Failures by City of Peterborough Led to Anti-Choice Ads on Buses

By Joyce Arthur, Abortion Rights Coalition of Canada

(www.arcc-cdac.ca; joyce@arcc-cdac.ca)

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The City of Peterborough must bear the blame for the offensive anti-choice ad[1] that will be on the backs of buses starting April 1st. The City caved into a lawsuit threat by the radical anti-choice group behind the ad, and reversed its initial refusal of the ad. Due to the City's pattern of capitulation and inaction, it is now under a court order to run this ad. Meanwhile, several other jurisdictions in Canada had the courage to go to court to challenge the anti-choice group behind the ad. In the first case to be decided, the City of Grande Prairie Alberta WON, and does not have to place the ad. (Translink in BC, Hinton Alberta,[2] and Toronto Transit Commission were also sued over their refusal of the same ad.)

The Court of Queen's Bench in Alberta ruled on Dec 22, 2016 that Grande Prairie's refusal to run the ad was reasonable, and the freedom of expression rights of the anti-choice group ("Canadian Centre for Bio-ethical Reform," CCBR) are outweighed by the harm the ad would cause to the city's ability to "maintain a safe and viable community". Further, the court said the ad would likely cause psychological harm to women who have had an abortion or may be considering one, as well as emotional distress to children and other transit and road users, many of whom would be a "captive audience" that can't escape the ads.

But due to a series of failures on its part, the City of Peterborough is not only allowing this ad to appear on its buses, but now *must* do so, with no legal recourse.

The Abortion Rights Coalition of Canada has written the City at least half a dozen times since Feb 2016, urging it to refuse the ads and providing the detailed legal information needed so that its refusal would withstand court scrutiny. There was virtually no response from the Mayor or Legal Services.

[1] View the ad here. It has three panels: two are of exaggerated, outsized images of fetuses claimed to be of 7 weeks and 16 weeks' gestation (without showing a pregnant woman), and the third panel is a large smear of blood. The slogan says "Growing, growing, gone" along with the claim "Abortion kills children. End the killing".

[2] Hinton Alberta lost in court on January 19, 2017, because it had unfortunately refused the ad sight unseen, apparently only on the basis that it was anti-abortion. The court said this was not reasonable.

Failure # 1: No advertising policy in place

On Feb 11, 2015, the City declined to post an ad[1] submitted by CCBR primarily on the basis that it would be "divisive or controversial" and "reduce ridership." Unlike most other cities, the City of Peterborough had no bylaw or policy related to advertising at the time. Decisions on advertising were being made on an *ad hoc* basis, despite the fact that some ads, especially advocacy and political ads, need special scrutiny because they can engage Charter and human rights issues or even be deemed hateful under the *Criminal Code*.

Of course, the lack of an ad policy should not prevent the City from conducting a legal analysis and refusing an ad on solid grounds, but that apparently did not happen in this case.

Failure # 2: Prioritizing money over ethics

The City published a new "Sponsorship, Naming Rights, and Advertising" policy on November 23, 2015, with limits on advertising set out in Section 6.1 (a single page in a 25-page document). The City's rationale for the policy said nothing at all about these new limits for advertising. The policy's purpose was solely to "generate non-tax revenue while providing a venue for willing partners to gain exposure for their products and services."

In a March 2017 report to City Council,[3] City Solicitor and Director of Legal Services Patricia Lester says that Council was already aware of the CCBR litigation in Nov 2015, and that Council had requested certain clauses in the ad policy that would help them review future ads. Still, the new policy was too late to defend the City's prior refusal of the CCBR ad, and the policy's focus on generating revenue tells us that the City's main priority is to make money from ads – which it will from the anti-choice ad.

Failure # 3: Inadequate reasoning to refuse the ad

The City's initial refusal of the ad was justified on weak or insufficient grounds, according to the Ontario Superior Court of Justice, Divisional Court (Sep 2016):

> "The decision of the Respondent contained little consideration of the extent of the limitation on freedom of expression that was imposed, provided scant information on the statutory objectives that it was pursuing, and set out no analysis by which those opposing interests were balanced in any way."

The lack of any advertising policy may have contributed to the City's failure to engage in any kind of balancing of Charter rights or other legal analysis to support its decision and reasoning. But as noted above in Failure #1, it still could have done so. The City did not even cite the Canadian Code of Advertising Standards – even though we now know that the anti-choice ad likely violates two sections of the Code – "Accuracy and Clarity" and "Unacceptable Depictions and Portrayals".

Considering the controversial nature of the ad and the extremist group behind it, the City should have done its homework by considering how the ad might conflict with the Advertising Code, as well as the *Charter of Rights and Freedoms*, the *Criminal Code*, and human rights codes. It could have also consulted

[3] This report was released on March 24 but is dated March 27. Because of technical difficulties with the original link, we have temporarily uploaded it to the ARCC website for the reader's convenience.

ad policies from other similar jurisdictions for guidance, since many cite reasonable standards that ads must meet.

Failure # 4: Caving in without adequate legal research

In November 2015 or perhaps a bit earlier, the CCBR filed an application for judicial review of Peterborough's decision to reject its paid ad. Upon advice from its Legal Services department, the City reversed its decision and consented to the ad.

It appears that the City, acting on advice from Legal Services, simply accepted CCBR's arguments that their freedom of expression could not be infringed. There is no indication that City Council was made aware of legal precedents that in fact *do* limit speech in many ways and which are not unconstitutional.

In particular, the ability to place reasonable limits on advertising was endorsed by the Supreme Court in its 2009 case *Greater Vancouver Transportation Authority v. Canadian Federation of Students* (2009 SCC 31). Although the court ruled in that case that a transit company could *not* refuse two specific political ads,[4] the court also said "…the purpose of providing a 'safe, welcoming public transit system' … is a sufficiently important objective to warrant placing a limit on freedom of expression." (para 76) Further, the court said "…the Canadian Code of Advertising Standards …could be used as a guide to establish reasonable limits on advertising, including limits on discriminatory content…" (para 79).

Subsequent lower court decisions in the last year have limited advertising deemed discriminatory, hateful, or harmful to vulnerable groups: *American Freedom Defence Initiative v Edmonton (City)* (2016 ABQB 555, Oct 4), and *Canadian Centre for Bio-Ethical Reform v City of Grande Prairie* (2016 ABQB 734, Dec 22).

Failure #5: Misusing Supreme Court decisions

Ironically, it's the-above noted GVTA case (*Greater Vancouver Transportation Authority v. Canadian Federation of Students*) that the City has primarily relied on from the start to explain why the City was forced to accept the ad. City Solicitor Patricia Lester said in her March report to City Council: "…the highest court in our country, the Supreme Court of Canada, has stated that the public is expected to put up with some controversy in a free and democratic society." That line is lifted right out of the GVTA decision, paragraph 77.

Paragraph 77 falls right in between paragraphs 76 and 79 quoted above in Failure #4 – the ones that support limitations on ads. Yet neither passage was cited in the City Solicitor's report. Unfortunately, the report failed to accurately reflect key aspects of this Supreme Court decision that were directly relevant to the very issue the Council was facing.

This occurred despite the fact that City Council and Legal Services had been earlier advised of these two paragraphs in a June 2016 letter from ARCC's lawyer Donald Crane. In addition, the City's Feb. 25, 2016 press release was likely informed by Legal Services, in particular this statement:

[4] One ad from the BC Teachers Federation criticized BC's provincial government for budget cuts to education; the other ad from the Canadian Federation of Students encouraged students to vote in the next provincial election.

> *"*The Supreme Court of Canada has consistently refused to take into account the content of the speech when ruling on cases under section 2(b) of the Charter, on the basis that controversial and even unpopular communications are often those most in need of protection."

Much of that is actually a direct quote from the R. v. Zundel case (1992, 2 SCR 731). Ernst Zündel was a Holocaust denier charged with "spreading false news" under Criminal Code Section 181, which prohibited knowingly making false statements that would likely "cause injury or mischief to a public interest." The Supreme Court struck down that law. However, that case is unrelated to cases on advertising, which require a different test. As ARCC's lawyer Donald Crane explains:

> "In fact, the Supreme Court and other courts have consistently taken into account the content of the speech in such cases, but more to the point, when it comes to bus advertising, it is the *context* of the speech which is critical. The Court has made it clear that there is no single standard of permissible speech, in every context. In other words, the test to be applied to words affixed to a city bus is not the same as the test to be applied to words spoken from atop a soapbox in a public park."

Failure #6: Not fighting CCBR's court order

Although the City had reached an agreement with the CCBR by Nov 2015 to run the ad, the CCBR sought to have that agreement entered as a court order ("consent order") in a Feb 2016 judicial review action. Basically, the anti-choice group wanted a guarantee that their ad would run. The Ontario Superior (Divisional) Court had little choice but to accept CCBR's arguments and grant the court order requiring the city to run the ad, because the City had left itself with no legal leg to stand on. It didn't even participate in the February court case because it had already consented to running the ad.

The court order decision was released in Sep 2016. After hearing about it, we (ARCC) wrote the City on Sep 7, calling the court order "very unfortunate" and asking: "*How can a court compel a city to run an ad that appears to be inaccurate, discriminatory, and/or hateful?"* We could hardly believe the City would be so unwise as to let the CCBR bring its case completely unopposed, so we naively asked the City what arguments were used in court against the ad. Needless to say, there was no reply from the Mayor or Legal Services. On Oct 24, we sent a second letter, but received only a curt thank-you from City Solicitor Patricia Lester.

So it appears the City made no effort at any time to fight the court order. It had already given into CCBR's demands and officially consented to the ad long ago – several months before the public even learned about the ads, and well before City Council was finally provided with the legal information they needed to refuse the ads (by ARCC and Donald Crane). But by then it was too late.

Failure #7: Not opposing the declaration and putting other cities at risk

Disturbingly, the CCBR had also asked the Ontario Superior Court (in Feb 2016) for an independent declaration that the City's decision to refuse the ad infringed their right to freedom of expression under the *Charter of Rights and Freedoms*, and that this could not be saved under Section 1 of the Charter (which allows justifiable limits on rights in some circumstances).

Granting such a declaration may have given CCBR the legal precedent to place the ads on buses throughout Ontario (and perhaps Canada), with limited legal recourse for the cities involved. Thankfully, the court declined to grant the declaration, because:

> "Without an evidentiary record from the Respondent addressing these issues and in the absence of any adversarial party to contest the evidence and submissions of the Applicant, we decline to make a declaration that may be seen to be a general pronouncement with precedential value."

It turns out that the City had also *consented to the declaration long ago*, as Solicitor Patricia Lester made clear in her March 2017 report to City Council. So in an ironic twist, the City decided not to oppose the declaration, but the Court refused to grant it because it was unopposed. The City's acquiescence to the declaration had created a risk for itself and other cities grappling with offensive ads in the future. However, the court's refusal allowed Lester to reassure City Council that: "…the Court's decision was limited in its scope and effect and does not bind the City in any future advertising decisions."

In reality, the court's decision against the declaration was just a lucky break for the City (and the rest of Canada). The whole thing stemmed directly from the City's initial too-quick agreement to settle and its failure to oppose the consent order and declaration.

Failure #8: Closing the door to any appeals

On Jan 3, 2017, in the wake of the Grande Prairie Alberta decision and pressure by pro-choice activists, the City announced it would start running the ad at the end of March. The City's excuses were that it had no advertising policy at the time of the initial refusal, and that the court order's appeal period had expired. In other words, the City cited its own failures as if they were satisfactory reasons for running the ad.

In City Solicitor Patricia Lester's March 2017 report to City Council, she concedes that an appeal is still possible if the City were to ask for an "extension of time to file a motion seeking permission to appeal." However, she discourages this action on the basis that it would be unlikely to succeed since the "Divisional Court Order was given on consent of the City." In other words, all the previous failures of the City preclude it from seeking any viable option out of the debacle it now finds itself in.

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We don't know why the City of Peterborough took the route of surrender and inaction. However, it's worth pointing out that if anti-choice sentiment was present amongst city councillors or staff, it might have been enough to overcome common sense and divert the City from its civic duty and professionalism, such as its (neglected) obligation to engage in a sound legal analysis.

In conclusion, the City bears responsibility for this situation, so it must also bear the consequences of any negative effects of the ad, including reduced transit ridership and public trust. Worst of all, the City will be responsible for subjecting its own residents to inaccurate, harmful, hateful, discriminatory ads on its buses for a long time – while profiting from it.

Peterborough's citizens were denied any say in this case, but fortunately they can still express themselves loud and clear in one place: the voting booth during the next municipal election.