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Honour Killings and City Buses – The Limits on Advertising Controversial Messages on Public Transit and the Soon-To-Be-Decided Case of *AFDI v The City of Edmonton*

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Introduction

Consider these two ads which deal with the subject of honour killings. You are told that the maker of these advertisements, the American Freedom Defence Initiative ("AFDI") published the ads in order to raise awareness of the subject and to provide support to young girls whose lives are in danger. These ads are similar with the exception of the revisions made to the second ad in italics.

> Girls' Honor Killed by their Families. Is Your Family Threatening you? Is Your Life in Danger? We Can Help: Go to FightforFreedom.us
>
> *Muslim* Girls' Honor Killed By Their Families. Is Your Family Threatening You? *Is there a Fatwa On your Head?* We Can Help: Go to FightforFreedom.us

The second ad has the initials "SIOA", or "Stop the Islamization of America" added at the bottom.

Advertising for the second ad has been purchased from the Edmonton Transit Service ("ETS"). It will appear in the form of a large panel covering the rear of an Edmonton city bus. AFDI has purchased 5 such ads which will run for 4 weeks.

Do you believe either of these ads constitutes lawful expressive activity such that they are protected by freedom of expression as provided by section 2(b) of the *Charter*?

What do you make of the second sign? It doesn't expressly advocate violence or hate, nor is it expressly hateful of the Muslim community. It is a matter of fact that thousands of Muslim girls around the world have been killed in this way.

But is it misleading to suggest that honour killings only happen in the Muslim community and might this expose the Muslim community to vilification and harmful stereotyping by those who don't know better? Is the logo "Stop the Islamization of America" a laudable aim worthy of protection, or is it simply hateful?

The right to freedom of expression is one of the most jealously guarded *Charter* rights we enjoy, but it is not limitless. We would argue that the protection afforded by section 2(b) is not merely concerned with a person's right to express their views but with fostering a society which promotes a vibrant and respectful market place of ideas in which everyone, not merely those with the loudest or most raucous voice, can be heard. In that respect, it is important to keep the comments of Justice McLachlin (as she then was) in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927 ("*Irwin Toy*") in mind where she recognized the values which the right to freedom of expression seek to further (at para 243):

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They...can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

Short of expressing messages which consist of hate speech, do we have a responsibility to treat each other with respect? To communicate in a way that recognizes our differences and which promotes a truly free exchange of ideas in which everyone is entitled to participate as equal? To make people feel valued members of our civic culture rather than making them feel marginalized, vulnerable and devalued?

The questions which we've raised above aren't the basis of a law school exam. They lie at the heart of the fascinating case of *American Freedom Defence Initiative v The City of Edmonton,* which will be heard by a Queen's Bench Justice in Edmonton in early 2016 (see documents related to the case here). After the second ad was approved and placed on ETS buses, The City of Edmonton received numerous public complaints. Following an internal review, ETS removed the ads due to their offensive nature. AFDI is seeking a declaration that ETS violated its section 2(b) right to freedom of expression, and that, in the result, ETS must run the ad as it originally contracted to do.

In writing this post, we are not intending to prejudge the decision that the Court of Queen's Bench will have to make in this case, which is already complicated enough (cross-examinations have yet to be conducted on the affidavits filed by the parties and written briefs have not yet been submitted). Rather, our purpose is to discuss the issues which arise in a more general manner because the advertising of political, religious, or public policy messages on municipally-owned buses or property by activist groups is likely to grow. We should add that this post is a companion piece to an article to be published this spring in the *Digest of Municipal & Planning Law* (*DMPL*) where we discuss the constitutionality of various existing advertising policies being used by municipalities across Canada, including those used by ETS in the *AFDI* case (look for that in the May issue of the *DMPL*).

Who is AFDI?

Together, AFDI and its sister entity, Stop Islamization of America (SIOA), form the American branch of the controversial international organization, Stop Islamization of Nations. Readers may recall AFDI's highly publicized campaign to stop a mosque from being constructed in New York city near ground zero. The self-described human rights advocacy group "go[es] on the offensive" when it perceives government capitulation to Islamic supremacism (article here). Its 18-point platform includes, among other things:

- Profiling Muslims at airports and in hiring for positions that involve national security or public safety;
- Conducting surveillance and "regular inspections" of mosques;
- Altering school curricula in its discussion of Islamic doctrine;
- Halting immigration of Muslim persons to countries that do not have a Muslim majority;
- "Careful investigation" of Muslims who are residents/citizens in non-Muslim countries; and
- Criminalizing the foreign funding of university Islamic Studies departments and positions. (the full is platform available here)

AFDI primarily spreads its message through bus and billboard campaigns, grassroots protests, and political lobbying. Its bus campaigns have already garnered significant attention (and litigation) south of the border. In 2012, AFDI successfully argued that the New York transit authority's ban on demeaning advertisements violated the First Amendment in *American Freedom Defence Initiative v Metropolitan Transportation Authority*, 1:11-cv-06774 PAE (S.D.N.Y., 2012). In so doing, it won the right to place ads on New York City buses which read:

> In any war between the civilized man and the savage, support the civilized man. Support Israel Defeat Jihad.

In that decision, the judge classified the ad as protected political speech occurring within a designated public forum.

Encouraged by this and other victories in the U.S., AFDI has continued to expand its bus campaigns to other major American cities. Like New York, these municipalities have struggled to balance free expression guarantees with the rights of an Islamic community that, perhaps unsurprisingly, is feeling picked on (see further examples of AFDI's advertising campaigns and public pushback here and here).

This case is, as far as we know, the first court challenge that AFDI has commenced in Canada, but it will likely not be its last. We can only assume that AFDI is seeking to expand its brand of messaging to other cities throughout Canada and that this case is the first of many.

The Right to Advertise on Canadian City Buses

Interestingly, the facts in the *AFDI* case are similar to those in the Supreme Court of Canada's decision in the case of *Greater Vancouver Transportation Authority v Canadian Federation of Students*, [2009] 2 SCR 295 ("*GVTA*"). In *GVTA*, the Canadian Federation of Student sought to place advertising on the sides of buses operated by the Greater Vancouver Transportation Authority and by British Columbia Transit. The purpose of the ads was to encourage young people to vote in the upcoming provincial election. The transit authorities refused to place the ads on the basis that they did not comply with their policies regarding advertising on buses. The Canadian Federation of Students argued that the policies, which only allowed commercial but no political advertising, violated its freedom of expression.

The specific policies which were the subject of the challenge:

- Only allowed commercial advertisements, or those having to do with public service announcements and public events;

- Did not allow any advertisements likely, "in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy"; and

- Did not allow any advertisement which "advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gather or event, a political party or the candidacy of any person for a political position or public office".

Writing for the majority, Justice Deschamps applied the three-part test established in the earlier decision, *Montreal (Ville) v 2952-1366 Quebec Inc.*, [2005] 3 SCR 673) ("*City of Montreal*") (at para 57) to determine whether the policies infringed upon the CFS' section 2(b) right (at paras 37-47). First, Justice Deschamps confirmed that the CFS ads consisted of expressive content which triggered the application of section 2(b) (at para 38). Second, she concluded that the buses were government owned property on which expressive activity was protected, and she likened the advertising space made available on buses to other public spaces, such as sidewalks and parks, which have historically supported such a use (at para 42):

> ...While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, here is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use – both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

Justice Deschamps further held that advertising space made available on buses would not undermine the values underlying constitutional protection (at paras 43-47):

> ...The very fact that the general public has access to advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private space... The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city...

Justice Deschamps concluded that advertising space on buses was a type of public space which attracted the protection of section 2(b) of the *Charter* and that the policies infringed upon CFS's right to freedom of expression. The question turned to a justification of that infringement under section 1 of the *Charter*.

Justice Deschamps agreed that there was a substantial pressing purpose for the policies, namely to provide for "a safe, welcoming public transit system" (at para 76) but she did not understand how mere political speech would, in itself, jeopardize public safety and she therefore held that the policies were not rationally connected with their purpose (at para 76):

> ...I have some difficulty seeing how an advertisement on the side of a bus that constitutes political free speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile

> environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the objective of providing a safe and welcoming transit system will be undermined.

Justice Deschamps further held that the means chosen to carry out the purpose of creating safe and welcoming transit system were not reasonable or proportionate and she objected to the policies because they effectively prohibited all forms of political messages (while allowing commercial advertising) and because excluding advertisements which "create controversy" was overbroad (at para 77).

Justice Deschamps concluded that the restrictions the policies imposed on CFS' right to advertise its political views constituted an unjustifiable infringement that was not saved by section 1 (at para 80), and she consequently declared them to be of no force and effect pursuant to section 52 of the *Constitution Act* (at para 90).

The Court's decision in *GVTA* really should not come as any surprise. It is consistent with two previous Supreme Court of Canada decisions, namely *Committee for the Commonwealth of Canada v Canada* ([1991] 1 SCR 139) and the *City of Montreal* case, above, which discuss the limits of public protest and expression in government owned public space.

In our view, the *GVTA* decision makes it difficult for municipalities to prohibit or limit a group's right to advertise its political views or social advocacy messages on existing advertising space located on municipally owned lands or infrastructure. This is because advertising space made available for public use serves the same function as venues such as public streets, parks, or other public spaces where freedom of expression is already protected.

This doesn't mean, however, that municipalities are entirely without recourse and we can think of at least three options which might be available:

- We wonder whether advertisements placed *inside of* transit vehicles, where it is more difficult to avoid exposure to an unwanted message, may attract the captive audience doctrine. This doctrine has found acceptance in the U.S. and establishes that a person may be considered a captive audience to another's unwanted speech where the following two factors are present:

    i) First, the method of communicating the unwanted speech must thrust the message upon the audience in such a manner that the listener cannot reasonably avoid it. Consequently, a listener who can take reasonable steps to avoid the offending speech cannot be said to be harmed and therefore does not require legal protection; and

    ii) Second, the unwanted speech must be received in a location where the listener has an expectation of privacy. Forcing the unwanted recipient to be exposed to the speech where he or she has a right to quiet enjoyment and privacy intrudes upon the listener's privacy interest in an "essentially intolerable manner" (for a previous ABlawg post on the subject, see here).

- As discussed later in this post, Justice Deschamps created some room for municipalities to argue for a "community standard" where the message causes offence to a particular audience.

- And, as discussed next, municipalities can nevertheless justify limits on speech that advocates hate and violence or is otherwise discriminatory or hateful under section 1 of the *Charter*.

The Limits of Offensive Expression

GVTA imposes a heavy burden on a municipality seeking to regulate its advertising space, but it doesn't render government authorities powerless. Indeed, Justice Deschamps expressly acknowledged that discriminatory speech may be justifiably restricted if it undermines the existence of a safe and welcoming transit system (*GVTA* at para 76). While her comment on offensive speech was left largely unexplored in *GVTA*, it will be central to AFDI's success: How far can a municipality go in restricting ads that are not merely political, but are hateful or offensive? The answer to this question will likely be drawn from Canada's jurisprudence on hateful or offensive speech.

Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467 ("*Whatcott*") is the leading decision on hate speech in Canada. Here, the Supreme Court of Canada upheld Saskatchewan's human rights ban on hateful expression, but read down the law to only catch expression that exposed vulnerable persons to hatred – which it equated with vilification or detestation (*Whatcott* at para 109).

Whatcott dealt with the publication and distribution of various homophobic fliers in mailboxes across Regina and Saskatoon. The fliers sought to keep homosexuality out of public schools, and to this end, equated homosexuality with pedophilia. Several complaints were lodged with the Saskatchewan Human Rights Commission. The Commission held that the fliers exposed LGBTQ persons to hatred and ridicule in contravention of the Human Rights Code (the "Code"), and prohibited their future distribution. Whatcott appealed the decision, and challenged the constitutionality of the Code's limit on his expression.

The Supreme Court of Canada upheld the Code's prohibition on hate speech, but significantly narrowed the scope of the provision. In reaching this conclusion, the unanimous Court agreed with Whatcott that section 2(b) of the *Charter* applied to his case, and that the Code infringed his freedom of expression. This conclusion was not surprising. In Canada, all attempts to convey meaning attract section 2(b) protection unless they constitute violence or a threat of violence. The fliers were a non-violent attempt to convey meaning, and the Code expressly restricted that expression. Therefore, the section 2(b) violation was not seriously contested.

The government was nevertheless able to justify its restriction on Whatcott's freedom of expression through the section 1 analysis. This win did not, however, come without sacrifice. In order for the government to pass the section 1 reasonable justification test, the Code's prohibition on offensive speech was significantly narrowed. While the original prohibition applied to speech that exposed persons to hatred, ridicule, belittlement or otherwise affronted dignity, post-*Whatcott*, only the prohibition on hateful speech remained (*Whatcott* at paras 92, 108).

The Court's reasoning was driven by the serious interests at stake and the degree of state intrusion into what a person can or cannot say. Given the importance of free expression, and the fact that the Code prohibited speech under the threat of state proceedings, only the most extreme forms of expression (exposing groups to "detestation" or "vilification") could fall within its bounds.

The Court's section 1 analysis was thorough and instructive. The objective of prohibiting hate speech under a human rights regime is more than individual – it seeks to reduce the societal costs caused by discrimination at large (at paras 71 - 74). This social objective was sufficiently "pressing and substantial" as the marginalization of vulnerable groups harms our entire society (at para 74). Since the goal was focused on group rather than individual harms, expression that targeted individuals, hurt individual feelings, or impugned an individual's dignity failed to meet the rational connection stage of the test. Hateful or offensive expression rises beyond the level of individual harm where it seeks to "...marginalize the group by affecting its social status and acceptance in the eyes of the majority", and is therefore prohibited (at paras 80, 82). For similar reasons, only the most extreme language of hatred that targeted marginalized groups would be minimally impairing. Prohibiting language that was merely offensive or hurt feelings was impermissibly overbroad.

Lastly, in assessing the overall proportionality of the prohibition, the Court called upon the values underlying section 2(b) of the *Charter* – truth seeking, political discourse, and personal fulfillment (*Irwin Toy* at para 243). Since hateful speech strays from these core values, the Court was more willing to defer to the government's chosen course of action. This approach renders hate speech an easier target for government restrictions, because it often obscures the truth and shuts down democratic discourse (*Whatcott* at paras 44, 45, 75, 148; *Lemire v Canada (Human Rights Commission)*, 2014 FCA 18 at para 60).

The narrowed ban on hateful expression caught only two of Whatcott's four fliers. The remaining fliers, while extremely offensive, failed to demonstrate the degree of hatred required by the prohibition.

With this context in mind, what (if anything) can *Whatcott* tell us about offensive advertisements on city buses? The policies that ETS employs entitles it to pull ads that fall far short of the "hateful" speech outlined in *Whatcott* (for more on this, see our companion piece to be published in the *DMPL*). Nonetheless, *Whatcott* will be useful in predicting where the line will be drawn for acceptable expression on city transport. As we see it, three themes emerge from *Whatcott* that will help municipalities and Courts distinguish between acceptable and unacceptable expression on city transit: (1) Not all speech is created equal; (2) State restrictions on speech must be proportional and balanced; (3) The reasonable apprehension of harm governs.

Each of these themes is examined in more detail below.

1. Not all speech is created equal

Free expression protections are tied to the core values underpinning section 2(b): self-fulfillment, political discourse and truth-seeking (*Irwin Toy*, *supra*). Starting with *Keegstra*, the Supreme Court used these three goals to build a value assessment into its examination of impugned speech. As a result, even though all restrictions on non-violent speech are subjected to section 1 justification, not all speech is equally worthy of protection (*Whatcott* at para 29, *R v Keegstra*, [1990] 3 SCR 697).

City transport operations may be able to draw on this reasoning to demonstrate that offensive ads are "less worthy" of protection. Although a group such as AFDI may argue that its ability to advertise on city buses promotes self-fulfillment, there are some factors that indicate the ad in question may not promote the values of truth seeking and open political discourse.

In the present context, truth seeking could present an obstacle to AFDI's case. The website listed in the advertisement, which purports to be a resource for vulnerable individuals, is a conspiratorial anti-

Muslim blog with a few (mainly broken) links to other anti-Muslim resources. The ad is more likely an attempt to further AFDI's mission than it is a source of help for girls in crisis.

The ad may also discourage political discourse, rather than enhance it. The ad does not attack Muslims or advocate AFDI's platform outright. Rather, it attempts to paint the Muslim community as perpetrators of a heinous crime reviled in our society. This "hallmark of hate" raises concerns similar to those in *Whatcott* – if Muslim persons would like to enter into a democratic debate on their rights, they must first disprove the allegation that they tolerate (or accept?) honour killings within their community (*Whatcott* at paras 44, 45, 76). If minority groups are required to overcome an unfair and unreasonable threshold question in order to participate in debate, their contribution to society's political discourse will be stifled.

2. State restrictions on speech must be proportional and balanced

Despite being less worthy of protection, a limit on offensive speech still must be justified as a reasonable limit under section 1 of the *Charter*. Restrictions on speech will only be viewed as reasonable if the degree of state intrusion is proportional to the harm the state seeks to avoid. In order to preserve constitutionality in *Whatcott*, the Supreme Court was forced to narrow the hate speech provisions so that only the most severe and vitriolic expression would fall within their scope. In other words, if the government is entitled to prosecute a person based on their expression, that targeted expression must be extraordinarily narrow.

Municipal transport policies often entitle the authorities to pull ads at a much lower threshold than that described in *Whatcott*. However, it is possible that this broader scope could be justified, because there is a comparatively lower degree of state intrusion. In other words, a transport authority may be able to limit a broader range of expression on buses because it is merely restricting advertising space. When the government intrusion at issue involves criminal prosecution or human rights proceedings, the scope of expression that may be limited will be much narrower.

3. The reasonable apprehension of harm governs

Whatcott demonstrates that the government can restrict offensive speech if it causes a reasonable apprehension of harm to society. This harm does not have to be empirically measured – the Court is entitled to look at the entire context and reach conclusions based on its own common sense. However, evidence of societal harm must be broader than an individual's hurt feelings.

In order to demonstrate that the ads were pulled to restrict a reasoned apprehension of societal harm, ETA may draw on the numerous public complaints it received, but it must do so carefully. As we've discussed above, *Whatcott* is clear that one or more individual complaints are inadequate to justify curtailing someone's free speech. However, Justice Deschamps' reference to a "community standard of tolerance" in *GVTA* may provide a workable answer for municipalities.

The community standard test has thus far only been applied in cases dealing with obscenity bans (see, for example, *R v Butler*, [1992] 1 SCR 452). *GVTA* suggests that the concept may be extended to demarcate the reasonable limits on offensive advertisements. This is what Justice Deshamps suggested in the *GVTA* case (at para 77):

> ... **While a community standard of tolerance may constitute a reasonable limit on offensive advertisements**, excluding advertisements which "create controversy" is

> unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society. [emphasis added]

Allowing municipalities to identify and prohibit those messages which are offensive to their communities' standard of tolerance would certainly provide an effective way to combat the proliferation of problematic messaging. Indeed, municipalities are well-versed in *Charter* litigation and with arguing that their legislation was enacted to address some pressing and substantial problem found in their communities. Ultimately, the municipality defending the prohibition of certain problematic messages would have to demonstrate that the harm caused by the message is significant enough to warrant the limitation and that the limitation constitutes a minimal impairment of the affected party's section 2(b) rights.

But allowing for community standards of tolerance also creates the spectre of patchwork consistency where minority interests are over-represented through political correctness or under-represented because they lack a political voice rather than the uniform application of *Charter* principles. While there are sure to be small, rural or isolated communities in Canada which require special considerations, are cities like Calgary, Edmonton, Vancouver, Toronto, Montreal, Saskatoon, Halifax really that different? Aren't all these cities representative of our worlds' cultures, religions, and all the challenges these bring with them?

Next Steps

What are municipalities to do? They are caught in very difficult position.

It is clear from Canadian case law that restrictions on expressive activity in government-owned space which can be likened to public parks, sidewalks, or other spaces which support the values underlying freedom of speech, will likely constitute an infringement which must be justified under section 1 of the *Charter*. But is the threshold for excluding certain hateful or hate speech practically too onerous? There are messages which fall short of hate speech but which, through inadvertence or design, will nevertheless be deeply offensive to certain groups within our communities. Don't those types of messages also run contrary to the purposes articulated in *Irwin Toy* for promoting freedom of expression?

One could argue that AFDI's second ad, or indeed any ad with the logo "Stop the Islamization of America" is not ultimately concerned with seeking and attaining truth, encouraging Muslims to participate in social and political decision-making, or fostering an environment for tolerant and respectful speech. One could argue that these types of ads serve no real purpose in promoting the values underlying free speech and only serve to make the Muslim community feel picked-on, marginalized and shamed.

Even if you disagree, do messages like AFDI's ads raise special considerations for a municipality which is required by law to place these messages on the side of its buses or other municipally-owned advertising space? Should the balancing exercise in section 1 of the *Charter* attract special considerations here? We believe that these types of messages pose special challenges for municipalities and warrant special consideration for some of the following reasons:

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- Messages placed in public spaces such as existing advertising signs or billboards located on municipal infrastructure, buildings, buses, will be viewed by a larger number of people given their location and exposure;

- People reading these messages may believe that these advertisements are condoned by their municipality or city council, or reflect their municipality's views;

- These messages, if targeted towards a particular group which finds them deeply offensive, may promote mistrust and tension between this group and others, civil unrest, larger protests, and, at worst, violence; and

- These messages and their resulting impact may undermine efforts by officials who are seeking to promote community harmony and dialogue.

Defining the limits of appropriate speech isn't just an exercise in legal abstractions, nor does it just involve lawyers. Rather, it goes to the heart of how we can live together in peaceful community with our neighbours and what we, as a community aspire to be. What role should our municipalities have in deciding whether to allow advertising in its space which might be hurtful or offensive? Should municipalities have input in deciding what expression might not be appropriate for its communities? Or, should the courts be the sole arbiters of what constitutes acceptable expression?

Whatever its outcome, the *AFDI* decision raises fascinating public policy implications and we will be there to blog about it.

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