



City of
Peterborough

To: Members of the Committee of the Whole

From: Patricia Lester, City Solicitor and Director of Legal Services

Meeting Date: March 27, 2017

Subject: Report OCS17-004
Transit Advertising

Purpose

A report to Council with regards to transit advertising.

Recommendation

That Council approve the recommendation outlined in Report OCS17-004 dated March 27, 2017, of the City Solicitor and Director of Legal Services, as follows:

That Report OCS17-004 be received for information.

Budget and Financial Implications

There is no budget or financial implications to this report.

Background

Council at its meeting of February 13, 2017 passed the following resolution:

That staff provide a report to Committee of the Whole within two cycles regarding:

- a) Options to adjust the city-wide advertising policy to ensure that harmful messages are not permitted on city property, including transit vehicles; and,
- b) The municipality's legal options to prevent the display of graphic images on public transit.

This report will address subparagraph (a) of Council's resolution in a preliminary way since a more fulsome report regarding the City's Sponsorship, Naming Rights and Advertising Policy (the "Policy") will be provided at a later date from the Director of Corporate Services. Furthermore, this report will address subparagraph (b) in the context of the advertisement being placed with the City by the Canadian Centre for Bio-Ethical Reform.

Legal Options and Solicitor-Client Privilege

In attempting to address Council's direction in this report, to provide "legal options to prevent the display of graphic images on public transit", no confidential legal advice that has been provided to Council has been divulged. All of the information contained in this report is either not subject to solicitor-client privilege or information that is publicly available from the relevant Court files and public documents.

For greater clarification, where legal advice of any kind, which includes communications related to the law and all advice within the realm of a continuing legal context, is sought or is given from a lawyer, the confidential communication is protected. The solicitor-client privilege belongs to the client and the lawyer "acts a gatekeeper, ethically bound to protect the privileged information that belongs to her client".

As Council is aware, direction was provided to staff to settle the litigation brought by the Canadian Centre for Bio-Ethical Reform (the "CCBR") and throughout a period of two years staff has kept Council apprised and provided confidential legal advice on an as-need basis.

If Council as the “client” wishes to waive their solicitor-client privilege it requires a Council resolution to be passed and in addition a resolution allowing for any discussion or documents, which were provided in Closed Sessions of Council, to be released into the public domain.

If City Council waives this privilege, it allows for an opposing side or a future litigant to infer the nature and extent of the legal advice. This information once in the public domain may lead to increased legal liability and subsequent litigation brought against the municipal corporation.

Options to Revise the Sponsorship, Naming Rights and Advertising Policy

When Council approved the Director of Corporate Services Report CPFS15-054 in November 2015, they also approved a corporate Policy relating to sponsorship, naming rights and advertising thus seeking creative ways to continue to improve the City’s service delivery to citizens, customers and visitors, while at the same time minimizing the financial impact to taxpayers.

In November 2015 Council was already aware of the litigation (an “Application for Judicial Review”) brought by the CCBR against the City and had directed staff to settle the litigation, based upon legal advice provided to Council which was subject to solicitor-client privilege. In addition, based on Council’s direction, staff drafted certain clauses in the Policy that would assist them in reviewing future advertisements that might violate certain laws or standards not acceptable to the City. In doing so, staff also reviewed other municipal policies, such as Vancouver’s advertising policy.

The Policy contains a position statement regarding advertising:

4.4 Position Statement Regarding Advertising

The City is a host of advertising and does not endorse nor advocate any position put forward by outside advertisers. The City cannot violate freedom of expression under the Canadian Charter of Rights and Freedoms. Freedom of expression is a protected right under the Charter. The City appreciates that some advertisements may cause concern for customers but the City has no legal authority to decline advertising content as long as the advertisements comply with the Canadian Code of Advertising Standards, the Canadian Criminal Code and other applicable laws.

In addition, Section 6 of the Policy sets out the standards and limitations by which any advertising would-be vetted

Part 6: Standards and Limitations

6.1 All advertising:

- a. Must meet the Canadian Code of Advertising Standards, as amended from time to time;
- b. Will not offend the Canadian Criminal Code, as amended from time to time; and
- c. Must comply with the laws, statutes, regulations and by-laws in force, as amended from time to time, including the Canadian Charter of Rights and Freedoms.

6.2 Acceptance of an advertisement does not constitute the City's express or implied endorsement of the content or message in the advertisement or of the advertisement sponsor itself. The City will not accept advertising that:

- a. Promotes alcohol or other addictive substances, where it will be viewed primarily by children;
- b. Promotes the sale of tobacco;
- c. Promotes pornography;

6.3 The City reserves the right to reject a bid from a Potential Partner, or from any person or Company that is affiliated, associated or controlled, as defined in the Canadian Business Corporations Act, R.S.C., 1985, c.44, by the Potential Partner that is indebted to the City.

6.4 A partner will not be invited to influence or impact the message or content of a program or exhibit, unless developing the program or exhibit was clearly part of the Agreement.

With a policy now in place, staff have the ability to review each and every proposed advertisement to see if they comply with corporate policy.

Option 1 to Revise Policy

From a legal drafting perspective, Part 6 of the Policy was drafted on a broad basis versus a specific listing of all potential advertisements that may not be acceptable to the City. To draft such a comprehensive list would, not only, be impossible but potentially unenforceable if a Court found that specific Policy provisions amounted to a blanket, indiscriminate denial of specific forms of advertisements.

In addition, to determine if an advertisement was potentially “harmful” is in itself a subjective question and may place the City in a position where we are not compliant with the various laws, including the Charter.

Option 2 to Revise Policy

Depending on the outcome of the appeal in the Grande Prairie case (later described), the inclusion of an additional reference in Part 6 to “community standards” may provide staff with greater direction for vetting future advertisements. However, if the Court of Appeal of Alberta does not uphold the lower court’s decision, then potentially a municipality’s denial of an advertisement based on a “community standard” may not be a demonstrable justification for denying a guaranteed Charter right.

Council Direction

On February 22, 2016, the CCBR issued a media release that, in part, stated that in January 2015 they applied to the City to post a pro-life advertisement on a bus, which was refused by the City because it was divisive and controversial. The release went on to state that the City had now agreed to post the advertisement and would not oppose CCBR’s request for a declaration from the Court on breaching its Charter rights.

City staff does not act unilaterally without Council direction and, therefore, in response to the CCBR release, the City issued its own media release on February 25, 2016, attached as Appendix “A” to this report. The City sought to publicly clarify that it had further reviewed its initial decision and now acknowledged that the specific CCBR advertisement was expressive speech protected under the Charter and subject only to such reasonable limits prescribed by law. The City did not approve the advertisement rather they determined that the refusal to run the advertisement was not demonstrably justified under the Charter in this particular instance.

The City further clarified that as a government entity and a transparent public organization, we must uphold the laws of our country and respect the freedom of expression rights of those seeking to advertise on City property, including City buses.

As a general matter, in the context of declining an advertisement, a municipality must prove that the particular reason for declining the advertisement was demonstrably justified in a free and democratic society before the municipality can limit a constitutionally guaranteed right to freedom of expression. In Peterborough's case, as public Court documentation indicates, City transit staff declined the advertisement by stating that the "primary objective of Peterborough Transit is to increase ridership and any advertisement that may be viewed negatively by our riders would be deemed to be contrary to that objective and will not be accepted".

As the Court decision in Peterborough's case shows, the Court was required to examine the particular reason given by the City for refusing the proposed advertisement and determine (on the facts of this case) whether that stated reason provided demonstrable justification for denying CCBR's guaranteed Charter right.

Each case will be examined on its particular facts and the results of each case will differ depending upon the reasons given for the denial and whether those reasons can be proven in a Court of Law to be a proportional justification for the denial of a right guaranteed by the Charter. To be clear, in Peterborough's case the City was required to prove before the Ontario Divisional Court, on admissible evidence, that an infringement of CCBR's Charter right of freedom of expression (which right to freedom of expression has been recognized by the Supreme Court of Canada) was demonstrably justified in relation to the City's then stated objective of "increasing ridership".

In response to the City's media release, staff provided additional information to the media indicating that the City would not oppose CCBR's request for two court orders: one compelling the City to post the advertisement and a second order declaring that the court declaration that the City had breached CCBR's Charter rights. Staff further indicated that only CCBR would be attending the actual Divisional Court hearing on February 23, 2016.

Divisional Court Hearing Heard February 23, 2016, Decision August 11, 2016

The Divisional Court in Hamilton, composed of three judges, heard this matter on February 23, 2016. The City did not have a legal representative personally attend in court that day because the matter was proceeding by a settlement agreement (on consent). The City did not file any responding documentation since, again, the matter was proceeding by consent agreement. Attached as Appendix "B" to this report are the Reasons for Judgment and Consent Order, issued by the court.

After approximately six months of consideration, the Divisional Court ordered the City to accept for publication and post CCBR's advertisement. However, because the City had not filed any responding documentation in an attempt to prove justification for its initial denial, the Court did not grant CCBR's request for a declaration that the City had infringed CCBR's constitutional right of freedom of expression. The Court stated:

“Without an evidentiary record from the Respondent addressing these issues and in the absence of any adversarial party to contest the evidence and submissions of the Applicant, we decline to make a declaration that may be seen to be a general pronouncement with precedential value.”

In other words, the Court's decision was limited in its scope and effect and does not bind the City in any future advertising decisions. The City is entitled in future advertising decisions to give other justified reasons and stated objectives for accepting or denying proposed advertisements. The advertising Policy approved by Council provides the framework for making these decisions.

Since Council's direction was to settle the matter, the City did not seek permission to appeal the consent order to the Ontario Court of Appeal. Such an appeal would not be automatically permitted and, in addition, seeking that permission to appeal must be sought within a short, specified time frame.

Accordingly, if the City now intends to appeal the Divisional Court Order (which Order was made on agreement) then it would have to first seek an extension of time to file a motion seeking permission to appeal before arguing the motion for leave to appeal and, given all of the circumstances, it is unlikely that the City would be successful in doing so, especially since the Divisional Court Order was given on consent.

Subsequent Court Decisions

A. CCBR v. Grande Prairie (City), December 2016

The court in the Grande Prairie case was required to decide whether Grande Prairie's denial of the advertisement was reasonable given its stated reasons and objective for denial, that being the advertisement “would be disturbing to people within our community”. This is a factually different reason than Peterborough's stated objective and reason, namely that it would “reduce ridership”. The judge in the Grande Prairie case determined that Grande Prairie's denial was justified under the Charter.

In reviewing the decision, the following are some of the differences between Peterborough's denial and Grande Prairie's:

- the judge stated that a city's justification for denying an advertisement "will depend on the facts in a particular case";
- before CCBR applied to run its advertisement, Grande Prairie imposed their "community standard" by referencing the Canadian Code of Advertising Standards, which was incorporated in a written agreement they had with a third-party advertiser;
- Grande Prairie only refused the one particular CCBR advertisement and not all others, therefore only restricting CCBR's right as little as possible; and
- CCBR has sought leave to appeal this case to the Court of Appeal of Alberta and therefore a final decision is still pending.

The Grande Prairie case will assist Peterborough in reviewing future advertising requests, but it cannot change the Ontario Divisional Court decision.

B. CCBR v. Hinton (Town), January 2017

The court in the Hinton case was required to decide whether the Hinton's denial of the CCBR's advertisement (which was the same advertisement as Peterborough received) was reasonable. The court found that the Town of Hinton's denial was not reasonable and was, in fact, a violation of section 2(b) of the Charter.

The Town denied the advertisement even before knowing its contents and did not examine the proposed advertisement, but pre-judged its contents. The court also recognized that CCBR was required to commence the Court application because its Charter rights had been infringed but questioned why there was a need for the lawyers to attend in person at the hearing when the parties had agreed to a consent declaration/order.

The Hinton case demonstrates that a blanket refusal of certain forms of advertisement or a prejudgment of an advertisement will very likely infringe a Charter right.

CCBR Placement of Advertisement on Transit

Staff can now confirm that CCBR has provided their final advertisement to the City, which complies with the Divisional Court's Consent Order, with an April 1st placement start date. The advertisement is a Tail Poster (21" high x 70" long) which will slip into the track on the back of two buses. The advertisement will

run for three months. As per the City's practice, the buses with the advertisement will be randomly rotated amongst the various City transit routes. The advertisement in the lower right hand corner of the poster, will state the following: "Advertisement by Centre for Bio-Ethical Reform". This is in compliance with the Policy - Position Statement Regarding Advertising. The City as a host of advertising, does not endorse nor advocate any position put forward by outside advertisers.

With regards to public comments/tweets that the City has received concerning vandalism of our buses because of a particular advertisement, the City has not traditionally experienced any significant level of vandalism to-date. Although staff is aware that vandalism to pro-life advertisements on benches around the City has occurred, neither the benches nor advertisements belong to the City.

Responding to the Public

Staff has recognized that the publication of CCBR's advertisement on public transit has caused concern for some members of the public and have reviewed and responded to the numerous emails and correspondence received. Documentation that is public has been provided or the public has been directed as to where to obtain same.

However, if answers to some questions have been in the realm of solicitor-client privilege, staff have not responded to those questions except to provide the information set out in the City's media release of February 2016.

Summary

Staff recognize that the publication of CCBR's advertisement on public transit has caused concern for some members of the public, transit customers and some members of Council. However, the highest court in our country, the Supreme Court of Canada, has stated that the public is expected to put up with some controversy in a free and democratic society.

Staff will continue to review each and every advertisement in compliance with our Policy and all applicable laws.

Submitted by,

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Attachments:

Appendix “A”- City Media Release, February 25, 2016

Appendix “B” - Ontario Superior Court of Justice Divisional Court – Reasons for Judgment and Consent Order