

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

BETWEEN:

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

Applicants

and

MUNICIPAL DISTRICT OF FOOTHILLS NO. 31

Respondent

P R O C E E D I N G S

Calgary, Alberta
December 20, 2019

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1 Proceedings taken in the Court of Queen's Bench of Alberta, Calgary Courts Centre,
2 Calgary, Alberta

5 December 20, 2019 Morning Session

7 The Honourable Court of Queen's Bench
8 Mr. Justice Poelman of Alberta

10 J. Kitchen For G. Top, J. Top, Spot Ads Inc., R. Martin,
11 J. Markiw and B. Wickhorst
12 S.E.D. Fairhurst Municipal District of Foothills No. 31
13 K. Girvin Court Clerk

16 THE COURT: Number 7, Gerrit Top and Municipal District of
17 -- I can't read the whole style of cause.

19 MR. FAIRHURST: My Lord, that's Mr. Kitchen's matter and I'm
20 responding but I believe that there may be some ex partes that have made their way into
21 the courtroom since you have dispensed with all prior ones. They may want to proceed --

23 THE COURT: I don't think we'll interrupt the list for them at
24 this stage, Mr. Fairhurst. Counsel should be aware that if they want ex parte or consent
25 orders, they should do it at the front of the list. Otherwise, they can do it at the end of the
26 list. Or, as I like to remind people, there is a very convenient drop-off box on the 7th
27 floor and they'll be processed in a reasonable period of time. But if you want to wait,
28 you're entitled to wait.

30 You're starting to unpack boxes and big briefcases, I presume counsel are aware this is a
31 20-minute matter?

33 MR. FAIRHURST: Yes.

35 MR. KITCHEN: My Lord, Kitchen, J., I'm on for the applicants.
36 From Justice Centre for Constitutional --

38 THE COURT: I'm sorry, I didn't get your name?

40 MR. KITCHEN: Kitchen, J.

41

1 THE COURT: Mr. Kitchen.

2

3 MR. KITCHEN: Yes. I'm on for the applicants. I'm here with
4 Justice Centre for Constitutional Freedoms. I have with me my -- our articling student,
5 Jocelyn Gerke (phonetic). Thank you, My Lord.

6

7 THE COURT: And I see Mr. Fairhurst is on for The Municipal
8 District of Foothills No. 31?

9

10 MR. FAIRHURST: Thank you, indeed I am My Lord, and I am
11 accompanied by Ms. Emily Shillette.

12

13 **Submissions by Mr. Kitchen**

14

15 MR. KITCHEN: My Lord, I'll be brief. We can briefly discuss
16 the facts. I'll move onto submissions regarding the applicants' relief sought pursuant to a
17 promissory estoppel, and I'll provide submissions regarding a request for an injunction,
18 and I'll end with a brief discussion of section 1(a) of *The Alberta Bill of Rights* and the
19 remedy sought by the applicants.

20

21 My Lord, this is an application to stay the enforcement of a bylaw that prohibits a
22 particular class of signage and is currently the subject of a *Charter* challenge. \$2,000
23 tickets have been issued to landowners who are exercising their constitutional right to
24 free expression on their land. If the stay is not granted, the responding County will,
25 starting on Christmas Eve, of all days, enter private lands to remove signs. The applicants
26 have filed with this Court an originating application to strike the bylaw as an unjustified
27 infringement of their rights to free expression as protected by the *Charter*. Originating
28 application was filed in May 2009 (sic), supporting affidavits of the applicants in June.

29

30 Foothills County entirely prohibits signs attached to the sides of trailers parked in within
31 the view of roadways.

32

33 THE COURT: Just before we get to that, I assume you're
34 proceeding on the basis of the usual tripartite test for an injunction?

35

36 MR. KITCHEN: I am, My Lord.

37

38 THE COURT: And I'm presuming there's an undertaking as to
39 damages?

40

41 MR. KITCHEN: No, My Lord. No damages have been sought in

1 this action.

2

3 THE COURT: Is that an issue, Mr. Fairhurst, in this
4 application?

5

6 MR. FAIRHURST: I don't believe it impacts the substance of it, My
7 Lord.

8

9 THE COURT: Thank you.

10

11 Then proceed, Mr. Kitchen.

12

13 MR. KITCHEN: Thank you, My Lord. As I was saying, My
14 Lord, Foothills County entirely prohibits signs attached to the sides of trailers. It does not
15 regulate them, it prohibits them. Nobody can get a permit from the County to display a
16 trailer sign. Although a number of other types of roadside signs are permitted. The
17 applicant Spot Ads is in the business of leasing advertising space --

18

19 THE COURT: Is there an affidavit that I should be looking at
20 as you're going through your submissions?

21

22 MR. KITCHEN: My Lord, do you have the file in front of you?

23

24 THE COURT: I do.

25

26 MR. KITCHEN: Okay --

27

28 THE COURT: I've got a lot of affidavits, but I'm reminding
29 you this is a 20-minute spot, so you're going to have to be stepping briskly and -- but if
30 you're making submissions, I'd like to be able to follow it in the evidence.

31

32 MR. KITCHEN: The affidavit of Josh Laforet, the CEO of Spot
33 Ads, he swore a brief affidavit back in June laying out --

34

35 THE COURT: Sorry, which affidavit?

36

37 MR. KITCHEN: The affidavit of Josh Laforet.

38

39 THE COURT: Let me --

40

41 MR. KITCHEN: Forgive me, My Lord, I can provide you --

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THE COURT: Let me see if I can turn that up. I realize a lot of this evidence may go over the merits of the matter. I'm trying to focus on what's relevant for the purpose of this interlocutory injunction.

MR. KITCHEN: What's relevant for Spot Ads is that they lease -

-

THE COURT: Okay, I have the affidavit of Mr. Laforet now, thank you.

MR. KITCHEN: Thank you. The essence of the -- of what's going on with Spot Ads is they lease the sides of these trailers to advertisers, and the trailers sit on landowners' land, and landowners earn income from having that trailer there. The three applicants to this application are three landowners in Foothills County: Ross Martin, John Markiw, and Brian Wickhorst. They've had or -- have now or had previously Spot Ads' trailers on their property. The applicants Gerrit and Jantje Top are Foothills County landowners as well. They have on their property a sign expressing their pro-life political views and informing pregnant women of available support services. And their sign -- their sign is not a Spot Ads sign.

THE COURT: Sorry, that's some commercial signs and some signs that promote various issues that a landowner might be interested in for personal reasons.

MR. KITCHEN: Yeah, essentially --

THE COURT: Okay.

MR. KITCHEN: -- it would be a political expression and commercial expression.

My Lord, by way of background, the parties agreed in the late summer to dates for the filing of a response affidavit for the County. Dates for cross examination in special chambers here were also agreed to. The County committed to provide its affidavit no later than October 7, committed to cross-examinations on November 6 and 7, a month later, and a hearing on the merits of the matter was scheduled for December 11th, nine days ago, originally. The evidence is that no penalizing enforcement action regarding the prohibited trailer signs had yet been undertaken by the County as of September 2019. Nor was there any notice that penalizing enforcement action was being contemplated by the County. Now the County did not provide its responding affidavit to the -- to the

1 applicants until after the date set for cross-examination, a full month after it said it would.
2 Well, that delay necessitated the cancellation of cross examination, which jeopardized the
3 December 11th hearing. Again, at this point there was no notice that penalizing
4 enforcement action was in the works. Yet --
5

6 THE COURT: When was the bylaw passed? Roughly.
7

8 MR. KITCHEN: The bylaw was passed several years ago. It was
9 amended in June. The substance is no different. The wording is a little bit different, but it
10 -- substantially, trailer signs have been prohibited by the bylaw for several years.
11

12 THE COURT: Thank you.
13

14 MR. KITCHEN: Now, the evidence we have in the affidavit of
15 Darlene Roblin and her supplemental affidavit is that the County was intending to
16 proceed with penalizing enforcement action as early as October. The County knew that.
17 Nobody else knew that. A few days after the December 11th date for the hearing on the
18 merits was adjourned, the County took advantage of that delay and started issuing
19 threatening enforcement letters against landowners. The first went out November 12th,
20 the first date by which they demanded that the signs be down would be November 26th.
21 Counsel for the applicants discovered this, raised it with counsel for the County, and then
22 counsel for the County, on the first day of scheduled enforcement, November 26, stated
23 in an email, and I quote:

24
25 I have confirmation from Foothills County that it will refrain from
26 enforcement respecting non-compliance with the by-law until the
27 Court has rendered its decision.
28

29 Now, counsel for the County --
30

31 THE COURT: I'm sorry, could you direct me to the document
32 you're reading from, or if it's --
33

34 MR. KITCHEN: Yeah.
35

36 THE COURT: -- in the text of an affidavit, I can go there as
37 well.
38

39 MR. KITCHEN: That's the affidavit of Jeremy Graf, not the
40 supplemental but the original. It's Exhibit E. That was filed on December 13th. I believe
41 it actually says Affidavit Jeremy Graf on the front of it.

- 1
2 THE COURT: Yes, I have it.
3
- 4 MR. KITCHEN: Excellent. Thank you. Now, this email was sent
5 by counsel for the County. It was provided to Spot Ads, and then early in the next
6 morning on November 27th, it was provided to landowners. Ross Martin --
7
- 8 THE COURT: I presume at the time this document was sent
9 the parties were still expecting to proceed on December the 11th?
10
- 11 MR. KITCHEN: No, no this is after that. At this point, the parties
12 are expecting to proceed on February 19th --
13
- 14 THE COURT: I see is there a date --
15
- 16 MR. KITCHEN: -- for a hearing on that.
17
- 18 THE COURT: -- is there a hearing date set for February 19?
19
- 20 MR. KITCHEN: There is, a half-day, yeah. Now that email was
21 provided to Ross Martin, among others, and both he and Spot Ads relied upon the
22 representation of the County's counsel in that email, so they did not take down their
23 signs. They left them up thinking it was safe to do so. Contrary to that representation of
24 non-enforcement, the County issued violation tickets to landowners and Spot Ads starting
25 on December 2nd. Spot Ad -- stop orders were also issued to landowners. My Lord, that's
26 what brings the applicants here, 5 days before Christmas, seeking equitable injunctive
27 relief.
28
- 29 THE COURT: And what is going to happen on December 24?
30
- 31 MR. KITCHEN: On December 24th, the letters indicate that the
32 County will come onto the land of Pat -- of Pat Miller and remove the signs from her
33 property.
34
- 35 THE COURT: Okay.
36
- 37 MR. KITCHEN: And then on December 27th, they will come on
38 the land of Ross Martin and remove the sign from his property.
39
- 40 THE COURT: Okay.
41

1 MR. KITCHEN: My Lord, I'll quickly go to the stop order
2 argument and then the injunctive argument.

3
4 My Lord, the test for promissory estoppel in the public law context has three
5 requirements: communication of a clear representation, reliance by a claimant upon that
6 representation to his or her detriment, and that the representation was lawful. As I've
7 mentioned, on November 26th, counsel for the County communicated in writing
8 representation that the County would refrain from enforcement, as it had been doing all
9 along, until the Court ruled on the *Charter* challenge. That representation was provided to
10 Ross Martin and other landowners early in the morning of November 27. They didn't
11 take down their signs. Then on December 2nd, counsel for the County communicated
12 that, contrary to representation -- prior to representation of non-enforcement, the County
13 was going to enforce anyways.

14
15 THE COURT: And where do I find that document?

16
17 MR. KITCHEN: My Lord, if I can -- I can direct you, same
18 affidavit, affidavit of Jeremy Graf, Exhibit J. Three letters that go back and forth between
19 counsel.

20
21 THE COURT: Thank you.

22
23 MR. KITCHEN: If you go down, first letter, second paragraph,
24 the last sentence there. This is communication from my co-counsel, Mr. Jay Cameron.
25 This is referring to oral phone communications between counsel for the County and
26 myself. And at that point, at that point (INDISCERNIBLE) was communicated regarding
27 the prior representation of non-enforcement. However, no notice was provided as to when
28 enforcement would proceed or in what manner.

29
30 Now, Sir, the very same day, December 2nd, tickets and stop orders began to be issued to
31 the landowners, first to Pat Miller and then to Ross Martin on December 4th. And Ross
32 Martin, who's an applicant in this matter, he swore an affidavit. He received a letter from
33 the County November 12th warning him that he'd be penalized if he didn't remove the
34 sign by the 26th. He didn't. On the -- on the morning of the 27th, which is the first day he
35 could have been ticketed, he was provided with the email from counsel for the County
36 saying that enforcement would not proceed. He relied upon that, but then he received a
37 ticket on December 4th without warning from the County. It's our submission that the
38 County ought to be estopped from proceeding with such penal enforcement action.

39
40 THE COURT: And you're saying the estoppel is based on Mr.
41 Fairhurst's December 6 email?

1
2 MR. KITCHEN: Yes.
3
4 THE COURT: Okay.
5
6 MR. FAIRHURST: November 27 email, Sir.
7
8 MS. SHILLETTO: 26th.
9
10 MR. KITCHEN: The email was sent by (INDISCERNIBLE) --
11 we'll go back to Exhibit E, My Lord, sent on November 26th.
12
13 THE COURT: I'm having difficulty with the dates on this
14 document. Yes, November twenty -- November 26th, did you say?
15
16 MR. KITCHEN: Yes.
17
18 MR. FAIRHURST: I'm sorry, 26th, I said the 27th, it should be --
19
20 THE COURT: Yes, yes, November 26, I see it now, thank you.
21
22 MR. FAIRHURST: It is.
23
24 MR. KITCHEN: 5:17 PM.
25
26 THE COURT: I was looking at the header of presumably the
27 printout.
28
29 MR. KITCHEN: Oh yes, I see the -- yes.
30
31 THE COURT: Thank you. Okay, so that's your -- that's your
32 estoppel argument.
33
34 MR. KITCHEN: Yeah. Just --
35
36 THE COURT: What -- what is the detrimental reliance that you
37 rely on for promissory estoppel?
38
39 MR. KITCHEN: My Lord, he -- Ross Martin was ticketed with a
40 \$2,000 ticket. That's detrimental. He will lose income if the sign is taken down, that he's
41 currently earning to have the sign there. And, My Lord, lastly, he will lose his right to

1 communicate with the public through very effective means, which is outdoor public
2 advertising.

3

4 THE COURT: Okay.

5

6 MR. KITCHEN: Moving to the injunctive argument. As you
7 know, there's three steps: whether there's a serious issue to be tried, whether there's
8 irreparable harm, and balance of convenience. My Lord, as you know, this is a *Charter*
9 case. It's about the infringement of the fundamental freedom of expression.

10

11 THE COURT: Mr. Fairhurst, for purposes of this application,
12 does the respondent take issue that there is a serious issue to be tried?

13

14 MR. FAIRHURST: We do not.

15

16 THE COURT: Okay, let's proceed then to irreparable harm.

17

18 MR. KITCHEN: Excellent. Thank you. My Lord, as you know,
19 irreparable harm refers to the nature of the harm suffered rather than its magnitude. It's
20 harm that cannot be quantified in monetary terms. The applicants submit they will suffer
21 irreparable harm if this Court does not issue an injunction because they will lose their
22 constitutionally protected right to express themselves by their chosen means. Such
23 significant harm, by its very nature, is not compensable. No amount of money could ever
24 compensate citizens who have their right to free expression restricted unjustifiably. In
25 particular for the Tops, they will lose the ability to communicate to the public their
26 politically oriented expression regarding their pro-life beliefs.

27

28 Regarding the third step, My Lord, which is where most of the analysis usually is, the
29 Supreme Court has ruled that public interest must be given --

30

31 THE COURT: Just -- just so I have you, Mr. Kitchen, on
32 irreparable harm, are you relying only on the personal advocacy element, or is there a
33 commercial element as well? I'm thinking of the, what's the nature of the, what's the
34 name of the business? Spot Ads?

35

36 MR. KITCHEN: Spot Ads. We were -- we're relying on the harm
37 to the loss of the constitutionally protected right to free expression.

38

39 THE COURT: Thank you. Balance of convenience?

40

41 MR. KITCHEN: Yes, My Lord. It's our submission either the

1 applicant or the respondent may tip the scales of convenience in his favour by
2 demonstrating a compelling public interest argument. As the Court has said, the
3 government does not have a monopoly on the public interest. It's our submission the
4 public interest is best served in this case by staying enforcement. The benefit of the sign
5 prohibition in the bylaws, unarticulated and tenuous at best, whereas the harm to the
6 applicants is clearly substantial in the loss of their constitutional rights.

7
8 Esthetic concerns, which is what the respondent has raised, and whatever purported harm
9 they (INDISCERNIBLE) for that, are not considered serious by the respondent. At least,
10 it appears so, given the lack of enforcement prior to November 2019. Many of these signs
11 have been up for years, and there's been no penal enforcement. And I note on this
12 esthetic concern, the County has asserted that complaints have been received from the
13 public, twice, in both the affidavits of Darlene Roblin. There's no evidence of that. In the
14 two opportunities to provide any record, any evidence of complaints, none are before
15 you, none are on the record. Presumably, if there's complaints, there'd be some record of
16 it and they'd be produced because that would be relevant. Further, My Lord, the public
17 interest is not served when the municipal government is permitted to take advantage of a
18 delay that it has solely caused, or to resign from representation it has made to its citizens
19 that -- and that those citizens have relied on to their detriment. The respondent's conduct
20 weighs in favour of the applicants in granting injunction, I would submit. Public interest
21 in this case is served by the issuing of a stay, which will protect the constitutional rights
22 of members of the public to express themselves in important means.

23
24 THE COURT: What's the duration of the stay you're seeking?

25
26 MR. KITCHEN: My Lord, we're seeking an interlocutory
27 injunction until the Court has determined the constitutionality of the challenged bylaw,
28 and in the alternative, an interim stay to at least get us over the Christmas break because
29 that's the period in which the signs will be taken down, further tickets will be issued.

30
31 THE COURT: And I think you confirmed that there's a hearing
32 set for sometime in February?

33
34 MR. KITCHEN: February 19th.

35
36 THE COURT: Thank you. Okay, anything further?

37
38 MR. KITCHEN: My Lord, if you'd permit me, the applicants are
39 also seeking procedurally pursuant to section 1 (a) of the *Alberta Bill of Rights*.

40
41 THE COURT: Sorry, you went through that rather quickly.

1 What section?

2

3 MR. KITCHEN: Section 1 (a) of the *Alberta Bill of Rights* which
4 protects the --

5

6 THE COURT: Thank you.

7

8 MR. KITCHEN: -- the right to enjoyment of property and the
9 right not to be deprived thereof, except by due process of law. We submit that due
10 process of law was not achieved because no notice was provided after the
11 (INDISCERNIBLE). The (INDISCERNIBLE), in our submission, nullifies any previous
12 notice and was procedurally unfair to ticket the landowners the same day as that
13 (INDISCERNIBLE) was finally received.

14

15 THE COURT: You're saying the tickets were issued the same
16 day as the notice that your clients could no longer rely on the November 26th email?

17

18 MR. KITCHEN: Yes, yes My Lord, exactly.

19

20 THE COURT: Thank you.

21

22 MR. KITCHEN: Thank you.

23

24 THE COURT: Okay.

25

26 MR. KITCHEN: Thank you, My Lord.

27

28 THE COURT: Thank you.

29

30 Mr. Fairhurst?

31

32 **Submissions by Mr. Fairhurst**

33

34 MR. FAIRHURST: Thank you, Sir. I do not wish to besiege you
35 with a lot of material, but I can advise that Mr. Graf was cross examined on his affidavit.
36 I have the original transcript of the cross-examination, my friend has a copy. What's
37 important are the three exhibits that were entered in that cross-examination, and I'll
38 address the quality of the evidence that my friend brings to the table. But it compels me
39 to address one point right off the bat, My Lord, and that is the email that I sent of
40 November 26th. My friend does accurately outline that the landowners began receiving
41 letters from the County on Novembers (sic) 12 and 13, relative to compliance with the

1 bylaw. And in those letters, and those letters are evidence in the supplemental affidavit of
2 Darlene Roblin who is a sergeant enforcement officer with the Foothills County, in those
3 letters, it indicates to each of the landowners that they are in contribut -- contravention of
4 the Land Use Bylaw, the section in particular that relates to roadside trailer signage.
5 They're advised that in the event that they do not comply by the end of November that
6 stop orders and violation tickets would be the next qualitative enforcement step that
7 would be undertaken by the County.

8
9 THE COURT: Sorry, when were those letters, did you say
10 October-ish?

11
12 MR. FAIRHURST: They were -- they were sent November 12 and
13 13.

14
15 THE COURT: November 12 and 13?

16
17 MR. FAIRHURST: Yeah.

18
19 THE COURT: And then we get to your letter of November 26.

20
21 MR. FAIRHURST: That's -- that's correct. What -- to back up, and
22 actually I think it is probably appropriate that I put this framework in place, Sir, the
23 County -- the County issues a letter to all landowners, including my friend's clients, on
24 February 1st, of 2019. And that letter can be found in Ms. Roblin's affidavit, sworn
25 November 8.

26
27 THE COURT: What exhibit?

28
29 MR. FAIRHURST: Actually, it's probably easier to identify it, Sir,
30 as Exhibit D to Ms. Top's affidavit, that is the affidavit that Ms. Top swore on the 15th of
31 June, and it's Exhibit D. And there you'll see a letter dated February 1, issued by the
32 County. I can advise the Court that within the confines of Ms. Roblin's evidence, she
33 positively swears to the fact that each of the landowners would have received the letter of
34 February 1. And what the County is advising is that it will be undertaking steps to
35 enforce the bylaw, and it's asking all landowners to comply by removing signage from
36 their property. It also advises that the Land Use Bylaw will be amended by the County,
37 and that notification with respect to that amendment process is forthcoming.

38
39 So the first step is for the County to advise all landowners that it requests compliance
40 with the existing bylaw on the books. The bylaw was indeed amended June 5, 2019.
41 Notice was provided to all landowners of that particular section of Foothills County's

1 counsel, and discussion of the amendments to the bylaw, and Ms. Roblin speaks to that in
2 her supplemental affidavit. In fact, Spot Ads, through Mr. Laforet, was represented at the
3 public hearing to discuss the amendments to the bylaw, and that's June 5, 2019.

4
5 THE COURT: What was the upshot of the amendment?

6
7 MR. FAIRHURST: The upshot of the amendment was to actually
8 increase the amount of the fines from what was stated in the February 1 letter as being
9 fines of \$1,000 per occurrence, and the upshot would be that the punitive measures under
10 the bylaw would be increased to allow fines of \$2,500, or sorry, \$2,000 for a first
11 occurrence, and then escalating thereafter for further occurrences --

12
13 THE COURT: And what was the date of the original bylaw?

14
15 MR. FAIRHURST: The date of the original bylaw --

16
17 THE COURT: Or it could be the year if --

18
19 MR. FAIRHURST: 2012, Sir.

20
21 THE COURT: Okay. So no significant changes of a
22 substantive nature, but the penal effect of a violation of the bylaw was increased.

23
24 MR. FAIRHURST: That's correct.

25
26 THE COURT: Okay.

27
28 MR. FAIRHURST: There were also some clarifications that were
29 made with respect to the definition of vehicle sign, so as to better particularize what was
30 meant by a vehicle sign, and there was also sort of amendments that were addressed at
31 the location of the signage relative to the property.

32
33 THE COURT: Okay.

34
35 MR. FAIRHURST: So June 5, publication of that meeting had
36 occurred in the Western Wheel where, as I've told you, Mr. Laforet on behalf of Spot
37 Ads attended that public hearing. Ms. Roblin identifies in her affidavit the fact that he
38 signed the notice of attendance sheet at that council meeting on November 5, had the
39 opportunity to make submissions, and minutes were made of the June 5 meeting.

40
41 THE COURT: Is all of this, Mr. Fairhurst, going to the issue of

1 promissory estoppel?

2

3 MR. FAIRHURST: It is.

4

5 THE COURT: Okay.

6

7 MR. FAIRHURST: And my submission, Sir, is that what you see
8 from February 1 is an escalating course of enforcement activity. The starting point for the
9 County is one of education. It is one of attempting to secure compliance on the part of its
10 residents.

11

12 THE COURT: Okay, so your point is that at most, the
13 applicants lost a few weeks by your letter.

14

15 MR. FAIRHURST: Correct.

16

17 THE COURT: Okay.

18

19 MR. FAIRHURST: Correct.

20

21 THE COURT: I have that point.

22

23 MR. FAIRHURST: What Ms. Roblin tells us in her affidavit
24 evidence is that the County then undertakes a review of all parcels where there are
25 violations of the bylaw, and that is undertaken in October of 2019. It's as a result of that
26 activity that a letter is then generated that is going to be sent to the landowners, and that
27 letter has been provided to my friends, and it's in the evidence of Ms. Roblin, and it's
28 drafted November 1, 2019. Ms. Roblin also tells us that that letter then gets disseminated
29 to each of the landowners that are in contravention of the bylaw, between Novembers
30 (sic) 12 and 13. So those are the enforcement measures that are taken up to that point in
31 time. And again, the letters of November 12, sorry, 11 and 12, which are in the
32 supplemental affidavit of Ms. Roblin, paragraphs 14 and 16.

33

34 THE COURT: I'm not sure I have the supplemental affidavit of
35 Ms. Roblin.

36

37 MR. FAIRHURST: It was --

38

39 THE COURT: You have --

40

41 MR. FAIRHURST: It was re --

1
2 THE COURT: I'm sorry, I do have it. December 18 was
3 sworn?

4
5 MR. FAIRHURST: December 18 was its sworn and filing date,
6 that's right. You have it.

7
8 THE COURT: I have it now, thank you.

9
10 MR. FAIRHURST: And so, what you see is an escalating -- an
11 escalating course of enforcement. I'm contacted by my friend, and what is important is at
12 this point in time, there is no agreement as to a stay of enforcement activity. There is no
13 evidence of that agreement at all. My friend contacts me after his clients had received --
14 certain of his clients have received the letters of November 12 and 13 and is requesting
15 that the County consider a stay or relaxation of enforcement measures. That results in me
16 sending the email of November 26, which he has appended to the affidavit of Mr. Graf.
17 And I want to take you carefully through the affidavit of Mr. Graf. The email indeed was
18 sent by me, and it was sent in error. And it's an error for which I am solely responsible.
19 And it's --

20
21 THE COURT: Yeah, I -- I've seen that in your follow-up letter.

22
23 MR. FAIRHURST: And in that follow-up letter, Sir, you'll see that
24 is Exhibit K to, sorry, Exhibit J, to Mr. Graf's affidavit. You'll see that I specifically
25 make mention of a telephone call that I had with Mr. Kitchen on November 27. And
26 under cross-examination of Mr. Graf, who is a legal assistant with my friend's firm, and
27 I'll comment on that in a few moments, three exhibits were appended. And they are email
28 exchanges between myself and Mr. Kitchen with copies to Mr. Cameron, and Exhibit 1 is
29 an email of November 27, 2019, and you should find it behind the original transcript of
30 the cross examination of Mr. Graf.

31
32 THE COURT: Yes, I have it.

33
34 MR. FAIRHURST: And you'll see that that email is dated
35 November 27, and it's sent by Mr. Kitchen back to me, and it acknowledges a phone call
36 of that day. Mr. Kitchen then proceeds to provide me with the names of all landowners in
37 the entity of Foothills that have Spot Ads trailers on their property, a fact that was
38 unknown to me up until I received this email of November 27. He then identifies that he
39 looks forward to being provided the Foothills position regarding enforcement against
40 these landowners. He comes before you and relies upon my email of November 26th to
41 express that it is some form of promise from a public --

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THE COURT: Okay, I have that point, Mr. Fairhurst. Mr. Kitchen was hurrying along at my urging. You need to move quickly as well, we're here in the morning chambers. I think I have your point on promissory estoppel.

MR. FAIRHURST: Thank you, Sir. If there are any -- if there are any questions that arise, please do not hesitate to --

THE COURT: Of course.

MR. FAIRHURST: -- to ask me on that particular point. I'm going to provide to you authorities relied upon by Foothills County in connection with -- in opposition to this application, and so I will deal with --

THE COURT: And are we on the injunction tests?

MR. FAIRHURST: We're on the injunction tests. We've dispensed with the issue of serious issue to be tried.

THE COURT: Yes.

MR. FAIRHURST: What's important for this Court to understand is that neither Ms. Top, nor Mr. Laforet on behalf of Spot Ads, have provided any evidence in connection with this particular application. My friends rely on the affidavit evidence that was filed in June of this year, but there is no fresh evidence why either of those individuals, or sorry, that business and the Tops, in support of this particular application. There is no evidence of irreparable harm having been incurred or suffered or will be suffered by either of those individuals. The affidavits that my friend does rely on are the affidavits of the applicants Markiw and Wickhorst as well as Martin. What the evidence discloses, Sir, and it's in the supplemental affidavit of Ms. Roblin, is that the applicants Markiw and Wickhorst have actually complied with the enforcement measures. The signage has been removed from their property and they seem content to have complied with that. Ms. Top and Spot Ads continue to be in violation of the -- to be in violation of the bylaw. But in order to find some irreparable harm, there has to be some foundation in the evidence, and there's simply no evidence before you here with respect to that particular point.

When I get to the balance of convenience, I would refer you and urge you to consider the Court of Appeal decision in *PT v. Alberta*, which is a decision on which I had the good fortune to appear, as did my friend's office.

1 THE COURT: I'm sorry, which authority?

2

3 MR. FAIRHURST: *PT v. Alberta.*

4

5 THE COURT: Thank you.

6

7 MR. FAIRHURST: And in particular, I would direct your attention
8 to paragraphs 75 and 76 of that decision. And within those paragraphs, we find the Court
9 of Appeal outlining to us that: (as read)

10

11 Legislation is presumed to produce a public good. The assumption of
12 public interest in enforcing the law weighs heavily in the balance.
13 The Courts will not likely order that laws, parliament, or legislature
14 duly enacted for the public good are inoperable in advance of
15 complete constitutional review.

16

17 And that's exactly the issue that was before the Court of Appeal in the *PT v. Alberta*
18 decision.

19

20 The Court goes on to say:

21

22 Only in clear cases will interlocutory injunctions against the
23 enforcement of a law on grounds of alleged unconstitutionality
24 succeed.

25

26 On paragraph 108 of that decision, the Court borrows from the classic case relating to
27 injunctions - the *RJR-MacDonald* decision - and reproduces that which occurs at
28 paragraphs 351 and 352 of that case. It reads as follows: (as read)

29

30 The weight accorded to public interest concerns is partly a function
31 of the nature of legislation generally, and partly a function of the
32 purposes of the specific piece of legislation under attack.

33

34 Whether or not they are ultimately held to be constitutional,
35 the laws which litigants seek to suspend or from which they
36 seek to be exempted by way of interlocutory injunctive relief
37 have been enacted by democratically-elected legislatures and
38 are generally passed for the common good,

39

40 This is a presumption that my friend needs to overcome in order to address the last aspect
41 of the injunctive relief test - the balance of convenience. I suggest to you that there is

1 nothing on the record here that allows him to rebut that presumption.

2
3 Going further --

4
5 THE COURT: The -- I haven't read this case in detail just now,
6 Mr. Fairhurst, but if I'm not mistaken, it involved an application for an injunction
7 regarding some relatively recent legislative changes to the *Schools Act*.

8
9 MR. FAIRHURST: That's exactly correct, Sir.

10
11 THE COURT: I think your friend's point on the balance of
12 convenience is that we're here dealing with legislation that is some years old, that had not
13 been actively enforced until within the past year.

14
15 MR. FAIRHURST: Certainly I would concede that we have a
16 situation where active enforcement commences February of 2019. The education process
17 that the County is attempting to engage in to secure compliance commences at that point
18 in time. And it has been a situation of one that has escalated --

19
20 THE COURT: Okay.

21
22 MR. FAIRHURST: -- since that point in time --

23
24 THE COURT: Yes.

25
26 MR. FAIRHURST: -- due to the County's resources.

27
28 What I would urge the Court to consider as well is the decision of Justice O'Ferrall in the
29 *360 Ads v. Town of Okotoks* case. And this case -- or this decision, rather, of Justice
30 O'Ferrall was rather compelling because it is really sort of dealing with facts very similar
31 to what you have before you. At paragraph 13 of that decision, Justice O'Ferrall outlines -
32 - sorry, 14: (as read)

33
34 In this case, the Municipal Governmental Act promotes specific
35 public interests. For instance, section 639 of the Municipal
36 Government Act requires every municipality to have a land use
37 bylaw. Section 640(1) of the Municipal Government Act states that a
38 land use bylaw may prohibit or regulate and control the use and
39 development of land in the municipality. The declared purpose of
40 these and other planning and development provisions is to achieve
41 "the overall greater public interest". So I must assume that the

1 actions taken by the Town are to promote the public interest. It is not
2 for a judge of this Court, on an interlocutory motion such as this, to
3 assess the actual benefits which result from the municipality's
4 actions. It is the applicant for the stay who must offset those
5 presumed public interest considerations by demonstrating a more
6 compelling public or private interest in staying the municipality's
7 actions.

8
9 Again, I indicate to you that my friend cannot overcome that presumption.

10
11 THE COURT: Your friend made reference to esthetic values as
12 being the underlying policy goal over legislation, is that accurate?

13
14 MR. FAIRHURST: That is accurate.

15
16 THE COURT: Thank you.

17
18 MR. FAIRHURST: There is a -- there's a companion issue here, and
19 that companion issue is actually addressed in the Spot Ads 360 case that Justice O'Ferrall
20 determined. There is a -- there's a dual system at play here. The County has certain
21 objectives that it can satisfy through its Land Use Bylaw, and this bylaw in particular,
22 and without a doubt, and I say to this Court, esthetics is the driving -- the driving factor.

23
24 THE COURT: Okay.

25
26 MR. FAIRHURST: But there is also a regulatory regime that is
27 managed by the Province under the *Highway Traffic Safety Act* and it has to do with
28 where these signs may be located relative to highways so that they prove not to be
29 distracting to drivers.

30
31 My friend, and what you'll see in the factual circumstances of the 360 case, is that there is
32 the necessary application to the Province in connection with this particular type of
33 signage. That evidence is not before you today, Sir. And the reason it's not is because Mr.
34 Laforet was not made available for cross-examination in advance of this particular
35 application.

36
37 But I just draw to your attention that it's not simply the esthetics that are at issue, there
38 are other issues that are at play.

39
40 I would also draw your attention to an aspect of Mr. -- Justice O'Ferrall's decision in the
41 360 Ads case. And, in particular, what you'll see in that case is his consideration is

1 whether or not an injunction should be granted pending an appeal of a SDAB decision to
2 prevent enforcement of this particular -- of a bylaw very similar to the one in question
3 here going forward. And Justice O'Ferrall notes in the *360* case: (as read)

4
5 A competitor of 360Ads on lands directly adjacent to the lands in
6 question removed its offending advertisements in response to the
7 municipality's direction.

8
9 So, too, has a competitor of Spot Ads in Foothills County, following the November
10 notice, they have actually removed their signs.

11 Justice O'Ferrall continues on in the *360* case: (as read)

12
13
14 To grant a stay to 360Ads may give it an unfair competitive
15 advantage. Any such advantage would have a negative public
16 interest aspect to it as well.

17
18 If one reviews the affidavit of the November 8, 2019 affidavit of Ms. Roblin, in particular
19 at Exhibit G, what you'll see is a representation of signage that has now been removed or,
20 rather, the placer of that sign and the landowner on whose sign that sat, has now complied
21 with the bylaw.

22
23 THE COURT: What was the signage?

24
25 MR. FAIRHURST: At Exhibit G, it is an Ads 360 sign.

26
27 THE COURT: Okay. I have it. It's the one that indicates,
28 "Pregnant, need help?"

29
30 MR. FAIRHURST: No. Let me just find it for you.

31
32 THE COURT: There's a lot of signs in this exhibit. Just -- I
33 don't need to see it, Mr. Fairhurst. The nature of the ad, is it a commercial ad? Is it a
34 personal ad?

35
36 MR. FAIRHURST: It's a commercial ad.

37
38 THE COURT: Okay.

39
40 MR. FAIRHURST: And what -- what the exhibit clearly identifies,
41 My Lord, is that the ad has been placed by 360 Ads, a competitor of the commercial

1 applicant on this application.

2

3 THE COURT: Mr. Kitchen's main argument, if I understand it
4 correctly, for this injunction application, is the right of free speech, free expression of a
5 personal view.

6

7 MR. FAIRHURST: Yes.

8

9 THE COURT: I don't know that you've addressed that.

10

11 MR. FAIRHURST: Well that's the serious issue to be tried.

12

13 THE COURT: Well he also relies on it for the irreparable harm
14 and the balance of convenience.

15

16 MR. FAIRHURST: The -- to indicate that expression is being
17 curtailed or infringed by virtue of this bylaw is a stretch, My Lord. What we're talking
18 about is roadside --

19

20 THE COURT: Well if someone has a roadside sign expressing
21 their personal advocacy in an issue of same nature and the municipality requires it to be
22 taken down, how can you say that's not an interference with free expression?

23

24 MR. FAIRHURST: Well, what we have is we have a commercial
25 advertisement that is simply making advertising space available to advertisers. The
26 contracts that speak to the placement of those advertisements are not in front of you. The
27 people that place those ads, with the exception of Ms. Top -- Mr. and Mrs. Top, are not in
28 front of you.

29

30 The evidence of the landowners is simply to say that I enjoy a measure of income that
31 helps me defray property tax on my land. There's nothing within their evidence that is
32 speaking to a right of expression. They are speaking to the enjoyment of the amount an
33 income that they get to setoff as against their property tax assessments.

34

35 So I'm suggesting to you that there isn't strong evidence in front of you to show
36 expression being curtailed in any fashion.

37

38 THE COURT: Thank you. You need to wrap up, Mr. Fairhurst.

39

40 MR. FAIRHURST: I think I need to come back, unless you tell me
41 otherwise, Sir, to the arguments that my friend makes on reliance or promissory estoppel.

1 Again, having regard to the phone conversation that occurs the next day as confirmed by
2 the email of November 27th, it's made clear at that point in time, as expressed in my letter
3 of December 6th, that that email of the 26th was sent in error, could not be relied on, and
4 that the decided direction of the County was to proceed with enforcement. That is
5 communicated to my friend.

6
7 The only way in which this Court receives the November 26th email is through the
8 affidavit evidence of a legal assistant at my friend's office. If one looks at paragraph 10 of
9 Mr. Graf's affidavit, you'll see that the paragraph outlines -- you'll see that the paragraph
10 -- just trying to get to tab 8.

11
12 THE COURT: What are you directing me to, Mr. Fairhurst?

13
14 MR. FAIRHURST: I'm directing you to paragraph 10.

15
16 THE COURT: Of Mr. Graf's affidavit?

17
18 MR. FAIRHURST: Of Mr. Graf's affidavit.

19
20 THE COURT: Sworn December 12th?

21
22 MR. FAIRHURST: Sworn December 12, cross-examined on
23 yesterday. Sir, what you see in that particular paragraph is double hearsay. My simple
24 submission to the Court is that the affidavit of Mr. Graf should not be expected, certainly
25 paragraphs 9 and 10 of that affidavit should not be accepted. But if they are to be
26 accepted as evidence, one must look at the exhibits that were exhibited during cross-
27 examination, as well as the communications outlined in Exhibit K to Mr. Graf's affidavit.
28 As we all know, having a legal assistant swear an affidavit is not good practice, and what
29 is happening in Mr. Graf's affidavit, again at paragraph 10, is the communication of
30 double hearsay and it's the only evidence on which my friend relies to show that an email
31 of November 26th was somehow relied upon by either Spot Ads or, indeed, any of the
32 landowners. Why Mr. Laforet couldn't provide evidence on that point is a mystery.

33
34 THE COURT: I have that point.

35
36 MR. FAIRHURST: I think it's also important, Sir, that I point out
37 that my friend made much about enforcement activity against a Pat Miller. Pat Miller is
38 not an applicant.

39
40 THE COURT: Thank you.

41

1 Before you reply, Mr. Kitchen, I notice Ms. Wong and Mr. Stead have come back in.

2

3 (OTHER MATTERS SPOKEN TO)

4

5 THE COURT: Mr. Kitchen?

6

7 **Submissions by Mr. Kitchen (Reply)**

8

9 MR. KITCHEN: My Lord, just a few points. First, My Lord, my
10 friend is trying to say that enforcement (INDISCERNIBLE) and that everybody had
11 notice of that. Well, there's no notice provided that they were attending in October,
12 (INDISCERNIBLE) penal letter starting at November 12th. That letter on February 1st,
13 there's no dates there, there's no timeline of when penal enforcement is going to
14 commence. There's no notice. So, you can go to all these hearings about the bylaw, that
15 doesn't actually say what the County's intentions are about penal enforcement and that's
16 what really matters.

17

18 Secondly, My Lord, it's not just the representation that's at issue here, it's the delay
19 caused by the County. The County was months late filing its affidavit. So late and was
20 provided after cross-examinations were scheduled which led to the generalization of the
21 date. No notice was provided that meanwhile the County was planning and intended to
22 take advantage of that delay to enforce. As soon as that delay was in place, they enforced.
23 They knew that, but nobody else did. Landowners didn't know, Spot Ads didn't know.

24

25 Subsequent emails between counsel for the applicants and for the County do not
26 demonstrate any kind of (INDISCERNIBLE) on November 27th. They just demonstrate
27 that there's continued confusion and continued requests for the actual position of the
28 County. I think those emails just muddy the water. No (INDISCERNIBLE) is really in
29 place until December 2nd.

30

31 As far as evidence of irreparable harm to the Tops and Spot Ads, My Lord --

32

33 THE COURT: Sorry, irreparable harm of what?

34

35 MR. KITCHEN: My Lord, my friend has said there's no evidence
36 of irreparable harm.

37

38 THE COURT: Yes.

39

40 MR. KITCHEN: The evidence -- well, there's the evidence of
41 Ross Martin, I'll direct you to that --

- 1
2 THE COURT: Okay.
3
4 MR. KITCHEN: -- and that's representative of everybody. That's
5 the affidavit of Ross Martin. Do you have that before you, My Lord?
6
7 THE COURT: I have that before me.
8
9 MR. KITCHEN: He specifically says, in paragraph 5 he says, and
10 this is going to be important later on, too: (as read)
11
12 It's my intention of having Spot Ads' signs on my property to
13 exercise my constitutional right to freedom of expression and display
14 the advertising message on the sign to the public.
15
16 It's the same for the Tops. The irreparable harm is obvious. They will -- they will cease to
17 be able to express their (INDISCERNIBLE) beliefs. They set out --
18
19 THE COURT: Well it's not -- it's never obvious, Mr. Kitchen.
20 Mr. Fairhurst says we're dealing with a commercial interest here and if -- if the harm is
21 irreparable there has to be something more than simply taking down someone's
22 commercial sign.
23
24 MR. KITCHEN: I agree, My Lord.
25
26 THE COURT: I beg your pardon?
27
28 MR. KITCHEN: I agree. This isn't about the commercial interest.
29 It's about the constitutional right of people who own their land to express themselves with
30 lawful expression on their lands to the public through a means that has been recognized
31 through the centuries as a hallmark of a free nation such as Canada.
32
33 THE COURT: Yes. And he says there's no evidence by any of
34 the applicants here that that interest is at stake.
35
36 MR. KITCHEN: That their free expression interests is at stake?
37
38 THE COURT: Yes.
39
40 MR. KITCHEN: I would disagree.
41

- 1 THE COURT: So direct me to the affidavit that sets that out,
2 please.
3
- 4 MR. KITCHEN: My Lord, what you're asking is for an applicant
5 to say that they will suffer harm --
6
- 7 THE COURT: No, I'm looking for an affidavit that gives me
8 some evidence on which I can infer that result.
9
- 10 MR. KITCHEN: That they will suffer harm if they're unable to
11 continue to speak their message?
12
- 13 THE COURT: If I understand Mr. Fairhurst, he's saying we're
14 talking about individuals who are earning some extra money, effectively for a
15 commercial purpose, and that has to give way to the municipality's legitimate bylaw. If
16 you've got some evidence that says, I want to use my land to exercise my right of
17 expression, then just direct me to that. I'm sure it's in here somewhere, Mr. Kitchen. You
18 have to understand I've got about ten affidavits before me, I've never seen this case
19 before, and I'm relying on counsel to direct me to the evidence.
20
- 21 MR. KITCHEN: My Lord, I direct you to paragraph 4 of the
22 affidavit of Jantje Top.
23
- 24 THE COURT: Yes?
25
- 26 MR. KITCHEN: She says: (as read)
27
28 My husband I believe strongly and --
29
- 30 THE COURT: Sorry, I thought I had that one before me but I
31 don't.
32
- 33 MR. KITCHEN: Okay.
34
- 35 THE COURT: Top?
36
- 37 MR. KITCHEN: Top. Ms. Jantje Top.
38
- 39 THE COURT: Is that the one that doesn't have the name on the
40 front cover?
41

1 MR. KITCHEN: Yes, I apologize, My Lord. It doesn't have the
2 name on the front of it.

3
4 THE COURT: Thank you. Which paragraph?
5

6 MR. KITCHEN: Paragraph 4. She says: (as read)
7

8 My husband and I believe strongly the inherent worth, dignity of all
9 human life including pre-born human life. We believe we should do
10 everything we can to support young women who are pregnant and
11 possibly feeling fearful and alone. Further, we are of the opinion that
12 Canada ought to create laws and protect --
13

14 THE COURT: Yes, you don't need to read it out. I've read it
15 now. Thank you. That answers the question I put just now.
16

17 MR. KITCHEN: Thank you, My Lord.
18

19 My Lord, on the point of the province, that's irrelevant. The province does permit signs
20 by the road within 300 metres. There's a permitting process but that process cannot be
21 engaged here because the County has prohibited the signs. That process cannot even
22 begin to be engaged. All that is irrelevant. As long as there's a prohibition in place, no
23 one can apply for a permit - whether it's to the province or the County.
24

25 And, lastly, My Lord, I will direct you to the exhibit, Exhibit C of the affidavit of Ross
26 Martin.
27

28 THE COURT: Martin?
29

30 MR. KITCHEN: Ross Martin.
31

32 THE COURT: Exhibit C. Yes?
33

34 MR. KITCHEN: Exhibit C. This -- see, Ross Martin receives an
35 email from Josh Laforet of Spot Ads, you can see that there at the top of the page. It
36 specifically says, "See below the email of the County lawyer. We can have the signs up
37 without threats of fines as the Court has made a ruling."
38

39 Mr. Martin was provided the email, he relied upon it. It's in his affidavit, he said he relied
40 upon it. He kept the signs up, the sign is still up. You have a picture of the sign at Exhibit
41 A of his affidavit. And he relied on that representation to his \$2,000 detriment. No notice

1 was provided to him by the County that it was changing its mind again. So that's -- that's
2 the reliance, and that's the detrimental reliance.

3
4 My Lord, the last point is balance of convenience. My friend spoke of the presumption.
5 I'll just quickly direct you to my -- my articling student's going to pass up. This is the
6 *National Council of Canadian Muslims* case. Quebec Court struck down new legislation
7 in Quebec which I believe subsequently re-enacted by the (INDISCERNIBLE) clause. I
8 can direct you to paragraph 45 --

9
10 THE COURT: Yes, I see it. Thank you.

11
12 MR. KITCHEN: You know, it says that it's trite law that there's a
13 presumption. But it says: (as read)

14
15 This case falls under a very narrow, unusual, and special exemption
16 for the following reasons ...

17
18 And it lays out the reasons. So, My Lord, it's our submission -- it's not our submission
19 that there's no presumption, of course there's a presumption. Our submission is that we
20 have rebutted that assumption. It is possible for applicants, especially in constitutional
21 cases like the *National Council of Muslim* case, that the applicant can rebut that
22 presumption of public interest. There is no demonstrable harm to the public, to the
23 council, beyond the presumption that legislation is in the public interest. There's no
24 demonstrable harm. And there's a series of harms that I've laid out to the landowners and
25 to the Tops in not being able to express themselves.

26
27 And that's, you know, considering the fact that other signs are around, this bylaw is very
28 arbitrary as there were signs -- other signs are allowed, roadside signs are common all
29 over the province, all over the County. This particular prohibition, it's a prohibition on
30 (INDISCERNIBLE) regulation, it's arbitrarily (INDISCERNIBLE) and there's no
31 evidence that they actually are (INDISCERNIBLE) any other signs.

32
33 So, it's our submission that free expression is not being arbitrarily restricted in this
34 manner and that -- and free expression is always, always, in the public interest.

35
36 THE COURT: I don't know that it's the place of any of us or
37 your clients to second-guess the municipality's or the County's decision on esthetic
38 values, assuming that it falls within their jurisdiction to make those decisions.

39
40 MR. KITCHEN: My Lord, I would submit that to justify
41 violation of what is perhaps the most fundamental freedom in our society, that is -- that

1 evidence is on the government to (INDISCERNIBLE). These sign cases have come up
2 plenty before and it's usually conceded --

3

4 THE COURT: Well I'm not saying there aren't competing
5 interests that need to be weighed. It seems to me that's a matter for February the 19th.

6

7 MR. KITCHEN: It is, My Lord. But in the meantime, Tops and
8 the landowners will suffer irreparable harm by having their free speech rights taken away
9 until the Court determines the constitutionality of the bylaw. That's not -- that's not
10 compensable.

11

12 THE COURT: Thank you.

13

14 MR. KITCHEN: Thank you, My Lord.

15

16 **Submissions by Mr. Fairhurst (Reply)**

17

18 MR. FAIRHURST: One point -- or two points arising, Sir, if I may?
19 And my friend speaks to the point of irreparable harm and I would be remiss if I did not
20 point the Court's attention to paragraphs 11 through 13 of Ms. Roblin's November 8
21 affidavit wherein you'll see that the County's evidence lays out a development permit
22 process that may be accessed by those seeking to erect signs within the county. So the
23 manner in which my friend seeks to protect the freedom of expression can actually be
24 accommodated provided that that development permit process be engaged.

25

26 My friend comes back to the point about Mr. Martin and the manner in which he has
27 acted. The Court will note that the stop order relative to Mr. Martin does not take effect
28 until December 27th. An appeal may be taken from a stop order, then leads to a hearing
29 in front of the subdivision appeal board. If there's any harm, it's the cost of filing that
30 appeal fee that he suffers. But he has a track available to him to challenge the
31 enforcement activity that has been undertaken against him.

32

33 With respect to the violation ticket, he's not imminently under threat of a violation ticket.
34 The first appearance hearing date, and this is in the evidence, for that violation ticket is
35 April 27th, 2019 (sic). Far beyond a February 19 hearing date. What I understand as a
36 matter of practice is an appeal undertaken under a stop order, there is no enforcement
37 activity. So, that's the first date that we're talking about here is December 27th --

38

39 THE COURT: Okay. Now we're on to a new point altogether,
40 Mr. Fairhurst. Are you basically saying that none of the enforcement activities will have
41 any effect until some time after February 19th?

- 1
2 MR. FAIRHURST: If Mr. --
3
- 4 THE COURT: Because what I had understood was that the
5 applicants, certainly some of them, were under threat of the municipality removing the
6 signs from the property.
7
- 8 MR. FAIRHURST: No. And I apologize that if I wasn't clear in my
9 submissions, My Lord, neither Mr. Wickhorst or Mr. -- the only applicant that currently
10 is under threat of a stop order is Mr. Martin. And that stop order has a compliance date of
11 December 27. If that stop order is appealed, if there's a file -- if there's a filed appeal for
12 that stop order, the matter then goes before the SDAB. It can go down that particular
13 track. Nobody else is facing that imminent deadline in the way that Mr. Martin is facing
14 it.
15
- 16 The violation tickets have been issued to Spot Ads. The violation tickets have also been
17 issued to Mr. Martin. But, again, the earliest of the dates for first appearance on the
18 violation ticket is April 27th, far beyond the February 19 day.
19
- 20 THE COURT: So why does the municipality consider it so
21 important to issue those violation tickets?
22
- 23 MR. FAIRHURST: I'm sorry?
24
- 25 THE COURT: What's the significance of issuing those
26 violation tickets now?
27
- 28 MR. FAIRHURST: The --
29
- 30 THE COURT: I don't get that, Mr. Fairhurst.
31
- 32 MR. FAIRHURST: All that the County is doing is following
33 through on the permitted enforcement measures that it is entitled to follow through on.
34 My friend makes the argument that you should've provided us with some notice of this.
35 Notice was provided in February --
36
- 37 THE COURT: That's not the point I'm trying to make, Mr.
38 Fairhurst. Your client is engaged in a process in which there'll be a hearing before the
39 Court, now February 19th, I gather it had originally been set for December --
40
- 41 MR. FAIRHURST: Yeah.

1
2 THE COURT: -- that will determine the legitimacy of these
3 enforcement activities.

4
5 MR. FAIRHURST: Correct.

6
7 THE COURT: Why do these enforcement activities need to be
8 undertaken now?

9
10 MR. FAIRHURST: Because these enforcement activities don't
11 simply relate to Spot Ads and the applicant - the individual landowner applicants that are
12 before you. It relates to a more expansive group across Foothills County. And so, again, I
13 had taken you earlier to --

14
15 THE COURT: Same point. What's the difference between end
16 of December and end of February given that this bylaw has been on the books for some
17 years?

18
19 MR. FAIRHURST: The County is not preferring one group over
20 another. It has rolled out an enforcement program as against all people that are in -- that
21 are in contravention of the Land Use Bylaw. So it simply can't be seen to be preferring
22 Spot Ads and its clientele and Mr. and Mrs. Top, or others.

23
24 THE COURT: Okay. Thank you.

25
26 **Decision**

27
28 THE COURT: This is an application by a number of applicants
29 by way of originating application.

30
31 MR. KITCHEN: My Lord, I have an amended originating
32 application.

33
34 THE COURT: Thank you. I had it here a moment ago. Now
35 that I have the document before me, I'll start again.

36
37 A number of applicants - Gerit Top, Jantje Top, Spot Ads Inc., Ross Martin, John Mariw,
38 and Brick Wickhorst - have commenced an action by originating application against the
39 Municipal District of Foothills No. 31 seeking a declaration that a bylaw of the M.D.
40 unjustifiably infringes section 2(b) of the *Canadian Charter of Rights and Freedoms* and
41 section 1(d) of the *Alberta Bill of Rights* and should, therefore, be declared void and of no

1 effect.

2
3 The bylaw in question originally passed on July 12, 2012. This allows certain signage
4 placed on land owned by various landholders, whether that signage be a big commercial
5 advertising nature or of a public interest advocacy nature, where those signs are placed
6 on, for the most part, parked transport truck trailers.

7
8 The applicants say that the bylaw, as I say originally passed in 2012, amended on June 5,
9 2019, infringe their freedom of expression and their constitutionally protected rights to
10 engage in expressive activities on their own private property.

11
12 For the purposes of the application this morning for an interlocutory injunction, there is
13 no issue that there are legal issues to be determined by the Court. What the applicants
14 seek is a stay of the enforcement of the bylaw until the Court can hear the merits of those
15 arguments. An application for that purpose was initially scheduled to be heard on
16 December 11 of this year, I'm advised by counsel for the applicants that it could not
17 proceed because of late filing of the respondent's affidavit. I am not in a position to make
18 a finding of whether that is so, but in any event, the hearing is now scheduled for
19 February 19, 2020.

20
21 The application for an interlocutory injunction must be determined according to the well-
22 known three-part test set out in *RJR-MacDonald Inc. v. Canada Attorney General* [1994]
23 1 SCR 311. For the applicants to succeed in obtaining their injunction, they must show,
24 first, a serious issue to be decided; second, that they will suffer irreparable harm if the
25 stay or the injunction is not granted; and, third, that the balance of convenience favours
26 granting the stay.

27
28 The M.D., through its counsel, quite properly concedes that for purposes of this
29 application for an injunction, the requirement of a serious issue to be decided has been
30 satisfied. That does not mean, of course, that the M.D. does not vigorously contest the
31 merits of the action, merely that it recognizes there are issues that need to be fully aired
32 before the Court.

33
34 Much of the dispute on this application has to do with whether the applicants have shown
35 irreparable harm. They rely primarily on the contention that the very nature of the
36 enforcement activities which the M.D. has now begun to undertake must constitute
37 irreparable harm. They say that any unnecessary and potentially unlawful interference
38 with their constitutional rights of free expression cannot be compensated by any
39 subsequent award of damages. Indeed, it has to be noted that in this action, as in many
40 actions of like nature, the remedy sought is not damages but the substantive declaration
41 that the bylaw is void and unenforceable.

1
2 The M.D. argues that there has to be some evidence of irreparable harm. They point out
3 that there has already been some compliance with the bylaw by some landowners and
4 they point to the fact that some of the evidence from the landowners indicates that these
5 activities are primarily in the nature of a source of additional cash.

6
7 In my view, the M.D.'s arguments on irreparable harm unduly minimize the interest
8 sought to be protected by the applicants. If, as I assume for the purposes of this analysis,
9 there is indeed an unlawful interference with the rights of expression of the applicants on
10 their own private property, it is hard for me to see how that would not meet the test for
11 irreparable harm.

12
13 I refer, as only one example, to the affidavit testimony of Ms. Top who refers to the
14 efforts that she and her husband make to publicly advocate their views on "the inherent
15 worth and dignity of all human life". They no doubt are of the view that the importance
16 of their rights of expression to advocate their personal views would be irreparably
17 harmed in a way that no money could compensate if they were unable to make that
18 message public on their own property for a period of some months. That is only one
19 example.

20
21 Other applicants have similar concerns. And while, as the M.D. points out, the evidence
22 was earlier than this emergency application, in my view, it is adequate to show that the
23 interference with the expression rights of these applicants would constitute irreparable
24 harm. It is hard for me to see how a different conclusion could be reached if we are to
25 give those constitutional rights the importance which our constitution and jurisprudence
26 says they have.

27
28 I turn then to the final element of the test - balance of convenience. The M.D. properly
29 relies on a line of authority which states that Courts should generally assume harm to the
30 public if actions of a governmental authority to enforce its legislation are restrained. *PT v.*
31 *Alberta*, 2019 ABCA 158, paragraphs 33 to 35, 43 and 44, and *360Ads Inc. v. Okotoks*
32 *Town*, 2018 ABCA 319, paragraphs 13 through 15.

33
34 That is not, however, an absolute rule. As I observed during submissions, the *PT v.*
35 *Alberta* decision involved relatively recent school's legislation that of course was
36 presumptively valid as having been passed by the Legislature and which was then, within
37 a reasonably diligent fashion, sought to be enforced. Of course, it also dealt with the very
38 important area of the public interest in ensuring the safe environment for the education of
39 children in the province.

40
41 This case is of a different nature. I do not minimize the policy objectives of the M.D.

1 Primarily, it seems, the interest is in ensuring reasonable esthetic control over the
2 landscape. However, I take note of the fact that the legislation substantially in its present
3 form has been available for enforcement for a number of years and it is only earlier this
4 year that the M.D. began, as its counsel phrases it, to gradually educate landowners. And
5 then to gradually increase the penalties and move towards active enforcement.
6

7 We are dealing with a period of an additional delay from around the end of December to
8 a decision following the Court hearing on February 19, 2020. I am not convinced that the
9 balance of convenience favours the M.D. on this point. Rather, I conclude that the nature
10 of the irreparable harm asserted by the applicants, the nature of the enforcement activities
11 gradually being implemented by the M.D., and in my view, with respect, the lack of a
12 compelling public interest to move now as opposed to in a couple of months, favours as
13 to balance of convenience the position of the applicants.
14

15 I find it unnecessary to address the argument of promissory estoppel which was relied on
16 by the applicants as part of the basis for their injunction application.
17

18 I conclude that the applicants have satisfied the test for an interlocutory injunction in the
19 nature of a stay of enforcement of the bylaw. That stay will be in place until February 19,
20 2020.
21

22 Is there anything further to be addressed counsel?
23

24 MR. KITCHEN: Just one point of clarification. It's likely the
25 Court will not render its decision on February 19th.
26

27 THE COURT: I've made it go to February the 19th, assuming
28 that counsel can address the presiding justice on that date if there is an issue regarding an
29 extension of the stay.
30

31 MR. KITCHEN: Thank you, My Lord.
32

33 MR. FAIRHURST: Thank you, My Lord.
34
35

36
37 PROCEEDINGS ADJOURNED UNTIL FEBRUARY 19, 2020
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41

1 **Certificate of Record**

2

3 I, Katie Girvin, certify that this recording is the record made of the evidence in the
4 proceedings in Queen's Bench, held in courtroom 1002, at Calgary, Alberta, on the 20th
5 day of December, 2019, and that I was the court official in charge of the sound-recording
6 machine during the proceedings.

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1 **Certificate of Transcript**

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I, Nicole Carpendale, certify that

(a) I transcribed the record, which was recorded by a sound-recording machine, to the best of my skill and ability and the foregoing pages are a complete and accurate transcript of the contents of the record, and

(b) the Certificate of Record for these proceedings was included orally on the record and is transcribed in this transcript.

TEZZ TRANSCRIPTION, Transcriber
Order Number: AL-JO-1004-6817
Dated: January 26, 2020