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# Lost and Found? – The Captive Audience Doctrine Returns in *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie* (*City*)

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**Case Commented On:** *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City)*, 2016 ABQB 734 (CanLII)

Does your freedom to express yourself include forcing me to listen? This question invokes the captive audience doctrine, a concept previously discussed at some length here. The doctrine lies at the heart of a decision in which the Canadian Centre for Bio-Ethical Reform (CCBR) argued that the City of Grande Prairie's refusal to post CCBR's pro-life advertisement on the sides of the City's buses infringed upon its freedom of expression. The Alberta Court of Queen's Bench decision in *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City)*, 2016 ABQB 734 (CanLII) (*CCBR*) follows on the heels of *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 (CanLII ) (*AFDI*), blogged about here, which similarly dealt with the limits of advertising on city buses. Taken together, the *CCBR* and *AFDI* decisions are most helpful to municipalities seeking to limit the placement of controversial advocacy messaging in public places.

## Facts

The CCBR is an educational, "pro-life" activist organization devoted to making Canada abortion-free. Its current advocacy campaign is called EndtheKilling and aims to expose as many Canadians as possible to images of, and to engage directly in conversations about, abortion.

In February 2015, the CCBR applied to post an advertisement on the sides of City of Grande Prairie buses. The ad was divided into 3 separate sections: the first, with an image of a fetus at 7 weeks with the caption "GROWING"; the second, with an image of a fetus at 16 weeks with the caption "GROWING"; the final section, a blank image containing the caption "GONE". The ad contained the words "ABORTION KILLS CHILDREN" and provided the online address for the CCBR and a link to its EndtheKilling campaign. The City informed the CCBR that it would not post the advertisement. In the City's view, the advertisement was "disturbing" and, because of its content, would not have been allowed pursuant to the City's agreement with its bus advertiser or in accordance with clause 14 of the *Canadian Code of Advertising Standards* (the *Code*) (at para 13).

The CCBR argued that the City was not justified in declining the advertisement based on its content, disturbing or otherwise (at para 18). Further, whether the advertisement contravened the City's agreement with its advertising contractor or with the *Code* was irrelevant to the discussion regarding the CCBR's freedom of expression as guaranteed by section 2(b) of the *Charter* (at paras 17-18). In reply, the City argued that it had acted reasonably in refusing to post the CCBR advertisement. In its view, the CCBR advertisement constituted hate speech and promotes hatred towards women who were choosing to exercise their legal right to an abortion (at paras 21, 76).

Allowing the CCBR advertisement would have frustrated the City's objectives of creating a welcoming transit system and promoting a safe and viable community which the City believed it had a statutory obligation to fulfill. The City further argued that the CCBR advertisement would have created a captive audience and been psychologically harmful to people seeing it, especially young children (at para 22).
When the matter was finally heard in court, it was brought by the CCBR as a judicial review application of the City's decision. The question to be determined was whether the City, acting in its capacity as administrative decision maker, disproportionately, and therefore unreasonably, limited CCBR's freedom of expression as protected by section 2(b) of the *Charter* (at para 26).

There appears to have been agreement (at para 28) that the analytical framework which applied to the City's decision was that which the Supreme Court of Canada articulated in the case of *Doré v Barreau du Québec*, 2012 SCC 12 (CanLII). This approach requires a two-step analysis. First, what are the statutory objectives which the decision maker is seeking to achieve? Second, do those statutory objectives accommodate the protection of *Charter* rights and, if they interfere with those rights, is that interference proportional (*CCBR* at para 32)?

**The Decision**

***What are the statutory objectives the City was seeking to achieve?***

With respect to the applicable statutory objectives, the Court (Madam Justice C.S. Anderson) acknowledged the broad jurisdiction granted to municipalities pursuant to section 3(c) of the *Municipal Government Act*, RSA 2000, c M-26, which states that one of the purposes of a municipality is to develop and maintain safe and viable communities (at paras 44-45). As in the previous decisions in *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 (CanLII) (*GVTA*) and *AFDI*, where courts concluded that a valid statutory objective for municipalities was to provide a safe and welcoming transit system, the Court agreed with the City that prohibiting hateful advertisements or propaganda on City property "...will ensure a tranquil, smoothly functioning transit system, with no risk of danger due to inflamed emotions or devastated psyches" (at para 46). The Court had no difficulty applying clause 14 of the *Code* and concluded, as in the previous decisions of *GVTA* and *AFDI*, that "…all ads must comply with the *Code*, they must not be offensive to the general public, and they must be free of demeaning, derogatory, exploitative or unfair comment or representation of any person or group of persons" (at para 47). Finally, the Court seems to have accepted that municipal policies or contractual agreements entered into between municipalities and third party advertising contractors might also apply to set the boundaries of the statutory objectives (at para 50). In all, the Court's conclusion that "…the statutory objectives generally relate to protecting the public from harm and providing a safe environment within the municipality, but particularly on municipal transit" (at para 51) is consistent with the previous decisions in *GVTA* and *AFDI*.

***Do these statutory objectives interfere with CCBR's freedom of expression and if so, is that interference proportional?***

In accordance with the *GVTA* decision, the Court rightly concluded that advertising space on buses was a type of public space which attracted the protection of section 2(b) of the *Charter* (at para 52). However, the Court was also mindful of the core values which freedom of expression seeks to protect (at paras 54-55) and hinged its decision regarding proportionality to three

factors: the hateful nature of the CCBR advertisement, the captive audience doctrine, and the harmful impact on society of the CCBR advertisement.

### i. Was the CCBR advertisement hateful?

The City argued that the CCBR advertisement constituted hateful propaganda because it compared women who have exercised their legal right to abortion to "killers or murderers" and because the advertisement "incites anger and revulsion towards these women" (at para 76). In assessing the true purpose behind the CCBR advertisement, the Court took a similar contextual approach as in *AFDI* and examined the content of the CCBR website. The Court concluded that the various statements on the website which characterized abortion as killing or as evil "…are strong statements that vilify women who have chosen, for their own reasons, to have an abortion; they are not [contrary to what the CCBR argued] merely informative and educational" (at para 80). The Court concluded that it did not have to decide whether the advertisement constituted hate speech because in all respects the City had exercised its discretion reasonably in refusing to post the advertisement (at para 82).

Taken together, the courts' decisions in *AFDI* and *CCBR* clearly establish that advertising which singles out specific groups of people for vilification or disparaging characterization is not protected speech. This makes good sense – speech which targets certain groups of people, especially those who are otherwise exercising their legal rights (in this case, women seeking abortions) cannot be said to promote the objectives which underlie freedom of expression (at para 55).

### ii. The Captive Audience Doctrine?

While this doctrine has been the subject of academic discussion and jurisprudence in the United States, it has found little application in Canada. I have always found this puzzling. In my view, freedom *from* unwanted speech is a necessary corollary to the freedom *to* speak. If the underlying purpose of freedom of expression is to encourage a civil society in which everyone can freely participate as equals in the exchange of ideas without being made to feel marginalized, then precluding a listener's freedom from unwanted speech distorts the careful equilibrium between the freedoms of *both* the speaker and listener:

> ...Much has been said and written, throughout the captive-audience controversy, on the relations between "freedom of speech" and "freedom from unwanted speech." The question whether the former includes the latter, as a matter of sound construction, is a technical one of great difficulty. What is perfectly clear is that the claim to freedom from unwanted speech rests on grounds of high policy and on convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense. Forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communicating freedoms… (Charles L. Black Jr. "He Cannot Choose But Hear: The Plight of the Captive Auditor" (1953) Faculty Scholarship Series Paper 2585, at page 967

In *CCBR*, the Court endorsed the captive audience doctrine and cited with approval a passage from the case of *Ontario (Attorney General) v Dieleman*, 1994 CanLII 7509 (ON SC), 117 DLR (4th) 449, which explains the captive audience doctrine in the following terms (*CCBR* at para 57,

citing *Dieleman* at para 640, which in turn quoted from *Lehman v City of Shaker Heights*, 418 US 298 (1974) at 306-7):

> ...if we are to turn a bus or streetcar into either a newspaper or a park, we take great liberties with people who because of necessity become commuters and at the same time captive viewers or listeners.
>
> In asking us to force the system to accept his message as a vindication of his constitutional rights, the petitioner overlooks the constitutional rights of the commuters. While the petitioner clearly has a right to express his views to those who wish to listen, he has no right to force his message upon an audience incapable of declining to receive it. In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.

In Canada, the most comprehensive treatment of the captive audience doctrine occurred in the case of *R v Breeden*, 2009 BCCA 463 (CanLII), where the BC Court of Appeal confirmed that political protest in the lobby of a courthouse, municipal hall or a fire station did not attract *Charter* protection. At paragraph 34, the Court of Appeal held that the values which underlie freedom of expression, namely democratic discourse, truth finding and self-fulfillment, are undermined when observers are not given a practical choice to avoid witnessing the expressive activity. The approach in *Breeden* is very similar to that taken in *CCBR* where the Court agreed that "...forced listening is antithetical to the principles underlying freedom of expression, since it denies the competition of ideas that is assumed to be foundation of free communication" (at para 58; the Court cites *Breeden* at para 56).

While the captive audience doctrine has not been applied as frequently in Canada as it has in the U.S., this is not for lack of appropriate opportunities. I have previously argued here and in a blog post about *R v Booyink*, 2013 ABPC 185 (CanLII) that the captive audience doctrine should be invoked more often. In *Booyink*, members of the CCBR held signs, handed out pamphlets and sought to engage passengers in conversation about the evils of abortion at the luggage carousel of the Calgary airport. My co-authors and I argued that the captive audience doctrine could well have applied given that passengers picking up their luggage would not have been able to avoid the placards bearing images of bloody fetuses which were being waved about in very close proximity. The same argument could have been made for applying the captive audience doctrine to the facts in the *AFDI* case.

In American jurisprudence, one of the hallmark characteristics of a captive audience is that the message must be thrust on an 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 the use of the doctrine. It is unlikely that a captive audience exists if the listener can avoid the message by averting their eyes, turning away, or crossing the street. In *Breeden*, the BC Court of Appeal distinguished the case of a truly captive listener who is confronted with a signboard in a confined building such as a foyer with someone in a sidewalk or concourse area (at para 34). The argument was that sidewalks and concourses allow an unwilling listener to take evasive action and avoid the unwanted message. One might have thought that this reasoning would similarly have applied to members of the public of Grande Prairie who might have happened to see the CCBR advertisement – they could

just as easily have averted their eyes or turned away from the bus. However, in *CCBR*, the Court was not prepared to recognize this distinction:

> ...ads on city buses are viewed in very close proximity by those who have no other means of transportation. They are also viewed in close proximity by other users of the road, be they drivers of passengers in their own private vehicles or taxis, cyclists, or pedestrians, etc. City bus ads can also be seen from inside homes, while playing at playgrounds, or simply walking on city sidewalks. (at para 69)
>
> ...Everyone sees a city bus, from the youngest to the oldest citizens of a municipality. Consequently, the messages carried on city buses must be appropriate for such a diverse audience. (at para 70)

There is a good reason for the Court's finding on this point, and it has to do with the nature of the CCBR advertisement. Had the advertisement been what the CCBR argued it was intended to be, "merely informative and educational" (at para 77), then the Court may have been less prepared to use the captive audience doctrine. But what clearly animated the Court's decision was its view of the advertisement's harmful nature and the fact that the images, when viewed by the general public, would cause psychological harm, especially to vulnerable groups such as young, unprepared, viewers.

### iii. Was the CCBR Advertisement Harmful to the Community?

In *CCBR*, the Court acknowledged *GVTA*'s reference to a community standard test for controversial advertising (at para 62). In the post on the *AFDI* decision, I questioned the court's adoption of a community moral standards test notwithstanding its (*obiter*) endorsement in *GVTA*. In my view, such a test is vague, impossible to quantify, and precludes controversial, but otherwise legitimate forms of speech. Realistically, how do you apply a community standard of tolerance test to a public policy issue as divisive as abortion?

The *AFDI* post suggests that a better way to assess restrictions on controversial speech in public places is to apply an objective, harm-based assessment which recognizes that controversial messaging advertised on municipal property must be considered in its unique context:

- 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 will 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.

It does not appear that the Court in *CCBR* applied the community standards test as had previously been done in *AFDI*. Rather, the Court accepted that ads placed on the sides of city buses have an elevated impact because of their unique location and unavoidably large viewership:

> A critical aspect of the context in this case is the public nature of the City's buses...buses are operated on city streets and form an integral part of the public transportation system. The general public using the streets, including but not limited to those who become bus passengers, is exposed to the messages placed on buses. (at para 67)
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> ...A bus exterior is a location where it is almost impossible to avoid the expression...If the same message were being expressed along a city sidewalk, for example, only those in the vicinity would see or hear it, and any person seeking to avoid the expression could cross the street to the other side...This is not the case with a city bus. (at para 69)

Having distinguished the difference between an advertisement placed on city property and a private sign held by someone on a sidewalk, it was but a short stretch for the Court to consider the harmful psychological impact that the CCBR advertisement would likely have for general public viewership:

> If it is acceptable and justifiable to restrict the audience for certain types of content, 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. (at para 72)
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> I find the ad is likely to cause psychological harm to women who have had an abortion or who are considering an abortion. It is also likely to cause fear and confusion among children who may not fully understand what the ad is trying to express. They may not be familiar with the word abortion, but they can read and understand that "something" kills children. Expression of this kind 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. (at para 82)

In *CCBR*, the Court recognized that hateful or offensive expressive activity in a prominent public space can have a harmful psychological impact on the well-being of civil society. While I agree completely, I would hasten to add that such a conclusion needs to be arrived at with care. Here, when the City refused to post the CCBR advertisement, no public complaints had yet been received. Assessing the advertisement's harmful impact is, to a certain extent, speculative, and we need to be careful that we're not underestimating society's tolerance for controversial and provocative messaging. And, we need to be mindful that a test which references community harm doesn't turn into a test of community censorship.

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