

CITATION: Canadian Centre for Bio-Ethical Reform v. City of Peterborough ONSC 1972  
DIVISIONAL COURT FILE NO: DC-662-15 JR  
DATE: 201603\_\_

ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT  
GORDON R.S.J., KENT AND THORBURN JJ.

BETWEEN: )  
)  
)  
CANADIAN CENTRE FOR BIO- )  
ETHICAL REFORM ) Carol Crosson, Counsel for the Applicant.  
)  
Applicant )  
)  
-- and -- )  
)  
CITY OF PETERBOROUGH )  
) Unrepresented.  
Respondent )  
)  
)  
AND ON NOTICE TO: THE ATTORNEY )  
GENERAL OF ONTARIO ) Unrepresented.  
)  
) HEARD: February 23, 2016

Overview:

- [1] The Applicant seeks a declaration that the decision of the Respondent to refuse to post an advertisement submitted by it infringed s. 2(b) of the *Canadian Charter of Rights and Freedoms* and cannot be saved under section 1.
- [2] The Respondent did not appear. The only material it filed was a consent order to accept for publication and post the advertisement in question upon payment of the usual and customary charge of the Respondent for such service.
- [3] The Applicant served the Ministry of the Attorney General with its Notice of Constitutional Question and other materials on July 29, 2015. In response, counsel for the Ministry advised the Applicant as follows:

Our office does not intend to become involved in this stage of the proceedings.  
However, subsection 109(3) of the Courts of Justice Act requires you to notify the

Attorneys General of Canada and Ontario of any appeal or review of this matter in which a constitutional issue is raised. Accordingly, we would appreciate receiving a Notice of Constitutional Question should an appeal be launched in these proceedings.

- [4] Consequently, the Ministry filed no documents and was not represented before us.

**Background Facts**

- [5] The Applicant is a non-profit corporation which functions as a pro-life educational organization. It attempts to inform the public about its views of fetal development and abortion by providing literature, visual displays and oral presentations.
- [6] The Respondent operates a transit system for its residents. As part of the transit operations, advertisements may, for a fee, be posted on the sides of buses.
- [7] On February 11, 2015, a representative of the Respondent declined to post an advertisement submitted by the Applicant. The advertisement displayed three pictures. The first two were of pre-born babies, one at approximately 7 weeks old and the second at approximately 16 weeks. The third picture was a blank red square with no other visual image in it. Under the first two pictures the captions read: "Going". Under the last picture, the caption read: "Gone". On the right side of the pictures, the advertisement said: "Abortion Kills Children", with the website address "endthekilling.ca" beneath.
- [8] The Respondent seems not to have had any bylaw or express policy upon which its decision was taken. However, the reasons for the Respondent's refusal to post the advertisement on its buses are reflected in two letters. The first was sent by the person responsible for managing bus advertising for the Respondent in which he stated that "the primary objective of the 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". The second letter was provided by counsel for the Respondent and stated that "The City typically only sells advertising space for non-controversial products or services...", and that "The City, as a public entity, does not take a position or permit itself to be seen as though it were taking a position, on matters which have, or appear to have a moral, religious or ethical component. Advertisements which promote an issue which is divisive or controversial and which could be perceived to be sanctioned by the City, by allowing an advertisement to appear on or in City-owned property, are not permitted".

**Jurisdiction**

- [9] Section 2(1) of the *Judicial Review Procedure Act* provides, among other things, that on an application by way of originating notice, the court may grant any relief that the applicant would be entitled to in a proceeding by way of an action for a declaration in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

- [10] Section 1 defines “statutory power” to include a power conferred by or under a statute to exercise a statutory power of decision. “Statutory power of decision” is defined to include a power or right conferred by or under a statute to make a decision deciding or prescribing the legal rights, powers, privileges, immunities, duties or liabilities of any person or party.
- [11] We are satisfied there is jurisdiction to entertain the order requested by the Applicant. The *Municipal Act, 2001*, S.O. 2001, c. 25 confers power upon municipalities to make decisions relative to public transportation. The administration of public transportation has been found to include the management of advertisements posted on the sides of buses [see *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component* [2009] 2 SCR 295]. Accordingly, a decision made by a representative of the Respondent concerning advertisement on its buses would be a statutory power of decision.

### Standard of Review

- [12] Violations of the *Charter* will generally take one of two forms. First, a law may be unconstitutional on its face if it violates a *Charter* right or freedom and cannot be saved under section 1. In such cases the law will be invalid and the court will be compelled to declare it of no force or effect. Second, the *Charter* may be infringed not by the law itself but by the actions of delegated decision makers in applying it. In such cases the law remains valid, but a remedy for the unconstitutional action may be sought. [See *Eldridge v. British Columbia (Attorney General)* [1997] 3 SCR 674].
- [13] Although responsibility for public transportation is delegated to municipalities by virtue of the *Municipal Act*, the *Act* itself does nothing to limit the Applicant’s rights or freedoms. We have been referred to no bylaw or written policy of the Respondent pursuant to which it exercised its discretion. What is challenged in this case is the action of a delegated decision maker of the Respondent in applying the Respondent’s statutory mandate with respect to public transportation.
- [14] The Supreme Court of Canada has, in *Dore v. Barreau du Quebec* [2012] 1 S.C.R. 395, and subsequently in *Loyola High School v. Quebec (Attorney General)* [2015] SCC 12, set out the approach to be followed when a discretionary administrative decision engages the protections enumerated in the *Charter*. It held that the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that the decision-maker is obliged to pursue.
- [15] The onus is first on the Applicant to establish that its constitutionally enshrined freedom has been limited. The onus then shifts to the Respondent to establish that the limit was imposed in pursuit of its statutory objectives and that the Applicant’s freedom of expression was not limited more than reasonably necessary given those statutory objectives.

- [16] On judicial review, the court is to determine whether the decision was reasonable in the sense that it reflected a proportionate balance between the *Charter* protection as stake and the relevant statutory mandate.

Analysis

*Does the Charter Apply in the Circumstances of this Case?*

- [17] In *Greater Vancouver*, supra, the Supreme Court of Canada held that where transit authorities are government entities the *Charter* applies to all of their activities including the operation of the buses they own and the placement of advertisements thereon.
- [18] Clearly the *Charter* does apply in the circumstances of this case. The transit system in question is operated by the Respondent which is a corporate body governed specifically by the provisions of the *Municipal Act, 2001*.

*Has There Been Limitation of the Applicant's Section 2(b) Freedom of Expression?*

- [19] Section 2(b) of the *Charter* provides that everyone has the fundamental freedom of, among other things, expression.
- [20] Where an activity conveys or attempts to convey a meaning it has expressive content and prima facie falls within the scope of the guarantee [see *Irvin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 199].
- [21] Whether or not one agrees with the content of the advertisement proposed by the Applicant, there can be no doubt that it has expressive content that prima facie falls within the scope of section 2(b).
- [22] The representative of the Respondent, by refusing to accept the Applicant's advertisement, interfered with the Applicant's freedom of expression. Indeed, in *Greater Vancouver*, supra, the Supreme Court of Canada held a similar type of refusal to constitute such a limit.

*Is the Limitation Greater Than Reasonably Necessary to Meet the Respondent's Statutory Objectives?*

- [23] The decision of the Respondent contained little consideration of the extent of the limitation on freedom of expression that was imposed, provided scant information on the statutory objectives that it was pursuing, and set out no analysis by which those opposing interests were balanced in any way.
- [24] Accordingly, we have little difficulty accepting that the decision made by the Respondent was not reasonable in the circumstances. The Respondent conceded this point by consenting to an order that it will accept the advertisement for posting in the usual course.

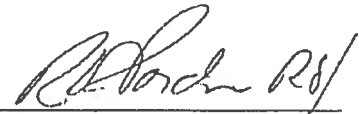
*Should a Declaration be Granted?*

[25] We have considerable unease with the Applicant's request for a declaration that the limit on its freedom of expression caused by the Respondent's decision was unconstitutional. To do so would require us to have a full understanding of the statutory objectives being pursued by the Respondent and the ability to analyze whether the Applicant's freedom of expression was being limited as little as possible in all of the circumstances. 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.

Conclusion

[26] The consent order is issued in accordance with the terms of the agreement between the parties that the Respondent shall accept for publication and post the advertisement of the Applicant identified as Exhibit "A" to the affidavit of Nicholas McLeod filed with the Application Record dated August 12, 2015, upon payment of the usual and customary charge of the Respondent for such service.

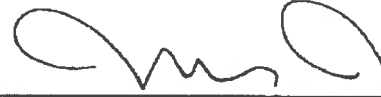
[27] The parties have resolved the dispute between them. For the reasons set out above, on the record before us we are unable to issue the declaration requested by the Applicant. The Applicant has advised that the issue of costs need not be addressed by us.



Mr. Justice R. D. Gordon, R.S.J.



Mr. Justice J. C. Kent



Madam Justice J. A. Thorburn

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**BETWEEN:**

CANADIAN CENTRE FOR BIO-ETHICAL REFORM

Applicant

– and –

CITY OF PETERBOROUGH

Respondent

AND ON NOTICE TO: THE ATTORNEY GENERAL OF  
ONTARIO

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**REASONS FOR JUDGMENT**

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Released: March , 2016

Court File No. # DC-15-662-JR

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)**

BEFORE THE HONOURABLE )

FEBRUARY 23, 2016

Gordon RSJ )

Kent J. )

Thorburn J. )

**BETWEEN:**

CANADIAN CENTRE FOR BIO-ETHICAL REFORM

Applicant

- and -

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CITY OF PETERBOROUGH

Respondent

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**CONSENT ORDER**

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**THIS APPLICATION**, made by the Applicant, specified in the Notice of Application dated July 28, 2015, was heard on February 23, 2016. **UPON** the Application of the Applicant herein; and upon having read the Affidavit of Nicholas McLeod, filed; and upon hearing submissions by Counsel for the Applicant and with the consent of Counsel for the Respondent;

**THIS COURT ORDERS THAT:**

1. The Respondent shall accept for publication and post the advertisement of the Applicant identified as Exhibit "A" to the affidavit of Nicholas McLeod filed with the Application Record dated August 12, 2015 upon payment of the usual and customary charge of the Respondent for such service.
2. As the parties have come to an agreement regarding costs, there shall be no order regarding costs so long as the parties abide by their agreement.

Dated at Hamilton this 23 day of February, 2016

*[Handwritten signature]*  
*[Handwritten signature]*  
*[Handwritten signature]*

APPROVED AS TO FORM AND CONTENT:

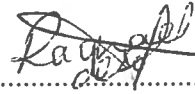
LLF LAWYERS LLP

Per: *[Handwritten signature]*  
Jeff Lancot  
Solicitor for the Respondent

ENTERED AT HAMILTON  
IN Book No. 352  
as Document No. 136  
on Aug 11/16  
By: \_\_\_\_\_



This is Exhibit "A" referred to in the affidavit of  
Nicholas McLeod, sworn  
before me on June 4<sup>th</sup>, 2015



.....  
A commissioner for taking affidavits for  
Ontario

**RACHAEL ANN MARIE deSOUZA**

