necessary nor desirable to revisit *Committee for the Commonwealth of Canada* in the present case.

The broadest approach was taken by L'Heureux-Dubé J. who emphasized, at p. 198, that for those with scant resources, the use of public property may be the only means of engaging in expressive activity:

> If members of the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression. Only those with enough wealth to own land, or mass media facilities (whose ownership is largely concentrated), would be able to engage in free expression. This would subvert achievement of the *Charter*'s basic purpose as identified by this Court, i.e., the free exchange of ideas, open debate of public affairs, the effective working of democratic institutions and the pursuit of knowledge and truth. These eminent goals would be frustrated if for practical purposes, only the favoured few have any avenue to communicate with the public.

Nonetheless, L'Heureux-Dubé J. recognized that certain kinds of public property must remain outside of the scope of s. 2(*b*). She held that restrictions on the time, place and manner of expressive activity must be justified under s. 1, rather than within the s. 2(*b*) analysis. She stated, at p. 198, that "some, but not all, government-owned property is constitutionally open to the public for engaging in expressive activity." She then listed, at p. 203, the criteria for determining when public property will be considered a "public arena" and prohibitions on expressive activity thereon will not be justified under s. 1:

1. The traditional openness of such property for expressive activity.

...

2. Whether the public is ordinarily admitted to the property as of right.

3. The compatibility of the property's purpose with such expressive activities.

...

4. The impact of the availability of such property for expressive activity on the achievement of s. 2(*b*)'s purposes.

5. The symbolic significance of the property for the message being communicated.

...

6. The availability of other public arenas in the vicinity for expressive activities.

...

Chief Justice Lamer reviewed the interest of the individual wishing to express him- or herself, and the government's interest in ensuring effective operation of services and undertakings in accordance with their intended purpose. Lamer C.J. concluded as follows at p. 156:

> In my opinion, the "freedom" which an individual may have to communicate in a place owned by the government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.

Lamer C.J. therefore held, at p. 157, that "if the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall

outside the sphere of s. 2(*b*)." He then considered, at p. 158, whether the form of expression used in that case was "compatible with the performance of the airport's essential function." He concluded, at p. 158, that "the distribution of pamphlets and discussion with certain members of the public are in no way incompatible with the airport's primary function, that of accommodating the needs of the travelling public".

McLachlin J. had a different approach, at pp. 236-37:

> ... the test for the constitutional right to use government property for public expression should conform to the following criteria. It should be based on the values and interests at stake and not be confined to the characteristics of particular types of government property. Reflecting the concepts traditionally associated with free expression, it should extend constitutional protection to expression on some but not all government property. The analysis under s. 2(*b*) should focus on determining when, as a general proposition, the right to expression on government property arises. The task at this stage should be primarily definitional rather than one of balancing, and the test should be sufficiently generous to ensure that valid claims are not excluded for want of proof. Once it has been determined that the expression in question at the location in question falls within the scope of s. 2(*b*) thus defined, the further question arises of whether the government's limitation on the property's use for the expression in question is justified under s. 1. At this stage the concern should be primarily one of weighing and balancing the conflicting interests--the individual's interest in using the forum in question for his or her expressive purposes against the state's interest in limiting the expression on the particular property.

Under this approach, at p. 239, once the activity in question is found to be expression,

> a further enquiry into the purpose served by the expression in question must be made before it can be found that s. 2(*b*) applies. In a case where the restriction involves a state-owned property, that examination will focus on whether the forum's relationship with the particular

> expressive activity invokes any of the values and principles underlying the guarantee. The effect of that inquiry is to screen out many potential claims to the use of government property as the forum for public expression.

In this case, it is not necessary to determine which of the three approaches should be adopted. Regardless of the approach chosen, it is clear from *Committee for the Commonwealth of Canada* that postering on some public property is protected by s. 2(*b*). A brief discussion of each approach in the context of this case makes this conclusion self-evident.

Under the approach proposed by L'Heureux-Dubé J., all restrictions on expressive activity on public property violate s. 2(*b*). Place restrictions must be justified under s. 1 which will be discussed below. In my view, an application of the factors enumerated by L'Heureux-Dubé J. clearly leads to the conclusion that this by-law could not be justified under s. 1.

Using Lamer C.J.'s approach, we must balance the interest of the respondent in publicizing the performances of his band, against the state interest in ensuring effective and safe operation of services. In this case, the public property used by the respondent to convey his message was utility poles. The question to be asked is therefore whether attaching posters to public utility poles is incompatible with the poles' use of carrying utility transmission lines. In my opinion, it is not. In this regard, I would adopt the words of McFadyen J. in *Re Forget, supra* at p. 557: "Generally speaking, a poster does not interfere with the use of the utility pole as a utility pole. It does not deprive the public of the use of such a pole." Without considering other types of public property, it is clear that

postering on some public property, including utility poles, is compatible with the primary function of that property.

Finally, under McLachlin J.'s approach, the question to be asked is whether postering on public property, and in particular on utility poles, furthers any of the values or purposes underlying s. 2(*b*). In *Irwin Toy*, this Court articulated the values underlying freedom of expression at p. 976:

> ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

In this case, one does not have to go further than the second value articulated in *Irwin Toy*, namely participation in social and political decision-making. As I noted above, posters have communicated political, cultural and social information for centuries. Postering on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making. In *Re Forget, supra*, at pp. 557-58, McFadyen J. observed that

> after the invention of modern printing technology, posters have come to be generally used as an effective, inexpensive means of communication. Posters have been used by governments to publish notices dealing with health, immigration, voters' lists, recruitment of armies, etc. Posters have been used by political parties, private and charitable organizations and by individuals. They convey messages, give notice of meetings and fairs.... [I]n societies where the government tends to repress opposition ideas, posters are the only means of communicating opposition ideas to a large number of people.

In *Fink v. Saskatoon (City of)* (1986), 7 C.H.R.R. D/3431, at p. D/3440, a Saskatchewan Board of Inquiry found that a prohibition of postering in Saskatoon violated freedom of expression under the *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1. In its decision, the Board referred to the evidence of the art historian Robert Stacey, author of *The Canadian Poster Book: 100 Years of the Poster in Canada* (at p. D/3440):

> [Mr Stacey] testified it was early recognized that posters were an effective and inexpensive way of reaching a large number of persons. In order to be effective, posters of course must be affixed to a surface and publicly displayed. Posters are traditionally used by minority groups to publicize new ideas or causes. Posters are both a political weapon and an educational device. According to Mr. Stacey, one measure of the openness of a democratic society has been the willingness of the authorities to allow postering. . . . Posters are an economic way of spreading a message. Utility poles have become the preferred postering place since the inception of the telephone system. . . . Posters have always been a medium of communication of revolutionary and unpopular ideas. They have been called "the circulating libraries of the poor." They have been not only a political weapon but also a means of communicating artistic, cultural and commercial messages. Their modern day use for effectively and economically conveying a message testifies to their venerability through the ages. [Emphasis added.]

I would adopt this characterization of the relationship between the message and the forum in the present case. In my view, it is clear that postering on public property, including utility poles, fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(*b*).

Before leaving this branch of the analysis, I must address the concerns raised by Galligan J.A., dissenting in the Court of Appeal, who came to a different conclusion on this issue. He distinguished between using a public forum as an instrument of expression and conduct at a public forum. In his view, this Court's

decisions in *Committee for the Commonwealth of Canada* allow for the use of public property in the sense of expressing oneself in a particular location, rather than allowing for the use of public property as a means of expression. I repeat his views at p. 298:

> My reading of *Dorval Airport* [*Committee for the Commonwealth of Canada*] leads me to conclude that the issue decided by the Supreme Court of Canada was that if a person is at a location on public property to which the public has a general right of access, freedom of expression permits the direct communication of views to others by discussion, by distribution of written material or by carrying placards. The attaching of posters to public property is a very different use of public property because it is using that property as part of one's means of expression. The Supreme Court of Canada did not say that freedom of expression encompasses the right to use public property as a means or instrument of one's expression.

With respect, I do not find this distinction between using public space for leaflet distribution and using public property for the display of posters persuasive. Surely the appellants in *Committee for the Commonwealth of Canada* were "using" the public property in question to convey their message, just as the respondent in this case was "using" the utility poles to convey his. One could "use" a utility pole to express oneself in many different ways: by sticking a poster to it by attaching a speaker to it to amplify a speech or even by climbing on it to gain a speaking platform. The question should not be whether or how the speaker uses the forum, but rather whether that use of the forum either furthers the values underlying the constitutional protection of freedom of expression (the McLachlin J. approach) or is compatible with the primary function of the property (the Lamer C.J. approach).

Therefore, I would conclude that, under any of the approaches proposed in *Committee for the Commonwealth of Canada*, the first step in the *Irwin Toy* analysis is satisfied. Postering on some public property, including the public property at issue in the present case, is protected under s. 2(*b*). The focus then moves to the question of whether the purpose or effect of the by-law is to restrict freedom of expression.

3. The Purpose of the By-law

It seems evident that the by-law is aimed at the consequences of the particular conduct in question, and is not tied to content. On its face the by-law is content-neutral and prohibits all messages from being conveyed in a certain manner and at certain places. The by-law is directed at avoiding the consequences associated with postering, namely litter, aesthetic blight, traffic hazards and hazards to persons engaged in repair and maintenance. In *Irwin Toy Ltd., supra*, at p. 975, Dickson C.J. noted that a rule against littering is not a restriction "tied to content". Rather, "[i]t aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning". The court below held that the purpose of the by-law is "meritorious" and not to restrict expression. I would agree.

4. The Effect of the By-law

In *Irwin Toy, supra* at pp. 976-77, Dickson C.J. discussed the burden on the individual seeking to establish that the effect of governmental action violates

s. 2(*b*). After repeating the three principles and values underlying the protection of free expression in our society, he stated:

> In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression.

It is clear that the effect of the by-law is to limit expression. The absolute prohibition of postering on public property prevents the communication of political, cultural and artistic messages. The appellant did not dispute that the effect of the by-law is to restrict expression, but rather argued that postering on public property does not further any of the values underlying s. 2(*b*). As I have already concluded, the expression in question promotes political and social discourse, one of the underlying purposes of s. 2(*b*). Therefore, the respondent has established a violation of s. 2(*b*), and the analysis now proceeds to s. 1.

B. *Section 1*

The objective of the by-law is pressing and substantial. The by-law seeks to avoid littering, aesthetic blight, traffic hazards, and hazards to persons engaged in the repair and maintenance of utility poles. Similarly, the total ban is rationally connected to these objectives. By prohibiting posters entirely, litter, aesthetic blight and associated hazards are avoided.

The question therefore becomes whether the by-law restricts expression as little as is reasonably possible. The limitation at issue in the present case is a complete ban on postering on public property. In *Ford, supra*, at p. 772, the Court discussed the "distinction between the negation of a right or freedom and a limit on it". While the negation of a right or freedom does not necessarily require that such an infringement not be upheld under s. 1, "the distinction between a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise and one that permits a qualified exercise of it may be relevant to the application of the test of proportionality under s. 1" (at p. 773). In *Ford*, the Court held that a complete prohibition on the use of languages other than French on commercial signs could not meet the requirements of the proportionality test, particularly the rational connection and minimal impairment branches. In contrast, in *Irwin Toy, supra*, the Court upheld substantial content-based restrictions (as opposed to a total ban) on advertising directed at children. It will therefore be more difficult to justify a complete ban on a form of expression than time, place or manner restrictions.

The U.S. Supreme Court considered a similar prohibition in *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Stevens J. for the majority of the court (Burger C.J. and White, Powell, Rehnquist and O'Connor JJ. concurring) accepted that the city's interest in avoiding visual clutter was sufficient to justify the complete prohibition on postering and that the ban curtailed speech no more than was necessary to accomplish its purpose. The majority rejected the argument that the public property concerned was a "public forum" protected by the First Amendment, or should be treated as a "public forum".

However, I find more helpful the dissent of Brennan J. (Marshall and Blackmun JJ. concurring) which discussed, at p. 830, less restrictive alternatives than a complete ban on postering:

> ... [the City] might actively create a particular type of environment; it might be especially vigilant in keeping the area clean; it might regulate the size and location of permanent signs; or it might reserve particular locations, such as kiosks, for the posting of temporary signs. Similarly, Los Angeles might be able to attack its visual clutter problem in more areas of the City by reducing the stringency of the ban, perhaps by regulating the density of temporary signs, and coupling that approach with additional measures designed to reduce other forms of visual clutter.

With regard to the objectives identified by the appellant in the present case, worker safety is only affected with respect to posters attached to wooden utility poles. The by-law extends to trees, all types of poles, and all other public property. Traffic safety is only affected where posters are displayed facing roadways. The application of the by-law is not so restricted.

In *Re Forget, supra*, at p. 561, McFadyen J. suggested some alternatives to a total ban:

> ... such values might equally be preserved by regulating the use of the poles for such purposes by specifying or regulating the location, size of posters, the length of time that a poster might remain in any location, the type of substance used to affix posters, and requiring that the posters be removed after a certain specified time. If necessary, a reasonable fee could be imposed to defray costs of administering such a system.

These kinds of alternatives could control the concerns of litter and aesthetic blight in a manner which is far less restrictive than the by-law. In my view, the total ban

on postering on public property does not impair the right as little as is reasonably possible, given the many alternatives available to the appellant.

Moreover, the benefits of the by-law are limited while the abrogation of the freedom is total, thus proportionality between the effects and the objective has 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, at 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". Therefore, the by-law cannot be justified under s. 1.

VI. Conclusion and Disposition

I would conclude, therefore, that under any of the approaches proposed in *Committee for the Commonwealth of Canada*, postering on some public property, including the public property at issue in the present case, is protected under s. 2(*b*). Therefore the by-law is a limit on s. 2(*b*). This limit cannot be justified under s. 1 as it is overly broad and its impact on freedom of expression is disproportionate to its objectives.

For the foregoing reasons, I would therefore dismiss the appeal with costs, and answer the constitutional questions as follows:

1. Do ss. 1 and 2 of the Corporation of the City of Peterborough By-law 3270 (as amended by By-law 1982-147) limit the right guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. If the answer to question 1 is yes, are such limits demonstrably justified pursuant to s. 1 of the *Charter*?

No.

Appeal dismissed with costs.

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