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

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## Courts Have Endorsed Use of the Advertising Code

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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,<sup>1</sup> including graphic images of aborted fetuses.

The Code is administered by Ad Standards, a private watchdog agency with limited enforcement powers. Although the Code has no authority or legal standing on its own, it is widely endorsed by advertisers, advertising agencies, media, and consumers. In 2019, Ad Standards received 1,858 complaints,<sup>2</sup> slightly less than in 2018<sup>3</sup> but a 10% increase over 2017. This followed major spikes in 2015 and 2016 compared to previous years.<sup>4</sup> Further, at least 75 local governments already cite the Code in their bylaws or policies,<sup>5</sup> 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, possibly rising to the level of meeting a Section 1 Charter challenge over freedom of expression.<sup>6</sup>

Six court decisions have supported use of the Code by local governments, as follows:

***GVTA case*** – *Greater Vancouver Transportation Authority v. Canadian Federation of Students, Supreme Court of Canada (2009 SCC 31)*:<sup>7</sup>

- The court said that cities could use the Code as a guide to establish reasonable limits on advertising:

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

<sup>2</sup> <https://adstandards.ca/wp-content/uploads/Ad-Complaints-and-Disputes-Report-2019.pdf>

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

<sup>4</sup> [www.theglobeandmail.com/report-on-business/industry-news/marketing/canadas-ads-watchdog-sees-spike-in-complaints-from-unhappy-customers/article29613612/](http://www.theglobeandmail.com/report-on-business/industry-news/marketing/canadas-ads-watchdog-sees-spike-in-complaints-from-unhappy-customers/article29613612/)

<sup>5</sup> <https://www.arcc-cdac.ca/wp-content/uploads/2020/06/City-Search-Advertising-Code-Worksheet-all.pdf>

<sup>6</sup> Note that we are not suggesting that the Code replaces or takes precedence over any existing or future laws. 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](http://www.adstandards.com/en/standards/thecode.aspx)

<sup>7</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/7796/index.do>

- “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)

**AFDI case** – American Freedom Defence Initiative v Edmonton (City), Alberta Court of Queen’s Bench (2016 ABQB 555):<sup>8</sup>

- 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)

**Grande Prairie case #1** – Canadian Centre for Bio-Ethical Reform v City of Grande Prairie, Alberta Court of Queen’s Bench (2016 ABQB 734):<sup>9</sup>

- The judge agreed with the city that a bus ad by the Canadian Centre for Bio-ethical Reform probably violates Section 14 of the Code (“Unacceptable Depictions and Portrayals”) and ruled that the City’s decision to reject the ad was reasonable:
  - “...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

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<sup>8</sup> [www.canlii.org/en/ab/abqb/doc/2016/2016abqb555/2016abqb555.html](http://www.canlii.org/en/ab/abqb/doc/2016/2016abqb555/2016abqb555.html)

<sup>9</sup> [www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html](http://www.canlii.org/en/ab/abqb/doc/2016/2016abqb734/2016abqb734.html)

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)

***Translink case*** – *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority, Supreme Court of BC (2017 BCSC 1388)*:<sup>10</sup>

- 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. In its conclusion, the court said:
  - “...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)

***Grande Prairie case #2*** – *The Canadian Centre for Bio-Ethical Reform v. City of Grande Prairie, Court of Appeal of Alberta (2018 ABCA 154)*<sup>11</sup>

- 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 CCBR (Canadian Centre for Bio-Ethical Reform) 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

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<sup>10</sup> [www.courts.gov.bc.ca/jdb-txt/sc/17/13/2017BCSC1388cor1.htm](http://www.courts.gov.bc.ca/jdb-txt/sc/17/13/2017BCSC1388cor1.htm)

<sup>11</sup> [www.canlii.org/en/ab/abca/doc/2018/2018abca154/2018abca154.html](http://www.canlii.org/en/ab/abca/doc/2018/2018abca154/2018abca154.html)

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)

***Lethbridge case*** – *Lethbridge and District Pro-Life Association v Lethbridge (City), Court of Queen’s Bench of Alberta (2020 ABQB 654)*<sup>12</sup>

- The City of Lethbridge lost this case on Oct 29, 2020. The anti-choice group had sued the City 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.<sup>13</sup>
- **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.** (Also see our *Quick Assessment Guide for Cities to Evaluate Public Messaging Requests*.<sup>14</sup>)
- 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

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<sup>12</sup> <https://www.canlii.org/en/ab/abqb/doc/2020/2020abqb654/2020abqb654.html>

<sup>13</sup> 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.

<sup>14</sup> <https://www.arcc-cdac.ca/wp-content/uploads/2020/06/quick-assessment-guide-public-messaging.pdf>

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 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<sup>15</sup>; 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. Of course, the Code is voluntary and Ad Standards is a private agency not subject to the Charter, but since many municipalities cite the Code in their bylaws, this brings a degree of legal authority to the Code.
- 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,<sup>16</sup> 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.

Two lawyers discuss some of the above cases in relation to anti-abortion bus ads in their Sept 2018 blog article: *The Shrinking Space for Hateful Speech in the Public Square – The Alberta Court of Appeal’s Decision in Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City), 2018 ABCA 154*.<sup>17</sup> 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*] and in British Columbia...” [*Translink case*]

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<sup>15</sup> 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>

<sup>16</sup> Interpretation Guideline #6: <https://adstandards.ca/code/interpretation-guidelines/>

<sup>17</sup> <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/>