5 December 2016

No Offence, But I Hate You: *American Freedom Defence Initiative v Edmonton (City)*

By: Ola Malik, Jeff Watson and Holly Wong

Case Commented On: *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 (CanLII)

Our Canadian courts are jealous guardians of the freedom of expression, which the Canadian *Charter* protects in section 2(b). The rationale for protecting freedom of expression is that society should be free to discuss and decide what is true, what is right and what is good. As with most things Canadian, we have accepted that the way in which we speak to one another should be politely regulated. Our courts have accepted that for expression to be truly valued, our public square must provide everyone with the opportunity to speak as equals, where no one is made to feel marginalized or devalued. How very Canadian, indeed! To a large extent, *how* we speak to one another is as important as *what* we say, and that, in our view, is a good thing. 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 all of us live together in a peaceful community with our neighbours and what we, together as a community, aspire to be.

Those of us who practice municipal law and who are interested in freedom of expression issues have been eagerly awaiting the case of *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 (*AFDI*). Indeed, we were so intrigued by the issues this case raises that we commented on them long before trial, here, and in a companion piece titled "Controversial Advertising on City Buses – Are Municipalities Ready for What's To Come?" (2015) 7:5 DMPL (2d) 1-6.

The Facts

The American Freedom Defense Initiative (AFDI) applied for a declaration that the City of Edmonton's removal of an ad from the exterior of Edmonton buses constituted an infringement on its freedom of expression and further, sought an order enjoining the City of Edmonton from violating its freedom of expression in the future. Initially, AFDI had been approved by Edmonton Transit to post an ad which read:

> Girls Honor Killed by Their Families. Is your Family Threatening You?
> Is Your Life in Danger? We Can Help: Go to FightforFreedom.us

AFDI subsequently submitted a revised ad, which contained photos of seven Muslim women who were murdered as a result of honour killings along with the following caption:

> Muslim Girls Honor Killed by their Families.
> Is Your Family Threatening You? Is There A Fatwa on You Head?
> We can help: go to Fightforfreedom.us

Paid for by the American Freedom Defense Initiative

The ad included the logo for the American Freedom Defense Initiative and the logo for an organization called "SIOA" which stands for "Stop Islamization of America".

Pattison Outdoor Group (Pattison), the agency contracted by the City of Edmonton to manage all of Edmonton Transit's advertising, notified AFDI that this second ad had been approved for posting but that Edmonton Transit reserved the right to remove the ad if it received public complaints. Within the first week or so of the ad appearing, a manager for Edmonton Transit received a call from a city councillor advising that he had received numerous complaints regarding the ad. Edmonton Transit conducted an internal review and, after meeting with several people who had been offended by the AFDI ad, ordered that it be removed.

At trial before Justice J.J. Gill of the Alberta Court of Queen's Bench, AFDI argued that its freedom of expression under section 2(b) of the *Charter* had been infringed and could not be saved by section 1 of the *Charter* because this infringement (1) was not a limit "prescribed by law"; and because the infringement (2) was not a demonstrably justified limit in a free and democratic society.

At trial, the City of Edmonton conceded that its decision to pull the ad infringed upon AFDI's freedom of expression. Arguably, this was an appropriate concession to make given Justice Deschamps' decision in *Greater Vancouver Transportation Authority v Canadian Federation of Students,* 2009 SCC 31 (CanLII) *(GVTA),* that advertising space on municipal buses was a type of public space which attracted the protection of section 2(b) (at paras 37-47). Consequently, in the *AFDI* case, the analysis moved to whether the infringement was saved by section 1.

In this post, we quickly summarize the first issue, whether removal of the ad was "prescribed by law", and move to the second, more interesting issue, whether the City of Edmonton's infringement upon AFDI's freedom of expression was a demonstrably justified limit in a free and democratic society.

The Applicable Contractual Provisions and the Canadian Code of Advertising Standards

Edmonton Transit, like most other large municipalities, does not engage directly with advertising customers; rather it contracts this service out to third parties, in this case, Pattison. The agreement between the City of Edmonton and Pattison with respect to advertising services contains two important contractual conditions which regulate advertisement:

Clause 16.1 Any advertisement to be placed in or on the Buses … shall be of a ***moral and reputable character*** and the Contractor agrees that it will forthwith remove from any...Bus...any advertisement which the City...determines is contrary to this Clause.

Clause 16.3 The contents of advertising material shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board [emphasis added].

There are also agreements which are entered into between Pattison and its advertising customers. The Production Agreement provides as follows:

> Pattison reserves the right to not display any advertising ***which is considered to be in violation of the Canadian Code of Advertising Standards*** or which Pattison deems may be ***offensive to the moral standard of the community***, or which ***Pattison believes negatively reflects on the character, integrity or standing of any organization or individual*** [emphasis added].

A clause in the Pattison Transit Advertisement Agreement stipulates that:

> Pattison reserves the right to reject or remove any Advertising Material which does not... in Pattison's sole opinion, ***comply with the standards*** set by the Canadian Advertising Foundation or the applicable Transit Authority…[emphasis added]

The *Canadian Code* of Advertising Standards (*Code*) sets out the criteria for advertising standards. It was created and is administered by Advertising Standards Canada, a self-regulating group of private advertisers and other various media agencies. Provision 14 of the *Code* addresses "Unacceptable Depictions and Portrayals" and is worth reproducing here in full:

> Clause 14: It is recognized that advertisements may be distasteful without necessarily conflicting with the provisions of this Clause 14; and the fact that a particular product or service may be offensive to some people is not sufficient grounds for objecting to an advertisement for that product or service. Advertisements shall not:
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> (a) Condone any form of personal discrimination, including that based upon race, national origin, religion, sex or age;
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> (b) Appear in a realistic manner to exploit, condone or incite violence; nor appear to condone, or directly encourage, bullying; nor directly encourage, or exhibit obvious indifference to, unlawful behaviour;
>
> (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;
>
> (d) Undermine human dignity; or display obvious indifference to, or encourage, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.

Was the Infringement Prescribed by Law?

In the *AFDI* decision (at para 59), Justice Gill reproduced the rationale behind requiring that government limits on rights and freedoms be prescribed by law, which Justice Deschamps had set out in *GVTA*:

> ...The requirement that a limit on rights be prescribed by law reflects two values basic to constitutionalism or the rule of law: 1) in order to preclude arbitrary or discriminatory action by government officials, all official action in derogation of rights must be authorized by law; 2) citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly.

Justice Gill held that the criteria for determining whether an ad would be permitted to be posted on Edmonton Transit property were limits prescribed by law (at paras 71-73):

> ...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.
>
> Pattison in turn communicated to prospective advertising clients that it would abide by the standards referred to in the contractual documents…Those wishing to advertise are the only ones who might experience a restriction of their freedom of expression in this context. They were apprised of this information. Clients choosing to advertise signed agreements recognizing that Pattison would apply these standards.
>
> In my view, those potentially or actually affected by the restrictions were given a reasonable opportunity to know the standards which would apply and could act accordingly.

In the result, Justice Gill found that the City of Edmonton's advertising policies and criteria were limits prescribed by law which satisfied the first step of the section 1 analysis. We agree in all respects with Justice Gill's decision on this point.

Was the Infringement Reasonable and Demonstrably Justified?

Justice Gill held that the City of Edmonton's objective for its advertising policies – to provide a safe and welcoming public transit system – was a sufficiently important objective to warrant placing a limit on AFDI's freedom of expression (at paras 83-86) (as Justice Deschamps had similarly held in *GVTA*). Of importance was Justice Gill's observation that the section 2(b) freedom must be interpreted consistently with the preservation and enhancement of multiculturalism values, as protected in section 27 of the *Charter* (at para 90).

Justice Gill also held that a rational connection existed between the City of Edmonton's decision to restrict advertising which it felt was offensive to the moral standards of the community, or which negatively reflected on the character, integrity or standing of any organization or individual, and its objective of providing a safe, welcoming public transit system (at para 88). This is very similar to the conclusions in the *GVTA* decision, where the Court held (at para 76) that:

> ...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.

With respect to the question of minimal impairment, Justice Gill concluded (at para 94) that the AFDI ad was not intended to provide help for victims of religious extremism but rather, was designed to:

> ...bring the Muslim population of Edmonton, including Muslim/Islamic Faith in general into public contempt or ridicule. This purpose is clear from a review of the AFDI website as well as the SIOA's website. The aim is to encourage Muslim individuals to leave Islam and convert from their Muslim faith, or alternatively to advocate special treatment of Muslims and their exclusion from non-majority Muslim countries.

Justice Gill described the purpose of the ad as follows (at paras 95 and 100):

> If one reads the advertisement in a light most favourable to AFDI, it simply encourages possible victims of religious extremism to self-report victimization. However, the logos of AFDI and SIOA are a significant and prominent part of the advertisement. The incorporation of the logos is a promotion of the AFDI and its SIOA initiative. The invitation in the advertisement to "go to FightforFreedom.us" directs the audience to further content. It suggests that there is more information to be shared beyond the words and images that appear on the advertisement. In my opinion, such things as logos, website addresses and the websites referred to are properly considered by the City in applying its policy. To find otherwise would be to allow form to triumph over substance. It would allow advertisers to incorporate references to draw the audience, without impunity, to discriminatory or otherwise unacceptable content.
>
> ……….
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> In fact, the AFDI's advertisement might reasonably be viewed as a ruse to further what appears to be one of its true objectives, which is to target Muslims. The phrase "dog whistle politics" comes to mind, whereby coded messaging is understood by a portion of the population who might support the objectives of the advertiser, in this case AFDI and SIOA.

Consequently, Justice Gill had no difficulty concluding that the City of Edmonton's restrictions minimally impaired AFDI's section 2(b) freedom of speech (at para 107).

Finally, Justice Gill held that the City's objective of providing a safe and welcoming transit system far outweighed the deleterious effects of its refusal to permit the posting of offensive or discriminatory ads on its buses. (at paras 110-114). Justice Gill ultimately concluded that the infringement upon AFDI's freedom of expression was in all respects justified under section 1 of the *Charter* and dismissed AFDI's applications against the City of Edmonton (at paras 115-117).

Commentary

How Do You Judge a Message?

In our earlier blog post here, we examined the background of the AFDI organization and its blatantly xenophobic, anti-Muslim views. If you go to the SIOA, AFDI and FightforFreedom.us websites here, here, and here, you can you see for yourself what the true policy objectives of these organizations are.

This raises an interesting question. How far should a court go to determine the contextual meaning or intent of a controversial advertisement or advocacy message? Read textually, (without referring to these websites), the AFDI ad could be interpreted as a concerned, public service announcement. However, the City of Edmonton was rightly concerned about the impact upon its citizens of allowing an arguably hateful organization to promote what was in substance an anti-Muslim advocacy message. We believe that the City was absolutely correct to peer

beyond the literal meaning of the AFDI ad and consider its true intent as reasonably inferred from the clearly troubling advocacy positions of the AFDI, SIOA and FightforFreedom organizations. Justice Gill's decision sends a clear message that the underlying intent and purpose of a message is as important to consider as its plain textual meaning. Excluding organizations which promote discrimination, hate, and xenophobia under the guise of innocent advocacy from our public squares is a good thing and is consistent with the values which underlie a free and democratic society under section 1 of the *Charter*.

Should We Apply a Community Moral Standard Test to Controversial Messaging?

Justice Gill found that the City of Edmonton properly exercised its discretion to pull the AFDI ad pursuant to the various contractual advertising agreements and *Code* provisions which did not permit the posting of an advertisement if it was "offensive to the moral standards of the community", "negatively reflects on the character, integrity, or standing of any organization or individual", or was not of a "moral and reputable character". While we don't quibble with the ultimate outcome of Justice Gill's decision, we have concerns about whether these evaluative criteria, agreed to by Pattison and the City of Edmonton, can appropriately be applied to controversial advocacy messaging.

Firstly, criteria which evaluate a message based on whether it: (1) offends the moral standards of a community; (2) negatively reflects on a person; or, (3) is of an immoral or irreputable character, are unhelpfully vague and subjective. This is especially so when the criteria are applied to controversial advocacy messaging, where the person evaluating the message in accordance with these criteria is going to have to make the judgment call, based on their own prejudices and biases. In short, these criteria are very difficult (if not impossible) to apply in any objective, consistently reliable way and the danger is that they yield highly unpredictable results from one case to the next, depending on the particular issue.

We do not believe that any of these criteria were necessary given the values and principles which underlie a section 1 analysis. In *R. v Oakes,* [1986] 1 SCR 103, 1986 CanLII 46 (SCC), Dickson C.J. discussed the contextual assessment to be given to a section 1 analysis and noted that the core values and principles which form part of a free and democratic society include:

> …respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

These criteria are much easier to define and understand than concepts that reference morality, character, reputation and community acceptance. They are also consistent with the values which underlie the protection of expressive activity, which Justice McLachlin (as she then was) identified in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC) (at para 243):

> (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.

Secondly, it was in the *GVTA* case that Justice Deschamps opened the door to a community standard test for advertisements, albeit with a very important caveat (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]

It is likely that Justice Deschamps raised the community standard test because the advertising policy being considered in *GVTA* prohibited any advertisement which was "...likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy" (at para 74, *GVTA*). Justice Deschamps spent no more time discussing this test and we wonder whether these comments were intended to have further broader application.

The Supreme Court of Canada has for some time been gradually moving away from a community standard of tolerance test to a harms-based test in the context of obscenity and indecency law in cases such as *R. v Butler,* [1992] 1 SCR 452, 1992 CanLII 124 (SCC); *R. v Mara,* [1997] 2 SCR 630, 1997 CanLII 363 (SCC); and *Little Sisters Book & Art Emporium v Canada (Minister of Justice)* [2000] 2 SCR 1120, 2000 SCC 69 (CanLII). A strict application of the community standard of tolerance test as applied in this context had come under increasing criticism for imposing a majoritarian sexual morality on minority sexual norms and for failing to recognize changing societal mores and a growing acceptance of what were once considered deviant sexual conduct and behaviour.

The critique of the community standard of tolerance test was acknowledged by a majority of the Supreme Court of Canada in *R. v Labaye,* [2005] 3 SCR 728, 2005 SCC 80 (CanLII), which adopted a harms-based test for determining whether conduct (in this case, a sex club in Montreal which permitted people to meet each other for group sex) could be described as indecent pursuant to the *Criminal Code*. Writing for the majority, McLachlin CJC stated as follows with respect to the community standard of tolerance test (at para 18):

> How does one determine what the "community" would tolerate were it aware of the conduct or material? In a diverse, pluralistic society whose members hold divergent views, who is the "community"? And how can one objectively determine what the community, if one could define it, would tolerate, in the absence of evidence that community knew of and considered the conduct at issue?...

For the majority in *Labaye*, the new test (which we won't discuss at length here) focused on the nature of harm of the impugned behavior and whether the risk of harm from engaging in that behavior was so great that it was incompatible with the proper functioning of society (at paras 33 and 56):

> ...The inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its fundamental laws, has recognized as essential...Unlike the community standard of tolerance test, the requirement of formal recognition inspires confidence that the values upheld by judges and jurors are truly those of Canadian society. Autonomy, liberty, equality and human dignity are among these values.
>
> ……….

> Incompatibility with the proper functioning of society is more than a test of tolerance. The question is not what individuals or the community think about the conduct, but whether permitting it engages a harm that threatens the basic functioning of our society. This ensures in part that the harm be related to a formally recognized value, at step one. But beyond this it must be clear beyond a reasonable doubt that the conduct, not only by its nature but also in degree, rises to the level of threatening the proper functioning of our society.

If you're employed with a municipality and have an application before you from an advertiser which may raise objections or cause controversy, how can you reasonably be expected to decide, with any consistency, whether the ad is "offensive to the moral standards of a community", as required by the agreement between the City of Edmonton and Pattison? Can your community have several, or even competing, community standards – and if so, how do you choose? Which criteria do you use – public complaints? And if so, how many public complaints does it take to decide that a message offends a community's moral standard?

Evaluating controversial advocacy messaging in accordance with a community standard of tolerance test which incorporates notions of morality, reputation, or character, rather than harm in the sense described in *Labaye*, is inherently subjective and creates the spectre of patchwork application. Minority interests may be over-represented through paternalism or under-represented because they lack a political voice, rather than having a uniform application of *Charter* principles. While there are sure to be small, rural or isolated communities in Canada which require special considerations, aren't major metropolises representative of our world's cultures, religions, and all the challenges these bring with them?

Should Advertising on Municipal Property be Considered Differently?

As we've discussed, the Supreme Court majority in *Labaye* overlooked the community standard of tolerance test in favor of an objective, harm-based assessment. Of interest is whether a controversial advocacy message placed on municipal advertising space requires a different assessment of harm than other forms of expressive activity. Here are some reasons why controversial messaging advertised on municipal property raises unique concerns:

- Messages placed in public spaces such as existing advertising signs or billboards located on municipal infrastructure, buildings, buses, are likely to be viewed by a large number of people given their privileged location.

- Anyone reading these messages may believe that these advertisements are condoned by their public officials and reflect a municipality's official views.

- Victims of these messages may be made to feel inadequate, shameful, and vulnerable and will likely feel powerless or marginalized. Supporters of the messages will feel vindicated in their views and will likely be emboldened to perpetuate the messages through thoughts and acts.

There is a very high threshold before speech is found to be discriminatory and hateful under human rights legislation. In the case of *Saskatchewan (Human Rights Commission) v Whatcott* 2013 SCC 11 (Can LII), Mr. Whatcott was found to have contravened the Saskatchewan *Human Rights Code* by distributing homophobic flyers that exposed LGBTQ persons to hatred and ridicule. He argued that the *Code*'s hate speech provisions infringed his freedom of expression.

The unanimous Supreme Court of Canada upheld the *Code*'s ban on hateful expression, but significantly narrowed the scope of the provision. According to the Court, only the most extreme expression that objectively exposed persons to hatred or contempt fell within the constitutionally protected ambit of the *Code* (at para 109). The Court set out a stringent and high threshold for what constitutes hate speech:

- The speech must *objectively* expose a protected group to hatred. Subjective individual feelings are not the focus (at para 56).

- The words "hatred" and "contempt" must be restricted to those most extreme forms of emotion described as "detestation" and "vilification". Prohibiting language that was merely offensive, humiliating, impugned individual dignity or caused hurt feelings was impermissibly overbroad and fell outside the objectives of human rights legislation (at paras 47 and 57).

- The focus of a hate speech inquiry must target the likely effect of the speech. To qualify as hate speech, it must be likely to actually expose a person or groups to hatred by others (at paras 52, 54 and 58).

- Only the most extreme language of hatred that targeted marginalized groups was minimally impairing. Prohibiting language that is merely offensive, causes hurt feelings, or which might expose a person to ridicule was impermissibly overbroad and could not be upheld (at paras 92 and 108).

It's important to note that in *Whatcott*, the Supreme Court of Canada was asked to rule on the constitutionality of the Saskatchewan *Human Rights Code*'s provisions as they pertained to Mr. Whatcott's freedom to express himself, as well as whether imposing restrictions on Mr. Whatcott's speech was justified by section 1 of the *Charter*. What is striking about the *Whatcott* decision is the high threshold required to prove hateful speech.

Contrast the high threshold found in *Whatcott* with the much lower test required to find "Unacceptable Depictions and Portrayals" in Clause 14 of the *Code,* which focuses on advertisements that condone discrimination or violence, lead to public contempt or ridicule, or undermine human dignity. While we've expressed our doubts regarding the applicability of the *Code* to controversial advocacy messaging here, we wonder whether Clause 14 might be appropriate to the unique context of controversial advocacy messaging on municipal advertising space.

The important point here is that an assessment of harm necessarily depends on context. While it would likely be very difficult to restrict someone's freedom to pass out flyers criticizing a political party or religious belief, it may be easier to restrict someone's freedom to post an image on city property depicting the image of a bloody aborted fetus. Should we make it easier, not harder, for municipalities to restrict the rights of advertisers to post controversial advocacy messaging on municipal property? Are the psychological assaults caused by offensive advocacy messaging on a city bus or on the side of a city building more deleterious to the proper functioning of society? We think so. And we think that Justice Gill's decision helps us.

This post may be cited as: Ola Malik, Jeff Watson & Holly Wong "No Offence, But I Hate You: *American Freedom Defence Initiative v Edmonton (City)*" (5 December, 2016), online: ABlawg, http://ablawg.ca/wp-content/uploads/2016/12/Blog_OM_etal_AFDI.pdf

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