Court File No. COA-24-CV-0540

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

WOLF RUCK

Applicant
(Appellant)

and

CITY OF MISSISSAUGA

Respondent
(Respondent in Appeal)

FACTUM OF THE INTERVENOR, CANADIAN CONSTITUTION FOUNDATION

Date: January 24, 2025

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PART I - INTRODUCTION

1. The Canadian Constitution Foundation intervenes because this appeal raises important issues of when and how a municipality may dictate how a private garden grows.

2. The appellant Wolf Ruck is a self-represented litigant that objects to the City of Mississauga repeatedly entering his property and mowing down his natural garden. Mississauga took this action pursuant to a weed control by-law that prevents grasses from growing more than 20 cm tall, and prohibits the growth of certain plant species.

3. While the application judge correctly found that the weed control by-law infringed Mr. Ruck's right to freedom of expression under the *Canadian Charter of Rights and Freedoms*,[1] he incorrectly found that this infringement was justified under the *Oakes* test.

4. The application judge's errors are rooted in the notion that the by-law's primary effect is to reduce safety risks presented by weeds or other unorthodox plant species. The by-laws primary effect, however, is to impose subjective aesthetic standards on residents' lawns. Curbing perceived blight is not a pressing and substantial objective that outweighs a private property owners' right to express himself through gardening.

PART II - SUMMARY OF FACTS

5. The Appellant, Wolf Ruck, resides in the City of Mississauga. Mr. Ruck owns a detached home where he has lived for several years (the "**Property**"). Mr. Ruck maintains a natural garden on the Property. He is passionate about his natural garden and is advocate for the many environmental benefits associated with natural gardens. Mr. Ruck's garden and the wildlife it

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[1] *Constitution Act, 1982, The,* Schedule B to the Canada Act 1982 (UK), 1982, c 11 [***Charter***].

attracts form part of Mr. Ruck's "lifelong interest in photography, video and art in the out-of-doors."[2]

6. The City of Mississauga ("**Mississauga**") is a municipality located Ontario, Canada.

Weed Control Bylaw

7. Mississauga previously relied on the *Weed Control Act*, RSO 1990, c. W5 (the "***Act***") to control tall grasses and enforce the removal of noxious weeds. The *Act* specified that grass could not exceed 30 cm. The *Act* also listed certain species of plant that could not be grown at all. In 2002, the Ministry of Agriculture issued a directive stating that the *Act* was designed to address noxious weeds for agricultural and horticultural land (the "**Directive**"). It was not designed to apply to urban areas.

8. Following the Directive, Mississauga passed an initial weed control by-law in 2003. The new by-law incorporated the definitions of the *Act*, and incorporated the 30 cm restriction on grass height. In 2017, Mississauga replaced the 2003 by-law with the by-law that is the subject of this appeal (the "**By-Law**").

9. The By-Law's recitals state that the By-Law has multiple purposes, which include public safety concerns, as well as preventing "tall grasses and nuisance weeds from contributing to neighborhood blight".[3]

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[2] Letter from Wolf Ruck dated June 19, 2022, *Respondent's Exhibit Book* [***REB***], Tab 2, p. 9.
[3] *Ruck v City of Mississauga*, 2024 ONSC 2579 ["**Application Decision**"] at para 9, *Respondent's Compendium* [***RC***] at Tab 3, pp. 15-16.

10. As observed by the application judge, the By-Law has two basic prohibitions: (a) a landowner must not permit grass to grow to a height greater than 20 cm and (b) a landowner must not permit certain plant species to grow on their property.[4]

11. Schedule "A" to the By-Law lists the prohibited plant species. The schedule includes "sow thistle". In its factum on the application, Mississauga conceded that, in an urban environment, the "prohibition on sow thistle is primarily connected to aesthetic concerns since damage to commercial crops is not a risk".[5]

12. When a resident does not comply with a compliance request, the By-Law permits Municipal Law Enforcement Officers ("**MLEOs"**) to enforce the By-Law by entering a property to "complete the work required to bring the Lands into compliance".[6]

Enforcement of Bylaw on Mr. Ruck's Property

13. On the Property, Mr. Ruck grows a variety of different plant species that encourage pollination, reduce stormwater runoff and improve wildlife habitat. The plants include sow thistle.[7] The plants and grasses grow tall and have exceeded 20 cm in height.

14. Mississauga has received anonymous complaints about Mr. Ruck's property. Municipal Law Enforcement Officers ("**MLEOs**") have attended the Property on multiple locations and conducted remediation work. In one case, on August 24, 2023, Mississauga employees mowed what appears

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[4] Application Decision at para 8, *RC*, Tab 3, p. 15.
[5] Application Factum of the Respondent at para 47-48, *Appellant's Appeal Book and Compendium* [***AABC***] at Tab 4, p. 216.
[6] Nuisance Weed and Tall Grass Control By-law No. 0125-2017, as amended [the "**By-Law**"], Exhibit "A" to the Affidavit of Blaine Williamson affirmed December 5, 2023 [**Williamson Affidavit**], *REB* at Tab 5A, p. 134.
[7] Letter from Wolf Ruck dated June 26, 2022, *REB*, Tab 2, p. 11.

to be most of Mr. Ruck's grass and garden at the Property, as reflected in before and after photographs produced by Mississauga.[8]

Evidence on Application

15. Mr. Ruck attempted to place substantial evidence before the court that he believed showed the importance of natural gardens, the importance of his garden to his identity and expression, and his concerns with the By-Law and how it had been enforced. The application judge declined to admit most of Mr. Ruck's evidence.[9]

16. Mississauga tendered an affidavit from an MLEO that was personally involved in some of the By-Law enforcement at the Property. The affidavit provided some history of the By-Law and appended the Mississauga corporate reports relating to the By-Law's enactment. The affiant did not, however, provide any direct evidence as to (i) how or why the 20 cm restriction reduces safety risks, or (ii) why the prohibited plants in Schedule "A" were included in the By-Law, including sow thistle.

17. A corporate report appended to the affidavit touches briefly on the origins of the 20 cm height restriction. It states that the height restrictions were being reduced to 20 centimetres to bring Mississauga in line with other municipalities. The report also states: "[n]uisance weeds and long grass may contribute to allergic reactions or health problems, may disrupt ecological systems, and may pose a risk to safety and fire safety by impairing visual sightlines[10]Other than these statements, Mississauga tendered no evidence demonstrating health or safety risks associated with long grass.

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[8] August 24, 2023 Photographs, Exhibit P to the Williamson Affidavit, *REB*, Tab 5P, p. 236-257; see also August 22, 2023 Photographs, Exhibit O to the Williamson Affidavit, *REB*, Tab 5O, p. 235.
[9] Application Decision at paras 20-26, *RC*, Tab 3, pp. 18-20.
[10] Corporate Report re Amendment to New By-Law, Exhibit "F" to the Williamson Affidavit, *REB* at Tab 5F, p. 156.

The Application Decision

18. The following determinations are relevant to the CCF's submissions:

(a) The application judge affirmed that bylaw infringed section 2(b) of the *Charter*, as gardening is an alternative form of expression.[11]

(b) The application judge found that the objective of the bylaw was "protecting residents from noxious weeds and protecting residents from the risks of fire and other accidents associated with tall grasses". In defining the objective, the application judge did not include combatting aesthetic blight.[12]

(c) The application judge found that there was a rational connection between the objective and the bylaw, without giving any reason for that finding.[13]

(d) The application judge found that the bylaw was minimally impairing, because the By-Law was sufficiently targeted to grasses in excess of 20 cm and plant species identified in Schedule "A".[14]

(e) The application judge found bylaw proportionate with reference to all the stated purposes of the By-Law generally. The application found that these purposes collectively outweighed the effect that residents "cannot express themselves through their gardens in precisely the manner that they wish".[15]

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[11] Application Decision at para 34, *RC*, Tab 3, p. 22.
[12] Application Decision at para 39, *RC*, Tab 3, p. 23.
[13] Application Decision at para 39, *RC*, Tab 3, p. 23.
[14] Application Decision at paras 40-46, *RC*, Tab 3, pp. 23-25.
[15] Application Decision at para 44, *RC*, Tab 3, pp. 24-25.

(f) The application judge dismissed Mr. Ruck's complaints of improper enforcement, finding that was no affidavit evidence on this point.[16]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

19. The CCF submits the application judge erred (i) in finding By-Law was rationally connected to the objective of public safety; (ii) in finding the By-Law was minimally impairing; (iii) in finding the By-Law was proportionate; and (iv) by dismissing the allegation that the enforcement of the By-Law was unconstitutional.

Natural Gardens are Protected Expression

20. The application judge correctly found that s 2(b) of the *Charter* extends beyond expression found in speech, and captures any activity that "attempts to convey meaning".[17]

21. In *Bell v Toronto*, Justice Fairgrieve of the Ontario Court of Justice confirmed that the growing of natural gardens "had expressive content and conveyed meaning" and, therefore, enjoyed *Charter* protection.[18]

22. In the decision, Justice Fairgrieve found that a City of Toronto by-law that banned "excessive growth of weeds and grass" violated the *Charter* as it had the effect of preventing the growth of natural gardens. In coming to this conclusion, Justice Fairgrieve observed that the appellant's garden had been targeted by the City of Toronto "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."[19]

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[16] Application Decision at para 50, *RC*, Tab 3, p. 26.
[17] *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, *Intervenor's Book of Authorities* [***IBOA***] Tab 1.
[18] *Bell v Toronto (City)*, [1996] O.J. No. 3146 (OCJ – Prov. Div.) [***Bell***] at para 52, *IBOA*, Tab 2, p. 101.
[19] *Bell*, *supra* note 18 at para 43, *IBOA*, Tab 2, pp. 98-99.

No Rational Connection

23. In considering the rational connection branch of the *Oakes* test, the application judge found the By-Law's objective to be: "protecting residents from noxious weeds and protecting residents from the risks of fire and other accidents associated with tall grasses."[20] In defining this objective, the application judge did not include or reference aesthetic blight as a relevant consideration.

24. Having identified public safety as the By-Law's objective, the application judge concluded that the "weed control by-law is rationally connected to those objectives"[21] without providing reasons. This conclusion was in error.

25. Upon finding a breach of section 2(b), the burden shifted to Mississauga to demonstrate a rational connection between the By-Law and the objectives as found by the application judge. Here, this meant Mississauga bore the burden of showing that the primary prohibitions of the By-Law – growing grass over 20 cm and growing the species in Schedule "A" – were rationally connected to the objective of public safety.

26. With respect to grass height, Mississauga led no direct evidence that grasses over 20 cm (or any other height) create a distinct or particular fire risk. Mississauga's only evidence to support that tall grasses create a safety risk is in a hearsay corporate report that merely states that tall grasses "may pose a risk to safety and fire safety by impairing visual sightlines". Mississauga did not lead any evidence from the author of that report, or any other expert or person qualified to discuss what safety risk tall grasses present.

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[20] Application Decision at paras 37-39, *RC*, Tab 3, p. 23 citing *R v Oakes*, [1986] 1 SCR 103 [***Oakes***].
[21] Application Decision at para 39, *RC*, Tab 3, p. 23.

27. The absence of this evidence notable when examined in the context of *Bell*. There, the City of Toronto introduced a 20 cm height restriction to its weed control by-law after the appellant had commenced the proceeding. In commenting on the new restriction, court found that there "appears to be no obvious co-relation between a height restriction for plants and any health, safety, or environmental hazards posed by them" and determined that this fact made it "even clearer that [the City of Toronto]'s concern with weed control is primarily motivated by aesthetic considerations".[22]

28. With respect to the prohibited plant species, Mississauga has conceded that not all the plants listed in Schedule "A" present a safety risk or concern. Specifically, Mississauga has noted that sow thistle does not pose a risk in urban settings, but is rather viewed as an aesthetic concern.[23] Accordingly, the inclusion of the sow thistle is not connected to the objective of protecting the public.

29. In the absence of evidence showing a connection between the By-Law's prohibitions and public safety, the By-Law's primary effect appears to be the same as in *Bell*: combatting perceived aesthetic blight.

30. The Supreme Court and Ontario Court of Appeal have found that combatting aesthetic blight can be a pressing and substantial objective in the context of (i) postering public spaces, and (ii) large and offensive billboards on private property.[24]

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[22] *Bell*, *supra* note 18 at para 45, *IBOA*, Tab 2, p. 99.
[23] Application Factum of the Respondent at para 47-48, *AABC* at Tab 4, p. 216.
[24] See, for example, *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084, *IBOA*, Tab 3, in which a musician successfully challenged a by-law that prohibited posting flyers advertising his band's performances; *R v Guignard*, 2002 SCC 14, *IBOA*, Tab 4 in which an individual erected a billboard on his property expressing his dissatisfaction with an insurance company; and *Vann Niagara Ltd. v Oakville (Town Of)*, 60 O.R. (3d) 1, [2002] O.J. No. 2323, *IBOA*, Tab 5, in which advertising signs were erected on both public and private property.

31. Combatting aesthetic blight is not a pressing and substantial, however, in the context of gardens and grasses. Lawn and garden design is inherently subjective, and regulation inherently involves imposing one's subjective taste on another. This is particularly not pressing or substantial when dealing with private property.

Minimal Impairment

32. The application judge also erred in finding the By-Law was minimally impairing with respect to its two primary prohibitions.

33. With respect to the prohibited plant species, the application judge failed to address Mississauga's concession that sow thistle had been included based primarily on aesthetic concerns. In this regard, Schedule "A" could be drafted in a manner not to include plant species that only give rise to aesthetic concerns.

34. With respect to tall grasses, the application judge found that the 20 cm restriction fell withing the "reasonable range of alternatives" but did not – and could not – point to any evidence tendered by Mississauga to show why 20 cm or any other height was within a reasonable range to reduce fire or other safety risks.

Proportionality

35. The application judge's proportionality analysis was influenced by the finding that the By-Law's primary purpose was public safety. As noted, Mississauga has not shown that the By-Law achieves this objective, as opposed to addressing perceived blight.

36. Absent cogent evidence showing that the By-Law's provisions materially reduce safety risks, the effects of the By-Law must be weighed against the benefits of combatting perceived blight.

Any such benefits are minimal, and are outweighed by the deleterious effect of limiting residents ability to express themselves through their private gardens at their private residences. The application judge dismissively referred to the effect of the By-Law as being that residents cannot "express themselves through their gardens in precisely the manner that they wish". The purpose of free expression, however, is to allow residents to express themselves in *precisely* the manner they wish, and only to limit that expression where there is compelling justification. Mississauga has not offered compelling justification.

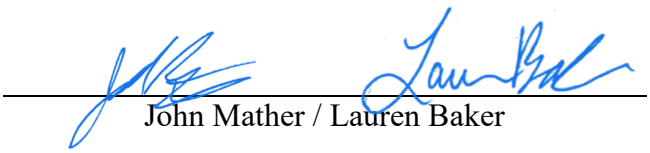
Enforcement

37. In the alternative, if the By-Law is found constitutional, it still must be enforced in a constitutional manner. MLEOs cannot indiscriminately mow and remove plants. Such enforcement action is neither minimally impairing nor proportionate. In this regard, Section 15 of the By-Law requires the City to enter the property and "complete the work required to bring the Lands into compliance" (emphasis added).

38. The application judge erred in finding that there was no affidavit evidence on which to find that plants were improperly removed. To the contrary, Mississauga's affidavit showed that during the August 2023 enforcement action, MLEOs cut down effectively the entirety of Mr. Ruck's garden, with what appears to be little regard to the nature of the plant species.

39. The application judge ought not to have quickly dismissed Mr. Ruck's complaints about enforcement and allowed Mr. Ruck the opportunity to adduce further evidence about the nature of Mississauga's enforcement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of January, 2025.



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SCHEDULE "A"

Authorities

1. *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927
2. *Bell v Toronto (City)*, [1996] O.J. No. 3146 (OCJ – Prov. Div.)
3. *Ramsden v Peterborough (City)*, [1993] 2 SCR 1084
4. *R v Guignard*, 2002 SCC 14
5. *Vann Niagara Ltd. v Oakville (Town Of)*, 60 O.R. (3d) 1, [2002] O.J. No. 2323

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2 Everyone has the following fundamental freedoms:

- **(a)** freedom of conscience and religion;
- **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- **(c)** freedom of peaceful assembly; and
- **(d)** freedom of association.

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