# Examining Legal Strategies and Caselaw for Restricting Anti-Abortion Speech in Municipal Advertising

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## Purpose

The aim of this report is to provide city decision-makers with the legal information regarding the regulation of anti-abortion messaging. This report will outline the current legal framework upon which municipalities may base decisions regarding the regulation of anti-abortion messaging in public spaces.

## Definitions

*Messaging*: Transferring, by any medium of communication from one person or device to another, content, or information, be it text, images, or voice.

*Advertising*: Any message the content of which is controlled directly or indirectly by the advertiser expressed in any language and communicated in any medium to Canadians with the intent to influence their choice, opinion, or behaviour.[1]

*Advertiser*: An "entity" that engages in "advertising" and has, or shares with one or more entities, the final authority over the content of "advertising" or an "advertisement."[1]

*Anti-Choice Messaging*: Messaging that is opposed to the concept of allowing pregnant women to exercise choice in terminating their pregnancy by way of medical abortion.

*Political Advertising*: "Advertising" appearing at any time regarding a political figure, a political party, a government or political policy or an issue publicly recognized to exist in Canada or elsewhere.[2]

A note on the use of "woman" or "women" in this report: abortion has historically been framed as a women's rights issue. However, it is well established that individuals who do not identify as "women", including two-spirit peoples, underage girls, transgender men, and non-binary individuals, can and do experience pregnancy. We respectfully acknowledge that such individuals are equally impacted by discussions and regulations that centre on access to abortion as will be discussed throughout this paper.

## The Advertising Code

Ad Standards is a self-regulated organization in Canada that creates and enforces advertising guidelines with the goal of fostering truthful, accurate, and fair public messaging.[3] The principal instrument of Ad Standards is the *Canadian Code of Advertising Standards* (the "*Code*"). Enforcement of the *Code* and the review of complaints is conducted by the Ad Standards

[1] *Canadian Code of Advertising Standards* [The "Code"]
[2] *Ibid*.
[3] About Ad Standards

Council.[4] The *Code* has been adopted voluntarily by organizations across Canada, including many municipalities.

The *Code* is comprised of 14 provisions that apply broadly to most forms of advertising. Ad Standards, in reviewing messaging which featured anti-abortion themes, has previously upheld complaints that engaged the following provisions:[5]

**Clause 1 Accuracy and Clarity**

> (a) Advertisements must not contain, or directly or by implication make, inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations.
>
> (b) Advertisements must not omit relevant information if the omission results in an advertisement that is deceptive or misleading.

**Clause 8 Professional or Scientific Claims**

> Advertisements must not distort the true meaning of statements made by professionals or scientific authorities. Advertising claims must not imply that they have a scientific basis that they do not truly possess. Any scientific, professional or authoritative claims or statements must be applicable to the Canadian context, unless otherwise clearly stated.

**Clause 11 Superstition and Fears**

> Advertisements must not exploit superstitions or play upon fears to mislead the consumer.

**Clause 14 Unacceptable Depictions and Portrayals**

> Advertisements shall not:
> (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.

[4] Ad Standards Council

[5] Upheld Complaints Against Anti-Abortion Ads

# 1 The Current Legal Framework for the Restriction of Expression

## The Doré/Loyola Framework

In *Doré v Barreau du Québec,* the plaintiff, Mr. Doré, was suspended for the content of a letter he had sent to the presiding judge following a criminal proceeding for which he was acting as counsel.[6] The plaintiff appealed the decision to suspend him on the basis that the letter was protected by his right of expression pursuant to section 2(b) of the *Charter*.[7] The review process, escalating to the Supreme Court of Canada, considered the incompatibility of the traditional *Oakes* test in situations where it is not a law or regulation engaging a *Charter* protection, but rather, a discretionary administrative decision issued on an individual basis.[8]

The incompatibility of the existing legal scheme with the nature of the case led the court to derive a new framework for assessment. Justice Abella, attempting to reconcile this incompatibility, provided: "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".[9] Thus, the *Doré* test for justifying a *Charter* infringement is simplified as:

1. Whether a *Charter* protection is engaged by the administrative decision;
2. Whether the decision furthers a valid municipal statutory objective; and,
3. Whether the decision-maker has proportionally balanced the *Charter* protections of the individual/group of individuals with the objectives of the administrative body.

The court in *Doré* further elaborated on the proportionality element of the test, stating that where a decision does interfere with a *Charter* guarantee, the limitation or interference should be as minimally invasive as possible.[10]

These respective decisions were delivered at the Supreme Court level, and so they have become the leading authority for *Charter* challenge cases where an administrative body is making discretionary decisions that evoke the *Charter* protections of the affected parties. Thus, the *Doré/Loyola* test described above is now the appropriate legal standard under which city decisions to reject or remove public messaging, including those that feature anti-abortion content, are held.

[6] *Doré v Barreau du Québec*, 2012 SCC 12 at para 9. [Doré]
[7] *Ibid* at para 18.
[8] *Ibid* para 37.
[9] *Ibid* at para 58.
[10] *Ibid* at para 7.

## The Guelph Case

A recent example of the *Doré/Loyola* framework's application in the above context was considered by the court in *Guelph and Area Right to Life v. City of Guelph*.[11]

In this 2022 case, the Ontario Superior Court of Justice recognized the necessity of cities to engage the *Doré/Loyola* framework when exercising discretionary decision-making on matters that engage *Charter* protection.[12] The case centered on a claim brought against the City of Guelph (the "City") following their removal of three posted anti-abortion advertisements.[13] Guelph and Area Right to Life, a non-denominational "pro-life" charitable organization, brought the claim against the city on the grounds that their section 2(b) *Charter* right to freedom of expression was infringed when the city removed three of their ads from public buses.[14]

While the relevant ads were originally approved and posted on the buses, the city opted to remove them following an influx of complaints from the public. The complaints were first submitted to the city directly, which referred the complainants to Ad Standards in accordance with their policy. The policy, developed by the City to incorporate the *Canadian Code of Advertising Standards* (the "Code"), specifically stated that any complaints raised regarding an ad would be remitted to Ad Standards for review. The City only became involved in the process if, after review from Ad Standards, the Code was found to have been violated and removal of the ad was warranted. [15]

In the case, Ad Standards found that the first ad (Advertisement No. 1) was "misleading" and therefore contrary to the *Code* Clause 1(a).[16] Advertisements No. 2 and 3 were both also reviewed by Ad Standards, who found them to be misleading and disparaging, thus in violation of the *Code* Clauses 1(a) and 14(c) respectively.[17] Accordingly, the City directed that all three advertisements be removed from the buses.

The court ruled that the removal of the ads constituted an unjustifiable infringement on the expression rights of the plaintiff organization.[18] In their reasons for judgment, the court said: "to the extent that the city wholly relied on Ad Standard's rulings and Ad Standards failed to engage in the necessary *Doré/Loyola* analysis, the City's decisions to remove the advertisements are unreasonable".[19] It was further emphasized by the court that the City's decision, even if their rationale for removing the ads had been accepted, was nonetheless

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[11] *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43 [*Guelph*]
[12] *Ibid* at para 94.
[13] *Ibid*.
[14] *Ibid* at para 15.
[15] *Ibid*.
[16] *Ibid*.
[17] *Ibid* paras 35-36.
[18] *Ibid* at para 94.
[19] *Ibid* para 85.

unreasonable on the grounds that they "failed to consider and weight their concerns over accuracy against the applicant's rights to freedom of expression".[20]

However, the court expressed sympathy for the city's point about the challenging nature of the decisions, while explaining that "the City cannot simply rely on a ruling by Ad Standards that does not perform the necessary analysis."[21]

As a remedy for the breach, the court remitted the matter back to the City such that they could conduct the analysis and decide the status of the ads under the proper legal framework.[22] In their conclusion, the court stated "it is far from a foregone conclusion that the City should be required to post the advertisements at issue on its buses. There are legitimate significant competing considerations, and the City should exercise its discretion in weighing those considerations".[23]

The importance of this judgment is to showcase that courts have recognized that cities can restrict anti-abortion messaging, and may have valid reasons for doing so, in accordance with their policies and with the *Code*. However, their decision can only be upheld in the law so long as the requisite *Doré/Loyola* test is performed by the city as part of their decision-making process, taking a robust approach to weighing the *Charter* rights of all those involved. As stated by the court in *Guelph*, "simply acknowledging or mentioning the applicant's *Charter* rights is not sufficient."[24]

# 2 Understanding Rights and Obligations of Parties to a Public Anti-Abortion Ad

## Obligations and Objectives of Cities

In Canada, all levels of government are obligated to uphold the *Charter* when creating and enforcing legislation.[25] As shown by the *Doré* and *Guelph* decisions, this obligation extends into the administrative process and decision-making conducted by cities, which includes the assessment of advertisements for posting in public spaces. At the same time, cities also have the discretion to implement and enforce legislation that helps them to achieve certain objectives and fulfill regulatory purposes. This right is provided by the *Charter* in section 1, which reads "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms

[20] *Ibid* at 86.
[21] *Ibid* para 84.
[22] *Ibid* at para 98.
[23] *Ibid* at para 100.
[24] *Ibid* at para 87.
[25] *Canadian Charter of Rights and Freedoms,* s 32(1), Part 1, The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*The Charter*]

set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[26] In the context of anti-abortion advertising on public transit, and as revealed in the case law, there are certain objectives that cities may highlight when considering whether to post such ads.

## Creating a Safe and Welcoming Transit Environment

Creating a safe and welcoming transit environment is often a leading objective of public transit authorities. Public transportation serves diverse communities throughout Canada, often serving as an essential lifeline for individuals who depend on public transportation to navigate their daily lives. Ads containing graphic imagery, explicit language, or discriminatory messaging can create discomfort or distress among passengers, undermining their sense of safety and well-being. By establishing guidelines to regulate the content of bus advertisements, transit agencies can maintain a positive and respectful atmosphere onboard, fostering a safer and more welcoming environment for all passengers.

From a further practical standpoint, maintaining safety in public transit is essential for transit agencies to uphold their reputation and credibility within the communities they serve. A positive image as a safe and reliable mode of transportation is instrumental in gaining public trust and support for transit initiatives. Conversely, any perception of insecurity or negligence can tarnish an agency's reputation, erode public confidence, and impede ridership growth.

Multiple key court decisions have recognized and upheld the creation of safe public spaces as a valid objective. In *GVTA*, the Supreme Court of Canada accepted that the advertising policy developed by TransLink was adopted for the purpose of providing "a safe, welcoming public transit system."[27] Justice Deschamps held that this objective was sufficiently important to warrant a limitation on the right to freedom of expression.[28] This decision was later referenced in the *AFDI* case, discussed in further detail in section 5 of this report, when the Alberta Court of King's Bench accepted that the City of Edmonton had properly established the objective of providing a safe, welcoming public transit system.[29] Like in *GVTA*, this objective was found to be of sufficient importance to warrant a limit to the freedom of expression of the ad-proposing group.

In *Grande Prairie #1*, Justice Anderson acknowledged the importance of the City's underlying objective of creating and maintaining a safe and welcoming transit environment, stating:

[26] *Ibid*, section 1.
[27] *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, 2009 SCC 31* at para 76. [*GVTA*]
[28] *Ibid*.
[29] *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555, paras 83-86. [*AFDI*]

> Expression [...] 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.[30]

Thus, the courts have amply acknowledged that the creation and maintenance of a safe and welcoming transit space is a valid municipal objective, particularly to regulate freedom of expression in the context of public messaging.

## Protecting Vulnerable Groups

Protecting vulnerable groups has been discussed at length in the context of regulating expressive advertising. In *Irwin Toy*, discussed later in this report, the court upheld legislation that restricted the freedom of expression rights of a commercial company that was advertising to children. In the court's reasons for judgment, they acknowledged that children are "particularly vulnerable" to manipulation in advertising.[31] Accordingly, the court ruled that the legislation restricting this type of advertising was justifiable, and thus saved by section 1 of the *Charter*.

In the particular context of anti-abortion advertising, the court in *Grand Prairie* identified the vulnerability of children who are subject to anti-abortion ads on public transit. Referencing a proposed advertisement rejected by the City (described in further detail on pages 16-17), Justice Anderson stated:

> If it is acceptable and justifiable to restrict the audience for certain types of content [referencing the *Film and Video Classification Regulation, Alta Reg 263/2009*], 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.[32]

Further, while not explicitly stating that women are in a position of vulnerability, Justice Anderson emphasizes that the ads were nevertheless likely to cause harm to women who have had or who are considering an abortion.[33]

The targeting of women through advertising that aims to vilify them not only has the potential to be psychologically harmful, but could also perpetuate anti-woman concepts and ideologies

[30] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2016 ABQB 734 at para 82. [*Grande Prairie 1]*.
[31] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1 SCC 927 [*Irwin Toy*]
[32] *Supra* note 30, at para 72. [*Grande Prairie 1]*
[33] *Ibid* at para 82.

that make public places socially and physically unsafe for women to inhabit. Recent reports from large Canadian cities such as Toronto have shown an increased rate of sexual harassment against female passengers, as well as increased incidences of physical violence on public transit.[34] Cities should be mindful of the ways that advertising influences the mindset and behaviour of its audience, particularly where there is already an increased likelihood of physical harm against women who exist in the same spaces as these messages.

## The Captive Audience Doctrine

The captive audience doctrine is vested in a belief that some audiences, in certain contexts and physical spaces, should be free from subjection to unwanted messaging.[35] This doctrine was adopted into law by the US Supreme Court as an exception to the First Amendment right to freedom of speech, applying particularly to cases where unwilling individuals were subject to messages and noise from the privacy of their homes.[36] US Courts have subsequently broadened the doctrine to cases where audiences are unwillingly captive to messaging in public.[37]

The captive audience doctrine is occasionally considered by Canadian courts in the context of reviewing municipal decisions to refuse to accept/post certain anti-abortion ads. For example, the court in *Grande Prairie* considered the captive audience doctrine in direct reference to anti-abortion advertising on public transit vehicles. At para 68, Justice Anderson emphasizes that a bus exterior is a location where it is almost impossible to avoid expression.[38] This was distinguished from the kind of advertising discussed by the Supreme Court of Canada in *Committee for the Commonwealth*, where Justice L'Heureux-Dubé explained that people who find certain expressions unpleasant in a park or on a street could easily move elsewhere.[39]

Justice Anderson went on to consider the fact that city buses are frequented by a broad and diverse range of individuals who rely on them as their primary means of transportation. This reinforces the need for public advertising, in general, to be suitable and appropriate for a diverse audience.

## Summary

These objectives, though not exhaustive, reinforce the importance of the role that city administration has in managing the content of messaging that is featured on public property. With particular emphasis on the impact that anti-abortion messaging has on the experience of

[34] Women, Safety and Public Transit in Toronto
[35] Patrick M Garry, *Captive Audience* (Free Speech Center at Middle Tennessee State University, 2024)
[36] *Kovacs v Cooper*, 336 U.S. 77 (1949)
[37] *Lehman v City of Shaker Heights*, 418 U.S. 298 (1974)
Note that in *Lehman*, the court distinguished that the city-owned public transportation in this case did not constitute a public forum, thus taking it outside of the scope of constitutional protection.
[38] *Supra* note 30, at para 68 *[Grande Prairie 1].*
[39] *Ibid* at 68.

transit users, particularly women, it is clear that cities may adopt policies and make decisions that take such objectives into account. Further, the case law reveals that, by doing so, cities may be better equipped to demonstrate that any *Charter* rights infringed by their decision were weighed against defined and rationally connected objectives.

# 3 Weighing Conflicting *Charter* Rights

## Charter Rights of Ad-Proposing Groups

The fundamental freedoms protected under the *Charter* are a cornerstone in the debate around anti-choice messaging in public spaces. Of those protections frequently engaged in the regulation of public messaging, two of the most relevant sections include: section 2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; and section 2 (a) freedom of conscience and religion.[40]

Public messaging, which has generally been held as inherently expressive in Canadian court decisions, evokes *prima facie* protection under section 2(b) *Charter*.[41] While the *Charter* specifically references freedom of expression in the press and media, this protection further applies to public spaces, including city-owned buses and infrastructure.[42] Additionally, quasi-public spaces have been assigned section 2(b) protection in Canada. For example, the court in *Committee for the Commonwealth of Canada v Canada* held that airports represent a "contemporary crossroads" that essentially function as a public thoroughfare, and are therefore expected to respect the *Charter* in creating and enforcing their advertising regulations.[43]

More specifically to religion-based groups, claims of infringement under section 2(a) of the *Charter* are often raised when certain messages are rejected by cities.[44]. As will be discussed in the Case Study section of this report, Canadian courts have come to mixed conclusions about whether anti-choice messaging is, in fact, a religious issue, or rather a socio-political issue that some religion-affiliated groups frequently engage in.

## Charter Rights of Ad-Targeted Groups

Section 7 of the *Charter* provides that everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of

[40] Courts Have Endorsed Use of the Advertising Code, ARCC.
[41] *Supra* note 32, at para 42.
[42] *Supra*, note 28, at para 46.
[43] *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC)
[44] *Supra*, note 30.

fundamental justice.[45] This section is particularly relevant from the perspective of women's rights and access to abortion, as was demonstrated in *R v Morgentaler*.[46]

In *Morgentaler*, an analysis of section 7 rights on abortion was conducted as part of the evaluation of whether the *Criminal Code* provisions that prevented access to local abortion facilities were constitutional.[47] Chief Justice Dickson and Justice Lamer, in concluding, reiterated Parliament's recognition of abortion rights under the *Criminal Code* section 251(4), stating that: the interest in the life or health of the pregnant woman takes precedence over the interest in prohibiting abortions, including interest of the state in the protection of the fetus, when "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health".[48]

Applying this standard to the case at bar, they continued by saying:

> "Security of the person" within the meaning of s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an act of Parliament forced a pregnant woman whose life or health is in danger to choose between… the commission of a crime... and… inadequate treatment or no treatment at all, her right to security of the person has been violated.[49]

In their assessment, the court held that the section 7 rights of pregnant women were infringed by the impugned provisions in a manner that was disproportionate to the objective of the legislation and could therefore not be saved by section 1.[50]

Having established that the provisions did infringe on the section 7 rights, Justice Wilson addressed the principles of fundamental justice.[51] In her concurring opinion, she stated that a woman's decision to terminate her pregnancy falls within a class of protected decisions that fall within the values of personal autonomy encompassed by section 7. Notably, she said that a woman's decision to terminate her pregnancy:

> …is a decision that deeply reflects the way the woman thinks about herself and her relationship to others and to society at large. It is not just a medical decision; it is a profound social and ethical one as well.[52]

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[45] *Supra*, note 26, section 7.
[46] *R v Morgentaler*, 1988 CanLII 90 (SCC). [*Morgentaler*]
[47] *Ibid* at pages 33-34.
[48] *Ibid* at page 34.
[49] *Ibid* at page 34.
[50] *Ibid* at page 35.
[51] *Ibid* at page 36.
[52] *Ibid* at page 37.

Provincial courts have also contemplated the *Charter* rights of women in the specific context of regulating anti-abortion advertising. In *Guelph*, the court stated at para 83:

> ...Ad Standards found that the advertisements were contrary to Clause 14.0 of the Code because they were demeaning to women who had obtained or were considering obtaining an abortion. Both of these considerations are relevant. The concern over the impact on women is especially relevant because it engages concerns over other *Charter* protected values such as the equality of women.[53]

It is suggested from the above analyses that Canadian courts do recognize the depth with which women's interests, as related to abortion, are embedded in their *Charter* rights and may be engaged by certain ads, including anti-choice ads.

# 4 Caselaw – Key Decisions, Outcomes, and Lessons

## Irwin Toy (1989)

The *Irwin Toy* decision established the framework for determining when commercial speech could be restricted under the *Charter*.[54] The Supreme Court of Canada decided in *Irwin Toy* that advertising, though a form of commercial expression, is still protected by section 2(b) of the *Charter*. This landmark decision clarified that commercial speech is entitled to constitutional protection, similar to other forms of expression, but can and will be restricted where there is a justifiable basis for doing so. Accordingly, the court adopted the *Oakes* test when conducting its *Charter* assessment of the Quebec government's implementation of the *Consumer Protection Act* legislation, under which Irwin Toy Ltd. was subject to advertising restrictions.

In *Irwin Toy*, the pressing and substantial objective of the impugned legislation was the "protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising."[55] The court concluded that the government's efforts to regulate child-targeted messaging, based on evidence demonstrating the adverse effects of manipulative advertising practices, was sufficiently pressing, rationally connected, and proportionate to the ultimate impairment that the laws had on the freedom of expression rights of the toy manufacturer.

The decision in Irwin Toy reinforces the need for government objectives to be clear, connected, and purposeful to meet the legal standard for a justifiable Charter right restriction as qualified by the relevant legal test, and in accordance with section 1.

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[53] *Supra* note 11, at para 83.
[54] *Supra,* note 32.
[55] *Ibid*.

## American Freedom Defence Initiative (2016)

In 2016, the American Freedom Defence Initiative ("AFDI") brought suit against the City of Edmonton following the City's decision to remove a bus ad developed and sponsored by AFDI.[56] The ad, which featured imagery of seven young Muslim women who had been "honour killed," included the following verbiage:[57]

Muslim Girls Honour Killed by their Families.
If Your Family Threatening You? Is There a Fatwa on Your Head?
We can help: go to Fightforfreedom.us
Paid for by the AmericanFreedomDefenseInitiative

A councillor for the city of Edmonton received numerous complaints about the advertisement.[58] He called the branch manager of ETS (the Edmonton Transit System) requesting an investigation. The manager then instructed the ETS garage to remove the ads until the investigation could be conducted.[59] The investigation included a review of the advertisements and the respective complaints, a meeting with two members of staff, and consultation with members of the community.[60] The City concluded that the messaging was offensive and unbecoming of the community, and thus would not be permitted to repost.[61] AFDI brought their action against the city on the grounds that the removal constituted a *Charter* infringement to their section 2(b) freedom of expression rights.[62]

Justice Gill of the Alberta Court of Queen's Bench ultimately dismissed the suit, concluding that "the City's policy constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Charter." The judge found that:

> …the limit imposed by the City was prescribed by law in furtherance of a pressing and substantial objective. It was proportionate in that it was rationally connected to the City's objective and the means chosen minimally impaired the s. 2(b) right. The harm caused is outweighed by the importance of promoting a safe and welcoming public transit system by prohibiting offensive and discriminatory advertisements on the City's public transport.[63]

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[56] *Supra*, note 29, at para 1.
[57] *Ibid* at para 21.
[58] *Ibid* at para 24.
[59] *Ibid*.
[60] *Ibid* at para 25.
[61] *Ibid* at para 26.
[62] *Ibid* at para 29.
[63] *Ibid* at paras 115 and 116.

## Hamilton – CHP (2018)

The 2018 Ontario case *Christian Heritage Party v Hamilton (City)* involved a *Charter* challenge brought against the City of Hamilton after a political advertisement was removed from the city bus shelters.[64] The advertisement, which featured messaging targeted towards the transgender community, was removed by the city following an inquiry from the CBC about the ads.[65]

Before issuing the order to remove the ads, the city's director of communications, made aware of the ad the same morning, consulted with: the city's liaison with the Hamilton Street Railway to obtain background information about the ad; the city legal department; the city's human rights team; the city's general manager, public works director; and, the city's coordinator of Access and Equity.[66] The decision was then made to order their removal, on the basis that they were offensive and/or discriminatory to the transgender community.[67]

The court in *CHP* ultimately quashed the City's decision to remove the ads.[68] In their reasons for judgment, Justice Varpio emphasized the importance of due process in evaluation and balancing competing *Charter* values.[69] Critically, the City of Hamilton provided no evidence that the *Charter* rights of the CHP were considered at any time in the assessment of their advertisements.[70] Further, they also did not, in their deliberations, make any direct reference to the *Code* or its provisions.[71] Under consideration for the *Doré* framework, Justice Varpio stated that:

> This is not a case where… the reviewing court can examine a sufficient record to determine reasonableness. In this case, there is an inadequate record to review and we cannot therefore engage in the analysis described in *Doré.*[69]

The outcome of this case highlights the importance of a methodical assessment in the administrative decision-making process.

## Hamilton – ARPA (2023)

The Association for Reformed Political Action ("ARPA") brought an action against the City of Hamilton in 2023 following the City's decision to reject a proposed advertisement from their public vehicles.[72] The proposed ad was a banner featuring the verbiage "We're for women's

[64] *Christian Heritage Party v Hamilton (City)*, 2018 ONSC 3690 at para 1.
[65] *Ibid* at para 21.
[66] *Ibid* at para 23.
[67] *Ibid* at para 24.
[68] *Ibid* at para 68.
[69] *Ibid* at para 63.
[70] *Ibid* at para 61.
[71] *Ibid* at para 24.
[72] *Association for Reformed Political Action Canada v. Hamilton (City of)*, 2023 ONSC 6443 at para 1. [*Hamilton-ARPA]*

rights" along with the web address "defendgirls.com".[73] Additionally, three photographs consisting of a woman in her twenties, a smiling younger girl, a smiling child ran across the banner with the caption "hers". A fourth photo, featuring an ultrasound photo of a fetus in utero, appeared next to the others with a caption reading "and hers."[74]

After receiving the application to post the ad, the City advised ARPA that revisions would need to be made to bring the ad within the standards set out in Clause 1 of the *Code*. Specifically, the words "and hers" would need to be revised "so as to not reflect personhood in relation to the image".[75] ARPA pressed the City for elaboration on the issue of accuracy, requesting an explanation of the "legal problem" associated with the ad.[76] The City replied, again rejecting the ad for the previously given reasons, but providing alternative changes that would allow them to accept the ad.[77] ARPA discontinued their discourse with the City, and filed an application for judicial review on the grounds that their section 2(b) *Charter* rights had been violated by the decision to reject the ad.[78]

The City conceded that they had not properly weighed ARPA *Charter* rights against their own objectives, as would be required under the *Doré/Loyola* framework.[79] ARPA urged the court to rule on whether the City could reject the ad even if it had performed the requisite analysis, but the court very clearly noted that this is a process that should be undertaken by the decision-maker.[80] As in the case in *Guelph*, the court remitted the matter back to the City to perform the proper assessment in accordance with the *Doré/Loyola* analysis.[81]

## Grande Prairie (2016, 2018)

The 2016 Alberta Court of King's Bench case *Canadian Centre for Bio-Ethical Reform* ("CCBR") *v City of Grande Prairie* involved a dispute between the city and CCBR following the rejection of a proposed bus ad.[82] The content of the ad included three photos. The first two photos depicted a fetus in utero at 7 weeks of development and 16 weeks of development, respectively. The photos were captioned with the words "7-weeks GROWING" and "16-weeks GROWING".[83] The third photo features a smear of blood (misidentified by the court as a blank red circle with no

[73] *Ibid* at para 2.
[74] *Ibid*.
[75] *Ibid* at para 3.
[76] *Ibid* at para 5.
[77] *Ibid* at para 6.
[78] *Ibid* at para 7.
[79] *Ibid* at para 8.
[80] *Ibid* at para 13.
[81] *Ibid* at para 16.
[82] *Supra* note 30 *[Grande Prairie 1].*
[83] *Ibid* at para 5.

image), captioned with the word "GONE".[84] To the right of the photos, the words "ABORTION KILLS CHILDREN" could be read along with the web address "ENDTHEKILLING.CA".[85]

The City, through its advertising partner Bus Bench Promotions Ltd., rejected the ad from posting. In their reasons for rejection, it was explained that "this ad would be disturbing to people within our community.[86] When CCBR requested a reference to the specific policy that the City relied on in rejecting the ad, the City did not reply.[87] In their submissions, the City stated that under their newly released advertising Policy, which incorporated the *Code of Advertising Standards*, they were obliged to reject the ad because it violated Clause 14.[88] CCBR brought the action on the basis that the City failed to uphold their obligations under the *Charter*, as the rejection of the ad constituted an unjustifiable infringement to their section 2(b) rights.[89]

The court ultimately found that the City's decision to reject the ad was "proportionate and reasonable."[90] Summarizing the applicable standard of review for discretionary municipal decision-making, Justice Anderson evaluated the decision to reject the ad under the standard of reasonableness demanded by the *Doré* framework.[91]

In her reasons for finding the City's decision reasonable, Justice Anderson noted at para 74 that the *prima facie Charter* infringement that resulted from the City's decision to reject the ad was restrained, in that it was limited to this particular ad in this particular instance. Further, the City referenced the *Code* in informing their decision-making process so as to achieve a balance between freedom of expression and other "equally important values."[92]

Additionally, Justice Anderson approached this case with particular regard for the doctrine of judicial notice. Drawing similarities to Justice Gill's approach in *AFDI*, this court looked beyond the immediate content of the ads to notice facts pertaining to CCBR's general position on the issue of abortion and how they perpetuate their ideologies via their website.[93] Justice Anderson provided at para 80:

> 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

[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid* at para 8.
[87] *Ibid* at para 9.
[88] *Ibid* at para 13.
[89] *Ibid* at para 14.
[90] *Ibid* at para 84.
[91] *Ibid* at para 26.
[92] *Ibid* at para 75.
[93] *Ibid* at paras 77-80.

> 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.[94]

Justice Anderson went on to state that the City's rejection of the ad was reasonable, and that the ad "is likely to cause psychological harm to women who have had an abortion or who are considering an abortion".[95] Further, the ad " is also likely to cause fear and confusion among children who may not fully understand what the ad is trying to express".[96] Finally, Justice Anderson acknowledged the importance of the City's underlying objective of creating and maintaining a safe and welcoming transit environment (previously summarized on page 7).

In 2018, CCBR appealed this decision to the Alberta Court of Appeal.[97] The appeal was raised on two grounds: firstly, the scope of the record that could properly be considered; and secondly, whether the decision to reject the ad was a violation of the appellant's *Charter* rights.[98] Justice Anderson's decision on the second issue was subject to review under the standard of correctness.[99]

Reviewing the trial judge's decisions under the *Doré* framework, the court of appeal first acknowledged the validity of the objective of providing a safe and welcoming transit system.[100] Thus, an essential step of the *Doré* framework, proving that a statutory objective was being promoted in their decision-making process, was satisfied by the City.[101]

The second consideration by the court was the reasonableness of the decision to reject the ad. The court reiterated that the existing caselaw permits some limitations on the content of advertising as justified within the scope of section 1 of the *Charter*.[102] Considering whether the limitation in this case was minimally impairing and proportional, the court of appeal stated at paragraph 71 that "on any reasonable view, the advertisement is likely to promote hatred against the identifiable groups of "women and their doctors".[103] Accordingly, the court of appeal held that this is a strong demonstration that the decision to limit CCBR's freedom of

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[94] *Ibid* at para 80.
[95] *Ibid* at para 82.
[96] *Ibid*.
[97] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154. [*Grande Prairie 2*]
[98] *Ibid* at para 23.
[99] *Ibid* at para 28.
[100] *Ibid* at para 64.
[101] *Ibid*.
[102] *Ibid* at para 65.
[103] *Ibid* at para 71.

expression rights in this particular context was reasonable and proportionate, thus satisfying this step of the *Doré* test.[104]

Bolstering the above reasons of judgment, the court of appeal also considered the accuracy of the advertisement and its relevance in the *Doré* analysis. In this assessment, the court noted the guiding principle derived from *Keegstra* that differences of opinion, or differences of the moral or social implications of facts, do not necessarily amount to inaccuracy.[105] Though the City did not rely on a finding of inaccuracy to justify the rejection of the ad, the court of appeal stated that, based on the court's discussion in *South Coast British Columbia*, the accuracy of the ad could have factored into the City's decision within the practicability of the *Doré* framework.[106]

The court of appeal held that the trial judge's finding in support of the respondent's decision, that the ad was likely to cause harm to women and children in particular, was reasonable.[107] This, along with the earlier addressed reasons that factored into the respondent's decision, led the court to conclude that "there were many reasons justifying the respondent's rejection of this advertising: its hateful nature, its likely audience, its potential for harm, possibly its accuracy, its non-compliance with industry standards, and its extreme tone. When all these factors are considered collectively, the respondent's decision was reasonable."[108] Accordingly, the court found that the City had sufficiently discharged their duties under the *Doré* framework and that the trial judge had not erred in finding the decision to be reasonable and proportionate.[109] As such, the appeal was dismissed.

## South Coast British Columbia (2017)

In 2017, CCBR brought an action against the South Coast British Columbia Transportation Authority ("Translink") following the decision to reject a proposed advertisement.[110] The group sought to have the decision declared a violation of their section 2(b) *Charter* rights that was not justifiable in accordance with section 1 of the *Charter*. The court ultimately ruled in favour of the respondent transit authority.[111]

The ad proposed by CCBR was, in its content, virtually identical to that in the previously discussed *Grande Prairie* cases. It featured three photos, two depicting the gestation of a fetus

[104] *Ibid*.
[105] *Ibid* at para 73.
[106] *Ibid* at para 74.
[107] *Ibid* at paras 80-83.
[108] *Ibid* at para 91.
[109] *Ibid* at para 102.
[110] *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2017 BCSC 1388 at para 1. [*South Coast British Columbia*]
[111] *Ibid* at para 57.

at 7 weeks and 16 weeks, and finally a panel with a blood smear.[112] The captions "Growing", "Growing" and "Gone" accompanied each respective photo. Along with the photos and captions, the words "Abortions Kills Children" and a link to the organization's website "endthekilling.ca" could be read to the right side of ad.

The ad was rejected by the Vice President of TransLink's advertising partner, Lamar Advertising, on the basis that it contravened Clause 2 of the Standards and Limitations section of their advertising policy.[113] The Clause provides that:

> No advertisement will be accepted which TransLink, in the exercise of its sole discretion, considers to be of questionable taste or in any way offensive in the style, content or method of presentation;

Following the initial rejection, the Director of Customer Engagement and Marketing for TransLink, informed CCBR that the decision was supported by TransLink. This was communicated following a consultation with Ad Standards.[114] In a subsequent letter of opinion provided to CCBR, the director reiterated that the ad was likely to contravene Clause 1 (Accuracy and Clarity) of the *Code*, because it a) purported that abortion kills children, which is contrary to Canadian Law defining human life as beginning at live birth; and, b) depicted a fetus at 16 weeks gestation, followed by the word "gone", which conveyed the general impression that most abortions are performed after 16 weeks of gestation.[115]

Justice Leask, assessing the decision to reject the ad, started with the requisite *Doré* framework. Looking first at the reasonableness of the decision, Justice Leask first accepted the objective of TransLink to provide "an efficient, safe, and welcoming transit system."[116] Thus, the *Doré* requirement that the decision of the city support a legislative objective was satisfied.

Next, Justice Leask considered whether the content of the ad needed to be discriminatory or hateful to warrant its rejection.[117] He looked to the court decisions in *GVTA* and *JTI-Macdonald*[118] to support the view that discriminatory or hateful content was not a legal requirement for the rejection to be justifiable.[119] Further, Justice Leask emphasized that the context of an advertisement is enough to warrant its rejection, stating that:

[112] *Ibid* at para 6.
[113] *Ibid* at para 7.
[114] *Ibid* at para 8.
[115] *Ibid* at para 10.
[116] *Ibid* at para 47.
[117] *Ibid* at para 49.
[118] Canada (Attorney General) v. JTI-Macdonald Corp., 2007, SCC 30.
[119] *Supra* note 110, at para 49.

> I agree with the respondent's submission that, given its proposed location, the advertisement could potentially cause psychological harm to children, and, to that extent, its rejection for publication was reasonable on the respondent's part.[120]

Accordingly, Justice Leask found that the surrounding context of the ad, including its content, placement, and the embedded website content, provided sufficient grounds to conclude that the ad could cause psychological harm to women and children.[121]

In his comments on TransLink's adoption and use of the *Code*, the justice stated that:

> I am in agreement with the respondent that this 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 [Ad Standards Council] 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.[122]

The court concluded that TransLink's decision to reject the advertisement was concluded to be neither unreasonable nor disproportionate, and the application was dismissed.[122]

That decision, however, was reversed in 2018 when the BC Court of Appeal ruled that TransLink did not sufficiently provide reasons to reject CCBR's proposed messages.[123] In the reasons for judgement, Justice Frankel allowed CCBR's appeal, stating that "the decision must allow an advertiser to understand why its advertisement has been rejected", in reference to his finding that TransLink had failed to acknowledge CCBR's right to freedom of expression, and did not "explain how the denial [to post the proposed message] represents a proportionate balance with TransLink's objectives".[124] Rather than accepting CCBR's submissions requesting an order requiring TransLink to post the advertisements, Justice Frankel remitted the matter to TransLink to review and reconsider the proposed ads.[125]

[120] *Ibid* at para 51.
[121] *Ibid* at paras 52-54.
[122] *Ibid* at para 56.
[123] *Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 at para 60.
[124] *Ibid* at paras 54-56.
[125] *Ibid* at para 60.

## Lethbridge (2020)

In *Lethbridge and District Pro-life Association v Lethbridge (City)*, the Alberta Court of King's Bench ruled that the City's decision to remove an advertisement from their public transit property was unreasonable.[126]

As of March 2007, the City of Lethbridge had a contractual agreement with their advertising partner, Pattison, that included the following relevant Clauses:[127]

> 6.01 Any advertisement to be placed in or on the buses or shelters of the City shall be of a moral and reputable character and the Contractor [Pattison] agrees that it will forthwith remove from any bus any advertisement which the City, in the reasonable exercise of its discretion, hereby desires removed.
>
> 6.03 The content of advertising shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board:
>
> > 6.03.1 All advertisements and any representations made therein shall conform to Federal and Provincial Laws, Regulations and Orders now in force or amended or promulgated hereafter.
> >
> > 6.03.1(ii) All federal or provincial political advertising will indicate that the advertisement is paid for by a party or candidate so as to avoid giving the impression that the City is supporting a given party or candidate.
> >
> > 6.03.3 No Municipal political advertising is permitted

In October 2016, the Applicant submitted an advertising request to Pattison, which featured a photo of a fetus in utero, along with a caption that read "Unborn Babies Feel Pain/ Say NO to Abortion", along with their website.[128]

Pattison advised the group that Lethbridge Transit would permit the ad only if the website address and words "Feel Pain" were removed; otherwise, it would be denied.[129] Pattison also advised the group of their requirement to comply with the *Code* pursuant to their contractual obligations to the City.[130] The Applicant went on to revise the ad and re-submit it for posting. The Applicant and Pattison continued correspondence regarding the content of the advertisement and its contravention with the *Code*. In November of 2017, Pattison informed

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[126] *Lethbridge and District Pro-life Association v Lethbridge (City)*, 2020 ABQB 654 at para 218. [*Lethbridge*]
[127] *Ibid* at para 25.
[128] *Ibid* at para 27
[129] *Ibid* at para 28.
[130] *Ibid*.

the Applicant, at the City's instruction, that the ad was rejected for violation of sections 1(a), 1(f), 8 and 11 of the *Code* unless the first copyline was removed.[131]

Following this letter, counsel for the Applicant requested the City to provide reasons for the continued rejection.[132] In January 2018, the City advised the Applicant that the proposed advertisement would be approved without additional changes.[133] The ads were posted, only to be removed in April 2018 as a result of "adverse community reaction."[134]

In his reasons for judgment, Justice Gates emphasized that the City ultimately failed to conduct the robust analysis of various competing interests.[135] He discussed the approach taken by both the City and the courts in the *Grande Prairie* cases to demonstrate that the type of considerations that would have been instrumental in fulfilling their obligations under the *Doré/Loyola* framework were absent.[136] Further, the court distinguished this case from the *Grande Prairie* cases based on the content of the ads themselves. Specifically, the ads in *Grande Prairie* featured language and imagery that was viewed as more likely to evoke a psychologically harmful response.

# 5 Overcoming Challenges in the Law

As discussed above, the courts have upheld municipal decisions to block advertisements on the basis of their content successfully in recent years. However, those cases that saw city decisions overturned also provide valuable insight into how courts will approach the issue of freedom of expression in the context of socially sensitive messaging.

## Concerns about "Undue Reliance" on the Code

The court in *Lethbridge* agreed with the applicant in finding that the City had placed "undue reliance" on the Code in reaching their decision to remove the ads.[137] Elaborating on this position, Justice Gates stated:

> A careful review of the City's written reasons reveals that alleged non-compliance with the *Code's* requirements was the single most important factor in the decision-making process.[138]

[131] *Ibid* at para 33.
[132] *Ibid* at para 34.
[133] *Ibid*.
[134] *Ibid* at para 36.
[135] *Ibid* at para 112.
[136] *Ibid* at para 111.
[137] *Ibid* at para 189.
[138] *Ibid*.

Justice Gates was critical of this approach, particularly noting the City's burden to balance their objectives with the Applicant's *Charter* rights would have required them to consider more factors beyond simply compliance with the *Code*.[139]

Courts have held that cities must show that they are balancing additional factors pertinent to the *Doré/Loyola* framework with their objectives and adoption of the *Code*. The court in *Grande Prairie* summarized one way of properly using the *Code* at para 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.[140]

The case law suggests that a municipality may make use of the Code as a "helpful tool" but not in place of doing its own robust and methodical assessment of an ad in the context of the required under *Doré/Loyola*.

## Concerns about whether the Limitation is Minimally Impairing

In addition to his findings of undue reliance on the *Code*, Justice Gates in *Lethbridge* further held that the decision to remove the ads was not minimally impairing the *Charter* rights of the ad proposing group.[141] Specifically, the City of Lethbridge failed to demonstrate that a minimal impairment analysis was undertaken in their assessment of the ad.[142] When discussing the balancing exercise required from Cities in making decisions, the court in *Guelph* similarly stated that:

> …the decision-maker's analysis must be "robust" and must have regard to whether the applicant's right to freedom of expression is affected as minimally as reasonably possible. In our view, simply acknowledging or mentioning the applicant's *Charter* rights is not sufficient.[143]

The minimal impairment requirement is an essential step in the *Doré/Loyola* analysis, and courts will look to evidence from the decision-maker to show that the decision they reached restricts the relevant *Charter* right as minimally as possible.

Several factors may be taken into consideration by Cities when performing a minimal impairment analysis, such as: a) the nature and impact of the advertisement; b) whether the advertisement is likely to cause harm, or otherwise engage *Charter* protection of another

[139] *Ibid*.
[140] *Supra* note 30, at para 96 *[Grande Prairie 1].*
[141] *Supra* note 126, at para 108.
[142] *Ibid*.
[143] *Supra* note 11, at para 87.

group; c) whether the advertisement complies with general standards such as those provided in the *Code*.[144]

In *Grande Prairie*, the court found that because the City issued their decision after assessing the specific ad for its specific content, rather than rendering a blanket decision that applied to all similar ads, the rejection constituted minimal impairment.[145]

## Objectively Verifiable Facts and "Inaccuracy"

Clause 1 of the *Code* has been repeatedly referenced in the advertisement rejection cases discussed above. While assessing messages for truthfulness and accuracy is an important element in the promotion of truth-seeking principles, the courts have expressed that the rejection of ads due to an alleged inaccuracy may not be an immediately sufficient reason to justify the *Charter* infringement it causes.

In *Guelph*, the court discussed the lack of a *Charter* analysis conducted by the City, as well as the overreliance on Clause 1 of the *Code* to justify the removal of the ads. The court stated: "In particular, it had no regard to the caution expressed in the case law that freedom of expression can include the right to express unpopular views or even untruths".[146] They further stated:

> ...where, as here, we are dealing with a form of political speech, concerns over inaccuracy cannot be the end of the analysis for rejecting an advertisement. The concerns over inaccuracy must be weighed against the applicant's right to freedom of expression. This would include consideration of whether the statement is an expression of opinion or fact.[147]

The court in *Grande Prairie* also addressed the issue of inaccuracy in the context of limiting freedom of expression, stating:

> One relevant factor in the *Doré* analysis would be whether the advertisement is inaccurate or misleading […] The core of the right to free expression is to allow citizens to have different views about different facts. Any argument about inaccuracy must therefore be based on objectively verifiable facts, not opinions about those facts.[148]

The court in *Grande Prairie,* further acknowledging that accuracy could be a factor considered as part of the *Doré* analysis, brought attention to TransLink's arguments in *South Coast British Columbia*. To justify its decision to reject the ad, TransLink listed the ways in which it was likely to violate clause 1 for accuracy and clarity, as listed below:

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[144] Legal Advice for Municipalities when Reviewing Ads to Run on Transit or Public Property, 2022, ARCC.
[145] *Supra* note 30, at para 93 *[Grande Prairie 1].*
[146] *Supra* note 11, at para 81
[147] *Ibid* at para 82.
[148] *Supra* note 30, at para 73 *[Grande Prairie 1].*

a) Because the first image depicts a fetus after seven weeks' gestation, and the second one at 16 weeks' gestation, someone viewing the advertising would assume that abortion occurs at 25 weeks' gestation. This is because the advertisement could be mistaken to represent a temporal series. However, 25 weeks' gestation is significantly later in a pregnancy than abortions are routinely carried out in Canada.

b) Even if the assumption is merely that an abortion occurs after 16 weeks' gestation, this is still significantly later than the vast majority of abortions are performed in Canada.

c) The two fetuses in the advertisement are portrayed as being of a similar size, whereas a fetus is approximately the size of a blueberry at seven weeks' gestation, and an avocado at 16 weeks' gestation.

d) The advertisement does not indicate when the "weeks" are measured from. Such a measurement could occur from the pregnant woman's last menstruation, conception, or missed menstruation, with the differences between these constituting a four week variable.

e) The advertisement is inaccurate in its claim that "Abortion Kills Children", as in Canada, a life starts at live birth.[149]

While Translink's justification was ultimately found to be insufficient by the court on appeal, it is suggested by the court's discussion of the *South Coast British Columbia* case in *Grande Prairie* that cities may consider arguing for the removal of an ad by introducing verifiable facts that discredit or disprove the accuracy of the purported message.

## Mixed Treatment of Abortion as a Human Right or a Political Issue

A notable challenge from the Canadian caselaw on anti-abortion messaging is the discrepancy between the treatment of such messages as either political *or* human rights-based by the courts. This inconsistency is significant, as courts are traditionally less inclined to uphold restrictions on messaging that consists of politically expressive content.[150] Ad Standards has attempted to reconcile this issue by creating an exemption for political and election advertising from the application of the *Code*, while explicitly excluding messaging concerning both sides of the abortion debate from the *Code*'s definition of political advertising.[151]

Despite Ad Standards' declination to classify abortion as a political issue, judges overseeing advertising disputes concerning the rejection or removal of anti-abortion messaging have taken markedly different approaches. In *Lethbridge*, Justice Gates relied on the occasional resurfacing

[149] *Ibid* at para 74.
[150] *Supra* note 27.
[151] *Supra* note 1.

of the abortion debate in the public sphere in characterizing abortion as a political issue, rather than one of human rights or social advocacy.[152] He went on to state that "the pro-life/pro-choice issue falls squarely within the *Code*'s definition of political advertising".[153] Accordingly, the judge suggested that the political advertising exemption set out by the *Code* should have been considered by the city of Lethbridge in their assessment of the five messages proposed by the applicant.[154]

However, courts of other jurisdictions in Canada have taken different approaches to the abortion debate than the court in *Lethbridge* as a result of the broad definition given to "political speech" by the Supreme Court of Canada in section 2(b) cases. For example, the court of appeal in the previously discussed *Grande Prairie* case described access to and the status of abortion as one which raises "contentious moral, social, and legal issues".[155] While they acknowledge that access to abortion remains an open topic of public debate, they do not explicitly label it as a political issue.

Additionally, the court in *Grande Prairie* acknowledged the Supreme Court's discussion of the *Code* in *GVTA*, stating that:

> …it seems clear that objectively developed advertising standards can provide guidance on the boundaries of permissible restrictions on political advertising.[156]

Nevertheless, there is a clear distinction between what the courts and the *Code* consider "political advertising" or "political speech." This suggests that policies banning political advertising, with the ultimate goal or effect of prohibiting anti-abortion messaging, cannot solely rely on Ad Standards interpretation of political speech in justifying their decision.

# 6 Decisions and Legislation in the Reproductive Rights Context

## Safe Access Zones

"Safe access", "bubble", or "buffer" zones are physical areas, within a prescribed proximity to facilities where abortion services are offered, where anti-abortion protesting is prohibited by law.[157] These laws were developed by certain provincial legislatures to ensure that women entering and leaving abortion clinics could do so without fear, intimidation, violence, or other interference posed by groups protesting abortion access.

[152] *Supra* note 126 at paras 186-188.
[153] *Ibid* at para 188.
[154] *Ibid*.
[155] *Ibid* at para 78.
[156] *Ibid* at para 52.
[157] Safe Access Zone Laws, ARCC

Safe access laws inherently limit the rights associated with protest, such as freedom of expression and freedom of assembly.[158] However, in light of the substantial objectives cited by various provinces in creating and enforcing safe access laws, the courts have upheld the resulting limitations as both reasonable and justifiable. The BC Court of Appeal addressed this concept in *R v Spratt*.

In 1998, two men were charged with offences under section 2(1) of the *Access to Abortion Services Act* (the "*Act*") for engaging in sidewalk interferences outside of an abortion clinic in Vancouver.[159] Both men appealed on the basis that the offences for which they were convicted were unconstitutional as an infringement on their *Charter* section 2(b) rights of freedom of expression.

The court assessed the *Act* under the application of the *Oakes* test. In their analysis, the court reinforced that the objective of the *Act*, protecting vulnerable women and those who provide their care, was sufficiently important to justify the limitation it imposes on the 2(b) *Charter* rights associated with demonstrations. They further found that the impugned provisions were crafted in such a way to be proportionate in their effects, and minimally impairing to the *Charter* rights of the appellants. Accordingly, the *Act* was upheld as a justifiable limit in accordance with section 1 of the *Charter*.[160]

## Regulation of Graphic Images of Aborted Fetuses

The display and distribution of graphic images of alleged aborted fetuses happens across Canada. Signage is displayed primarily on public streets and at universities, while graphic flyers are delivered to homes by anti-abortion volunteers. ARCC has argued that these graphics cause considerable community disturbance, with cities fielding numerous complaints from the public. In particular, the images can be devastating for children, as well as distressing to women and others capable of pregnancy, according to ARCC.[161]

Since 2022, nine municipalities have passed bylaws that regulate the private delivery to homes of graphic flyers that show aborted fetuses.[161] The most recent city to do so, St. Catharines, was sued by an anti-abortion group in February 2024, which claimed an infringement of their freedom of expression rights.[162] The case was rendered moot when the city repealed its bylaw in August 2024 because the definition of "graphic image" inadvertently captured ultrasound photos of fetuses.[161]

[158] Section 2(c) – Freedom of peaceful assembly.
[159] *R v Spratt*, 2008 BCCA 340 at para 1.
[160] *Ibid* at para 91.
[161] Take action against aborted fetus images.
[162] ARPA, Legal Challenge Launched against St Catharines By-Law that Targets Pro-Life Speech

In 2020, the City of Calgary passed an amendment to its *Temporary Signs on Highways* bylaw in response to graphic images of aborted fetuses being displayed outside high schools.[163] The amendment limits signs with advocacy messaging to just 5" x 3.5" within 150 metres of any Calgary school during school hours.

# 7 Conclusion

The posting of anti-abortion messages in public spaces continues to pose significant social and legal challenges in Canada. As discussed in the cases above, the regulation of such messaging by administrative decision-makers like municipalities continues to lack clarity and design in the law. This is further complicated by the inconsistent treatment of the *Code* by Canadian courts.

However, research suggests that it may still be possible, and even appropriate, to prohibit certain advertisements from infiltrating public spaces. Decision-makers may well consider the essential balancing act of discharging their *Charter* obligations while still maintaining and promoting safety and inclusivity in the public forums they oversee as they decide to reject or accept a proposed advertisement.

Adoption of the Ad Standards' *Code*, while not alone a sufficient standard in justifying the decision to block an advertisement, can prove a useful tool in evaluating a proposed message as part of a greater discretionary process.

As the courts continue to assess these discretionary decisions under the *Doré/Loyola* framework, municipalities and other administrative decision-makers may consider developing processes to reflect the engagement of a robust and pragmatic *Charter* analysis in reaching their decision. Given the cases discussed throughout this paper, such a practice appears to be an essential component of a successful defence of the decision to reject an anti-abortion advertisement.

[163] Bylaws related to signage.