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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

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Case Commented On: *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City)*, 2018 ABCA 154 (CanLII)

Introduction

Determining what limits apply to an advertiser's freedom of expression as it pertains to the advertising of offensive messaging on the sides of municipal buses has been the subject of considerable judicial commentary both at the Supreme Court of Canada level and recently by the Alberta Court of Queen's Bench and the Alberta Court of Appeal - see for example: the Supreme Court of Canada, in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295, 2009 SCC 31 (CanLII) (*GVTA*); the Alberta Court of Queen's Bench decisions in *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555 (CanLII) (*AFDI*), blogged about here and *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City)*, 2016 ABQB 734 (CanLII) (*CCBR QB*) (which is the subject of this appeal) which we have previously commented upon here. (See also a decision of the B.C. Supreme Court in *The Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2017 BCSC 1388 (CanLII)).

In *CCBR* and *AFDI*, the courts examined the hateful nature of the advertising messages, their harmful impact, and the challenges which this type of messaging poses for municipalities. In many ways, both these decisions addressed novel questions of law that hadn't been extensively canvassed elsewhere. The Alberta Court of Appeal's decision in *Canadian Centre for Bio-Ethical Reform v The City of Grande Prairie (City)*, 2018 ABCA 154 (CanLII) (*CCBR CA*) helpfully settles some of these questions and provides municipalities with useful guidance regarding the limits of freedom to advertise in municipal spaces.

In *CCBR*, Madam Justice Anderson of the Alberta Court of Queen's Bench returned to fundamental principles and drew our attention to Justice McLachlin's (as she then was) discussion in *Irwin Toy Ltd. v Quebec (Attorney General)*, [1989] 1 SCR 927, 1989 CanLII 87 (SCC) which identified the core values underlying freedom of expression as:

> (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. (*Irwin Toy* at para 243)

In many respects, these core values echo those identified by Chief Justice Dickson in *R. v. Oakes*, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), who held that the core values and principles which are part of a free and democratic society are:

> …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. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. (*Oakes* at para 64)

Writing for the majority of the Alberta Court of Appeal in the *CCBR* appeal decision, (with Justice Berger writing a separate, albeit largely concurring judgement), Justice Slatter recognized that freedom of expression can create tension with other *Charter* rights. While he recognized that freedom of expression requires that "the public must accept a certain amount of unpleasant, disagreeable, and even repugnant speech…" (at para 79), he also acknowledged that "…the principles underlying the protection of free expression recognize the importance of civility in public debate" (at para 80). Justice Berger confirmed that courts must balance competing *Charter* rights rather than create a hierarchy between them which "privileges one at the expense of another" (paras 105-106) and that this approach similarly applies when considering how to balance freedom of expression with other *Charter* rights and societal interests:

> In *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 SCR 442 the Supreme Court of Canada revisited the *Dagenais* test for reconciling freedom of expression with other rights and interests. The Court made clear that the *Dagenais* test applied not just to the reconciliation of competing *Charter* rights, but also to the reconciliation of freedom of expression with social interests that do not constitute *Charter* rights. (*CCBR CA* at para 111)

Let us return to the AFDI and CCBR ads: the sponsor behind the AFDI ad advocates for the profiling of Muslims at airports, the surveillance of Mosques, and the immediate halting of Muslim immigration into North America, while the CCBR ad compares women who have obtained the legal medical procedure of abortion, to killers or murderers. Is the purpose of these ads to meaningfully engage us in a discussion on immigration or the unborn's right to life in a manner which values differing opinions and promotes inclusive civility? Or, is their true intent to promote hatred, marginalize, and vilify in a way which ultimately harms society's ability to engage in truly inclusive and respectful dialogue on difficult issues?

We don't intend to repeat the facts at issue as we have covered them in the previous commentary. What we would like to do is focus on a number of factors which Justice Slatter identified as being pertinent in the Court's analysis under *Doré v Barreau du Québec*, [2012] 1

SCR 395, 2012 SCC 12 (CanLII) for determining whether the City of Grande Prairie acted reasonably in refusing to post the CCRB ad on the sides of its municipal buses. These factors are: (1) the "hateful" nature of the CCBR ad; (2) the application of the *Canadian Code of Advertising Standards* (the "*Code*") in determining the appropriateness of an advertisement; and (3) the harm posed by the CCBR ad.

Was the CCBR ad "hateful"?

In our previous commentary of the *CCBR* and *AFDI* decisions, we focused on the hateful nature of the advertising messages, the challenges which these pose for municipalities, and their harmful impact on citizens. We should note at the outset that, as least as the term is discussed in the context of *CCBR* and *AFDI*, "hateful" speech is not the same as "hate speech".

Section 319 of the *Criminal Code* makes it a criminal offence to engage in the public incitement of hatred against any identifiable group. In contrast, the kind of "hateful" speech referred to in the *CCBR* and *AFDI* decisions is defined in Clause 14 of the *Code* as an unacceptable depiction or portrayal of any identifiable group. This would include an advertisement which condones personal discrimination, exploits, condones or incites violence or bullying, demeans, denigrates, or disparages any identifiable group, or brings an identifiable group into public contempt or ridicule, or undermines human dignity, displays obvious indifference to, or encourages conduct or attitudes that offend standards of public decency.

In *CCBR QB*, Justice Anderson concluded that the various statements on the CCBR's 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" (*CCBR QB* at para 80). Justice Anderson concluded that she did not have to decide whether the advertisement constituted criminal hate speech because in all respects the City had exercised its discretion reasonably in refusing to post the advertisement (*CCBR QB* at para 82).

The question of whether the CCBR ad constituted "hate speech" was addressed in further detail in the *CCBR* appeal decision by Justice Slatter. Justice Slatter considered section 319(2) of the *Criminal Code* which makes it a criminal offence to communicate public statements and wilfully promote hatred against any identifiable group, and concluded that the CCBR ad did in fact constitute hate speech under the *Criminal Code*:

> …The advertisement clearly portrays women who terminate pregnancies, and medical professional and facilities that assist, as "killers of children". On any reasonable view, the advertisement is likely to promote hatred against identifiable groups of "women" and their doctors. (*CCBR CA* at para 71)

Like Madam Justice Anderson had concluded in *CCBR QB*, Justice Slatter agreed that it is ultimately unnecessary to prove that the CCBR met the threshold for a successful criminal prosecution under section 319 of the *Criminal Code* since speech which is hateful is not the type of expression which is protected by the *Charter*:

> …The hateful nature of the speech is still relevant. As noted in *Keegstra* at pp. 765-6: "…limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b)…" (*CCBR CA* at para 70 and see further references to *Keegstra* at paras 73 and 90)

This is an important point which should not be lost. Speech can still be "hateful" without rising to the threshold required to prove that it constitutes the crime of hate speech under the *Criminal Code*. This is because, as we've explained above, hateful speech does not fall within the core values which freedom of expression was intended to protect, and directly contradicts the values identified in *Oakes* as forming part of a free and democratic society.

Did the CCBR ad comply with industry standards on advertising?

It may come as a surprise to some that the *Code* is not legislated by government but is administered by an organization called Advertising Standards Canada, a self-regulating not-for-profit group of private advertisers which establishes advertising standards that are now used by most municipalities.

In *GVTA*, the Supreme Court of Canada acknowledged that the *Code* "...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" (*GVTA* at para 70). This approach was similarly adopted by the court in *AFDI* which recognized that the *Code* informs the section 1 analysis (*AFDI* at para 69). In *CCBR*, Justice Anderson took a similar approach.

In the *CCBR* appeal decision, Justice Slatter agreed and confirmed, at paragraph 75 that it was appropriate to consider whether an advertisement "complies with objectively and neutrally established standards for advertising" for the following reasons:

> Universally applied formal policies on advertising standards, such as the respondent's subsequently adopted policy on advertising, can also be an indication of a good faith attempt to balance statutory objectives with *Charter* values. Application of a universal policy counteracts subjectively based rejection of individual advertisements on an unprincipled basis. (*CCBR CA* at para 77)

It was therefore but a short stretch for Justice Slatter to conclude that:

> …the tendered advertisement would demean, denigrate or disparage women who had procured a miscarriage, and would tend to undermine human dignity, was well supported by the record. (*CCBR CA* at para 76)

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 and in British Columbia (see *The Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2017 BCSC 1388 (CanLII) at para 56).

Harm

In *CCBR*, Justice Anderson spent some time discussing the harmful impact of the CCBR ad, particularly its harmful psychological impact on a general viewership:

> ...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.
>
> ...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.
>
> 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.
>
> 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. (*CCBR QB* at paras 69, 70, 72 and 82)

In the *CCBR* appeal decision, Justice Slatter agreed (at para 83) and found there to be sufficient evidence for Justice Anderson to have reached these conclusions given the CCBR's portrayal of abortion as "the decapitation, dismemberment, and disembowelment of an innocent pre-born child" (at para 84). And, in reply to CCBR's argument that there was no scientific proof to substantiate Justice Anderson's conclusions regarding the harmful impact of the CCBR ad, Justice Slatter held that "[i]n a *Charter* analysis of this type, concrete scientific proof is not required, and a "reasoned apprehension of harm" suffices…" (at para 84).

We maintain that municipalities are put in a difficult position if they are forced to place hateful messaging in public spaces such as the sides of their buses or in other public property:

- 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.

Justice Slatter recognized these concerns and acknowledged the special role which municipalities must serve:

> Many public authorities would prefer to distance themselves from controversial topics that are not a part of their core mandate. The residents of a municipality are unlikely to be of one mind on a controversial topic like abortion, and some segment of the population would undoubtedly object if the municipality appeared to take sides on the issue. The right to free expression includes the right to "say nothing". …If a municipality is forced to display a controversial advertisement on public property, that, to some extent, impedes the municipality's right to "say nothing on a topic…"
>
> Municipalities have a public mandate and obligation to promote healthy and safe communities, whereas private entities have no such public obligation. Thus, advertisements that would be unacceptable to a public body might well be acceptable to a private enterprise that offers advertising space. It was not unreasonable for the transit manager to identify the existence of such opportunities in rejecting the advertising as being unsuitable for city buses. (*CCBR CA* at paras 87 and 89)

Further, Justice Slatter acknowledged (at para 88) that placing a disclaimer on the ads which stipulates that a municipality does not endorse an advertisement's messaging might go some distance to alleviate a municipality's concerns regarding the impact of a controversial ad but may not (because of the extreme nature of the ad) counteract the harmful impact caused by disturbing content.

Conclusions

Freedom of speech is one of our most jealously guarded freedoms. There are those who argue that imposing limits on freedom of expression, especially when perpetrated by unelected judges and bureaucrats, amounts to community censorship – that imposing political correctness from above robs us of the opportunity to freely engage in a marketplace of ideas from which society forms a consensus about what it holds to be both moral and legal.

But speech, like any other freedom protected in the *Charter*, is not without its limits. There are others who argue that hateful speech has no place in a society such as ours which seeks to foster values such as liberty, human dignity, equality, the enhancement of democracy, and the pursuit of truth through inclusive, tolerant public debate – that allowing hateful speech only benefits the bully with the loudest megaphone to exhort us to hate those who aren't like us.

Defining the limits of freedom of expression isn't just an exercise in legal abstractions. This question goes to the heart of how we live together in peaceful community and what we, as a community, aspire to be.

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