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Hill v. Corporation of the City of Brantford

Montour et al. v. Corporation of the City of Brantford

[Indexed as: Brantford (City) v. Montour]

2013 ONCA 560

Court of Appeal for Ontario, Doherty, Laskin and Simmons JJ.A.
September 13, 2013

Charter of Rights and Freedoms — Equality rights — Aboriginal peoples — Haudenosaunee claiming entitlement to regulate development within municipality and engaging in obstructive activity when developers refused to comply with their demands — City passing by-laws which prohibited unauthorized interference with development and construction on private property and imposition of unauthorized fees or other conditions for development — By-laws not discriminating against Haudenosaunee contrary to s. 15(1) of Charter — Canadian Charter of Rights and Freedoms, s. 15(1).

Charter of Rights and Freedoms — Freedom of expression — Reasonable limits — Haudenosaunee claiming entitlement to regulate development within municipality and engaging in obstructive activity when developers refused to comply with their demands — City passing by-laws which prohibited unauthorized interference with development and construction on private property and imposition of unauthorized fees or other conditions for development — By-laws violating s. 2(b) of Charter but limits on freedom of expression justifiable under s. 1 of Charter after removal of some overbroad language from by-laws — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law — Division of legislative authority — Haudenosaunee claiming entitlement to regulate development within municipality and engaging in obstructive activity when developers refused to comply with their demands — City passing by-law which prohibited imposition of unauthorized fees or other conditions for development — By-law not ultra vires as falling within federal power in relation to Indians and lands reserved for Indians.

Municipal law — By-laws — Validity — Haudenosaunee claiming entitlement to regulate development within municipality and engaging in obstructive activity when developers refused to comply with their demands — City passing by-laws which prohibited unauthorized interference with development and construction on private property and imposition of unauthorized fees or other conditions for development — By-laws discussed at closed door meeting and passed in brief open meeting — Exception under s. 239(2)(f) of Municipal Act to open meeting requirement in s. 239 applying as closed door meeting was necessary to obtain city solicitor's advice on legality of by-laws — By-laws not passed in bad faith — Municipal Act, 2001, S.O. 2001, c. 25, ss. 239, 239(2)(f).

Claiming that the Haudenosaunee had never surrendered the land on which the City was built and that they alone had the right to control how the land was

developed, the traditional governing body of the Haudenosaunee created the appellant for the purpose of regulating the development of private property in the City. The appellant demanded that developers obtain its approval and pay it fees in order to proceed with their projects. When developers refused to comply, the appellant and its supporters engaged in obstructive activities designed to stifle development in the City. After a lengthy discussion behind closed doors, City council passed two by-laws at a brief open meeting. By-law 63-2008 prohibited unauthorized interference with development and construction on private property, and By-law 64-2008 prohibited the imposition of unauthorized fees or other conditions for development. The appellant applied unsuccessfully to quash the by-laws. It appealed.

Held, the appeal should be allowed in part.

The City did not contravene the open meeting requirement in s. 239 of the *Municipal Act, 2001* as the exception in s. 239(2)(*f*) applied. The closed meeting was necessary in order to obtain the City solicitor's advice on the legality of the by-laws. Moreover, the appellant had failed to resort to s. 239.1 of the Act, which permitted it to ask for an independent investigation to determine whether council had complied with the open meeting requirement.

The by-laws were not passed in bad faith. The resolution to close the meeting under s. 239(4)(*a*) did not fail to give fair notice of the matters to be discussed in private. In the context of what was taking place in the City when the special council meeting was held, no reasonable citizen could have been in any doubt as to what was to be discussed. In the context of the ongoing disruptions, the public was given meaningful notice before the meeting of the nature of the by-laws. In the circumstances, the fact that the meeting was held almost entirely behind closed doors was not a sign that the by-laws were passed in bad faith. The by-laws did not target the Haudenosaunee people or the appellant. They applied generally to anyone who engaged in the activities prohibited by them.

The by-laws banned expressive conduct or communications and therefore limited freedom of expression contrary to s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. After the removal of some overbroad language from the by-laws, the limits on freedom of expression were demonstrably justified under s. 1 of the *Charter*. The City was faced with an urgent and serious problem. HDI and its supporters had brought virtually all development to a halt. Many of their actions were tortious. Council was entitled to act to curb what was taking place. With the exceptions of the prohibition on erecting signs on or adjacent to designated streets and the prohibition on inviting or requesting a tax as a condition of an application for development, the activities prohibited by the by-laws limited freedom of expression in a reasonably minimal way. The word "sign" should be removed from part of By-law 63-2008, and the words "request", "requests", "invite" and "invitations" should be removed from By-law 64-2008.

Once the words "invite" and "request" were removed, the by-laws did not discriminate against the Haudenosaunee contrary to s. 15 of the *Charter*. Neither by-law prevented the Haudenosaunee from interacting lawfully with developers or from advancing their constitutional interests in a lawful way.

By-law 64-2008 was not *ultra vires* as falling within the exclusive federal power in relation to Indians and lands reserved for Indians under s. 91(24) of the *Constitution Act, 1867*. The by-law was enacted under provincial legislative power in relation to property and civil rights. It would be invalid if it singled out the Haudenosaunee for special treatment or impaired their status as Indians either in purpose or effect, but it did not do so. Instead, it prohibited everyone

from engaging in the listed activities. Moreover, the by-law did not touch on a "core of Indianness".

London (City) v. RSJ Holdings Inc., [2007] 2 S.C.R. 588, [2007] S.C.J. No. 29, 2007 SCC 29, 283 D.L.R. (4th) 257, 364 N.R. 362, J.E. 2007-1242, 226 O.A.C. 375, 36 M.P.L.R. (4th) 1, EYB 2007-121030, 157 A.C.W.S. (3d) 842, **distd**

Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, [2002] S.C.J. No. 7, 2002 SCC 8, 208 D.L.R. (4th) 385, 280 N.R. 333, [2002] 4 W.W.R. 205, J.E. 2002-268, 217 Sask. R. 22, [2002] CLLC ¶220-008, 90 C.R.R. (2d) 189, 78 C.L.R.B.R. (2d) 161, 111 A.C.W.S. (3d) 272, **consd**

R. v. Oakes, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73, **apld**

Other cases referred to

Canadian Western Bank v. Alberta, [2007] 2 S.C.R. 3, [2007] S.C.J. No. 22, 2007 SCC 22, 281 D.L.R. (4th) 125, 362 N.R. 111, [2007] 8 W.W.R. 1, J.E. 2007-1068, 75 Alta. L.R. (4th) 1, 409 A.R. 207, [2007] R.R.A. 241, 49 C.C.L.I. (4th) 1, [2007] I.L.R. I-4622, EYB 2007-120167, 157 A.C.W.S. (3d) 299; *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, [1997] O.J. No. 3921, 103 O.A.C. 324, 40 M.P.L.R. (2d) 107, 74 A.C.W.S. (3d) 297 (C.A.); *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737, [1978] O.J. No. 3488, 88 D.L.R. (3d) 733, 6 M.P.L.R. 1, [1978] 2 A.C.W.S. 384 (Div. Ct.); *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, [2002] 2 S.C.R. 146, [2002] S.C.J. No. 33, 2002 SCC 31, 210 D.L.R. (4th) 577, 286 N.R. 131, [2002] 6 W.W.R. 1, J.E. 2002-605, 165 B.C.A.C. 1, 1 B.C.L.R. (4th) 1, [2002] 2 C.N.L.R. 143, REJB 2001-27059, 112 A.C.W.S. (3d) 808; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, 2005 SCC 62, 258 D.L.R. (4th) 595, 340 N.R. 305, J.E. 2005-2012, 32 Admin. L.R. (4th) 159, 201 C.C.C. (3d) 161, 18 C.E.L.R. (3d) 1, 36 C.R. (6th) 78, 134 C.R.R. (2d) 196, 15 M.P.L.R. (4th) 1, 143 A.C.W.S. (3d) 465, EYB 2005-97111, 67 W.C.B. (2d) 397; *NIL/TU, O Child and Family Services Society v. B.C. Government and Service Employees' Union*, [2010] 2 S.C.R. 696, [2010] S.C.J. No. 45, 2010 SCC 45, 407 N.R. 338, 326 D.L.R. (4th) 21, EYB 2010-181452, 2010EXP-3598, 294 B.C.A.C. 1, 2010EXPT-2426, J.E. 2010-1960, D.T.E. 2010T-727, [2010] 4 C.N.L.R. 284, 92 C.C.E.L. (3d) 221, 9 Admin. L.R. (5th) 161, [2010] 12 W.W.R. 402, 90 C.C.P.B. 1, [2010] CLLC ¶220-062, 11 B.C.L.R. (5th) 1; *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408, [1965] S.C.J. No. 13, 50 D.L.R. (2d) 704; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585, [2003] S.C.J. No. 34, 2003 SCC 55, 231 D.L.R. (4th) 449, 310 N.R. 122, [2003] 11 W.W.R. 1, J.E. 2003-1847, 187 B.C.A.C. 1, 18 B.C.L.R. (4th) 207, 5 Admin. L.R. (4th) 161, 3 C.E.L.R. (3d) 161, [2003] 4 C.N.L.R. 25, 111 C.R.R. (2d) 292, 125 A.C.W.S. (3d) 369; *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, 2004 SCC 31, 238 D.L.R. (4th) 1, 319 N.R. 322, J.E. 2004-1087, 187 O.A.C. 1, 12 Admin. L.R. (4th) 171, 33 C.C.E.L. (3d) 1, [2004] CLLC ¶230-021, 47 C.P.C. (5th) 203, 19 C.R. (6th) 203, 130 A.C.W.S. (3d) 816; *R. v. Dunbar*, [1982] O.J. No. 581, 138 D.L.R. (3d) 221, 68 C.C.C. (2d) 13, 28 C.R. (3d) 324, 7 W.C.B. 503 (C.A.); *R. v. Guignard*, [2002] 1 S.C.R. 472, [2002] S.C.J. No. 16, 2002 SCC 14, 209 D.L.R. (4th) 549, 282 N.R. 365, J.E. 2002-417, 49 C.R. (5th) 95, 92 C.R.R. (2d) 63, 27 M.P.L.R. (3d) 1, REJB 2002-28008, 111 A.C.W.S. (3d) 720; *R. v. Khawaja*, [2012] 3 S.C.R. 555, [2012] S.C.J. No. 69, 2012 SCC 69, 301 O.A.C. 200, 290 C.C.C. (3d) 361, 437 N.R. 42, 97 C.R. (6th) 223, 2012EXP-4411, J.E. 2012-2337, EYB 2012-215330, 356 D.L.R. (4th) 1, 104 W.C.B. (2d) 900;

United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. K-Mart Canada Ltd., [1999] 2 S.C.R. 1083, [1999] S.C.J. No. 44, 176 D.L.R. (4th) 607, 245 N.R. 1, [1999] 9 W.W.R. 161, J.E. 99-1845, 128 B.C.A.C. 1, 66 B.C.L.R. (3d) 211, 99 CLLC ¶220-064, 66 C.R.R. (2d) 205, 90 A.C.W.S. (3d) 892

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 15
Constitution Act, 1867, s. 91, para. 24
Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 35, (1)
Courts of Justice Act, R.S.O. 1990, c. C.43, s. 109 [as am.]
Municipal Act, 2001, S.O. 2001, c. 25, ss. 128 [as am.], (1) [as am.], (2), 238(2), 239 [as am.], (1), (2), (*f*), (*g*), (4) [as am.], (*a*) [as am.], 239.1, 239.2(1), 272, 273, (1)
Planning Act, R.S.O. 1990, c. P.13

Treaties and conventions referred to

Haldimand Proclamation of 1784
Nanfan Treaty of 1701

APPEAL from the order of Arrell J. (2010), 104 O.R. (3d) 429, [2010] O.J. No. 4968 (S.C.J.) dismissing an application to quash by-laws.

Louis C. Sokolov and *Jessica Orkin*, for appellants Aaron Detlor, Haudenosaunee Development Institute and Hazel Hill.

Neal Smitheman, *W. Thomas Barlow* and *Tracy A. Pratt*, for respondent Corporation of the City of Brantford.

Michael Beggs, for intervenor Attorney General of Canada.

The judgment of the court was delivered by

LASKIN J.A.: —

A. *Overview*

[1] The City of Brantford lies within the Haldimand Tract, an area of land stretching six miles wide on both sides of the Grand River. This land was once held by the Haudenosaunee people, who now claim that they never surrendered the land and that they alone have the right to control how it is developed.

[2] In the fall of 2007, the traditional governing body of the Haudenosaunee created the appellant, the Haudenosaunee Development Institute ("HDI"), for the purpose of regulating the development of private property in Brantford. HDI demanded that developers obtain its approval and pay it fees in order to proceed with their projects. When several developers refused to comply with these demands, HDI and its supporters began a series of measures to stifle development in the City. They blockaded development sites; they obstructed public rights of ways;

and they forced work stoppages by standing or sitting in front of equipment. By the spring of 2008, these measures were occurring almost daily.

[3] The Brantford City Council responded in May 2008 by passing two by-laws: By-law 63-2008, which prohibited unauthorized interference with development and construction on private property; and By-law 64-2008, which prohibited the imposition of unauthorized fees or other conditions for development. Council discussed these two by-laws with its solicitor at a lengthy meeting behind closed doors, and then, in a brief open meeting, passed them unanimously and without discussion.

[4] Several days later, Brantford sought an interlocutory injunction to restrain HDI and its supporters from engaging in the activities prohibited by the by-laws. The appellants applied to quash the two by-laws.

[5] Arrell J. heard both motions. He granted the interlocutory injunction and dismissed the application to quash the by-laws. The appellants sought leave to appeal the interlocutory injunction but leave was denied. The appellants appeal the dismissal of their application to quash to this court. Their appeal raises four issues:

(1) Did the application judge err by holding that the passage of the by-laws complied with the open meeting requirement in s. 239 of the *Municipal Act, 2001*, S.O. 2001, c. 25 (the "Act")?

(2) Did the application judge err by finding that the by-laws were not passed in bad faith?

(3) Did the application judge err by holding that the by-laws did not breach either s. 2(*b*) or s. 15 of the *Canadian Charter of Rights and Freedoms*?

(4) Did the application judge err by holding that By-law 64-2008 was not rendered invalid or inapplicable to the Haudenosaunee by the federal legislative power in relation to Indians under s. 91, para. 24 of the *Constitution Act, 1867*?

[6] The Attorney General of Canada intervened as of right on this appeal on a narrow issue raised in one paragraph of the appellants' notice of constitutional question. The appellants did not pursue this issue in oral argument and we did not call on the Attorney General to respond to it. I will deal with this issue later in these reasons.

B. *Factual Background*

(1) *The Haudenosaunee*[1]

[7] The Haudenosaunee's claims to the Haldimand Tract originate in two documents: the *Nanfan Treaty of 1701* and the *Haldimand Proclamation of 1784*. The proclamation recognizes the Haudenosaunee's right to use and possess all lands "six miles deep from each side of the Grand River beginning at Lake Erie and extending in that proportion to the head of the said river which them and their posterity are to enjoy forever". Of this tract of land, three parcels are partly located within the city limits of Brantford: the Johnson Settlement, the Eagle's Nest Tract and the Oxbow Tract. The Haudenosaunee claim that they never surrendered these three parcels and that the Crown improperly sold them in the 1840s.

[8] Before the application judge, the parties led expert evidence on whether the Haudenosaunee had validly surrendered these three parcels. The application judge preferred the City's expert, Ms. Joan Holmes. According to Ms. Holmes, between 1844 and 1846, the Haudenosaunee surrendered these three parcels for sale.

[9] Moreover, as the application judge noted, at para. 51 of his reasons, the Haudenosaunee have never sued the federal or provincial government for the return of these three parcels or for title to them. The Haudenosaunee did start a lawsuit against both governments in 1995, and have filed numerous land claims, but all their claims have been solely for compensation, never for title. Whether the Haudenosaunee do have a claim for title to any land within the City of Brantford is not an issue on this appeal.

(2) *The Haudenosaunee Development Institute ("HDI")*

[10] The customary, unelected governing body of the Haudenosaunee is the Haudenosaunee Confederacy Chiefs' Council. The chiefs' council created HDI in September 2007. The applicant Montour and the appellants Hill and Detlor are principals of HDI. HDI's terms of reference stipulate that "the HDI will identify, register and regulate development" within the Haldimand Tract. According to HDI policy, the land in and

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1 In Ontario, the Haudenosaunee are also known as the Six Nations. The Six Nations are the Mohawk, Oneida, Cayuga, Onondaga, Seneca and Tuscarora Nations.

around Brantford falls within a "red zone" — a zone where there is to be "zero to minimal development".

[11] HDI is not a lawful government authority. It has no statutory power to compel developers to accede to its demands. Nonetheless, it insists on the right to approve development projects, and to require developers to undertake archeological and environmental assessments, pay administrative levies ranging from $3,000 to $7,000 depending on the size of the project, and make annual payments for these projects.

[12] When HDI began to make its demands, several development projects were underway in Brantford. They included a hotel, a manufacturing facility, a residential subdivision and some retail stores. The developers for each project had obtained the required provincial and municipal permits and approvals. The application judge found that these projects "were of significant economic importance to the community" (at para. 5).

[13] What occurred when the developers of these projects refused to meet HDI's demands is best described by the findings of the application judge. The appellants did not mount any substantial challenge to these findings. On my review of the record, the application judge's findings are well supported — indeed, overwhelmingly supported — by the evidence before him.

(3) *The findings of the application judge concerning events taking place in the City of Brantford during 2007 and 2008*

[14] Although the application judge made his findings of fact on the City's interlocutory injunction motion, these findings provide a factual context for assessing the appellants' challenge to the by-laws.

[15] The application judge made general findings on the appellants' disruptive measures:

— Principals and supporters of HDI "systematically blockaded these development sites commencing in 2007" (para. 6).

— "These activities escalated into 2008 such that for all intents and purposes these projects came to a halt" (para. 6).

— "The evidence presented by the City, and not in any plausible way disputed by any of the respondents, is overwhelming that work blockades, stoppages and confrontations at the development sites were escalating in the early spring of 2008 to the point of being a daily occurrence" (para. 7).

— "The blockades of the various specified sites continued throughout the summer of 2008 and indeed based on the

evidence before me continued up to the start of the hearing of this application in early 2009" (para. 16).

[16] The application judge also made findings in connection with HDI's demands on one specific project — the Hampton Inn — being developed by Kingspan and others:

— "I find as a fact that Kingspan and the developers of the Hampton Inn met with Ms. Hill and Mr. Detlor as principals of HDI. They were told they must submit as application, an archaeological study and an environmental study. The developer of the Hampton Inn was also told that an application fee of $3000.00 was required and if HDI approved the project, the title in the land would be assigned to HDI in exchange for a long term lease and that annual development fees would be levied. The fee was not paid and the site was shut down regularly. Mr. Deltor representing HDI demanded a fee in the amount of $7,000.00 from Kingspan. This fee was not paid and there were on-going work stoppages, in spite of an interim injunction being issued. Kingspan eventually abandoned its project in Brantford. This evidence is uncontradicted by the respondents" (para. 13).

[17] From the evidence before him, the application judge had no doubt about HDI's intentions:

— "I find as a fact that in practice and into the future it was the intention of HDI to require all developers of undeveloped land to apply to it for a permit, pay the requisite fee and ultimately comply with all HDI's requirements, all without legal authority to do so. If they did not their projects would be shut down" (para. 14).

[18] The application judge then summarized the impact of the disruptive measures used by HDI and its supporters:

— "[A] number of these protests have led to violence, threats and intimidation against workers, protesters wearing masks, barricades being built by the respondents at worksites" (para. 18).

— "Public roads were obstructed, a number of the respondents and others trespassed on private properties and prevented entry to property over public roads" (para. 18).

[19] I accept these findings for the purpose of assessing the appellants' attack on the two by-laws.

C. *The Statutory Framework and the By-Laws*

(1) *The statutory framework*

[20] Numerous provisions of the *Municipal Act, 2001* give Ontario municipalities, such as Brantford, the power to pass specific kinds of by-laws. Section 128 is particularly relevant to this appeal as it gives municipalities the power to prohibit or regulate public nuisances. Section 128(1) states:

> 128(1) Without limiting sections 9, 10 and 11, a local municipality may prohibit and regulate with respect to public nuisances, including matters that, in the opinion of council, are or could become or cause public nuisances.

Brantford passed the two by-laws in issue on this appeal under s. 128(1) of the Act.

[21] Section 128(2) of the Act statutorily recognizes the deference generally given to municipalities when they exercise their legislative function:

> 128(2) The opinion of council under this section, if arrived at in good faith, is not subject to review by any court.

[22] Section 238(2) of the Act requires a municipality to pass a procedure by-law governing the calling, place and proceedings of meetings. Brantford's procedure by-law provides for special meetings of council, permits a meeting or part of a meeting to be closed to the public, and sets out the procedures to be followed in enacting by-laws. By-laws 63-2008 and 64-2008 were passed in accordance with Brantford's procedure by-law.

[23] Section 239(1) of the Act is another important provision on this appeal. It incorporates the open meeting principle on which HDI relies:

> 239(1) Except as provided in this section, all meetings shall be open to the public.

[24] As I will describe, the meeting at which By-laws 63-2008 and 64-2008 were discussed was closed to the public. However, s. 239(2) lists a number of exceptions to the requirement that municipal council meetings be open to the public. Brantford relies on the exception in subsection (*f*) for advice that is subject to solicitor-client privilege. Section 239(2)(*f*) provides:

> 239(2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

. . . . .

> (*f*) advice that is subject to solicitor-client privilege, including communications necessary for that purpose[.]

[25] Under s. 239(4) of the Act, members of the public are entitled to notice of a closed meeting and of its general subject matter. Section 239(4)(*a*) states:

> 239(4) Before holding a meeting or part of a meeting that is to be closed to the public, a municipality or local board or committee of either of them shall state by resolution,
>
> (*a*) the fact of the holding of the closed meeting and the general nature of the matter to be considered at the closed meeting[.]

[26] Any person may challenge a municipality's decision to close one of its meetings to the public by asking for an investigation into whether the municipality complied with s. 239. Sections 239.1 and 239.2(1) set out this investigation power:

> 239.1 A person may request that an investigation of whether a municipality or local board has complied with section 239 or a procedure by-law under subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public be undertaken,
>
> (*a*) by an investigator referred to in subsection 239.2(1); or
>
> (*b*) by the Ombudsman appointed under the *Ombudsman Act*, if the municipality has not appointed an investigator referred to in subsection 239.2(1).
>
> 239.2(1) Without limiting sections 9, 10 and 11, those sections authorize the municipality to appoint an investigator who has the function to investigate in an independent manner, on a complaint made to him or her by any person, whether the municipality or a local board has complied with section 239 or a procedure by-law under subsection 238(2) in respect of a meeting or part of a meeting that was closed to the public, and to report on the investigation.

Neither HDI nor any of the individual appellants asked for an investigation under s. 239.1.

[27] Finally, two provisions of the Act address the Superior Court's power to quash municipal by-laws. First, s. 272 implicitly recognizes the court's power to quash a by-law passed in bad faith:

> 272. A by-law passed in good faith under any Act shall not be quashed or open to review in whole or in part by any court because of the unreasonableness or supposed unreasonableness of the by-law.

[28] Second, s. 273(1) gives the Superior Court discretion to quash a municipal by-law for illegality:

> 273(1) Upon the application of any person, the Superior Court of Justice may quash a by-law of a municipality in whole or in part for illegality.

"Illegality" in s. 273 can include a failure to comply with statutory procedural requirements, such as the open meeting requirement

in s. 239, and bad faith: see *London (City) v. RSJ Holdings Inc.*, [2007] 2 S.C.R. 588, [2007] S.C.J. No. 29, at para. 40; *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321, [1997] O.J. No. 3921 (C.A.), at p. 331 O.R.

(2) *Passage of the by-laws*

[29] HDI challenges the process and procedures leading to the enactment of the two by-laws. Here, I briefly describe how Brantford City Council proceeded.

[30] The two by-laws were passed on Monday, May 12, 2008. Over a month earlier — on March 25 — council passed a resolution signalling its concern about the actions of HDI and its supporters. The resolution, which was posted on the council's website, said in part:

> . . . The City agrees with the Provincial position that developers are not required to pay licensing fees or taxes to the Haudenosaunee Development Institute[.]
>
> The City agrees with the comments from the Prime Minister's Office in which it was stated that incidents aimed at intimidation or coercion of developers are of great concern and the laws of the Province of Ontario and of Canada must be respected so economic development may flourish in an atmosphere of law and order[.]

[31] In accordance with the City's procedure by-law, a special meeting of council was scheduled for Monday, May 12, 2008. The meeting was set for 4:00 p.m. in the "Charlie Ward" committee room of city hall, which was the usual time and place for special meetings of council.

[32] The agenda for the meeting was available at the counter of the office of the clerk of city hall in the late afternoon of Thursday, May 8, and on the City's website early Friday morning May 9.

[33] The agenda contained a section titled "private and confidential agenda", which included the following item:

> 4.1 Land claims and related issues
>
> Advice that is subject to solicitor-client privilege, including communications necessary for that purpose.

[34] The agenda then noted "the potential for three by-laws to be presented in open session for approval following the consideration of the private and confidential items on the agenda". The agenda provided a description of the three by-laws. The first two by-laws summarized were 63-2008 and 64-2008; the third by-law is not in issue on this appeal:

63-2008 Being a by-law to prohibit certain activities on named properties.[2]

64-2008 Being a by-law to prohibit unauthorized fees, charges, levies, taxes requirements and conditions respecting development and construction.

[35] Although delegations from the public are permitted to attend special meetings of the Brantford City Council, no member of the public was present when the special meeting of council began at 4:00 p.m. on Monday, May 12, 2008. Soon after the meeting started, council passed a resolution — in accordance with s. 239(4)(*a*) of the Act — to "move in camera". It closed part of the meeting to the public in order to discuss the items on the private and confidential agenda. Those present at the closed meeting included the members of council, some of their staff, the City solicitor and the chief and deputy chief of police.

[36] At the end of the closed session, the doors of the committee room were opened and the council meeting resumed in public. Still no member of the public was present, save for one member of the media who was invited into the meeting.

[37] Council passed a motion to reconvene in open session. By-laws 63-2008 and 64-2008 were introduced and passed quickly without discussion. The vote in favour of each was unanimous. Copies of the by-laws were available at the meeting and afterward on request.

[38] The application judge found "that these by-laws were passed in full compliance with the City's usual practice, the City's procedural by-law, and all the applicable provisions of the *Municipal Act*" (at para. 72).

(3) *The two by-laws*

(a) *By-law 63-2008*

[39] By-law 63-2008 is titled "A By-Law to Prohibit Interference with Development, Construction and Access to Property". It has a lengthy preamble containing 11 recitals or "whereas" clauses. Six of these clauses refer expressly to HDI and its supporters. For example, the second and third recitals state:

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2 The description of By-law 63-2008 as enacted was "a by-law to prohibit interference with development, construction and access to property". The wording was changed on the advice of the City solicitor. Nothing turns on this change in wording.

> AND WHEREAS individuals associated with, or members, representatives, or supporters of, the Haudenosaunee Development Institute have caused approved construction and development on affected properties to be disrupted, hindered, delayed or otherwise obstructed by reason of such demands, requirements or stipulations;
>
> AND WHEREAS individuals associated with, or members, representatives, or supporters of, the Haudenosaunee Development Institute have also threatened to disrupt, hinder, delay or otherwise obstruct further proposed or approved construction and development on affected properties unless their demands, requirements or stipulations are satisfied[.]

The preamble shows that the actions of HDI and its supporters prompted the passage of By-law 63-2008.

[40] However, the by-law's operative provisions apply to any person who engages in the activities prohibited by the by-law. There are two operative provisions: ss. 2 and 3. Section 2 applies to designated streets and s. 3 to affected properties, that is, properties in which development or construction has been authorized.

[41] Section 2 generally prohibits putting up structures or signs, throwing things, or blocking traffic on designated streets. Section 3 similarly prohibits damaging or throwing things on any affected property, and interfering with development and construction on or with traffic going in and out of any affected property. Section 4 of the by-law tracks the language in s. 128(1) of the *Municipal Act, 2001* and states that "[a]ny contravention of sections 2 or 3 of this by-law is a matter that, in the opinion of Council, is or could become or cause a public nuisance and is hereby prohibited." The full text of By-law 63-2008 is at Appendix "A" of these reasons.

(b) *By-law 64-2008*

[42] By-law 64-2008 is titled "A By-Law to Prohibit Unauthorized Fees, Charges, Levies, Taxes, Requirements and Conditions Respecting Development and Construction". It too has a lengthy preamble consisting of 12 recitals, of which seven refer to the actions of HDI and its supporters. The first four recitals of By-law 64-2008 are identical to those in By-law 63-2008. The seventh recital describes Brantford's underlying concern with the actions of HDI and its supporters. It reads:

> AND WHEREAS the demands of individuals associated with, or members, representatives, or supporters of, the Haudenosaunee Development Institute are tantamount to the creation of a parallel, unauthorized and uncontrolled system respecting the regulation of development and construction, including the charging of fees, charges, levies, taxes, or other payments related to development and construction, the imposition of conditions of development or construction, and the submission of development applications and related reports, plans or documents[.]

Again, there can be no doubt that the actions of HDI and its supporters precipitated the passage of By-law 64-2008.

[43] However, the operative provisions of By-law 64-2008 apply, with one exception, not just to HDI and its supporters, but to any individual (or corporation or unincorporated association) that engages in the activities prohibited by the by-law. The by-law generally prohibits unauthorized demands for an application or fees for development. The conduct prohibited is broad — for example, s. 1 states that "[n]o individual, corporation, or unincorporated association shall request, demand, coerce, stipulate, require, invite, or collect . . . a tax or any charge . . . as a condition of . . . an application for development . . .". The breadth of the prohibited conduct is the subject of the appellants' *Charter* challenge to the by-law.

[44] Section 5 of the by-law refers specifically to HDI and its supporters. It states that their "requests, demands, coercion, invitations, stipulations or requirements" for fees as a condition of development or for an application for development are not authorized, are matters that in the opinion of council are or could constitute a public nuisance, and are therefore prohibited. The full text of By-law 64-2008 is at Appendix "B" to these reasons.

D. *The Issues*

(1) *Did the application judge err by holding that the passage of the by-laws complied with the open meeting requirement in s. 239 of the Municipal Act, 2001?*

[45] Section 239(1) of the *Municipal Act, 2001* requires that all municipal council meetings be open to the public, unless an enumerated exception applies. The open meeting requirement has these two important rationales: increase public confidence in local government and prevent secrecy in municipal decision-making. In *London (City) v. RSJ Holdings Inc.*, at para. 38, Charron J. emphasized that the legitimacy of municipal decision-making depends on openness and transparency:

> The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.

[46] Nonetheless, a municipal council is justified in closing all or parts of its meetings if it does so under one of the exceptions in s. 239(2) of the Act. In this case, in closing most of its May 12,

2008 meeting to the public, the Brantford City Council relied on the exception in s. 239(2)(*f*) for "advice that is subject to solicitor-client privilege including communications necessary for that purpose".

[47] The appellants submit that council's decision to discuss the two by-laws behind closed doors violated the open meeting requirement. They contend that the length of the closed door meeting followed by the brief open meeting renders the claim of solicitor-client privilege specious. Indeed, they go further and contend that council waived any privilege it might have had by including in the meeting two persons, the chief and deputy chief of police, neither of whom was party to the solicitor-client relationship between council and its staff and the City solicitor. In support of their submission, the appellants rely on *RSJ Holdings*, where the Supreme Court of Canada upheld this court's decision to quash a municipal interim control by-law enacted under the *Planning Act*, R.S.O. 1990, c. P.13 because it was discussed and then passed at two closed meetings of council.

[48] The application judge did not accept the appellants' submission. He concluded, but without elaboration, that the by-laws were passed "in full compliance" with "all the applicable provisions of the *Municipal Act*" (at para. 72). For the reasons that follow, I agree with his conclusion.

[49] That the discussion of the two by-laws took place behind closed doors does not by itself vitiate the validity of the claim of solicitor-client privilege. Council was faced with a volatile situation in a politically charged environment, which had reached near crisis proportions. Litigation was likely, if not inevitable. It had a duty to act to protect and balance the interests of all of the City's citizens. Yet in doing so, it had to ensure that it did not transgress its statutory authority. Thus, it needed legal advice to ensure that whatever steps it did take were lawful, and it needed to discuss that advice with its solicitor. On its face, council's claim of solicitor-client privilege for its discussions was anything but specious.

[50] Nor did the presence at the meeting of the chief and deputy chief of police amount to a waiver of the privilege. I accept the appellants' point that the chief and deputy chief were not clients of the City solicitor. The Brantford Police Service has its own legal counsel. But in this case, council and the police had a common interest: to understand the legal basis for these two by-laws. Indeed, I would have thought it vital for the heads of the police force to appreciate this legal basis as their officers would be responsible to enforcing the by-laws.

[51] This court has recognized that where two parties with a common interest consult a solicitor, their communications are privileged. In *R. v. Dunbar*, [1982] O.J. No. 581, 138 D.L.R. (3d) 221 (C.A.), Justice Martin wrote [at para. 57]:

> The authorities are clear that where two or more persons, each having an interest in some matter, jointly consult a solicitor, their confidential communications with the solicitor, although known to each other, are privileged against the outside world.

See, also, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, [2004] S.C.J. No. 16, at paras. 22-24. Thus, although council is the City solicitor's client, and the Brantford Police Service has its own counsel, for the meeting at which the by-laws were discussed, both parties together consulted the City solicitor with a common goal: to ensure that the two by-laws were lawful, enforceable and would put an end to the disturbances in Brantford. Accordingly, the chief's and deputy chief's attendance at the meeting did not vitiate council's claim of solicitor-client privilege.

[52] Moreover, the appellants' submission is undermined by their failure to resort to s. 239.1 of the *Municipal Act, 2001*. As I discussed earlier, that provision would have permitted the appellants to ask for an independent investigation to determine whether council had complied with the open meeting requirement. One reason for s. 239.1, at least in the context of a council's claim of solicitor-client privilege, is to avoid having to breach the privilege in order to justify its assertion. The appellants' failure to ask for an investigation is a further reason why I reject their submission.

[53] Finally, the decision in *RJS Holdings* does not assist the appellants. In that case, the municipality (the City of London) conceded that it had breached s. 239(4) of the *Municipal Act, 2001* by failing to pass a resolution giving notice of the closed meeting and its general subject-matter, and further conceded in the Supreme Court that it could not justify its closed meeting on the ground of solicitor-client privilege. Its sole remaining ground for its closed meeting — s. 239(2)(*g*) of the Act, which excepts discussion of a matter in which council may hold a closed meeting under another Act — found no support in the *Planning Act*. Accordingly, the City of London had no justifiable basis for discussing its interim control by-law behind closed doors.

[54] The case before us differs from *RSJ Holdings* in every important respect. Brantford City Council passed a resolution under s. 239(4) of the Act, and it had a justifiable ground for holding a closed meeting — obtaining advice subject to

solicitor-client privilege — a ground council did not disavow and the appellants have not shown to be specious.

[55] I would not give effect to this ground of appeal.

(2) *Did the application judge err by finding that the by-laws were not passed in bad faith?*

[56] The Superior Court has discretion to quash a municipal by-law passed in bad faith. In *H.G. Winton Ltd. v. North York (Borough)* (1978), 20 O.R. (2d) 737, [1978] O.J. No. 3488 (Div. Ct.), at pp. 744-45 O.R., Robins J. defined bad faith expansively:

> To say that council acted in what is characterized in law as "bad faith" is not to imply or suggest any wrongdoing or personal advantage on the part of any of its members: *Re Hamilton Powder Co. and Township of Gloucester* (1909), 13 O.W.R. 661. But it is to say, in the factual situation of this case, that Council acted unreasonably and arbitrarily and without the degree of fairness, openness, and impartiality required of a municipal government[.]

Our court has accepted this expansive definition: see *Equity Waste Management*, at pp. 340-41 O.R. However, municipal by-laws are presumed to have been enacted in good faith. The party seeking to quash the by-law has the onus of proving bad faith: see *Ottawa (City) v. Boyd Builders Ltd.*, [1965] S.C.R. 408, [1965] S.C.J. No. 13, at p. 413 S.C.R.

[57] The application judge referred to *Equity Waste Management* and concluded that the appellants had not rebutted the presumption that both By-laws 63-2008 and 64-2008 were passed in good faith.

[58] The appellants submit that the application judge erred in his conclusion. They point to what they say are four "badges" of bad faith, which cumulatively show that council acted unreasonably, without the degree of fairness, openness and impartiality required of it:

— the resolution to close the meeting under s. 239(4)(*a*) of the Act was deficient because it did not give fair notice of the matters to be discussed in private;

— the public was not given any meaningful notice before the meeting about the nature of the by-laws;

— almost the entire meeting was held behind closed doors;

— although seemingly of general application, the two by-laws target HDI and its supporters, yet none of the appellants was given notice of the by-laws.

[59] I do not accept the appellants' submission. None of the four "badges" the appellants rely on evidences bad faith. I will deal with each in turn.

(i) *The resolution passed under s. 239(4)(a)*

[60] The resolution passed under s. 239(4)(*a*) of the *Municipal Act, 2001* refers to "land claims and related issues". Perhaps in the abstract this brief description would not tell the ordinary citizen what was to be discussed in the closed meeting. But context matters. And in the context of what was taking place almost daily in Brantford when the special council meeting was called, no reasonable citizen, and especially no member of HDI or its supporters, could have been in any doubt about what was to be discussed.

(ii) *Notice to the public*

[61] Council did give advance notice to the public about the nature of the two by-laws to be considered, even though Brantford's procedure by-law did not require notice to persons who may be affected by a by-law. The notice that was given said simply: By-law 63-2008 — a by-law that prohibits certain activities on named properties; and By-law 64-2008 — a by-law that prohibits unauthorized fees, charges, levies, taxes requirements and conditions respecting development and construction.

[62] The appellants say that these descriptions were too vague to alert them that the by-laws may affect their interests. This assertion is not plausible. Even accepting that advance public notice of the by-laws was required — a point I need not decide — the description of the by-laws given met any reasonable notice requirement. Again, in the light of what was taking place in Brantford at the time, the Haudenosaunee and HDI would or should have been well aware from this notice that the two by-laws may affect their interests.

(iii) *Closed door meeting*

[63] That the meeting was held almost wholly behind closed doors is not a sign the by-laws were passed in bad faith. As I discussed under the first issue, a closed meeting was necessary to obtain the City solicitor's advice on the legality of the by-laws. The application judge dealt with this aspect of the appellants' claim of bad faith, at para. 79 of his reasons:

> The second ground of bad faith put forth by the respondents was the fact that the public meeting was conducted in 3 minutes whereby the by-laws were approved, and part of the meeting was conducted in camera. The evidence before me is that the reason part of the meeting was in camera was

> to receive some communications considered privileged by the City Solicitor. There is no evidence to dispute this explanation. There is also no evidence before me to suggest anything sinister about passing these by-laws in 3 minutes without debate. In fact the evidence suggests this is not an unusual occurrence. One wonders why there would be debate or discussion when no one from the public had elected to attend, the councilors had obviously reviewed the material in advance and all were in favour — what discussion or debate under those circumstances needed to take place? The respondents have not rebutted the presumption of good faith on this ground.

I agree with this paragraph of the application judge's reasons.

(iv) *Targeting*

[64] Finally, I do not accept that either by-law targeted the Haudenosaunee people or HDI in the sense of singling them out for special or different treatment. The preamble to each by-law candidly acknowledged — and Brantford City Council ought not to be penalized for its candor — that the actions of HDI and its supporters were the catalyst for the by-laws. However, municipal decisions are often made because municipal councilors, in their desire to act in the public interest, respond to the concerns of their constituents. Undoubtedly, that is all that occurred here: see *Equity Waste Management*, at pp. 344-45 O.R.

[65] The passage of the two by-laws was precipitated by the disruptive actions of HDI and its supporters, but the by-laws themselves apply generally to anyone who engages in the activities prohibited by them. In their operative provisions, the by-laws do not target the Haudenosaunee or HDI or any of their supporters for special treatment. One section of By-law 64-2008 — s. 5 — does refer specifically to HDI and its supporters. That section is superfluous. It adds nothing to the list of activities already banned by the other four sections of the by-law to which HDI and its supporters along with the rest of the citizens of Brantford are subject. Thus, the appellants were not entitled to any special notice of these by-laws beyond the public notice that was given several days before the by-laws were discussed and passed.

[66] Accordingly, the appellants have failed to demonstrate that the application judge erred in holding that bad faith had not been proven. I would not give effect to this ground of appeal.

(3) *Did the application judge err by holding that the by-laws did not breach either s. 2(b) or s. 15 of the Charter?*

[67] In addition to attacking the statutory legality of the two by-laws, the appellants challenged their constitutionality. They submit that some of the conduct prohibited by the two by-laws infringes the guarantee of freedom of expression in s. 2(*b*) of the

Charter and is not justified under s. 1. Alternatively, the appellants submit that the by-laws unjustifiably discriminate against the Haudenosaunee contrary to the equality guarantee in s. 15 of the *Charter*.

[68] The application judge found the appellants' s. 2(*b*) argument "to be without merit" (at para. 82). He also found no breach of s. 15 because the by-laws did not specifically target the Haudenosaunee. While I agree with the application judge's finding on s. 15, I do not wholly accept his finding on s. 2(*b*). Although most of the prohibited conduct can be justified under s. 1 of the *Charter*, the ban on a "request" and an "invite" in By-law 64-2008 is overly broad, as counsel for Brantford acknowledged during oral argument, and these words should be struck from the operative provisions of the by-law.

(a) *Section 2(b)*

[69] In dismissing the appellants' s. 2(*b*) claim, the application judge relied on the Supreme Court of Canada's decision in *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, [2002] S.C.J. No. 7. However, that case is not determinative of the constitutionality of Brantford's by-laws because, as the appellants point out, it was a private labour dispute about the legality of secondary picketing, to which the *Charter* did not directly apply. Thus, in *Pepsi-Cola*, the Supreme Court did not undertake the usual two-stage analysis of a *Charter* claim: have the claimants shown a state-imposed limitation on a *Charter* guarantee; and, if so, has the state justified the limitation under s. 1.

[70] Nonetheless, as I will discuss, *Pepsi-Cola* is helpful in dealing with the appellants' s. 2(*b*) arguments because picketing is a form of expression and *Charter* values inform the common law. Thus, in *Pepsi-Cola*, the Supreme Court did address the kind of expressive conduct that did not deserve constitutional protection.

[71] By-laws 63-2008 and 64-2008, in different ways, ban expressive conduct or communications. Virtually all expressive activity short of physical violence or threats of violence is protected under s. 2(*b*): see *R. v. Khawaja*, [2012] 3 S.C.R. 555, [2012] S.C.J. No. 69, at para. 70. Without parsing each by-law, I will assume that both by-laws limit the appellants' freedom of expression guaranteed by s. 2(*b*) of the *Charter*.

[72] Has Brantford justified the by-laws' limits on freedom of expression under s. 1 of the *Charter*? Section 1 of the *Charter* provides:

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 laws as can be demonstrably justified in a free and democratic society.

[73] Brantford has the onus of justifying the limits it imposed. The test under s. 1 remains the test in *R. v. Oakes*, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, though it has been elaborated on and refined in many later cases. The test has two parts: Brantford must show that it passed the two by-laws to meet a "pressing and substantial objective"; and it must show that the by-laws' limits on freedom of expression are proportional in the sense of being rationally connected to the objective, impairing the right to freedom of expression in a reasonably minimal way and having curtailed expression in a way that it is proportionate to the benefit sought. See *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, [2005] S.C.J. No. 63, at para. 88.

(i) *Pressing and substantial objective*

[74] That the by-laws were passed to meet a pressing and substantial objective cannot seriously be debated. Brantford City Council was faced with an urgent and serious problem within the municipality. HDI and its supporters had brought virtually all development in the City to a halt, had obstructed access to private property and had impeded traffic on public streets. Many of their actions were tortious. And, on the finding of the application judge, HDI and its supporters intended to continue with these disruptive actions. Council was entitled to act to curb what was taking place. The objective of the limitations on freedom of expression is without doubt pressing and substantial.

(ii) *Proportionality*

[75] The limitations on freedom of expression are obviously rationally connected to the City's objective in passing the two by-laws.

[76] As is invariably the case under the proportionality branch of the *Oakes* test, the key question is whether the limits impair freedom of expression "in a reasonably minimal way". The word "reasonably" is important. A court should not strike down a by-law because it can dream up what it thinks is a better or less intrusive way to address the municipality's problem. As McLachlin C.J.C. and Deschamps J. said, writing for the majority, in the *Montréal (City)* case,[3] at para. 94: "in dealing with social

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3 The case dealt with the City's regulation of noise pollution.

issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude".

[77] With the exceptions of the prohibition on erecting signs on or adjacent to designated streets in By-law 63-2008, and the prohibition on "invite" and "request" in By-law 64-2008, the activities prohibited by both by-laws limit freedom of expression in a reasonably minimal way. Here, the Supreme Court's decisions in *Pepsi-Cola* and *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. K-Mart Canada Ltd.*, [1999] 2 S.C.R. 1083, [1999] S.C.J. No. 44 are instructive. Both cases make it clear that a ban on criminal, tortious, or coercive conduct or conduct that prevents free access to private property or conduct that blocks traffic on public streets will be justified under s. 1 of the *Charter*: see *Pepsi-Cola*, at para. 103; and *K-Mart*, at paras. 37, 43 and 72.

[78] *By-law 63-2008*. By-law 63-2008 is reasonably tailored to ban conduct that amounts to the tort of nuisance — for example littering, loitering, damaging private property or putting up tents and the like on public streets; or conduct that amounts to the tort of trespass; or conduct that prevents unimpeded access to and from private properties being lawfully developed or that impedes traffic on public streets.

[79] However, one activity banned by By-law 63-2008 requires separate consideration: the ban in s. 2(a) on erecting signs on or adjacent to a designated street. Signs have long been recognized as an inexpensive yet effective means of expression, especially for individuals or groups who lack the financial resources to use other more expensive means of communication: see *R. v. Guignard*, [2002] 1 S.C.R. 472, [2002] S.C.J. No. 16, at para. 25. For that reason, the posting of signs, in many different contexts, merits constitutional protection.

[80] By-law 63-2008 contains two provisions banning signs. Section 2(a) prohibits unauthorized signs on designated streets or on city property adjacent to designated streets. Section 3(c) prohibits signs on any affected property — that is, a property approved for development or construction.

[81] The prohibition in s. 3(c) is appropriate. Council was justified in banning signs on private property approved for development. However, the blanket prohibition on signs on or adjacent to designated streets is overly broad and fails the proportionality branch of the *Oakes* test.

[82] Erecting signs on public streets is not by itself tortious conduct. And, although By-law 63-2008 does not prevent the appellants and their supporters from erecting signs on non-designated streets, from their perspective, by putting up signs

near development sites can they convey their message in a peaceful yet effective and meaningful way. Council would be justified in regulating the erection of signs on public streets near development sites. For example, it could limit the size or number of signs. But the blanket prohibition in s. 2(a) of By-law 63-2008 does not impair freedom of expression in a reasonably minimal way.

[83] *By-law 64-2008*. Under s. 1 of By-law 64-2008, no person, unless authorized, shall "request, demand, coerce, stipulate, require, invite or collect" a fee for development. The other operative provisions of the by-law use similar language.

[84] The words "demand", "coerce", "stipulate", "require" and "collect", all broadly speaking, amount to conduct that is coercive. Brantford was fully justified in banning this coercive conduct. However, neither a "request" nor an "invite" is coercive. Both may be viewed as non-coercive activity meant to persuade or at least to prompt discussion with developers. Banning this non-coercive activity limits freedom of expression more than is reasonably necessary.

[85] If the words "invite" and "request" are taken out of By-law 64-2008, both by-laws satisfy the third branch of proportionality: the prejudicial effects on free expression flowing from the two by-laws are proportionate to their beneficial effects. Accordingly, save for the prohibition on a request and an invite, Brantford has met its onus of justifying the limits on freedom of expression imposed in the two by-laws.

(iii) *Remedy*

[86] Section 273(1) of the *Municipal Act, 2001* gives the court discretion to quash a by-law for illegality — in whole or in part. Thus, the court has discretion to sever offending portions of a by-law. I would strike the word "sign" in s. 2(a) of By-law 63-2008. And, I would strike the following words in By-law 64-2008:

Section 1 — "request" and "invite"

Section 2 — "request"

Section 4 — "request" and "invitation"

Section 5 — "requests" and "invitations"

[87] The remaining provisions of the two by-laws are constitutional. And, with my proposed remedy, neither by-law prevents lawful and peaceful protests.