Abortion Rights Coalition of Canada

Your Voice for Choice

Canada's only national political pro-choice advocacy group

POB 2663, Station Main, Vancouver, BC, V6B 3W3 • info@arcc-cdac.ca • www.arcc-cdac.ca

Courts Have Endorsed Use of the Advertising Code

April 2022

The *Canadian Code of Advertising Standards* ("the Code") sets criteria for acceptable advertising that is "truthful, fair and accurate." This allows host advertisers (cities, media, and advertising companies) to exercise a justified veto power over messages that would likely violate the Code, including inaccurate, discriminatory, hateful, or demeaning messaging. Many anti-choice advertisements and public messaging have been found to violate the Code,[1] including graphic images of aborted foetuses.

The Code is administered by Ad Standards, which is a private watchdog agency with limited enforcement powers. The Code has no authority or legal standing on its own, but is widely endorsed by advertisers, advertising agencies, media, and consumers. In 2019, Ad Standards received 1,858 complaints,[2] slightly less than in 2018[3] but a 10% increase over 2017. This followed major spikes in 2015 and 2016 compared to previous years.[4] Further, at least 74 local governments already cite the Code in their bylaws or policies,[5] which attests to the Code's growing influence. Citations of the Code in local government bylaws and policies give the Code more authority and the force of law, and can become one part of a city's defence in a Section 1 Charter challenge over freedom of expression.[6] (Section 1 of the Charter allows fundamental rights to be justifiably limited to protect other rights, provided the infringement is reasonable and proportionate under the circumstances.)

Eight court decisions have supported use of the Code by local governments – details below.

---

1 https://adstandards.ca/complaints/complaints-reporting/archived-case-summaries/

2 2019 is the most recent year available (as of April 2022) https://adstandards.ca/wp-content/uploads/Ad-Complaints-and-Disputes-Report-2019.pdf

3 https://adstandards.ca/wp-content/uploads/2019/04/AdStandards-2019-Complaints-Report-EN.pdf

4 www.theglobeandmail.com/report-on-business/industry-news/marketing/canadas-ads-watchdog-sees-spike-in-complaints-from-unhappy-customers/article29613612/

5 https://www.arcc-cdac.ca/wp-content/uploads/2022/03/City-Search-Advertising-Code-Worksheet-all.pdf

6 Cities cannot rely *only* on the Code but may incorporate it as part of a Charter balancing exercise using the Doré/Loyola framework: https://www.cba.org/Sections/Administrative-Law/Articles/2019/The-song-remains-the-same. Also note that Ad Standards says: "The Code is not intended to replace the many laws and guidelines designed to regulate advertising in Canada." www.adstandards.com/en/standards/thecode.aspx

Two lawyers discuss some of these cases in relation to anti-abortion bus ads in their Sept 2018 blog article: *The Shrinking Space for Hateful Speech in the Public Square*.[7] They say:

> "For some time, it was unclear whether the courts would recognize the Code as setting an objective standard for acceptable speech, particularly within the advertising context. This question now appears to have been answered with some clarity in Alberta with the CCBR appeal decision *[Grande Prairie case #2 below]* and in British Columbia…" *[Translink case below]*

***GVTA case** – Greater Vancouver Transportation Authority v. Canadian Federation of Students, Supreme Court of Canada (2009 SCC 31):*[8]

Summary: The policy of TransLink and BC Transit (part of the GVTA) banned all "political" advertisements, causing them to refuse to run the student federation's proposed election ads for buses. The Supreme Court held that this policy was a violation of and unjustified limit on freedom of speech because it was not limited to particular kinds of political expression that could jeopardize safety or make people feel unwelcome. Justice Deschamps found that the policies were a "blanket exclusion of a highly valued form of expression in a public location, and ruled that this restriction is not a minimal impairment of freedom of expression, so it cannot be justified under Section 1's "reasonable limits".

Since the court found the blanket ban to be overbroad and not minimal, this means that bans on specific types of advertising aimed at specific audiences might meet Section 1's reasonable limits. Indeed, the court acknowledged that cities could use the Code as a guide to establish reasonable limits on advertising:

- "Thus, limits on advertising are contextual. Although we are not required to review the proposed standards, the Canadian Code of Advertising Standards, which is referred to in the transit authorities' advertising policies, could be used as a guide to establish reasonable limits, including limits on discriminatory content or on ads which incite or condone violence or other unlawful behaviour. Given that the transit authorities did not raise s. 1, however, the above comment is intended merely to provide guidance on what may be justified, but the determination of what is justified will depend on the facts in the particular case." (para 79)

[7] https://ablawg.ca/2018/09/13/the-shrinking-space-for-hateful-speech-in-the-public-square-the-alberta-court-of-appeals-decision-in-canadian-centre-for-bio-ethical-reform-v-the-city-of-grande-prairie-city-2018/

[8] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7796/index.do

AFDI case – American Freedom Defence Initiative v Edmonton (City), Alberta Court of Queen's Bench *(2016 ABQB 555):*[9]

Summary: The American Freedom Defense Initiative sued the City of Edmonton for its removal of a bus ad about honour killings of Muslim women, which was seen as a "dog whistle" for anti-Muslim sentiment. Justice Gill held that the City's objective of providing a safe and welcoming transit system far outweighed the negative effects of its refusal to run offensive or discriminatory ads on its buses.[10] Justice Gill ultimately concluded that the infringement upon AFDI's freedom of expression was justified under Section 1 of the Charter

The court discussed the reach and authority of the Code in Paras 65-71, and said the Code can form part of a Section 1 Charter analysis, in relation to whether ads can be rejected:

- Pattison Outdoor, an advertising company that many municipalities contract with, enforces a rule to adhere to the Code: "…I find the clear intent behind the agreement between the City and Pattison was that the City contractually bound Pattison to abide by the rules of Advertising Standards Canada, which are encompassed in the Canadian Code of Advertising Standards." (para 65)
- "The result in this case does not turn on the Code, as the City relied on its discretion as described in the contractual documents. However, the Code informs the s. 1 analysis. The Supreme Court has long emphasized the importance of context on a s. 1 analysis … In my view, the Court may take judicial notice of the Code in order to better understand the context of this case." (para 69)
- "…it appears that the City in this case exercised its discretion to prohibit advertising which it found to be of an immoral or irreputable character, offensive to the moral standards of the community, or which it believed negatively reflected on the character, integrity or standing of any organization or individual. I note that these bases for the City's discretion, described in different ways in the contractual documents, are in keeping with various standards contained in the Code, most notably s. 14." (para 71)

[9] www.canlii.org/en/ab/abqb/doc/2016/2016abqb555/2016abqb555.html

[10] https://ablawg.ca/2016/12/05/no-offence-but-i-hate-you-american-freedom-defence-initiative-v-edmonton-city/

Grande Prairie case #1 *– Canadian Centre for Bio-Ethical Reform v City of Grande Prairie, Alberta Court of Queen's Bench (2016 ABQB 734):*[11]

Summary: The court ruled that the City of Grande Prairie's decision to reject a proposed bus ad by the Canadian Centre for Bio-ethical Reform was reasonable. The judge agreed with the city that a proposed bus ad probably violated Section 14 of the Code, "Unacceptable Depictions and Portrayals". (The ad depicted two panels of growing fetuses and a third panel with a smear of blood containing the caption "GONE", and contained the words "Abortion kills children.")

- "…the City was guided by the ASC Code, referenced in its contract with Bus Bench. … The City's discretionary decision-making in relation to bus advertising is informed by these standards [as expressed in Section 14 of the Advertising Code] so as to balance free expression with other, equally important values." (para 75)
- "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." (para 96)

Note: The court also endorsed the "captive audience" doctrine, noting the petitioner "has no right to force his message upon an audience incapable of declining to receive it", given the "right of the commuters to be free from forced intrusions on their privacy."[12]

Translink case *– Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority, Supreme Court of BC (2017 BCSC 1388):*[13]

Summary: The respondent Translink refused to run a CCBR ad on its buses (the same ad as in the *Grande Prairie case #1*.) The court concluded the ad's content could potentially cause psychological harm, particularly to children and women who have had abortions; therefore, the respondent's decision was reasonable in the context of a proportionate balance between freedom of expression and Translink's statutory mandate to provide an efficient, safe and welcoming transit system.[14]

The respondent Translink argued that since the Code is in wide usage in the private sphere, it represents a limit on advertising that is saved by s. 1 of the Charter. The court concluded:

- "…I am in agreement with the respondent that this [the Code] represents an appropriate standard to use when filtering advertisements. This is because the *Code* was developed over an extended period of time in response to complaints about advertisements brought by members of the public by other advertisers and public interest groups. Similarly, ASC regularly deals with such complaints. As such, the use of the *Code*, as well as guidance from ASC regarding the *Code*, provides the respondent a means by which to render a decision on potential advertisements which is not merely subjective or arbitrary. Consequently, I find that the respondent acted reasonably in using the *Code* as a standard by which to measure the appropriateness of advertisements." (para 56)

---

11 www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html
12 https://ablawg.ca/2017/01/19/lost-and-found-the-captive-audience-doctrine-returns/
13 www.courts.gov.bc.ca/jdb-txt/sc/17/13/2017BCSC1388cor1.htm
14 https://harpergrey.com/knowledge/transportation-authoritys-decision-refuse-anti-abortion-advertisement-buses-upheld-reasonable-proportionate-judicial-review/

Grande Prairie case #2 *– The Canadian Centre for Bio-Ethical Reform v. City of Grande Prairie, Court of Appeal of Alberta (2018 ABCA 154)*[15]

Summary: This is the appeal of *Grande Prairie case #1*. The Court upheld the lower court's decision, ruling that the City's refusal of the anti-abortion bus ads by the CCBR was reasonable. The decision builds on and strengthens existing precedents around restriction of advertising, including supporting the use of the Code.

The Court accepted the use of the Code by cities without question. The decision refers frequently to the Code, which is given implicit deference:

- "However, it seems clear that objectively developed advertising standards [such as the Code] can provide guidance on the boundaries of permissible restrictions on political advertising." (para 52)
- Thus, whether or not the advertisement complies with the Canadian Code of Advertising Standards is a relevant consideration." [Judge then cites GVTA and Translink, the latter's finding of non-compliance with the Code, and how the first Grande Prairie decision had the same view.] "This is one factor that can be considered in deciding if the restraint on expression was reasonable and proportionate." (para 75)
- "The conclusion that the tendered advertisement would [under S.14 of the Code] demean, denigrate or disparage women who had procured a miscarriage, and would tend to undermine their human dignity, was well supported by the record." (para 76)

Hamilton case *– CHP v. City of Hamilton, Ontario Superior Court of Justice, Divisional Court, (2018 ONSC 3690)*[16]

Summary: The City of Hamilton had removed a transphobic ad by the Christian Heritage Party, but the court ruled against the city, finding that "The City failed to demonstrate that the process undertaken in making the decision was reasonable."

The court noted various deficiencies of the City's decision-making process, and gave credence to the Advertising Code, faulting the city for not checking with Ad Standards about the ad. In other words, the court saw the Code as a useful tool for municipalities to balance freedom of expression and its statutory objectives.

- As part of the Facts, the court noted that both the City and its advertising contractor, Outfront Media, had policies stating that advertising must comply with the Canadian Code of Advertising Standards. (paras 15, 16)
- "No one checked with the Canadian Advertisers Council [Ad Standards] to determine if the advertisements offended its Code." (para 61)

[15] www.canlii.org/en/ab/abca/doc/2018/2018abca154/2018abca154.html
[16] https://www.canlii.org/en/on/onscdc/doc/2018/2018onsc3690/2018onsc3690.html

- "Of note, however, nowhere in the materials or in submissions could counsel for the City point to how it was that the Advertisements contravened any law, Act, Code or other legal framework." (para 24)

Lethbridge case *– Lethbridge and District Pro-Life Association v Lethbridge (City), Court of Queen's Bench of Alberta (2020 ABQB 654)*[17]

Summary: The local anti-choice group had sued the City of Lethbridge for refusing five proposed ads for buses and bus benches/shelters. Justice M. David Gates said the city had placed "undue reliance" on the Code, such as by deciding on its own that all five ads contravened the Code despite obtaining an opinion from Ad Standards that three ads would likely contravene the Code, while one would not, and no opinion was given on the fifth ad. Further, the judge found no evidence that the city had conducted a Charter analysis in order to minimize infringement of the advertiser's freedom of expression.[18]

This case emphasizes the critical importance for cities to balance use of the Code with other considerations, including the advertiser's freedom of expression and the city's statutory objectives.[19])

The City of Lethbridge's use of the Code was central to this case. It is notable, therefore, that Justice Gates *did not criticize the Code itself or cities' use of it*, only that it cannot be the only consideration:

- "The City's contractual relationship with Pattison for the exclusive sale of advertising space on Lethbridge buses and shelters included the requirement that all advertising comply with the ASC Code. I accept the City's contention that whether or not the proposed advertising complies with the Code is a relevant consideration under the Doré/Loyola analytic framework: Greater Vancouver at para 79; Grande Prairie at para 75; South Coast at paras 35, 56. However, I would underscore the fact that this is one factor only. A decision-maker in circumstances such as those presented to the City in this instance cannot simply defer to an ASC opinion or Code non-compliance in conducting a Doré/Loyola proportionality analysis." (para 179)

- "The City's decision refers to the Code as a 'clear and objective standard for appropriate advertising'. However, it could not be the only factor given the requirement to balance the City's statutory objectives and the Applicant's Charter right to freedom of expression." (para 189)

- "As previously indicated, I accept the City's contention that it was entitled to rely on the Code as a guide on permissible restrictions. However, for the reasons outlined above, I find that the City placed undue reliance on the Code provisions and, indeed, reached conclusions

[17] https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb654/2020abqb654.html

[18] Another key aspect was that the proposed ads in question were deemed by the judge to be qualitatively different from the ad in the Grande Prairie decisions, i.e., not as offensive or graphic.

[19] Also see our Quick Assessment Guide for Cities to Evaluate Public Messaging Requests: https://www.arcc-cdac.ca/wp-content/uploads/2020/06/quick-assessment-guide-public-messaging.pdf

> that were contrary to the opinion provided by ACS relative to at least some of the proposed advertisements." (para 215)

Justice Gates did suggest that the city's and even the Code's interpretation of accuracy "may well have to yield to the Applicant's right to freedom of expression" (para 195). However, this is debatable given that paid advertising may be subject to greater limits under the Charter compared to public speech in general (e.g., the Irwin Toy case[20]; the Grande Prairie cases above). It is also significant that advertisers and host advertisers (media, cities, billboard companies, etc.) have been largely adhering to the Code since 1963, with no legal challenges to the Code itself or its use.

The judge also suggested that abortion-related ads should be deemed "political advertising" under the Code (see page 2 for definition), which would exempt them from compliance with the Code. **However, Ad Standards specifically excludes abortion-related ads from its definition of political advertising**,[21] as well as other "controversial" advocacy ads, including on animal rights, climate change, discrimination issues, and public health (e.g., about vaccines). Moreover, although abortion is *politicized* due to people holding strong personal views against it and wanting to restrict it, it is not a partisan political issue in itself – ultimately, abortion is a human rights issue, a social issue, and a health issue.

Guelph case: *Guelph and Area Right to Life v. City of Guelph, Ontario Superior Court of Justice, Divisional Court (2022 ONSC 43)*[22]

Summary: The city had refused to run three anti-abortion ads on buses because Ad Standards had deemed them inaccurate and/or demeaning to women. The anti-choice group claimed their Charter right to freedom of expression was violated. The court ruled that the City's decision was unreasonable because it failed to do a Charter analysis according to the Doré/Loyola legal framework (in this case, weighing the anti-choice group's freedom of expression rights against the City's statutory objectives and competing Charter rights of women). The city relied only on the Advertising Code and Ad Standards decisions, which the court recognized as important and useful, but insufficient. Notably, the court said the city did not have to run the ads. The court remitted the decision back to the city for reconsideration, giving them a chance to again review (and reject) the ads using proper criteria.

Also, the court affirmed that cities can rely on the Advertising Code and Ad Standards decisions, but cities must go further and consider competing Charter rights, including the advertiser's freedom of expression, and in this case also gender equality rights that may be undermined by ads. In this regard, the court said:

- "The intervenor Abortion Rights Coalition of Canada presented arguments in support of the City's decisions, emphasizing the importance of protecting abortion rights and the deleterious effects of the applicant's advertisements on the rights of women and people capable of pregnancy. There is obviously merit to these arguments. However, as reviewed

[20] Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927. https://www.canlii.org/en/ca/scc/doc/1989/1989canlii87/1989canlii87.html

[21] Interpretation Guideline #6: https://adstandards.ca/code/interpretation-guidelines/

[22] https://www.ontariocourts.ca/search-canlii/scj/dv-en.htm

above, it is not the court's role at this stage to weigh in on an evaluation of the advertisements. Rather, it is first for the City to weigh the issues identified by the Coalition against the applicant's right to freedom of expression." (para 91)

The court recognized the value of the Advertising Code as follows:

- "We are not faulting Ad Standards for failing to embark on this exercise [of balancing Charter rights]. Rather, the point is that the City cannot simply rely on a ruling by Ad Standards that does not perform the necessary analysis. (para 84)
- "There is no doubt that the [City's] Policy and [the Advertising] Code are a good starting point. Advertising standards that aim to ensure that advertisements are accurate and do not demean people based on gender or other characteristics are important, especially when dealing with advertisements that will be viewed broadly on public transportation. However, given the requirements of the Doré/Loyola analysis, reliance on a ruling by Ad Standards or a finding that an advertisement appears to be contrary to the Policy is not sufficient. The City must go one step further and engage in the requisite balancing of interests and rights." (para 88)
- "…the City is entitled to obtain and rely on rulings made by Ad Standards in deciding whether to post advertisements. However, the City cannot rely on Ad Standards as the final arbiter of the decisions it must make. This is not so much due to a concern over fettering *[the anti-choice group argued that the City fettered its decision-making by outsourcing it to Ad Standards]* but rather because the exercise performed by Ad Standards is not the same exercise as the analysis the City is to perform under Doré/Loyola. If Ad Standards performed such an analysis and the City relied on the analysis without any independent review or consideration, this may or may not give rise to concerns that the City improperly fettered its discretion. However, this is not what happened here and not an issue that needs to be decided in this context." (paras 96-97)