ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

Provincial Offences Appeal Court
Toronto Region
Old City Hall, Toronto

96 264 009

B E T W E E N :	
SANDRA ELIZABETH BELL **Appellant**	*Murray Klippenstein*, counsel for the appellant
- and -	
CITY OF TORONTO **Respondent**	*Thomas H. Wall*, counsel for the respondent
	Judgment: September 11, 1996.

FAIRGRIEVE Prov. J. :

At issue in this appeal is the validity of the City of Toronto by-law which has the effect, it appears to be conceded, of prohibiting so-called "wild" or "naturalized" gardens. The specific provision in question is the section of the Housing By-law under the heading, "Rubbish", which requires that residential yards be kept free of "excessive growths of weeds and grass".

The appellant was convicted of refusing to comply with an inspector's order to cut the weeds and grass in her yard which were alleged to be "excessive". A $50 fine was imposed. Ms. Bell now challenges the by-law on a number of different bases that, it should

be acknowledged, were not as clearly articulated at trial as they were in this court where she was represented by counsel. Mr. Klippenstein asserted that the focus of the appeal should be the appellant's submission that the impugned portion of the by-law should be found to be of no force or effect because it violated her freedoms of expression and conscience guaranteed, respectively, by s. 2(b) and s. 2(a) of the *Canadian Charter of Rights and Freedoms*. In addition, relying on traditional municipal law grounds, the appellant argued that the by-law was invalid both because it exceeded the City's delegated legislative authority and because it was void for vagueness and uncertainty.

The parties stated that they had agreed prior to the appeal that the case should be decided on the Charter grounds being advanced. The reason given was that the by-law under which the appellant was convicted has now been supplemented by a new by-law which prohibits grass and weeds over 20 cm. in height, but apparently has the same effect of prohibiting naturalistic gardens. Although I was informed that prosecutions remain outstanding under the old by-law under which Ms. Bell was convicted, its precise wording is no longer the pressing concern it was once perceived to be. Both the appellant and the City took the position that they were more interested in obtaining a judicial opinion concerning the constitutional validity of such municipal restrictions in general (even if it were ultimately only *obiter dicta* from the Provincial Division) than they were in a determination of the propriety of Ms. Bell's particular conviction or the enforceability of the specific provisions of the old by-law.

In the circumstances, I am prepared to consider issues that may not be strictly necessary to the disposition of this appeal, although (contrary to the parties' preference) I think I should deal with the non-constitutional grounds first. I am aware of the directions given by appellate courts that if a court can decide a case on its merits without considering constitutional issues, then it should do so: see *Bisaillon v. Keable*, [1983] 2 S.C.R. 60 at p. 71, 7 C.C.C. (3d) 385; *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106 at pp. 121-122, 17 C.C.C. (3d) 289; *R. v. Martin* (1991), 2 O.R. (3d) 16 at p. 30, 63 C.C.C. (3d) 71 at p. 85 (C.A.). At the same time, I appreciate that the minor consequences of the trial judgment hardly warranted the cost or effort involved in bringing this appeal. There have also been more recent authoritative statements recognizing an accused's right to raise issues relating not only to his "culpability", which would be sufficient to dispose of a case, but also to the constitutionality of the law under which he was prosecuted, and I do not think consideration of the Charter issues here would be inconsistent with that approach: see, for example, *R. v. Keegstra* (1995), 98 C.C.C. (3d) 1 at p.11, 39 C.R. (4th) 205 (S.C.C.); *R. v. Laba* (1994), 94 C.C.C. (3d) 385, 34 C.R. (4th) 360 (S.C.C.).

I should make it clear, however, that 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. In *RJR-MacDonald Inc. v. Canada (Attorney General)* (1995), 100 C.C.C. (3d) 449 at p. 526 (S.C.C.), La Forest J. quoted with approval the following passage from the judgment of Dickson C.J.C. in *Edwards*

Books & Art Ltd. (1986), 30 C.C.C. (3d) 385 at p. 436 (S.C.C.):

> I should emphasize that *it is not the role of this court* to devise legislation that is constitutionally valid, or *to pass on the validity of schemes which are not directly before it*, or to consider what legislation might be the most desirable.

(Emphasis added.) Despite the interest of the parties here in expanding the scope of this appeal, I cannot disregard the clear directions given by the Supreme Court.

In these reasons, I propose to set out the legislative provisions referred to during the course of argument, briefly summarize the evidence at trial and the additional evidence adduced at the hearing of the appeal, and then consider in turn the "municipal law" and Charter challenges to the by-law.

Relevant Legislation

City of Toronto By-law No. 73-68, passed March 14, 1968, is entitled "A By-Law to provide standards of repair and maintenance of dwellings and to prevent overcrowding of dwellings". Under the heading "Standards", s. 7 reads as follows:

> Rubbish
>
> 7. All parts of a dwelling, including the yards appurtenant thereto, shall be kept clean and free from
> (a) rubbish, garbage and other debris,
> (b) wrecked, dismantled, inoperative or unused vehicles, trailers and any other machinery or any parts thereof,
> *(c) excessive growths of weeds and grass,* and
> (d) objects and conditions, including holes and excavations, that are health, fire or accident hazards.

(Emphasis added.) Section 3(3)(a) of the by-law requires that the owner of a dwelling

"repair and maintain the dwelling in accordance with the standards", and s. 36 makes it an offence, punishable by a fine not exceeding $300, to contravene any of the provisions of the by-law or s. 6 of the *City of Toronto Act, 1936*.

On behalf of the City, Mr. Wall submitted that By-law No. 73-68 was passed pursuant to the authority conferred by s. 6(2) of the *City of Toronto Act*, S.O. 1936, c. 84, as amended, which reads as follows:

> 6. (2) The council of the said corporation may pass by-laws for fixing a standard of fitness for human habitation to which all dwellings must conform, for requiring the owners of dwellings to make same conform to such standard, for prohibiting the use of dwellings which do not conform to such standard, for governing and regulating persons in the use and occupancy of dwellings, and for appointing inspectors for the enforcement of the by-law.

"Dwelling" is defined in s. 6(1)(a) of the Act (as it is by s. 2(2) of By-law No. 73-68) to include any building used for human habitation "with the land and premises appurtenant thereto". Section 6(7) provides that a by-law passed under the authority of the section is enforceable "in the same manner as a by-law passed under the authority of the *Municipal Act*".

As already stated, counsel referred to what they described as the "new weed by-law" which supplements, rather than replaces, the by-law under which the appellant was convicted. By-law No. 1994-0440, as amended, appearing at Chapter 202 of the Toronto Municipal Code under the title, "Grass and Weeds", imposes a height restriction for grass and weeds of 20 centimetres and, among other things, allows the City to enter the premises and remove grass and weeds exceeding that height. The relevant parts of the by-law read as follows:

202-1. Maximum height; responsibility of owner or occupant.
A. No owner or occupant of private land located within the City's boundaries shall allow the growth of grass and weeds on his or her land to exceed twenty (20) centimetres in height.
B. Where the growth of grass and weeds on private land exceeds twenty (20) centimetres, the owner or occupant shall, at the expense of the owner, cut the grass and weeds and remove the cuttings.

202-2. Notice to Comply
A. Where the growth of grass and weeds on private land is in contravention of this chapter, the owner or occupant of the land shall be given written notice that compliance with the Article is required within the time specified in the notice, but no sooner than seventy-two (72) hours after the notice is given

. . .

202-3. Failure to comply; removal by City; costs.
A. Where an owner or occupant fails to comply with a notice given under s. 202-2, the Commissioner of City Property, or persons acting under his or her instructions, may enter upon the lands at any time between sunrise and sunset for the purpose of doing the things described in the notice.
. . .
C. Expenses incurred by the City for performing work required to be done by the notice may be collected with the same rights and remedies and in the same manner as municipal taxes.

202-4. Exemptions.
Nothing in this Article shall affect:
A. Any right or duty of the City with respect to any highway right of way; or
B. The application and enforcement of the Weed Control Act with respect to noxious weeds growing on private lands, including within a natural vegetation area.

202-5. Offences.
Any person who contravenes any provision of this Article is guilty of an offence.

The *Weed Control Act*, R.S.O. 1990, c. W.5, cited in the above by-law, was also referred to by Mr. Klippenstein in his argument. The provincial statute includes the following section:

> 3. Every person in possession of land shall destroy all noxious weeds on it.

"Noxious weed" is defined in s. 1 to mean a plant deemed to be such under s. 10(2) or designated as such under clause 24(a). Section 10 permits municipalities to pass by-laws designating a plant as a noxious weed, and s. 24(1)(a) authorizes regulations designating

plants as noxious weeds. With respect to enforcement, s. 13(1) authorizes an inspector to order the destruction of noxious weeds and, if the order is not complied with, to cause the weeds to be destroyed. Section 23(1) of the Act makes it an offence to contravene s. 3 or an order made under s. 13(1).

The sections of the *Canadian Charter of Rights and Freedoms* relied upon by the appellant were the following:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Every one 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; . . .

Further, s. 52(1) of the *Constitution Act, 1982* states:

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The Proceedings in the Provincial Offences Court

On October 28, 1993, the appellant was tried and convicted by Justice of the Peace A. Walton on a charge alleging that she

> ... on the 4th day of August, 1993, at 113 Pickering Street, Toronto, did commit the offence of failing to comply with an Order dated June 30, 1993, contrary to the City of Toronto By-law No. 73-68, s. 36.

There was really no issue concerning the facts allegedly constituting the offence. Ms. Bell admitted that she was the owner of the property at 113 Pickering Street. She also admitted that she had received an order from a building inspector under the by-law that she remove debris and that she cut the weeds and tall grass at that location. There was no issue that while she removed the debris as ordered, she failed to comply with the remainder of the order concerning her weeds and grass.

The only prosecution witness was Vito Furlano, a City of Toronto building inspector. He testified that after Ms. Bell had been given more than 15 days to comply with the order, he inspected her property to find that the growth of grass and weeds was, as he stated, "about one foot in height, excessively too high".

Ms. Bell gave evidence in her defence. She testified that when she moved to the property in 1990, its "front lawn" had three plants, a Virginia creeper vine, sedum, and Kentucky bluegrass. Ms. Bell testified that since that time, she had added a number of perennials to create what she considered to be "an environmentally sound wild garden". The plants she added, according to her evidence, included the following:

> ... Manitoba maple seeded naturally [*sic*], a white birch pine [*sic*] in the middle of the property, snow and summer cotton easter [*sic*], foxglove, variegated euonymous, blue fescue, juniper, lupine, mulberry, mugo pine, lady's thumb, hybrid tea rose, hens and chickens and foxtail.

She testified that she created this "wild garden" to reflect her environmental beliefs. Specifically, she testified that her garden encouraged a diverse eco-system which had the following advantages:

- it created a green corridor for migrating birds and butterflies;

- it eliminated the need to over-use treated water resources, stating that two-thirds of water consumption in the summer is for watering lawns;

- it eliminated the need for harmful pesticides that contaminated the water supply;

- it encouraged soil water absorption and renewal of the water table, rather than water run-off storm sewer problems;

- it avoided the need to burn fossil fuels used for mowing, and reduced the noise pollution caused by lawn mowers;

- the perennials and long grass reduced social erosion;

- it helped to return nature in this Province to its pre-settlement state which in itself, she testified, was an objective to be respected.

The appellant testified further that her wild garden

> . . . creates a natural setting for children and it exemplifies peaceful, nurturing co-existence with nature for them. I have a child and I feel it is important to him that I show him that we can exist within nature's way, not just our way.

Ms. Bell also stated in her evidence that none of her plants were noxious weeds, so that her neighbours could not be concerned on that account. She also stated that she was part of a larger community which shared these beliefs, adding the observation that the City itself had recently been "renaturalizing" its parks and ravines by creating wild areas.

The prosecutor did not cross-examine the appellant, leaving her evidence unchallenged. No one suggested that the earlier accumulation of debris on the property, which had been removed in compliance with the building inspector's order, brought into question the sincerity of the appellant's beliefs concerning naturalized gardens.

Also on behalf of the defence, Ms. Bell called Jane Hayes, a University of Toronto environmental studies student who had lived at her house from 1991 to 1993. Ms. Hayes testified that she had assisted the appellant in planting the wild garden at that time. She agreed that the "bio-diversity" of the garden was important to the neighbourhood since it attracted insects, worms and birds, and avoided the use of pesticides that killed off the natural insect population. Ms. Hayes testified as well that although she participated in the care of the garden, it was true that no one ever cut the lawn.

Ms. Bell took the position in her evidence at trial that since neither the word "excessive" nor "weeds" was defined in the by-law, it failed to impose a clear standard and that it should be considered void for vagueness. Her actual submissions were not transcribed, but the parties accepted that the appellant's claim to be exempt from the by-law raised the Charter issues that were advanced by Mr. Klippenstein on her behalf in this court.

In his reasons for finding the appellant guilty, after expressing sympathy for the appellant's beliefs, the learned justice of the peace stated that her concerns should properly be addressed to City Council. He ruled that "excessive weeds" were terms that could be found in the dictionary, and without expressly analyzing or articulating the reasons why the appellant's garden fell within the by-law's proscription, he found the appellant guilty.

The Additional Evidence on the Appeal

In accordance with the informal appellate procedures authorized by s. 136(3)(b) of the *Provincial Offences Act*, R.S.O. 1990, c. P.33, as amended, further evidence was adduced with the consent of both parties.

Recent photographs taken of the appellant's front and back yards were filed as exhibits. I think it is fair to say that they showed what to the uninitiated would appear to be an untended plot with tall grass and weedlike plants, in marked contrast to the carefully manicured conventional lawn and garden in the front yard of the semi-detached house adjoining the appellant's. Apparently designed to show their contrasting tastes, one photograph showed the open front porches of the two dwellings, the neighbour's with matching white wicker furniture and the appellant's with a collection of worn-out mismatched upholstered chairs.

Two expert witnesses were called by the appellant. Harry Merrens, a York University geography professor, is a landscaping historian specializing in the relationship between people and their environment. He described his field as including the study of "the way in which [people's] behaviour in modifying the earth is mediated through their perceptions, values and beliefs". Prof. Merrens testified that landscaping has an identifiable historical and social dimension, and he described the evolving styles of the designed landscape in Western Europe and North America over the last three or four hundred years.

It has moved, he stated, from the rigid geometry of large French gardens in the late 17th century to the "unstructured, romantic, natural" gardens of 18th century England, which were followed by more orderly symmetrical Victorian garden designs. This series of styles, according to Prof. Merrens, represented the imposition of certain values on the landscape.

With respect to current residential landscaping practices in North America, Prof. Merrens testified that domestic gardens typically involve straight peripheries marking property lines by neatly clipped hedges or highly ornamental flower beds accompanied by closely cropped grass. According to his evidence, this ubiquitous pattern reflects a belief or value system which carries "a commitment to the achievement of certain static effects that are considered attractive, by manipulating, dominating or manicuring the environment", and which expresses an urge to dominate or control nature to achieve particular pictorial effects.

In contrast to prevailing practices, however, Prof. Merrens testified that during the last 20 or 25 years in North America, an increasing number of people have adopted a different model with a more restrained approach to controlling nature. While the movement has produced a variety of forms, they are usually lumped together and described simply as "naturalistic gardens". These gardens, he stated, reflect different ecological or environmental goals. They involve a commitment to living in greater harmony with nature, not stunting or altering nature, but allowing it to express itself in a more spontaneous way. Such gardens still involve some degree of control, with many emphasizing native, rather than non-native, plant species, but they eliminate the need for chemical herbicides, pesticides and

power tools to control shrubbery or grass, and they reduce the use of water. People who are part of the naturalistic gardening movement are generally motivated by a philosophy with ecological, economic and spiritual goals that seek a more harmonious and restorative relationship with nature.

James Hodgins was the other expert in naturalistic landscaping who testified on behalf of the appellant. Educated as a biologist, Mr. Hodgins is the editor of *Wildflower Magazine*, a founding director of the Canadian Wildflower Society and the Field Botanists of Ontario, a former director of the Federation of Ontario Naturalists, and a member of the Canadian Nature Federation and Eastern Native Plant Alliance. He is also a co-author of a book, *Flowers of the Wild, Ontario and the Great Lakes Region*, published by the Oxford University Press, which has so far sold over 8,000 copies. Mr. Hodgins testified that the naturalistic landscaping movement has spread rapidly in recent years in Toronto and across North America. Many municipalities and university campuses now have naturalized gardens; the public property examples in Toronto he cited include the extensive restoration project in High Park and the naturalized woodlawn, prairie and marsh gardens in the new Yorkville Park. Mr. Hodgins estimated that there are now between two and three thousand naturalized residential gardens in the City of Toronto.

Concerning the building inspector's evidence at trial that the plants in the appellant's front yard were a foot high, Mr. Hodgins testified that about 90 per cent of native plant species grow higher than that. The 20-cm. height limit in the new by-law, he

testified, would eliminate golden rod, New England asters and evening primrose, all of which are part of the native plant community generally regarded as "weeds". As well, many grasses grow over a foot high, with Mr. Hodgins pointing to a half dozen species of grasses, all of which are over a metre in height, which grow in the flower beds outside the Toronto City Hall. According to his evidence, the effect of a 20-cm. height restriction (which he described as "bizarre, incomprehensible and arbitrary") would be to "sterilize" and "devastate" naturalized gardens, both aesthetically and ecologically.

Mr. Hodgins further testified that while one can find the word "weed" in dictionaries, it is a subjective, relative term that has no scientific standing. Golden rod, for example, is generally considered a weed in North America, but in England and Germany is regarded as an expensive ornamental plant.

Finally, Mr. Hodgins testified that one can readily distinguish naturalized gardens, with their planned choice and diversity of native species, from the neglected or derelict yard where a dozen or so rural or Eurasian species would quickly move in and take over. Doing nothing and simply allowing the forces of nature to prevail is inconsistent with naturalistic landscaping, he stated, which by definition requires a human presence in the garden. Having viewed the appellant's front yard in 1994, Mr. Hodgins testified that about 95 per cent of the species had apparently been deliberately planted. Without suggesting that the appellant's yard should be viewed as a model naturalized garden, his opinion clearly

was that it was distinguishable from the uncontrolled weed patch that one might associate with an abandoned vacant lot or a yard completely neglected by its owner.

Is s. 7(c) of By-law No. 73-68 ultra vires?

A municipality can exercise only those powers which are explicitly conferred by a provincial statute: see *R. v. Greenbaum* (1993), 100 D.L.R. (4th) 183 at p. 192 (S.C.C.). Mr. Wall submitted that s. 7(c) of By-law No. 73-68 was validly passed by the City of Toronto under the authority conferred by s. 6(2) of the *City of Toronto Act*, supra, permitting by-laws "fixing a standard of fitness for human habitation to which all dwellings must conform" and "prohibiting the use of dwellings which do not conform to such standard".

While Mr. Wall conceded that the City was not permitted to impose standards based on aesthetic preferences alone, he took the position that the prohibition against "excessive growths of weeds and grass" was properly viewed as part of the regulation of housing standards authorized by the Act. He pointed to the title of the by-law, purporting to provide "standards of repair and maintenance of dwellings and to prevent overcrowding of dwellings", as a clear indication of its valid purpose, although I think it is still necessary to articulate how the "standards" imposed actually relate to the authorized area of regulation.

Even if the standard of maintenance imposed by s. 7(c) is partly or even primarily aimed at avoiding eyesores or visual blight and, in the process, contributing to an appearance of well-maintained residential neighbourhoods, I do not think it follows that it exceeds the authority conferred by s. 6(2) of the enabling statute. In *Ramsden v. City of Peterborough* (1993), 106 D.L.R. (4th) 233 at p. 247 (S.C.C.), Iacobucci J. accepted that one of the objectives of a municipal by-law which prohibited affixing posters on public property was the avoidance of "aesthetic blight"; he not only did not consider this an improper goal, but went on to characterize this concern as "pressing and substantial". That the anti-weed by-law has an incidental effect of enforcing aesthetic standards which accord with conventional landscaping tastes is no reason, in my opinion, to regard it as exceeding the City's powers conferred by s. 6(2) of *The City of Toronto Act, 1936.*

In any event, quite apart from a desire to avoid unsightly and messy-looking premises, there appear to be valid public health concerns addressed by the by-law's prohibition of "excessive weeds and grass". It is common knowledge that many weeds are poisonous or "noxious", to use the word usually used in this context, and some can cause allergic reactions. While perhaps not of the same magnitude as health hazards posed by rotting garbage or open sewers, there is no need to minimize the danger created by, for example, deadly nightshade for small children or even ragweed for hay fever sufferers.

Similarly, without wishing to exaggerate the situation, overgrown dry grass and weeds can be seen as a potential fire hazard. Grass fires on Los Angeles hillsides

threatening residential neighbourhoods, judging by the nightly news at least, seem to be routine occurrences, and it seems sensible that to ensure the safety of dwellings here, the City of Toronto would have standards governing residential properties that are aimed at avoiding similar conditions. If one is inclined to think that such fire hazards are limited to dry, southwestern climates and do not apply to damp Ontario, it is interesting that in *R. v. Canadian Pacific Ltd.* (1995), 99 C.C.C. (3d) 97 (S.C.C.), the alleged environmental offence involved controlled burns of dry grass and weeds on a Kenora railway right-of-way which, it was accepted, posed a potential fire hazard.

It is also apparent that some weeds cause the kind of serious environmental harm that can result when, for example, a foreign plant like purple loosestrife spreads and disrupts the local ecosystem. Merely because the less serious damage to lawns caused by, for example, dandelions spreading from a neighbouring property might seem to be a fairly minor nuisance, I do not think it is necessarily too trivial for the municipality to consider in its effort to promote the kind of residential environment obviously favoured by most residents.

A similar challenge to the validity of a local by-law was considered recently in *Caledon (Town) v. Mik*, (Ont. Prov. Div., December 22, 1995, unreported), where Judge P. Harris found a provision requiring grounds to be kept free and clear of "materials" and "machinery" to be *ultra vires*. The Town claimed to have passed the by-law in the exercise of its power under s. 210 of the *Municipal Act*, R.S.O. 1990, c. M.45, concerning "health,

sanitation and safety" and, more specifically, item 80 referring to the "cleaning, clearing of any grounds, yards and vacant lots". Harris Prov. J. found, however, that the by-law in fact was directed to the unauthorized regulation of aesthetics or the visual appearance of properties, rather than any legitimate health or safety concern. It is noteworthy, I think, that at p. 8 of his reasons, Judge Harris suggested that the references in another part of the by-law to "garbage, rodents, *excessive weed growth* and other unsafe conditions" (emphasis added) were arguably designed to regulate environmental conditions that could adversely affect public health, sanitation and safety. In any event, I do not think that the more general authority conferred by the *City of Toronto Act* to regulate the "use and occupancy of dwellings" needs to be construed as narrowly as the "health, sanitation and safety" justification relied on by the municipality in the case decided by Judge Harris.

Mr. Klippenstein argued that even if the by-law had a valid purpose that was other than aesthetic in nature, the Province had already "occupied the field" of weed regulation, to use his phrase, by enacting the *Weed Control Act, supra*. It seems to me, however, that while there may very well be some overlap between the statute and the by-law, both in terms of some of the health and environmental concerns they address and the potential duplication when the allegedly excessive growths are of "noxious weeds" under the Act, the different provisions have substantially different purposes and effects. The by-law is directed at standards of maintenance for dwellings and applies to grass and weeds regardless of whether they have been designated as "noxious". In *Re Allen and City of Hamilton* (1987), 59 O.R. (2d) 498 (C.A.), MacKinnon A.C.J.O. found no conflict or

redundancy between a by-law requiring land to be kept free of garbage, refuse or waste and the section of the *Planning Act* requiring certain properties to be cleared of debris or refuse. His Lordship stated at p. 506:

> As stated, there is no conflict between the impugned by-law and the sections of the *Municipal Act* to which it refers, and s. 31 of the *Planning Act, 1983*. Each section of both statutes has its own purpose and no section, subsection or paragraph is rendered irrelevant or void by the other enactment. In my view s-ss. 5(1) and 9(1) of By-Law 84-35 were validly enacted.

I think the same conclusion should be reached here. By-Law No. 73-68 is not inconsistent with the *Weed Control Act*, and both provisions can operate concurrently.

In my view, s. 7(c) of By-law No. 73-68 was validly passed by Toronto's City Council in the exercise of its authority to "regulate the use and maintenance" of residential premises. The appellant's submission that the by-law should be struck on the ground that it is *ultra vires* is rejected.

Is s. 7(c) of By-Law No. 73-68 Void for Vagueness?

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:

> Byelaws must be certain. A byelaw 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 byelaw. However, if the words of the byelaw 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.
>
> The obligation of clarity is to enable every citizen to understand the bylaw in order to comply with it. . . .
>
> . . .
>
> The need to reaffirm the necessity of explicitness and specificity so that the "well-intentioned citizen" of common intelligence will not have to guess at the meaning of the bylaw is particularly important in a bylaw purporting to license and regulate the sale of magazines.

It would appear that the "void for vagueness" test in this context does not differ significantly from what the Supreme Court of Canada has stated concerning the same doctrine applicable to the criminal law. In *R. v. Canadian Pacific Ltd., supra* at p. 125 C.C.C., Gonthier J. summarized it as follows:

> In [*R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36], I enunciated the appropriate interpretative approach to a s.7 vagueness claim. As I observed there, the principles of fundamental justice in s. 7 require that laws provide the basis for coherent judicial interpretation, and sufficiently delineate an "area of risk". Thus, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (at p. 313 C.C.C., p. 59 D.L.R.). This requirement of legal precision is founded on two rationales: the need to provide fair notice to citizens of prohibited conduct, and the need to proscribe enforcement discretion.

Further, at p. 126 C.C.C., His Lordship stated:

> The use of broad and general terms in legislation may well be justified, and s. 7 does not prevent the legislature from placing primary reliance on the mediating role of the judiciary to determine whether those terms apply in particular fact situations. I would stress, however, that the standard of legal precision required by s. 7 will vary depending on the nature and subject-matter of a particular legislative provision.

The appellant's position was that the by-law's prohibition of "excessive growths of weeds and grass" was so open-ended that it failed to delineate with sufficient precision

the illegal conduct it sought to proscribe and that it authorized a "standardless sweep" by enforcement officials. The uncertainty, it was argued, came from two sources. First, in accordance with the evidence given by Mr. Hodgins, it was submitted that the word "weed" had no clear meaning, that it was a subjective and relative term without any scientific basis for classifying plants. It was not suggested, however, that the word "grass", despite its different varieties, posed the same definitional difficulties. Second, it was submitted that the by-law provided no standard by which one could assess whether growths of weeds and grass were "excessive", and that any test for making such a determination that could be devised by the courts would necessarily be subjective and arbitrary. For the same reason, it was submitted, the enforcement of the by-law turned on subjective and arbitrary decisions by building inspectors.

With respect to the first objection, I think that while the word "weed" may have some botanical ambiguity, courts could sensibly categorize the finite number of plant species according to recognized criteria. I appreciate that the dictionary definitions of the word may not contribute much certainty; *The Random House Dictionary* (1968), for example, defines "weed" simply as "a valueless, troublesome or noxious plant growing wild, esp. one that grows profusely or on cultivated ground to the exclusion or injury of the desired crop". At the same time, it is a word of common usage and there appears to be a consensus in the community certainly with respect to its application to many plant species. Evidence could be called, for example, as to whether a plant was harmful in the sense of posing a health risk or excluding or damaging other desired plants. Findings could presumably be made in

accordance with such evidence. In addition, it appears that the designation of particular plants as "noxious weeds" under the *Weed Control Act* would assist in identifying at least some members of the class. Although it might strain the language to refer to such a process of labelling plants as weeds or not a "legal debate" applying "reasoned analysis", it is nonetheless a procedure which courts could, I think, undertake if called upon to do so.

Determining when the line is crossed between acceptable growths of weeds and grass and those that are "excessive" strikes me as significantly more problematic. Mr. Wall submitted that the phrase "excessive growth of grass and weeds", when construed in the context of the whole by-law, is intelligible language that can be interpreted by the courts. The word "excessive" should be given its normal meaning, he argued, of "greater in amount or degree than is usual or necessary or right", and he submitted that anyone applying common sense would find Ms. Bell's garden unacceptable. Moreover, Mr. Wall asserted that a by-law enforcement officer would be in a position to determine whether weeds and plants were "excessive" and that courts, just as the justice of the peace did in this case, could rely on the evidence of an officer's assessment.

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.

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.

It would appear that the City itself recognized the subjective and discretionary nature of the phrase "excessive growths" in the old by-law when it passed the new by-law imposing a 20-cm. height restriction. It seems to me that regardless of whether one agrees with the evidence of Mr. Hodgins that the specified height restriction is "bizarre, incomprehensible and arbitrary", it at least provides certainty in enunciating the standard which property owners must apply in assessing the "area of risk" and which inspectors must apply in enforcing the by-law. On the other hand, since there appears to be no obvious co-relation between a height restriction for plants and any health, safety or environmental hazards posed by them, I think the new by-law makes it even clearer that the City's concern with weed control is primarily motivated by aesthetic considerations.

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.

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.

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?

As already stated, the appellant submitted that s. 7(c) of the by-law was of no force or effect because it unjustifiably infringed her freedom of expression under s. 2(b) and her freedom of conscience under s. 2(a) of the Charter.

Recently, in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, La Forest J., for the Court, stated at p 864:

> Section 2(b) must be given a broad, purposive interpretation: see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment; . . .
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> Apart from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee of freedom of expression; see *Irwin Toy*, supra, at p. 969. The scope of constitutional protection of expression is, therefore, very broad. It is not restricted to views shared or accepted by the majority, nor to truthful opinions. Rather, freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be ...
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> . . .
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> In *Irwin Toy, supra,* and more recently in *R. v. Keegstra*, [1990] 3 S.C.R. 697, this Court has adopted a two-step inquiry to determine whether an individual's freedom of expression is infringed. The first step involves determining whether the individual's activity falls within the freedom of expression protected by the Charter. The second step is to determine whether the purpose or effect of the impugned government action is to restrict that freedom.

The "very broad" scope of constitutional protection referred to by La Forest J. is demonstrated by the following passage from Dickson C.J.C.'s judgment in *Irwin Toy,* supra at pp. 968-70:

> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.
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> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day to day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If the person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

At pp. 976-77, the Chief Justice described the principles or values underlying the protection of free expression in a society like ours as including the following:

> ... (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles . . . But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfilment and human flourishing.

In *Ontario Adult Entertainment Bar Association v. Metropolitan Toronto (Municipality)* (1995), 26 O.R. (3d) 257 at p. 277, the Divisional Court held that what was

stated by the Supreme Court of Canada in *Edwards Books & Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 at p. 759, in relation to freedom of religion, also applied to freedom of expression under s. 2(b):

> The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, *nature* [emphasis added], and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices. The Constitution shelters individuals and groups only to the extent that religious beliefs or conduct might reasonably or actually be threatened. For a state-imposed cost or burden to be proscribed by s. 2(a), it must be capable of interfering with religious belief or practice. In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314.

While the Supreme Court considered that the Charter did not prohibit legislative action that had a "trivial or insubstantial" effect on a protected right, the Divisional Court quoted that passage and went on to hold that the form of expression for which protection was sought (in that case, exotic contact dancing) was itself too trivial and insubstantial to warrant constitutional protection. The Divisional Court stated at p. 278:

> We are of the opinion that the freedom of expression sought by the intervenors is trivial and insubstantial in relation to the "pursuit of truth, participation in the community and individual self-fulfilment and human flourishing". In the words of Dickson C.J.C., the prohibition cannot "lie at, or even near, the core of the guarantee of freedom of expression": see quotation from *Reference re ss. 193 and 195.1(1)(c) of Criminal Code*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 ... In our opinion, therefore, the constitutionally protected right of freedom of expression has not been breached, as close contact dancing is not a constitutionally protected right.

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).

Similarly, in my opinion, the appellant's activity cannot be dismissed as too trivial or insubstantial to warrant constitutional protection. Assuming, as the Divisional Court did in the contact dancing case, that the importance of the expressive activity is relevant to determining whether it is entitled to Charter protection (as opposed to merely being a consideration relevant to the s. 1 analysis if an infringement is found), it can be observed that the Supreme Court of Canada has in the past found both the act of affixing an advertisement for a rock band to a utility pole (*Ramsden v. Peterborough (City), supra*) and tobacco advertising (*RJR-MacDonald Inc. v. Canada (A.G.), supra*) to be protected forms of expression. It seems to me that the appellant's expressing her environmental beliefs, conveying a statement about living in harmony with nature, and seeking self-fulfilment in her gardening practices come much closer to the "core values" underlying s. 2(b) than the forms of expession given protection in those cases.

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.

Having found that the action falls within the ambit of s. 2(b) and that the effect of the by-law is to infringe that right, it becomes a question of applying the s. 1 justification analysis in accordance with the criteria outlined by the Supreme Court of Canada in *R. v. Oakes* [1986] 1 S.C.R. 103. In *Ross*, supra at pp. 871-872, La Forest J. stated:

> The factors to be considered in applying the *Oakes* test have frequently been reviewed, most recently in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, where both the majority and minority agreed that an approach involving a "formalistic 'test' uniformly applicable in all circumstances" must be eschewed. Rather, the *Oakes* test should be applied flexibly, so as to achieve a proper balance between individual rights and community needs. In undertaking this task, courts must take into account both the nature of the infringed right and the specific values the state relies on to justify the infringement.

At pp. 879-80, His Lordship summarized the analytical framework as follows:

> This Court in *Oakes, supra,* developed an approach under s. 1 that requires two things be established: the impugned state action must have an objective of pressing and substantial concern in a free and democratic society; and there must be proportionality between the objective and the impugned measure.
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> . . .
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> The second part of the s. 1 analysis, the "proportionality test" involves three determinations: that the measure adopted is rationally connected to the objective (rational connection); that the measure impair as little as possible the right or freedom in question (minimal impairment); and that there be proportionality between the effects of the measure and the objective.

In my view, the objectives of the by-law can be identified, as they already have been, as the imposition of maintenance standards for residential premises which seek to minimize aesthetic blight and avoid health and fire hazards and an environmental nuisance. At least some of its objectives can be seen as sufficiently pressing and substantial to justify interference with Charter rights. Similarly, its prohibition of "excessive growths of weeds and grass" is rationally connected to these objectives, assuming for the moment that "excessive" could be defined simply to mean weeds and grass which tend to cause the mischief sought to be avoided. By prohibiting weeds and grass which are "excessive" and authorizing building inspectors to order their removal when they reach that stage, aesthetically offensive yards and the other potential hazards associated with them are certainly avoided.

The question then becomes whether the impugned section of the by-law restricts expression as little as is reasonably possible. It is apparent that the effect of s. 7(c) is to impose a total ban on wild or naturalized gardens in private residential yards. According to the evidence, most grasses and native plants, some of which could properly be characterized as weeds, grow to a state (and certainly to heights exceeding 20 cm.) that would be regarded as "excessive" under the by-law. In *Ramsden v. Peterborough (City), supra* at p. 248, Iacobucci J. observed as follows

> While the negation of a right or freedom does not necessarily require that such an infringement not be upheld under s. 1, the distinction between a limit that permits no exercise of a guaranteed right or freedom in a limited area of its potential exercise and one that permits a qualified exercise of it may be relevant to the test of proportionality under s. 1" ([*Ford v. Quebec (Attorney General)* (1988), 54 D.L.R. (4th) 577] at p. 624). In *Ford*, the court held that a complete prohibition on the use of languages other than French on commercial signs could not meet the requirements of the proportionality test, particularly the

rational connection and minimal impairment branches. In contrast, in *Irwin Toy, supra*, the court upheld substantial content-based restrictions (as opposed to a total ban) on advertising directed at children. It will therefore be more difficult to just a complete ban on a form of expression than time, place or manner restrictions.

The City, I think, could justifiably regulate domestic gardens by prohibiting noxious weeds or dry combustible grass or plants that cause a fire hazard. The application of the by-law is not so restricted, however, and it has been applied in a way that imposes aesthetic standards with which, according to the testimony of Mr. Hodgins, naturalized gardens could never comply. It might be suggested that a word as flexible, and indeed as meaningless, as "excessive" could be interpreted in a way that would exclude interference with persons using wild gardens to express their environmental beliefs. In my view, however, that would require an interpretation of the by-law that disregards its primary purpose, namely, prohibiting visually offensive yards which deviate from the landscaping norm and would, as a result, violate the most basic rule of legislative construction.

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

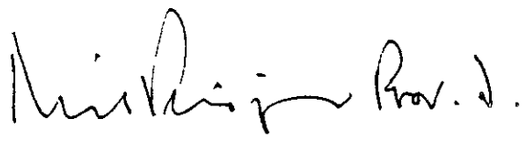
banning wild gardens does not impair as little as is reasonably possible the right to express the values and beliefs reflected in such gardens.

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.

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

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.



September 11, 1996.

David A. Fairgrieve,
Provincial Judge.

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