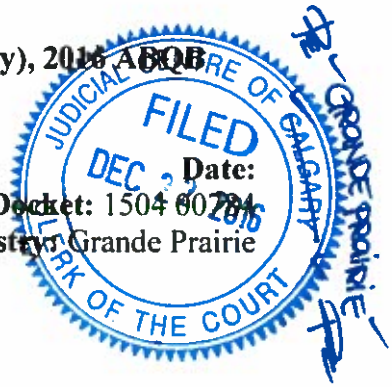
# Court of Queen's Bench of Alberta

**Citation: Canadian Centre for Bio-Ethical Reform v Grande Prairie (City), 2016 ABQB 734**




**Date:**
**Docket:** 1504 60284
**Registry:** Grande Prairie

Between:

**Canadian Centre for Bio-Ethical Reform**

Applicant

- and -

**The City of Grande Prairie**

Respondent

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**Reasons for Judgment**
**of the**
**Honourable Madam Justice C.S. Anderson**

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## Introduction

[1] The issue before this court is the extent to which a municipality can control the content of advertising on its public transit system without unjustifiably infringing an advertiser's fundamental right to freedom of expression set out in the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

[2] The Applicant, the Canadian Centre for Bio-Ethical Reform (the "CCBR"), brings an originating application for judicial review to quash a decision of the Respondent, the City of Grande Prairie (the "City"), on the grounds the decision infringed the CCBR's right to freedom of expression set out in s. 2(b) of the *Charter*. The CCBR also seeks a declaration that the decision was unreasonable from an administrative law standpoint.

[3] In its originating application, the CCBR also sought an order enjoining the City from violating the CCBR's *Charter* rights in the future. In subsequent submissions dated November 9, 2016, in response to my request for submissions regarding Justice Gill's recent decision in ***American Freedom Defence Initiative v City of Edmonton***, 2016 ABQB 555 ("***AFDI***"), the CCBR clarified that the current application relates only to judicial review of the City's decision,

which according to the CCBR limited its *Charter* right to freedom of expression more than was reasonably necessary to accomplish the City's valid legislative objective.

**Factual background**

[4] The CCBR describes itself as a non-profit pro-life educational organization that provides information about fetal development and abortion through providing literature, visual displays and oral presentations to the public, including high schools, universities and community organizations.

[5] In February 2015, the CCBR applied to post an ad on the exterior of the City's buses. The ad contains three images: the first of a fetus at approximately 7 weeks development, the second of a fetus at approximately 16 weeks development, and the third a blank red circle with no image. Under the first image is the caption "7-weeks GROWING", under the second image the caption states "16-weeks GROWING" and inside the third blank image is the word "GONE". To the right of the images is the statement "ABORTION KILLS CHILDREN" followed by a web address "**END**THE**KILLING**.ca" and the name of the organization behind the ad, i.e. the CCBR.

[6] The CCBR's Strategy & Project Director, Mr. Nicholas McLeod, explained in his affidavit that the ad was designed to educate the public on the subject of abortion, to demonstrate through pictures that an abortion "results in the loss of life of a pre-born child in the womb."

[7] In 2007, the City entered into an agreement with Bus Bench Promotions Ltd. ("Bus Bench") to handle bus advertising for the City. Mr. Murray Driver is its President. He explained to Mr. McLeod in response to the CCBR's application that all proposed ads require approval from the transit authority and that the proposed ad had been rejected.

[8] In response to further inquiries from the CCBR, the City's Transit Manager, Jason Henry, explained that City buses are taxpayer funded vehicles and that "this ad would be disturbing to people within our community." He suggested that there were other privately operated advertising opportunities within the city and advised the CCBR to seek them out as "GP Transit is not in a position to approve this ad."

[9] The CCBR immediately sought clarification and inquired as to the specific City policy that had guided Mr. Henry's decision. According to Mr. McLeod, the CCBR never received a response from the City.

[10] At the time the CCBR's ad was rejected, the City was in the midst of developing a comprehensive advertising policy. Ms. Terri Williams, the City's Legislative Services Manager, explained in her affidavit that the City Council passed the new advertising policy in March 2016 (the "Policy").

[11] Prior to enacting the Policy, the City's decisions were guided by its Transit Advertising Agreement with Bus Bench. Clause 9.02 of the Agreement states: "The contents of advertising materials shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board."

[12] Ms. Williams attests that, in the City's view, the CCBR's proposed ad violated clause 14 of the Canadian Code of Advertising Standards, prepared by the Advertising Standards Council, (the "ASC Code"), and that the ad was rejected for this reason. Clause 14 of the Code states:

14. UNACCEPTABLE DEPICTIONS AND PORTRAYALS

It is recognized that advertisements may be distasteful without necessarily conflicting with the provisions of this Clause 14; and the fact that a particular product or service may be offensive to some people is not sufficient grounds for objecting to an advertisement for that product or service.

Advertisements shall not:

(a) condone any form of personal discrimination, including that based upon race, national origin, religion, age or sex;

(b) appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour;

(c) demean, denigrate or disparage one or more identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, entities, products or services, or attempt to bring it or them into public contempt or ridicule;

(d) undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.

[13] Ms. Williams states that the City was "obliged to deny" the CCBR's proposed ad pursuant to the ASC Code. The CCBR takes issue with Ms. Williams' choice of language and argues the City fettered its discretion. The CCBR also argues the City has provided differing reasons for its refusal of the ad in the course of this litigation. First, Mr. Henry said the ad was "disturbing", then Ms. Williams explained the internal advertising contract and referred to the Code, and finally the City relied upon its new Policy. I will address these aspects of the CCBR's argument later in these reasons.

[14] In general, the CCBR submits the City is unfamiliar with its obligations under the *Charter*. It argues that the newly adopted Policy is no exception. The Policy's stated purpose is "to ensure that all Advertising on City Buses and Transit Property is consistent with the City's corporate values, image and strategic goals." The Policy Statement reads:

> The City recognizes the need to balance the City's standards, with respect to the display of Advertisements in or on City Buses and Transit Property, with an individual's freedom of expression. The City's objective in setting standards with respect to such Advertisements is to protect the public from content that is reasonably deemed by the City to be immoral, vulgar, disreputable, misleading or offensive to the general public.

[15] The CCBR objects to many aspects of the City's Policy including that all ads must comply with the ASC Code.

[16] While the City's new Policy provides valuable perspective, it is not under review. This application for judicial review relates to Mr. Henry's February 2015 decision to refuse the CCBR's ad. There is no application to strike the Policy pursuant to s. 52 of the Constitution, so the details of the Policy have limited relevance to this decision.

**Position of the parties**

[17] In general, the CCBR alleges that the City, as an entity subject to the *Charter*, has acted in direct opposition to what is required under s. 2(b). The CCBR submits the City has not been granted the power to prohibit a message based on its content, yet that is exactly what it has done.

[18] The CCBR submits the City has no legal justification for prohibiting advertising on the basis that an ad may be "disturbing" or that it violates an internal contract with an advertising company based on guidelines promulgated by a non-governmental regulator that does not consider the *Charter* in its decision making.

[19] The CCBR submits the City's decision to refuse its ad was unreasonable because it failed to properly balance the *Charter* guarantee of freedom of expression under s. 2(b) with the City's statutory objectives, thus the decision did not limit the relevant *Charter* guarantee no more than was necessary. The CCBR also alleges that, in coming to its decision, the City breached numerous principles of administrative law, resulting in an abuse of discretion that makes its decision *ultra vires*, and thus, unreasonable.

[20] In response, the City submits its discretionary decision to refuse the ad was reasonable or, at the very least, falls within a range of acceptable outcomes as required by administrative law principles and the analysis under ***Doré v Barreau du Québec***, 2012 SCC 12. Although Mr. Henry did not elaborate on his reasons for denying the CCBR's ad, the City argues his decision took careful consideration of *Charter* values. The City states that Ms. Williams' explanation in her affidavit did not replace Mr. Henry's decision, she simply expanded upon the initial reasons provided by Mr. Henry and clarified the reasons for the rejection of the ad.

[21] The City argues it was not attempting to be a "self-imposed arbiter of free speech", to use the CCBR's language; rather, it was exercising its statutory discretion to reject an ad it deemed inappropriate for the exterior of its transit buses. The City submits the courts have recognized that certain limits on free speech are justified, in particular, restrictions on hate propaganda. In exercising its discretion, the City concluded this ad was designed to promote hatred against an identifiable class: women who have chosen to exercise their legal right to have an abortion.

[22] The City submits that through the use of images and strong language, the ad effectively equates women who have had abortions with murderers, the most repugnant and villainous type of person in our society, capable of the most heinous crimes, thereby inciting anger and revulsion against these women. The City also argues such ads are damaging psychologically to women who have chosen to exercise their legal right to abortion and are likely to disturb public well-being. Furthermore, posting such ads on the exterior of buses exposes all people to the message; it effectively forces the entire public, including vulnerable children, to become viewers. The City submits that while the *Charter* recognizes the importance of allowing free speech, this right must be balanced against other vital interests.

**Issues**

[23] The issues to be decided are as follows:

1. What is the standard of review?
2. Was the decision to refuse the CCBR's ad reasonable?

## Analysis

### Standard of review

[24] The parties agree that the standard of review is reasonableness. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes: ***Dunsmuir v New Brunswick***, 2008 SCC 9. The Supreme Court of Canada defined reasonableness as being concerned with "the existence of justification, transparency and intelligibility within the decision-making process": ***Dunsmuir***, at para 47. It is also concerned, however, with whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[25] The reasonableness analysis is a contextual inquiry; it must be assessed in the context of the particular type of decision-making involved and all the relevant factors: ***Catalyst Paper Corp. v North Cowichan (District)***, 2012 SCC 2 at para 18.

[26] Under the ***Doré*** framework, the decision maker must proportionately balance the *Charter* protection with the applicable statutory objectives being pursued to ensure that the *Charter* guarantee is limited no more than is necessary. Thus, this court must determine if the City's decision to refuse the CCBR's ad was reasonable in that it reflects a proportionate balance between the *Charter* value of freedom of expression and the City's relevant statutory objectives. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case: ***Doré***, at para 54.

[27] If, in exercising its statutory discretion, the City properly balanced the relevant *Charter* value, freedom of expression, with its statutory objectives, then the decision will be found to be reasonable.

### Was the decision to refuse the CCBR's ad reasonable?

#### Analytical framework

[28] As previously stated, this application is not a challenge to the City's new advertising Policy; rather, it is an application for judicial review of Mr. Henry's decision to refuse the CCBR's ad. As such, the approach set out by the Supreme Court of Canada in ***Doré*** applies.

[29] In ***Doré***, the court considered the question of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. A lawyer challenged the constitutionality of the decision of the legal profession's disciplinary body to reprimand him for the content of a letter he wrote to a judge after a court proceeding. He claimed the reprimand infringed his freedom of expression under the *Charter*.

[30] The court held that the determination of whether an administrative decision-maker has exercised its statutory discretion in accordance with *Charter* protections must be in accordance with an administrative law approach, not a section 1 *Oakes* analysis.

[31] When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts; as such, the decision attracts deference: ***Doré***, at para 36. Yet, administrative discretion must be exercised in the context of our constitutional guarantees and the values they reflect. Therefore, in assessing whether an administrative decision infringes the *Charter*, the question is whether the decision-maker disproportionately, thus unreasonably, limited a *Charter* right: ***Doré***, at para 6. The reasonableness analysis is one that

centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives: ***Doré***, at para 7.

[32] In seeking to balance *Charter* values with the statutory objectives, the decision-maker must first consider the statutory objectives themselves. Then the decision-maker should ask how the *Charter* value at issue will best be protected in light of those statutory objectives. The core of the proportionality exercise is to balance the severity of the interference with the *Charter* protection with the statutory objectives: ***Doré***, at para 56.

[33] If the decision disproportionately impairs a *Charter* guarantee, then it is unreasonable. If it reflects the proper balance between the statutory mandate and the *Charter* protection, then it is reasonable: ***Doré***, at para 7. Ultimately, the decision must fall within a range of possible, acceptable outcomes: ***Doré***, at para 56. Thus, if in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable: ***Doré***, at para 58.

[34] The court summarized the judicial review process at para 57:

> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. ...

[35] In ***Doré***, the court balanced the fundamental importance of open, and even forceful, criticism of our public institutions with the statutory objective of ensuring civility in the legal profession. The court held that disciplinary bodies must demonstrate that they have given due regard to the importance of the expressive rights at issue, in light of an individual lawyer's right to expression and the public's interest in open discussion. Yet the court acknowledged that as with all disciplinary decisions, the balancing is a fact-dependent and discretionary exercise.

[36] On the facts, the disciplinary committee found that the lawyer's letter warranted a reprimand because it had overstepped the generally accepted norms of moderation and dignity. The court concluded that the discipline committee's decision to reprimand the lawyer reflected a proportionate balance between its public mandate to ensure that lawyers behave with "objectivity, moderation and dignity" and the lawyer's expressive rights. Justice Abella wrote at para 71:

> In the circumstances, the Disciplinary Council found that Mr. Doré's letter warranted a reprimand. In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.

[37] In ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12, the Supreme Court of Canada applied and affirmed the ***Doré*** framework in the context of a discretionary decision made by the Quebec Minister of Education, Recreation and Sports. Justice Abella, writing for the majority, summarized the ***Doré*** framework at paras 3 and 4:

> This Court's decision in *Doré* ... sets out the applicable framework for assessing whether the Minister has exercised her statutory discretion in accordance with the relevant *Canadian Charter of Rights and Freedoms* protections. ... The result in

> *Doré* was to eschew a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles.
>
> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* – both the *Charter*'s guarantees and the foundational values they reflect – the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[38] The Minister had exercised her discretion to deny Loyola's request for an exemption from a Program on Ethics and Religious Culture (the "ERC Program"). The ERC Program is mandatory at all schools in Quebec and requires every school to teach about the beliefs and ethics of different world religions from a neutral and objective perspective. The ERC Program requires teachers to take a professional stance of objectivity and impartiality; they are not meant to advance the truth of a particular belief system or attempt to influence their students' beliefs. Instead, their role is to foster awareness of diverse values, beliefs and cultures.

[39] Under the legislation, private schools may apply for an exemption from the Minister if they offer an alternative to the ERC Program that the Minister deems to be equivalent. Loyola, a private Catholic school, sought such an exemption on the grounds that the ERC Program was incompatible with its Catholic mission and convictions. It proposed an alternative program that placed greater emphasis on Catholic beliefs and ethics. The Minister concluded that the proposed program was not equivalent and rejected Loyola's request for an exemption.

[40] Loyola did not challenge the Minister's statutory authority to impose curricular requirements on the school; rather, it challenged her specific decision to deny the exemption it sought on the grounds that the decision interfered with its religious freedom. At the Supreme Court of Canada, Loyola no longer objected to teaching the basic principles of other world religions from an objective perspective, but it continued to seek permission to teach the ethics of other religious traditions from the perspective of the Catholic religion. It also asserted the right to teach Catholic doctrine and ethics from a Catholic perspective.

[41] The court reviewed the statutory objectives of the ERC Program, which included promoting respect for others and openness to diversity. The Minister's task was to arrive at a decision that proportionately balanced the realization of the ERC Program's objectives with respect for *Charter*-protected religious freedom.

[42] Justice Abella concluded that the Minister's decision, as evidenced by her letter to Loyola rejecting its proposal, reflected an assumption that any program taught from a religious perspective could not be an alternative to the prescribed curriculum and that the religious school could not teach even its own religion from its own perspective. In prescribing how Loyola should explain Catholicism to its students, the court held that the Minister had seriously interfered with its freedom of religion, while achieving no significant benefit to the ERC Program's objectives. Abella J wrote at para 68:

> ...the central problems with the Minister's decision: it treats teaching any part of the proposed alternative program from a Catholic perspective as necessarily inimical to the state's core objectives in imposing the ERC Program and it gives no weight to the values of religious freedom engaged by the decision. There is, in

> short, no balancing of freedom of religion in relation to the statutory objectives. The result is a disproportionate outcome that does not protect *Charter* values as fully as possible in light of those statutory objectives.

[43] Justice Abella explained that in the specific legislative context, in which private denominational schools are permitted, the restriction represented a disproportionate, thus unreasonable, interference with the values underlying freedom of religion and those who seek to offer and to receive a Catholic education. The court also concluded, however, that there was no significant impairment of freedom of religion in requiring Loyola to offer a course that explains the beliefs, ethics and practices of other religions in as objective and neutral a way as possible. The only objectionable part of the Minister's decision was the requirement that Loyola teach Catholicism from a neutral perspective.

**Statutory objective**

[44] In applying the ***Doré*** framework to the case at bar, the first step is to consider the statutory objectives underpinning the City's exercise of discretion. Section 3 of the *Municipal Government Act*, RSA 2000, c M-26 (the "*MGA*"), grants the City a statutory mandate to provide services and a safe and viable community for its members:

> The purposes of a municipality are
>
> (a) to provide good government
>
> (b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
>
> (c) to develop and maintain safe and viable communities.

[45] In its written submissions, the City states that its statutory objective in making the decision to prohibit the CCBR's ad, thereby limiting its right to freedom of expression, was to ensure that hateful expression was curtailed to protect the public from the harmful effects of such expression. The City sought to prevent the manifestation of harm associated with hate propaganda and to promote a safe and viable community.

[46] The City also stated in its submissions that restricting hate propaganda on public buses will ensure a tranquil, smoothly functioning transit system, with no risk of danger due to inflamed emotions or devastated psyches.

[47] The newly enacted advertising Policy seeks to protect the community from the numerous harms caused by hate propaganda and similar material by preventing them from being placed on City buses and transit property. The Policy states that all advertising should be consistent with the City's corporate values, image and strategic goals. To this end, all ads must comply with the ASC Code, they must not be offensive to the general public, and they must be free of demeaning, derogatory, exploitative or unfair comment or representation of any person or group of persons.

[48] As noted above, the Policy was not in place at the time of the decision to refuse the CCBR's ad. At that time, the City was governed by its contract with Bus Bench. This contract required that all ads comply with the ASC Code. Clause 14 of the ASC Code, quoted earlier in these reasons, states among other requirements that ads shall not demean, denigrate or disparage one or more identifiable persons, or group of persons.

[49] The Supreme Court of Canada and the Alberta Court of Queen's Bench in ***Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component***, 2009 SCC 31 ("***Greater Vancouver***") and ***AFDI***, respectively, accepted that similar policy language established the pressing and substantial objective of providing a safe and welcoming transit system.

[50] I note that in ***AFDI***, there was no policy *per se*; rather, the "policy" setting out this statutory objective was a series of agreements between the city, its advertising contractor, and the advertisers themselves, somewhat akin to the situation here.

[51] I find that when all these submissions are taken together, the statutory objectives generally relate to protecting the public from harm and providing a safe environment within the municipality, but particularly on municipal transit. I conclude, as did the courts in ***Greater Vancouver*** and ***AFDI***, that the statutory objective of controlling the content of advertising on City buses is to provide a safe and welcoming transit system, as part of the municipality's responsibility under the *MGA* to provide services and develop and maintain a safe and viable community. I note that the City asserted this specific statutory objective in its oral submissions and in its November 10, 2016 submissions discussing ***AFDI***.

**Freedom of expression**

[52] In ***Greater Vancouver*** the court confirmed that the exterior of City buses is a constitutionally protected space. There is no dispute that the City's decision to refuse the CCBR's ad infringed its freedom of expression – any decision that limits expression based on content engages s. 2(b) of the *Charter*.

[53] The question is whether the City limited the CCBR's right to expression no more than was necessary in pursuit of the statutory objective of providing a safe and welcoming transit system. In other words, did Mr. Henry proportionately balance the *Charter* value of freedom of expression with the statutory objective in the specific context of this case. While Mr. Henry's reasons do not specifically mention the *Charter*, I have considered whether his decision falls within a range of reasonable, acceptable outcomes that proportionately balance the *Charter* value with the statutory objective.

[54] Freedom of expression is fundamental to a democratic society. As stated by Dickson CJ, Lamer and Wilson JJ in ***Irwin Toy Ltd. v Quebec (Attorney General)***, [1989] 1 SCR 927 at para 41, "freedom of expression was entrenched in our Constitution ... 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."

[55] Yet freedom of expression is not absolute. Certain content, such as hate speech, is not protected because it does not promote the principles underlying the freedom of expression guarantee. Dickson CJ, Lamer and Wilson JJ summarized these principles at para 53 of ***Irwin Toy***: freedom of expression is related to 1) the attainment of truth, 2) the fostering of participation in social and political decision-making, and 3) the cultivation of individual self-fulfilment and flourishing in a 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."

[56] These comments suggest that the *Charter* guarantee of freedom of expression is meant to protect not only those who wish to express themselves, but also those who are the recipients of the expression. In ***Ontario (Attorney General) v Dieleman*** (1994), 117 DLR (4th) 449 (Ont Gen

Div) Justice Adams undertook a thorough review of the freedom of expression jurisprudence. Portions of his reasons have been referenced with approval by the British Columbia Court of Appeal in ***R v Spratt***, 2008 BCCA 340 and ***R v Breeden***, 2009 BCCA 463. Justice Adams noted at para 640 that courts have held that "freedom of expression assumes an ability in the listener *not* to listen but to turn away if that is her wish. The *Charter* does not guarantee an audience and, thus, a constitutional right to listen must embrace a correlative right *not* to listen."

[57] Justice Adams referred to Justice L'Heureux-Dubé's reasons in ***Committee for Commonwealth of Canada v Canada***, [1991] 1 SCR 139 at para 150, in which she borrowed from the American case ***Lehman v City of Shaker Heights***, 418 US 298 (1974) at pp 306-7:

> ...if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While [the] petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

[58] Justice Adams explained that the principle behind a constitutional aversion to a captive audience is that forced listening is antithetical to the principles underlying freedom of expression, since it denies the competition of ideas that is assumed to be the foundation of free communication. An important justification for permitting people to speak freely is that those to whom the message is offensive may simply "avert their eyes" or walk away. He explains that where this is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question.

[59] It is not uncommon for our radio and TV broadcasters to enable viewers and listeners to exercise this type of discretion by providing warnings when content is anticipated to be disturbing to some people (e.g. "viewer/listener discretion is advised"). Such warnings give audience members an opportunity to disengage.

[60] Justice Adams also noted that Canadian jurisprudence recognizes that not all speech is of equal value and much depends on the particular context: ***Dieleman***, at para 624. McLachlin J acknowledged in ***Committee for Commonwealth*** at para 274 that "as abhorrent as arbitrary or unfair content-related limitations may be, it must be conceded that when carefully tailored they may be integrally tied to important government purposes outweighing any interest a speaker may have in communicating a conflicting message."

[61] And La Forest J in ***Committee for Commonwealth*** held at para 45 that the right to freedom of expression "does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters."

[62] In ***Greater Vancouver***, Deschamps J, writing for the majority, considered and applied these principles to conclude that transit authorities have the right to limit certain forms of expression. While the limit in that case, prohibiting all forms of political advertising, was

overbroad, she held that transit authorities may be justified in imposing a community standard on advertisers. She wrote at para 78:

> The fact that the limits are overbroad in the instant case *does not mean that the government cannot limit speech in bus advertisements.* It is clear from this Court's s. 1 jurisprudence on freedom of expression that *location matters, as does the audience.* Thus, a limit which is not justified in one place may be justified in another. And *the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place.* [Emphasis added.]

[63] Deschamps J mentioned the existing restrictions against tobacco advertising that is appealing to young people or that is published in places frequented by young people. These restrictions have been held to be justified based on the need to protect youth because of their vulnerability: ***Canada (Attorney General) v JTI-Macdonald Corp.***, 2007 SCC 30.

[64] Deschamps J reiterated the point that limits on advertising are contextual. She suggested that the ASC Code, referenced in the transit authorities' advertising policies in ***Greater Vancouver*** (and referenced in the case at bar in the City's contract with Bus Bench), could be used as a guide to establish reasonable limits on advertising content. She added, however, that the determination of what is justified will depend on the facts in the particular case.

[65] In ***AFDI***, Justice Gill upheld as constitutional advertising policies that required any advertisement to be of "moral and reputable character" and "in compliance with" the ASC Code. Further, he found nothing wrong with the city's reserved right to remove ads that it deemed "offensive to the moral standard of the community, or ... negatively reflects on the character, integrity or standing of any organization or individual."

[66] In sum, the case law states that there are limits to freedom of expression and municipalities and their transit authorities may be justified in controlling some content, depending on the particular facts of the case.

**Application to the case at bar**

[67] A critical aspect of the context in this case is the public nature of the City's buses. As Deschamps J observed at para 43 in ***Greater Vancouver***, buses are operated on city streets and form an integral part of the public transportation system. The general public using the streets, including but not limited to those who become bus passengers, is exposed to the messages placed on buses.

[68] As such, a bus exterior is a location where it is almost impossible to avoid the expression. If the same message were being expressed along a city sidewalk, for example, only those in the vicinity would see or hear it, and any person seeking to avoid the expression could cross the street to the other side. L'Heureux-Dubé J noted in ***Committee for Commonwealth*** at para 151 that "people who find certain political expression unpleasant or disquieting in a park or on a street can easily move elsewhere." This is not the case with a city bus.

[69] Furthermore, ads on city buses are viewed in very close proximity by those who have no other means of transportation. They are also viewed in close proximity by other users of the road, be they drivers or passengers in their own private vehicles or taxis, cyclists, or pedestrians, etc. City bus ads can also be seen from inside homes, while playing at playgrounds, or simply walking on city sidewalks.

[70] Justice Deschamps wrote, at para 80, that "advertising on buses has become a widespread and effective means for conveying messages to the general public." The key aspect of this comment is the word "general". Everyone sees a city bus, from the youngest to the oldest citizens of a municipality. Consequently, the messages carried on city buses must be appropriate for such a diverse audience.

[71] I take judicial notice of the fact that as a society, we routinely restrict the audience for certain types of expression. Some movies, for example, are restricted to those 18 and over based on their content. One basis for restriction is that the film contains "disturbing content", which is defined in the *Film and Video Classification Regulation*, Alta Reg 263/2009 as containing "elements pertaining to distress, suffering or other disturbing elements. This includes the implication or threat of physical or psychological violence, or both, even when violence is not depicted."

[72] If it is acceptable and justifiable to restrict the audience for certain types of content, then the corollary is that it must be acceptable and justifiable to restrict the content when it is impossible to restrict the audience, so as to protect the same vulnerable groups. Children should not be forced to view potentially upsetting images and phrases in a public place.

[73] In the case at bar, the City had two choices: to accept the CCBR's ad or to reject it. It elected to reject the ad to achieve its statutory objective of providing a safe and welcoming transit system, yet in doing so, it infringed the CCBR's freedom of expression.

[74] The nature of the infringement, however, was limited to the rejection of this particular ad. The City did not state that abortion related ads would not be permitted, nor did it preclude the CCBR from bringing forward a different ad. It refused the proposed ad on the ground that "it would be disturbing to people within our community".

[75] In coming to this conclusion, the City was guided by the ASC Code, referenced in its contract with Bus Bench. Clause 14 of the ASC Code prohibits ads that condone personal discrimination; appear to exploit, condone or incite violence or unlawful conduct; demean, denigrate or disparage one or more identifiable persons or group of persons; and, undermine human dignity. The City's discretionary decision-making in relation to bus advertising is informed by these standards so as to balance free expression with other, equally important values.

[76] The City forcefully argues that the proposed ad is hate propaganda or hate speech. The City submits the ad promotes hatred against women who have had an abortion, a legal medical procedure in Canada. By effectively comparing such women to killers or murderers, the City argues the ad incites anger and revulsion against these women. The City further notes that while murder is a criminal act, having an abortion is not, and the women who undertake this medical procedure should not be so characterized. At the very least, the City suggests the ad is psychologically damaging to these women and goes against its statutory objective of protecting the public from harm. The CCBR states the ad is merely informative and educational and brings home the point that an abortion ends the life of a "pre-born child".

[77] In ***AFDI***, Justice Gill looked beyond the words and images that appeared on the ad itself and considered the logos, website address, and the website itself. He found these aspects of the ad are properly considered by the city in applying its policy and to find otherwise "would be to allow form to triumph over substance": ***AFDI***, at para 95.

[78] In looking beyond the ad, Gill J relied on the doctrine of judicial notice. He stated at para 68:

> A court may judicially notice facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy...

[79] Justice Gill examined the advertised website and found that it included comments that all Muslim immigration should be stopped, encouraged the profiling of Muslims and the surveillance and inspection of mosques. He wrote at para 99:

> The City, in applying its policy, would be entitled to consider this content, and the fact that the advertisement uses seven cases of extreme domestic violence to lure readers to websites containing discriminatory material. It concluded that AFDI was clearly attempting to do indirectly what it was not permitted to do directly: make offensive and discriminatory statements against Muslims.

[80] I have taken a similar approach and gone beyond the ad in this case. The CCBR's proposed ad directs viewers to the website "endthekilling.ca". The website discusses the CCBR's "overarching strategy" to use "graphic image-based projects" to end abortion in Canada. The website contains commentary such as "Now is the time to put an end to the slaughter. Now is the time to look evil in the face and say, enough. Now is the time to join together, and lend our voices to those who had theirs brutally taken from them." These are strong statements that vilify women who have chosen, for their own reasons, to have an abortion; they are not merely informative and educational.

[81] While citizens may be expected to put up with some controversy in a free and democratic society, as Deschamps J stated in ***Greater Vancouver***, there remain limits on expression to protect the general public, including children, from the harm caused by what many members of the public would view as disturbing expression in an exceedingly public space.

[82] There is no need to determine whether the CCBR's expression in this ad crosses the line into hate speech. Regardless of how the expression is characterized, I find that the City's decision to reject this particular ad was reasonable. I find the ad is likely to cause psychological harm to women who have had an abortion or who are considering an abortion. It is also likely to cause fear and confusion among children who may not fully understand what the ad is trying to express. They may not be familiar with the word abortion, but they can read and understand that "something" kills children. Expression of this kind may lead to emotional responses from the various people who make use of public transit and other users of the road, creating a hostile and uncomfortable environment. The creation of such an environment is antithetical to the statutory objective of providing a safe and, in particular, a welcoming transit system, within the greater context of providing services and developing and maintaining a safe and viable community.

[83] I find the City acted proportionately in that it restricted the CCBR's rights as little as possible by refusing only this one particular ad. It did not ban the CCBR from further advertising. It made no decision regarding other educational ads the CCBR might propose. The City submits that the CCBR would be welcome to apply to place a different ad on City buses, an ad that is less harmful.

[84] I find that the decision to refuse the CCBR's ad was proportionate and reasonable.

**Other issues**

[85] The CCBR made alternate arguments grounded in general principles of administrative law. In general, the CCBR submits the City acted *ultra vires* its authority by acting arbitrarily in changing the reasons for its decision, reconsidering its decision when it was *functus officio*, giving insufficient reasons for its decision, and delegating its discretionary power. I reject all these arguments.

[86] The CCBR submits, relying on ***Roncarelli v Duplessis***, [1959] SCR 121, that no discretion casts a net wide enough to shield an arbitrary or capricious municipal decision from judicial review. The CCBR argues that the City acted in an arbitrary, unreasonable and capricious manner and abused the discretionary power delegated to it by the legislature when it changed its reasons for decision from what was stated by Mr. Henry to what was stated by Ms. Williams.

[87] I find the City did not change the reasons for its decision. Ms. Williams' comments were made in her affidavit in response to the application for judicial review. Mr. Henry said the ad would be "disturbing to people within our community". Ms. Williams explained that the ad violated the ASC Code, which can broadly be described as prohibiting discriminatory and disturbing ads.

[88] The heart of Mr. Henry's decision and Ms. William's further explanation rests on the City's desire to protect the public from expression that runs counter to its statutory objective of providing a safe and welcoming transit system. The City's decision to accept or reject the CCBR's ad was not reconsidered, nor was a new reason for the original rejection provided.

[89] For similar reasons, I also reject the CCBR's claim that once Mr. Henry gave his decision and declined to provide an appeal, the City was *functus officio* and could not then change the nature of its decision. The CCBR encourages this court to ignore the allegedly changed reasons for decision offered by Ms. Williams.

[90] As stated above, I do not find Ms. Williams' statement to have changed the reasons for the decision to deny the ad; rather, she affirmed the decision and expanded upon the reasons first provided by Mr. Henry. Furthermore, the principle of *functus officio* states that once a matter has been disposed of, it may not be revisited due to the important interest of finality. In other words, if an administrative decision has been made, the decision-maker cannot simply go back and change that decision. There was no new decision here.

[91] The CCBR also alleges that the City did not provide adequate reasons for its decision and that the decision should be quashed on this basis. It relies on the Supreme Court of Canada's decision in ***Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)***, 2004 SCC 48. In that case, the court held that a municipality must give reasons for its decision when exercising discretionary statutory authority. The municipality had acted unreasonably because it had twice rejected the applicant's re-zoning applications without providing any reasons. In the case at bar, however, the City gave the CCBR reasons for its refusal of the ad, i.e. that it would be disturbing to people within the community. These reasons were sufficient to satisfy the City's obligation to provide reasons.

[92] Finally, I reject the CCBR's argument that the City breached the maxim *delegatus non potest delegare* and fettered its discretion by sub-delegating its discretionary decision making authority to the ASC. *Delegatus non potest delegare* simply requires that a delegate not sub-

delegate the statutory powers conferred upon it, the reason being that the exercise of statutorily-granted powers in fact must be exercised by the party granted such discretion.

[93] In the leading case of ***Vic Restaurant Inc. v City of Montreal***, [1959] SCR 58, the court found the city had acted *ultra vires* its authority by only granting liquor licences to applicants approved by the police force. The situation here is entirely different.

[94] In stating the City was "obliged to deny" the ad because in its view the ad violated the ASC Code, Ms. Williams' choice of words may have been unfortunate. Nonetheless, I find that she was simply stating that the City relies upon the ASC Code as a guideline for making advertising decisions. The City did not consult with the ASC regarding the decision at issue here and does not require the ASC's approval in making such decisions. Furthermore, the ASC did not make the decision to deny the CCBR's ad; the City made the decision.

[95] Statutory decision makers are entitled to use defined standards as guidelines, so long as they do not claim to be legally bound by them: ***Maple Lodge Farms Ltd. v Canada***, [1982] 2 SCR 2. In ***Greater Vancouver***, Deschamps J held at para 79 that the transit authorities could be guided by the ASC Code, but that they could not use it to bind their decisions.

[96] I find that on the facts of this case the City appropriately used the ASC Code, specifically clause 14, as a helpful tool in reaching the ultimate determination that the ad should not be accepted. The main point, however, is that the City did not delegate its decision making function to the ASC; as such, it did not act *ultra vires* its authority.

**Conclusion**

[97] The City's decision to reject the CCBR's proposed ad was reasonable. I dismiss the application for judicial review.

[98] If the parties are unable to agree, they may speak to costs.

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Heard on the 21st day of June, 2016.
**Dated** at the City of Grande Prairie, Alberta this 22nd day of December, 2016.

"J MARRIOTT for J. Anderson"

**For C.S. Anderson**
**J.C.Q.B.A.**

**Appearances:**
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