Brief Summaries of the Sandy Bell case (1996) and the Douglas Counter case (2002; appealed 2003) regarding the Constitutionally protected right to a "natural garden"

Prepared by Lorraine Johnson, www.lorrainejohnson.ca

If you have any questions about these summaries, or would like to discuss them further, please feel free to reach out to Lorraine via the Contact button on her website.

Lorraine was involved in both of these court cases, supporting Sandy Bell and Douglas Counter, and was present in court for these hearings.

Lorraine has written extensively (in books, essays, articles) on the Sandy Bell and Douglas Counter court cases; on other examples of municipal enforcement of naturalized landscapes; and on the general subject of municipal grass and weeds bylaws and the need to reform them in support of naturalized landscapes. Links to these writings can be found on Lorraine's website.

These brief summaries are intended to support individuals who are naturalizing an area and facing bylaw enforcement actions as a result of that work; and also groups/individuals who are interested in advocating in their communities for reform of municipal grass and weeds (property standards) bylaws, for whom details on these court rulings would be helpful.

- **Sandy Bell court case:**

Ontario Court of Justice ruling (Sandra Elizabeth Bell v. Toronto) decision:
https://thebrooksinstitute.org/sites/default/files/article/2022-06/Bell%20v%20Toronto%201996%20OJ%20No%203146%20%28OR%29%20-%20To%20Accompany%202022-06-21%20Canada%20Digest.pdf

Summary:

In 1993, Sandy Bell was fined $50 for her naturalized front yard on 113 Pickering Street in Toronto's east end—specifically, for having "excessive" growth of "grass" and "weeds". She appealed the fine to a Justice of the Peace, who found her guilty. She appealed the Justice of the Peace's decision at the Ontario Court of Justice.

Although by the time of her appeal to the Ontario Court of Justice, Toronto had already changed the bylaw under which Sandy had been charged (the bylaw was changed to prohibit grass and weeds over 20cm in height), the parties agreed that the appeal could go forward. Sandy's appeal was on the grounds that the old bylaw violated her Charter right to freedom of

expression. The Judge agreed, in a decision handed down in September 1996, ruling that the bylaw was "void for vagueness, "and therefore "invalid and unenforceable." He also ruled that the old bylaw unjustifiably violated the freedom of expression guaranteed by the Charter.

Although the case was not about the constitutionality of the new bylaw in Toronto (i.e., the one that now included a height restriction of 20cm for grass and weeds, replacing the old bylaw's terminology of "excessive growth,"), the Judge did comment on the new bylaw in his ruling (paragraph 5): "I am not purporting to decide in this case whether the new by-law, which is not in issue here, would survive Charter scrutiny, even if a constitutional challenge to it would presumably require the same kind of analysis that is required here and, I assume, lead to the same conclusion."

Excerpts from the Court decision are highlighted in yellow at the end of this Resource document. In building a case for reform of grass and weeds bylaws, it can be useful to share these excerpts with staff and Councillors in your municipality.

- **Douglas and Victor Counter court case:**

Superior Court ruling (Counter v. Toronto):
https://www.canlii.org/en/on/onsc/doc/2002/2002canlii26796/2002canlii26796.html

Court of Appeal ruling (Counter v. Toronto):
http://www.canlii.org/en/on/onca/doc/2003/2003canlii48374/2003canlii48374.html

For more details and the history of the Counters' experience with the grass and weeds bylaw, see the essay "Bogged Down: Water-wise Gardeners Get the Flush," by Lorraine Johnson, in *HTO: Toronto's Water from Lake Iroquois to Lost Rivers to Low-Flow Toilets* (edited by Wayne Reeves and Christina Palassio). The essay tells the stories of gardeners Douglas Counter and Deborah Dale, who went to court to defend their ecological plantings. Link to essay:
https://static1.squarespace.com/static/606c9e7dc06e361edcf23d6e/t/6192d7898546bf14211dfc1d/1637013385667/Bogged+Down+essay+in+HtO.pdf

Summary:

Douglas Counter (and his father, Victor) were ordered to remove the natural garden Douglas had planted on the boulevard at their home (52 Mulgrove Drive) in Etobicoke. The City deemed it an illegal encroachment on the untravelled City-owned road allowance (which, it is important to note, the property owner at the home abutting the road allowance is required to maintain, presumably as mown turf).

The Counters fought the order in the Ontario Superior Court. In a ruling released on October 29, 2002, the Court ruled that the City was justified in restricting the freedom of expression right for naturalized gardens affirmed in the Sandy Bell case, but only “to the extent that the City determines driver and pedestrian safety to be at risk.”

The City did not present any evidence of safety risk due to the Counters’ garden, so no action to cut the garden was required.

The ruling provided some clarity in that it affirmed the freedom of expression right to express one’s environmental beliefs with a naturalized garden on the public right-of-way (i.e., boulevard or, in the Counters’ case, stormwater drainage ditch), subject only to safety concerns. (From the ruling: “[31] Is the expression protected by section 2(b)? *Committee for the Commonwealth of Canada*, [supra] supports a finding that the Counters’ naturalized garden is protected expression under section 2(b).” AND “[33] Can the infringement be justified as a reasonable limit demonstrably justified in a free and democratic society? The restriction is justified and even apparent through common sense. The Counters are only required to alter the public portion of their garden to the extent that the City determines driver and pedestrian safety to be at risk. Based on the above, then, the measures taken by the City are proportional, and the limitations are justified.”)

The ruling further stated: “I repeat that the City can and ought to avoid problems of this sort by developing and implementing coherent plans with specific guidelines to deal with the critical issue of natural gardens and their enormous environmental significance.”

The Counters appealed this decision at the Ontario Court of Appeal, and in a decision released on May 21, 2003, the Court agreed with the lower Court’s decision: “In our opinion, the authority to limit the extent of the vegetation is tied specifically to safety hazards and is a reasonable limitation on the appellants’ *Charter* rights. We agree with Pitt J.’s conclusion that when read and interpreted in the light of its underlying purpose of controlling encroachments which create a safety hazard, the by-law is not so vague, ambiguous, uncertain or discretionary as to be unreasonable.”

EXCERPTS FROM THE RULING IN THE SANDY BELL CASE ARE BELOW, WITH YELLOW-HIGHLIGHTED SECTIONS THAT MIGHT BE USEFUL IN EFFORTS TO REFORM VARIOUS MUNICIPALITY’S BYLAWS

Indexed as:
Bell v. Toronto (City)

Between
Sandra Elizabeth Bell, appellant, and
City of Toronto, respondent

[1996] O.J. No. 3146

Ontario Court of Justice (Provincial Division)
Toronto, Ontario
Fairgrieve Prov. J.
September 11, 1996.
(34 pp.)

Municipal law — Bylaws — Construction or interpretation — Penal bylaws — Bylaws infringing property rights — Quashing bylaws, grounds for judicial interference — Uncertainty or vagueness — Civil rights — Freedom of speech or expression — Expression, what constitutes — Freedom of expression, scope of — Denial of.

Appeal of a conviction under a municipal by-law which prohibited naturalized gardens. The appellant challenged the validity of the by-law as a violation of the Canadian Charter of Rights and Freedoms. The appellant also argued that the by-law was invalid because it exceeded the City's delegated legislative authority and because it was void for vagueness and uncertainty. The by-law, which required that residential yards be kept free of excessive growth of weeds and grass, had been supplemented by a new by-law that prohibited grass and weeds over 20 centimetres in height. The appellant's garden was found to violate the by-law simply because of its appearance, and not on the grounds of any health concern, fire hazard or other nuisance.

HELD: Appeal allowed. The conviction was set aside and an acquittal was entered. Section 7(c) of the by-law was found invalid, both because it was void for vagueness and uncertainty and because it unjustifiably violated the freedom of expression guaranteed by section 2(b) of the Charter. While some of the goals of the by-law were sufficiently important to justify overriding a constitutional right, the objective of creating neat, conventionally pleasant yards did not warrant a complete denial of the right to express the values and beliefs reflected by naturalistic gardens. The word excessive in the by-law was completely subjective and essentially arbitrary, and provided no guidance to allow courts to reasonably interpret the word or devise a test that achieved the legislative objective.

…

¶ 38 It is a fundamental principle of municipal law that a by-law which is vague or uncertain will not be enforceable. In Hamilton Independent Variety & Confectionary Stores Inc. v. Hamilton (City) (1983), 143 D.L.R. (3d) 498 (Ont. C.A.), Lacourciere J.A., on behalf of a five-judge court, stated at p. 506:

> The duty of a municipal council in framing a bylaw is to express its meaning with certainty, 28 Hals., 4th ed., p. 731, para. 1329:
>
>> By-laws must be certain. A by-law must provide a clear statement of the course of action which it requires to be followed or avoided, and must contain adequate information as to the duties and identity of those who are to obey, although all the information need not be apparent on the face of the by-law. However, if the words of the by-law are ambiguous but their meaning can be resolved to give a reasonable result the courts

will give effect to that result. Any penalty provided must also be expressed with certainty.

…

¶ 43 I do not find the City's argument in this regard to be very persuasive. I do not accept that "common sense" dictates when growths of weeds and grass exceed what is "usual or necessary or right". Without a prescribed standard against which to measure such matters, it would surely become a question simply of personal taste or aesthetic preference. I have no difficulty thinking that in 1968 when the by-law was passed, at a time of greater conformity and homogeneity, perhaps there would have been no confusion as to what the word "excessive" conveyed in this context. In the more diverse, pluralistic and accommodating society of the 1990's, however, I do not think that it is so easily ascertained. Even if a preference for the typical suburban lawn remains prevalent (and I am sure it does), I think we have all become accustomed to accepting that not everyone shares the same tastes, and that differing practices are no less valid or tolerable simply because they deviate from the norm. While the by-law may have been passed for a legitimate purpose, it should be remembered that Ms. Bell's garden was found to have "excessive growths of weeds and grass" not because there was any evidence of any health concern, fire hazard or other nuisance or harm caused by it, but simply because of its appearance.

¶ 44 Moreover, it seems to me that people's expectations or standards of tolerance, to use the phrase normally applied to obscenity and indecency, can change over time, and that when it comes to landscaping practices, they obviously have. When one regularly encounters naturalized areas in High Park or other public spaces, when one sees the City itself actively encouraging vegetatIon not noticeably different from that found unacceptable in the appellant's garden, one's sense of what is "usual or necessary or right" is naturally affected. I accept Mr. Hodgins' evidence that there are now thousands of private naturalized gardens in Toronto, and I think that an inevitable consequence of routine exposure to them is that they no longer shock one's sensibilities. One does not necessarily approve of them or hope for one next door, but there is much in the urban environment that one accepts simply as part of living in a largely ugly North American city. Torontonians necessarily develop an aesthetic immunity to overhead wires, garish signs and billboards and tacky buildings. As far as landscaping is concerned, I am sure that many people find, for example, the long grass and weeds on the hillside abutting the Gardiner Expressway far less offensive than the nearby commercial gardens with plants carefully manicured into corporate logos. The point is not that attempts by a municipality to lessen visual blight are invalid, but that in defining what is impermissible, something more certain, precise or intelligible than the word "excessive" is required.

¶ 46 Given that there is no generally-accepted standard that would compel a finding that wild gardens involve "excessive" growths of weeds and grass, the question still remains whether courts can reasonably interpret the word and devise a test that achieves the legislative objective. In R. v. Butler, [1992] 1 S.C.R. 452, the Supreme Court managed to articulate a community standards test for determining whether there was "undue" exploitation of sex by examining whether the allegedly obscene item would be perceived by public opinion to be harmful to society. I have no doubt that courts could similarly devise a test to determine, for example, the meaning of "excessive noise" in the context of s. 75 of the Highway Traffic Act,

R.S.O. 1990, c. H.8. There is a self-evident standard, involving the normal sound of traffic or a running motor, against which the allegedly offending "excessive" condition could be measured. I do not think, however, that where grass and weeds are concerned, such an objective standard could be defined. One could in theory inject a kind of "social harm" test and require the prosecution to prove that the particular weeds or grass constituted a health or safety hazard or caused an environmental nuisance. That would ignore, however, the aesthetic consideration that I am satisfied was the primary purpose the by-law was designed to achieve. Again, it was apparent in this case that it was only the appearance of the appellant's yard that led the inspector to lay the charge and the court to make the finding of guilt, both done without any guidance provided by the by-law as to how visually unacceptable yards were to be determined.

¶ 47 The word "excessive" in the impugned by-law is, in my opinion, completely subjective and essentially arbitrary. Reliance on by-law enforcement officers to interpret the word in a sensible way accepts precisely the sort of "standardless sweep" and discretionary enforcement that are the hallmarks of vague and uncertain legislation.

¶ 48 I conclude that s. 7(c) of By-law No. 73-68 is void for vagueness and is, on that account, invalid and unenforceable.

Does s. 7(c) of By-Law 73-68 violate Charter rights?

...

...

¶ 52 There can be no doubt that the appellant's act of growing a naturalistic garden that included tall grass and weeds had expressive content and conveyed meaning. As an environmentalist, Ms. Bell implemented a landscaping form intended to convey her sincerely held beliefs concerning the relationship between man and nature. It also implicitly conveyed a critique of the prevailing values reflected in conventional landscaping practices. She testified that she meant to show her son, and presumably the public at large, that one could co-exist with nature in a peaceful, nurturing way. In Ross v. School District No. 15, supra at p. 865, La Forest J. repeated that "the unpopularity of the views espoused" is not relevant to determining whether their expression falls within the guarantee of freedom of expression. The fact that many people evidently do not share the appellant's environmental beliefs and disapprove of the way she chose to manifest them does not remove her chosen form of expression from the protection of s. 2(b).

…

¶ 54 Moving to the second step of the test, determining whether the purpose or effect of the by-law is to restrict a person's freedom of expression, I think it is apparent that one of the purposes of the by-law, indeed its primary purpose, is to impose on all property owners the conventional landscaping practices considered by most people to be desirable, and that one of its effects is to prevent naturalized gardens which reflect other, less conventional values. The by-law has a direct effect on the appellant's freedom of expression and, in my view, clearly violates s. 2(b) of the Charter.

…
¶ 59 I do not think that it would be impossible for the City to devise a valid by-law which imposes standards of "repair" or maintenance of residential yards which avoid a Charter violation. Clearly, not every weed patch or derelict yard manifests an intention to express one's beliefs or convey meaning; most, I would think, reflect mere laziness and indifference. It would be open to the City to draft a by-law that imposes a duty on neglectful property owners concerning minimal maintenance standards while exempting from the operation of the by-law those unconventional gardens which express their owners' environmentalist values. It is obvious, however, that a by-law that has the effect of totally banning wild gardens does not impair as little as is reasonably possible the right to express the values and beliefs reflected in such gardens.
¶ 60 Moreover, to use the words of Iacobucci J. in Ramsden, supra at p. 249, "the benefits of the by-law are limited while the abrogation of the freedom is total; thus, proportionality between the effects and the objective has not been achieved". While at least some of the goals of the by-law are sufficiently important to justify overriding a constitutional right (although it should be noted that the right claimed by the appellant does not include the right to grow noxious weeds or plants likely to catch fire), the objective of creating neat, conventionally pleasant residential yards does not warrant a complete denial of the right to express a differing view of man's relationship with nature. As between a total restriction of naturalistic gardens and causing some offence to those people who consider them ugly or inconsiderate of others' sensibilities, some offence must be tolerated. In my view, the by-law cannot be justified under s. 1.
¶ 61 Having found that the by-law unjustifiably infringes the appellant's freedom of expression guaranteed by s. 2(b) of the Charter, pursuant to s. 52(1) of the Constitution Act, 1982, it is of no force or effect. In those circumstances, I do not think it is necessary to consider whether it also has the effect of breaching the appellant's freedom of conscience guaranteed by s. 2(a).
Disposition
¶ 62 Section 7(c) of By-law No. 73-68 is found invalid, both because it is void for vagueness and uncertainty, and because it unjustifiably violates the freedom of expression guaranteed by s. 2(b) of the Charter. The appeal is accordingly allowed, the conviction set aside, and an acquittal entered. The fine which has been paid will be remitted to the appellant. In my view, the appellant is also entitled to her costs of the appeal, pursuant to s. 129 of the Provincial Offences Act. If counsel are unable to agree as to quantum of the costs to be paid by the respondent, the matter may be brought before me within 30 days of the release of these reasons.
FAIRGRIEVE PROV. J.
QL Update: 961001
qp/s/mmr/DRS/DRS/DRS/qlltl