

## Court of Queen's Bench of Alberta

Citation: **American Freedom Defence Initiative v Edmonton (City), 2016 ABQB 555**

**Date:**  
**Docket:** 140306143  
**Registry:** Edmonton

Between:

**American Freedom Defence Initiative**

Applicant

- and -

**City Of Edmonton**

Respondent

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**Reasons for Judgment  
of the  
Honourable Mr. Justice J.J. Gill**

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### **I Introduction**

[1] This matter arose as a result of the City's removal of an advertisement from Edmonton Transit System (ETS) buses. The Applicant, American Freedom Defence Initiative (AFDI) applies for a declaration that the City's removal of the advertisement violated its right to freedom of expression under s. 2(b) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK) (Charter)*, and that the violation is not a reasonable limit justified under s. 1 of the *Charter*. It also seeks an order enjoining the City from violating the AFDI's *Charter* rights in the future.

## **II Preliminary Issue**

[2] The City took the position at the outset of oral argument that AFDI's application is properly understood as a s. 1 challenge to the City's advertising policy, or lack thereof.

[3] AFDI agreed, but submitted that the conduct of the City in this case is also in issue, although AFDI filed no originating application for judicial review of the City's administrative decision.

[4] Having heard the parties and read their submissions, I conclude that the primary focus of the application is the constitutionality of the City's policy. However, the City's removal of the AFDI advertisement provides context and assists in understanding the positions of the parties in this regard.

## **II Background**

[5] ETS is solely owned and operated by the City. The City delivers annually over 80.2 million rides across the City of Edmonton using buses, light rail, and other vehicles. The City raises revenue by offering advertising space on the interior and exterior of ETS vehicles.

[6] At the relevant time, the City had a contractual agreement with Pattison Outdoor Group, a division of Jim Pattison Industries Ltd. (Pattison), Transit Advertising Proposal No. 879392, to manage all of the ETS advertising.

[7] Section 16 of the City's Agreement with Pattison provided:

16.1 Any advertisement to be placed in or on the Buses, LRT vehicles or LRT stations, Transit Centres, Bus Benches, or Shelters of the City shall be of a moral and reputable character and the Contractor agrees that it will forthwith remove from any Facility, Bus Bench or Shelter any advertisement which the City, in the reasonable exercise of its discretion, determines is contrary to this Clause.

16.3 The contents of advertising material shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board.

16.4 All advertisements and any representations made therein shall conform to Federal and Provincial laws, regulations and orders now in force or amended or promulgated hereafter...

[8] Interested parties wishing to advertise on an ETS forum were required to enter into a Production Agreement and a Pattison Transit Advertising / Transit Advertising Agreement with Pattison.

[9] The Production Agreement contained the following clause:

Pattison Outdoor Advertising 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 Outdoor Advertising deems may be offensive to the moral standards of the community, or which we believe negatively reflects on the character, integrity or standing of any organization or individual...

[10] A portion of the Pattison Transit Advertising / Transit Advertising Agreement - General Terms & Conditions stated as follows:

...Pattison reserves the right to reject or remove any Advertising Material which does not meet the production specifications...or which does not, in Pattison's sole opinion, comply with the standards set by the Canadian Advertising Foundation or the applicable Transit Authority...

[11] AFDI describes itself as an American non-profit, non-partisan human rights activist and advocacy group based in New York, USA, whose objectives include the promotion and defence of freedom of speech, freedom of conscience, individual rights and the equality of all people before the law.

[12] AFDI has developed an 18 point "Platform for Defending Freedom" which includes the following points:

AFDI calls for profiling of Muslims at airports and in hiring in professions in which national security and public safety could be compromised.

AFDI calls for surveillance of mosques and regular inspections of mosques in the U.S. and other non-Muslim nations to look for pro-violence materials. Any mosque advocating jihad or any aspects of Sharia that conflict with Constitutional freedoms and protections should be closed.

AFDI calls for curriculum and Islam-related materials in textbooks and museums to describe the Islamic doctrine and history accurately, including its violent doctrines and 1,400-year war against unbelievers.

AFDI calls for an immediate halt of immigration by Muslims into nations that do not currently have a Muslim majority population.

[13] SIOA stands for "Stop Islamization of America". It is an initiative of AFDI.

[14] On September 30, 2013, the City referred AFDI's Canadian advertising manager to Pattison in relation to an inquiry about the possibility of placing an AFDI advertisement on ETS buses.

[15] On October 1, 2013, a representative of Pattison spoke with a representative of AFDI. AFDI then emailed Pattison an image of the proposed advertisement:

Girls Honor Killed by Their Families. Is Your Family Threatening You?  
Is Your Life in Danger? We Can Help: Go to [FightforFreedom.us](http://FightforFreedom.us).

[16] The advertisement included the AFDI logo.

[17] On October 1, 2013, Pattison shared AFDI's request with ETS for five "seventy posters" (large advertising panels on the rear exterior of ETS buses) to be displayed on Edmonton buses for a duration of four weeks. The advertisement was approved by ETS.

[18] On October 2, 2013, Pattison advised AFDI through an email that the advertisement was accepted based on the artwork submitted. Following the email from Pattison approving the advertisement, AFDI submitted a revised advertisement with different artwork.

[19] On October 3, 2013 Pattison sent an email to ETS requesting a review and approval of the revised advertisement.

[20] On October 4, 2013, Pattison emailed AFDI stating that the new artwork had been approved for posting with the caveat that if there were a large number of public complaints, the

transit authority may order the material removed. The advertisement was scheduled to appear on ETS buses commencing on October 21, 2013 and would run for four weeks.

[21] The advertisement was paid for by the AFDI. It displayed the photos of seven young Muslim women who had been honour killed and the following wording:

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](http://Fightforfreedom.us)

Paid for by the AmericanFreedomDefenseInitiative

[22] Both the AFDI logo and the SIOA logo appeared at the sides of the advertisement.

[23] AFDI explains that the advertisement was motivated by recent Canadian cases, including one involving a father and his son who murdered his three daughters and wife as honour killings.

[24] Sometime during the period from October 26 to October 29, 2013, Charles Stolte (the Branch Manager of ETS) received a call from a City of Edmonton Councillor, advising him that he had received numerous complaints regarding AFDI's advertisement, and asking him to investigate the matter. Stolte contacted the ETS garage and instructed that the advertisement be removed immediately but requested that the posters not be thrown out as they may be placed back on the buses following an investigation into the complaints.

[25] During the week of October 28, 2013, Stolte investigated the complaints regarding AFDI's advertisement. He reviewed the advertisement and the complaints received through email, had a meeting with two staff members, and spoke with members of the community.

[26] Following this investigation, he concluded that the advertisement was not becoming of the community and was offensive. He directed that the advertisement not be permitted on ETS buses.

[27] On October 29, 2013, a senior account executive for Pattison sent an email to AFDI's Canadian advertising manager advising that a number of complaints had been received by Advertising Standards Canada, Edmonton Transit, and the City of Edmonton regarding AFDI's advertisement and that the City had ordered that the advertisement be removed.

[28] Pattison issued a full refund to AFDI for the money it had spent on the advertisement.

### **III Parties' Positions**

#### **A AFDI**

[29] AFDI submits that the removal of the advertisement limited its s. 2(b) rights, and was an act neither authorized or "prescribed by" law, nor demonstrably justified in a free and democratic society.

[30] AFDI argues that the City had no policy in place that qualifies as "law". Unwritten policy is not law and the City cannot rely on clauses in contractual documents between Pattison and the City, or those between Pattison and AFDI.

[31] Alternatively, if there was a policy it cannot be said to be "law". The City was not a party to the contracts between Pattison and the advertisers. The "policy" of these contracts is not

published or well known. It is neither transparent nor discernible by the public; it is not explicit and must be inferred. It is internal and informal; it can be amended and cancelled at will. At best, the contractual provisions are internal directives focused on indoor management and are not “law”.

[32] AFDI concludes that since there was no limit “prescribed by law”, the removal of the advertisement by the City was arbitrary and cannot be justified under s. 1.

[33] AFDI also submits that the limit on its freedom of expression fails the test laid out in *R v Oakes*, [1986] 1 SCR 103, [1986] SCJ No 7 (*Oakes*). The advertisement was removed because it was controversial. AFDI reasons that the removal was not rationally connected to the avoidance of controversy because the City had permitted other controversial ads to be placed on ETS buses.

[34] Further, this limit on advertising could not be considered to be a minimal impairment of AFDI’s freedom of expression. The action amounted to a total impairment of the AFDI’s freedom of expression as AFDI was entirely silenced without the benefit of further discussion.

[35] AFDI also notes that no apparent benefit flowed from the removal of the advertisement. The harm inflicted on the AFDI and on the general public by its removal is not outweighed by any identifiable benefit.

[36] In summary, AFDI submits that the removal of the advertisement was neither prescribed by law, nor was it a reasonable limit that can be demonstrably justified in a free and democratic society.

## **B City**

[37] The City concedes that ETS is subject to the *Charter* and that the advertising space on ETS buses is a type of public space which attracts the protection of s. 2(b) of the *Charter*. It also concedes that its refusal to post the AFDI advertisement based on its content was an infringement of AFDI’s s. 2(b) freedom of expression.

[38] The City argues that the contractual provisions cited above constitute a policy and meet the “prescribed by law” requirement. The courts are to take a flexible approach to this requirement, and the limit need not be prescribed by a “law” in the narrow sense. For example, it may be prescribed by regulation or by common law. It is sufficient if the “limit” simply results by necessary implication from either the terms or the operating requirements of the law.

[39] The City argues that it is irrelevant that it is not a party to Pattison’s contracts with AFDI and other customers. The City has overriding control over its property. Pattison acted as agent for the City in entering into the contract with AFDI, and signed as the City’s representative.

[40] The City acknowledges that the contract with Pattison is not published, but submits that it is accessible in the sense that the City provides a copy of it to anyone interested in advertising. In this case, where advertising is facilitated through a commercial provider, there is no reason for the policies to be available to the public at large. They are accessible if they are available to the people who wish to enter into a commercial agreement to advertise.

[41] The City submits that the policies are not administrative in nature. They are not meant for internal use. The policies are the rules that establish the rights of individuals to whom they apply. Each prospective customer who wishes to purchase advertising space on City buses is given a copy of the contract and must agree to its terms prior to using the service.

[42] The City takes the position that the relevant contractual clauses meet the “prescribed by law” requirement. They set out the rules applicable to prospective customers. They are general in scope and establish standards which apply equally to all who wish to take advantage of the advertising service. They are sufficiently precise.

[43] The City submits that its advertising policy has a pressing and substantial objective: to provide a safe and welcoming public transit system. Further, the limit meets the proportionality analysis. It is reasonable and rationally connected to the objective. It minimally impairs the right to freedom of expression. Any harm caused by infringing customers’, such as AFDI’s, s. 2(b) right is outweighed by the importance of prohibiting offensive and discriminatory advertisements on City public transport.

#### **IV Issue**

[44] As a result of the City’s concessions, the sole issue to be decided in this application is the following:

Was the City’s infringement of AFDI’s s. 2(b) freedom of expression effected pursuant to a “reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society” under s. 1 of the *Charter*?

#### **V Relevant Legislation and Standards**

##### **A *Charter***

[45] The *Charter* provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
2. Everyone has the following fundamental freedoms:
  - ...(b) freedom of ...expression, including freedom of the press and other media of communication...
27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

##### **B *Municipal Government Act***

[46] The *Municipal Government Act*, RSA 2000, c M-26 (*MGA*) provides:

1(1)(y) “public utility” means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

- (iii) public transportation operated by or on behalf of the municipality...

7 A council may pass bylaws for municipal purposes respecting the following matters:

- ...(d) transport and transportation systems...

## VI Analysis

[47] I preface this analysis with the observation that honour killings in any form, and on any justification, are criminal acts and are repugnant to the very foundations of Canadian society.

[48] Furthermore, it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression and the vital importance of this concept cannot be overemphasized: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, [1989] SCJ No 124 at para 3.

[49] The City has conceded that ETS is subject to the *Charter*. It has also conceded that in choosing to allow advertisements to be posted on its buses, the City created a forum for expression and as a result it brought them within s. 2(b) of the *Charter*. The City further concedes that its refusal to post the AFDI advertisement based on its content was an infringement of AFDI's s. 2(b) freedom of expression.

[50] The Supreme Court's decision in *Greater Vancouver Transportation Authority v Canadian Federation of Students - British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295 (*Translink*) supports these concessions.

[51] It remains to be determined whether the act which infringed AFDI's s. 2(b) right in this case was effected pursuant to a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

[52] The rights and freedoms guaranteed by the *Charter* are not absolute. The Supreme Court of Canada in *Oakes* at paras 66-71 set out the test to be applied when a protected right is curtailed. The City bears the onus to establish that the limit is justified. The standard of proof under s. 1 is the balance of probabilities, rigorously applied.

[53] Section 1 of the *Charter* requires that the limit be "prescribed by law". If it is, then the City must establish that the limit is demonstrably justified in a free and democratic society by:

1. identifying a pressing and substantial objective;
2. demonstrating proportionality by establishing that:
  - (a) a rational connection exists between the objective and the infringement;
  - (b) the means chosen minimally impairs the right in question;
3. showing that the benefits of the measure outweigh its deleterious effects.

### A Is the limit prescribed by law?

[54] The City relies on policies found and referenced in the contractual documents entered into between the City and Pattison, and between Pattison (acting as agent for the City) and advertising customers.

[55] Pattison is bound by the following provisions in its agreement with the City:

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, in the reasonable exercise of its discretion, determines is contrary to this Clause.

16.3 The contents of advertising material shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board.

[56] Anyone wishing to advertise receives a copy of the Production Agreement and the Pattison Transit Advertising / Transit Advertising Agreement General. Customers placing advertisements must sign the agreements. I am satisfied that, at the material times, the Production Agreement and Pattison Transit Advertising / Transit Advertising Agreement General were made available to persons who wished to advertise. There is no evidence to suggest otherwise.

[57] The Production Agreement provided:

...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.

[58] The Pattison Transit Advertising / Transit Advertising Agreement General Terms and Conditions provided:

...Pattison reserves the right to reject or remove any Advertising Material which does not meet the production specifications...or which does not, in Pattison's sole opinion, comply with the standards set by the Canadian Advertising Foundation or the applicable Transit Authority...

[59] Deschamps J. for the majority in *Translink* reviewed the Supreme Court's case law on this issue at paras 50-72. She explained that 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 and 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.

[60] Deschamps J. noted that there is flexibility in terms of the form and articulation of a limit on a *Charter* right. She observed that the limit need not be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by common law. It suffices if the limit simply results by necessary implication from either the terms or the operating requirements of the "law". She explained that this flexible approach recognizes that the parliamentary and legislative system relies heavily on framework legislation and delegations of broad discretionary powers. So long as the enabling legislation allows the entity to adopt binding rules and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law". Consequently, "law" includes limits contained in municipal by-laws, law society rules, or provisions of a collective agreement involving a government entity. These are all binding rules of general application, and are sufficiently accessible and precise to those to whom they apply.

[61] Deschamps J. noted that a distinction must be drawn between rules that are legislative in nature and rules that are essentially administrative. Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purposes of administrative efficiency. The key question is whether the rules are focused on "indoor management". In such a case, they are meant for internal use, and are often informal in nature.

They cannot in of themselves be viewed as “law”. Informal or strictly internal guidelines or interpretive aids might not constitute “laws”, particularly if they are not intended to establish individuals’ rights and obligations or to create entitlements.

[62] Deschamps J. further noted that only an intelligible standard is required, as opposed to absolute precision. In other words, the standard must not be so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools.

[63] Section 1(1)(y)(iii) of the *MIGA* identifies public transportation as a “public utility” provided by a municipality for public consumption, benefit, convenience or use. Section 7 of the *MGA* authorizes council to pass bylaws for municipal purposes respecting transport and transportation systems. As a municipal corporation, the City also enjoys the general power to contract in furtherance of its corporate objects, subject to statutory restrictions and prohibitions: IM Rogers, *The Law of Canadian Municipal Corporations*, 2d ed (Toronto: Carswell, 1971-) (Rogers) at 1036. AFDI has not pointed to any restrictions or prohibitions which would undermine the City’s capacity to enter into its agreement with Pattison in furtherance of its corporate objects.

[64] In my view, in determining whether the limit was “prescribed by law”, this Court must take a flexible approach which recognizes the reality that the municipal system relies heavily on contracts with independent service providers. The City is legally authorized to regulate its public transport. In engaging Pattison, it was logical that the City would incorporate reference to its advertising standards in its contract with Pattison, and that customers would in turn be apprised of and bound to those standards through their contracts with Pattison.

[65] Although the standards are somewhat differently described in the three agreements, I find the clear intent behind the agreement between the City and Pattison was that the City contractually bound Pattison to abide by the rules of Advertising Standards Canada, which are encompassed in the *Canadian Code of Advertising Standards*. The City also reserved an ultimate discretion to prohibit advertising which the City reasonably found to be of an immoral or irreputable character.

[66] Deschamps J. in *Translink* at para 79 noted *obiter* that limits on advertising are contextual. She stated that the *Canadian Code of Advertising Standards*, which appears to have been incorporated by reference in the *Translink* transit policies, could be used as a guide to establish reasonable limits, including limits on discriminatory content or on advertisements which incite or condone violence or other unlawful behaviour. Given that the transit authorities did not raise s. 1 in *Translink*, her comment was simply intended to provide guidance on what may be justified, but she added that the determination of what is justified will depend on the facts in the particular case.

[67] Advertising Standards Canada is a self-regulatory industry body. It publishes the *Canadian Code of Advertising Standards*, referred to in the agreements cited above. The *Code* is a well-publicized industry standard.

[68] A court may judicially notice facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R v Find*, [2001] 1 SCR 863, [2001] SCJ No 34 at para 48, *Newfoundland (Treasury Board) v NAPE*, [2004] 3 SCR 381, [2004] SCJ No 61 at para 56.

[69] The result in this case does not turn on the *Code*, as the City relied on its discretion as described in the contractual documents. However, the *Code* informs the s. 1 analysis. The Supreme Court has long emphasized the importance of context on a s. 1 analysis: *Thomson Newspapers Co (cob Globe and Mail) v Canada (Attorney General)*, [1998] 1 SCR 877, [1998] SCJ No 44 at para 87. In my view, the Court may take judicial notice of the *Code* in order to better understand the context of this case.

[70] The *Code* (<http://www.adstandards.com/en/Standards/theCode.aspx>), described by Advertising Standards Canada as the cornerstone of advertising self-regulation in Canada, currently sets out a number of different types of standards. Some concern accuracy and clarity, prohibiting deceptive and misleading advertising; others prohibit advertising based on superstitions and fears. Standard 14 addresses unacceptable depictions and portrayals, specifically prohibiting any form of personal discrimination, including discrimination based upon race, national origin, religion, sex or age; advertising which appears in a realistic manner to exploit, condone or incite violence or bullying; advertising which demeans, denigrates or disparages one or more identifiable persons, group of persons, or attempts to bring it or them into public contempt or ridicule; and advertising that undermines human dignity.

[71] Based on the information before the Court, it appears that 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.

[72] Pattison in turn communicated to prospective advertising clients that it would abide by the standards referred to in the contractual documents. These contractual provisions were intended to establish individuals' rights and obligations. They are applicable to all who want to take advantage of the advertising service. 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.

[73] 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.

[74] It is clear that despite sub-contracting to Pattison, the City retained a discretion to ensure that advertisements on City buses conformed to the expected standards. The discretion retained by the City is constrained by the standards referred to in the contractual documents. This retained discretion is in keeping with the City's ultimate responsibility for public transportation under the *MGA*; it is in keeping with the reality that the City cannot surrender or renounce its power through contract: *Rogers* at 1051. Nor can it avoid *Charter* obligations through sub-contracting to Pattison.

[75] The AFDI argues that the standards are not sufficiently clear.

[76] Although the standards could be more clearly and consistently described in the contractual documents, I find that it is sufficiently clear that the standards of the relevant self-regulatory industry body, Advertising Standards Canada, would be applied and that the City retained a discretion to refuse an advertisement which it reasonably found was offensive to

community standards, in particular through a negative reflection on the character, integrity or standing of any organization or individual. There is nothing secretive or non-intuitive about this information.

[77] I note that the policy in *Translink*, which was found to be sufficiently clear to be “prescribed by law” provided in part:

7 No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy.

[78] In my view, this part of the *Translink* policy is very similar to the formulation of the City’s retained discretion in the relevant contractual documents.

[79] It is perhaps also worthwhile mentioning the constitutional standard prescribed by law in s. 27 of the *Charter* which provides that the *Charter*, including the s. 2(b) right to freedom of expression, shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. While s. 27 may engender discussion as to its meaning and proper application in a given case, to the extent that it might limit freedom of expression, it is sufficiently clear to constitute a limit “prescribed by law”.

[80] Further, while the AFDI emphasized that the transit authority in *Translink* had actually adopted a formal policy, I see nothing in *Translink* which would suggest that rules or policies cannot be incorporated by reference. In fact, Deschamps J. expressly spoke to the reference to the *Code* in the policy before the Supreme Court.

[81] Similar to the finding at para 73 of *Translink*, the standards in the case before this Court are easily accessible to members of the general public who wish to advertise, and sufficiently precise as to the types of advertisements that will not be accepted. I conclude that they are “limits prescribed by law” within the meaning of s. 1 of the *Charter*.

[82] I conclude that the City’s curtailment of AFDI’s advertising was a “limit prescribed by law” within the meaning of s. 1 of the *Charter*.

**B Has the City identified a pressing and substantial objective?**

[83] The City submits that its advertising policies serve the same pressing and substantive objective as that of the Vancouver Transit Authorities in *Translink*: providing a safe and welcoming public transit system.

[84] The wording of the contractual agreements supports this contention in referring to the moral standards of the community. The incorporation by reference of the *Code* provides further support in prohibiting advertising which condones discrimination, violence, denigration of persons or groups or which undermines human dignity.

[85] In *Translink* at para 76, the objective of providing a safe, welcoming public transit system was found to be pressing and substantial. There is no basis upon which to distinguish this case on this particular point.

[86] I find that the City has established that its objective is to provide a safe, welcoming public transit system. As well, the City has met the burden of showing that this is a sufficiently important objective to warrant placing a limit on AFDI’s freedom of expression.

**C Has the City demonstrated proportionality?**

**1 Has the City established that a rational connection exists between the objective and the infringement?**

[87] The next step is to determine whether the measures taken by the City were rationally connected to the objective of providing a safe, welcoming public transit system. The proportionality test requires that the measures used to impose limits on *Charter* rights be fair and not arbitrary, carefully designed to achieve the objective in question, and rationally connected to that objective.

[88] There can be no doubt that the restriction of advertising which is offensive to the moral standards of the community, or which negatively reflects on the character, integrity or standing of any organization or individual, is rationally connected to the objective of providing a safe, welcoming public transit system.

**2 Did the means chosen minimally impair the right in question?**

[89] The means chosen must also impair freedom of expression as little as possible.

[90] Again, I note in this regard that s. 27 of the *Charter* mandates that the *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians. It follows that, s. 2(b) must be interpreted in a manner consistent with the preservation and enhancement of multiculturalism.

[91] In my view, a prohibition on advertisements which are offensive to the moral standards of the community, or which negatively reflect on the character, integrity or standing of any organization or individual minimally impairs the s. 2(b) freedom of expression.

[92] AFDI argues that the content of its advertisement was not offensive or discriminatory. Rather, it promotes the rights of victimized Muslim women who have no voice. This argument relates to a consideration of the reasonableness of the City's removal of the advertisement in this particular case. Nevertheless, I find it to be relevant to the primary issue of the constitutionality of the limit, as it is an example of the application of the City's policy.

[93] AFDI suggests that the content is restricted to the words on the advertisement. It argues that the words should be taken at their face value and it is inappropriate to consider other content such as the AFDI (SIOA) website referenced in the advertisement. It notes that pro-Islam, pro-Christian, atheist and other religious advertisements have been placed on ETS buses in the past.

[94] The City submits that the AFDI advertisement cannot be properly analyzed without also considering the content of this included website. The City submits that while AFDI's message may appear to be aimed at helping young women, when the context is properly understood it is clear that the ultimate purpose is to bring the Muslim population of Edmonton, including the 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.

[95] 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.

[96] I reiterate that there can be absolutely no argument with the proposition that honour killings in any form, and on any justification, are criminal acts and are repugnant to the very foundations of Canadian society.

[97] However, the City in applying its policy is entitled to consider an advertisement as a whole, in this case, the term “Muslim” in reference to “honour killings”, the “Islamization of America” logo as well as the background and history of both AFDI and SIOA. In doing so, the City concluded that the advertisement is properly understood as an attempt by AFDI to mask its discriminatory anti-Muslim and/or anti-Islamic agenda in the form of an advertisement which purports to offer help to young women in danger.

[98] The websites contain statements directed against members of the Muslim faith which at best can be described as discriminatory. The AFDI website statements include:

- a suggestion of an immediate halt of immigration by Muslims to nations that do not currently have a Muslim majority population (which includes Canada); and
- the profiling of Muslims.
- the surveillance and inspection of Mosques.

[99] The City, in applying its policy, would be entitled to consider this content, and the fact that the advertisement uses seven cases of extreme domestic violence to lure readers to websites containing discriminatory material. It concluded that AFDI was clearly attempting to do indirectly what it was not permitted to do directly: make offensive and discriminatory statements against Muslims.

[100] 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.

[101] Deschamps J. in *Translink* expressly recognised at para 76 that if an advertisement is offensive in that, for example, its content is discriminatory or it advocates violence, the objective of providing a safe and welcoming transit system will be undermined.

[102] Returning to the proportionality analysis, the objective of the City was to provide a safe, welcoming public transit system. The City’s advertisement policy as set out in the relevant agreements permits the removal of advertisements which may be offensive to the moral standard of the community, or which negatively reflect on the character, integrity of any organization or individual.

[103] While the advertisement purportedly offered help to victimized Muslim girls, the City appears to have concluded that the true aim of the advertisement was to advance an offensive and discriminatory agenda.

[104] The City's policy to remove or disallow offensive advertisements is rationally connected to the objective of providing a safe, welcoming public transit system.

[105] According to s. 27 of the *Charter*, s. 2(b) must be interpreted so as to preserve and enhance multiculturalism. The City's policy is obviously designed with that objective in mind.

[106] AFDI notes that the City has permitted other controversial ads to be placed on ETS buses in the past. Far from buttressing AFDI's argument, this observation supports the conclusion that the City's policy does not unreasonably or arbitrarily stifle freedom of expression.

[107] I conclude that the City has established that its policy minimally limits s. 2(b) freedom of expression.

### **3. Do the benefits of the measure outweigh its deleterious effects?**

[108] Lastly, the benefits of the limiting measure must outweigh the deleterious effects. The more serious the effects of a measure, the more important the objective must be.

[109] Freedom of expression is of vital importance.

[110] AFDI argues that both the AFDI and its audience lose out as a result of any policy which would authorize the removal of its advertisement, as the City has thereby removed an opportunity for Muslim women to escape victimization.

[111] All right-minded Canadians are concerned about domestic violence in any form. Our legislators, law enforcement members and courts are keenly aware of the prevalence and insidious nature of violence within some family units. Domestic violence knows no boundary, whether it be race, age, socio-economic status or religion. Canadian laws clearly reflect our society's intolerance of such violence and provide various protections to complainants. It goes without saying that initiatives to support victims of family violence to come forward are extremely important, and essential to addressing this serious societal problem.

[112] However, AFDI purports to offer a help line to victimized Edmonton Muslim women which would link them to a New York based organization advocating some extreme anti-Muslim positions as outlined above. In my view, it is speculative that this would actually be helpful to Muslim women in Edmonton. On the other hand, I have no doubt that many Edmontonians and Canadians in general, whether Muslim or non-Muslim, would find the positions advanced by the AFDI, including its SIOA initiative, to be offensive, discriminatory and demeaning.

[113] I conclude that, to the extent that the City's policy infringed AFDI's s. 2(b) freedom of speech, the benefit of doing so far outweighed the deleterious effects.

[114] Expressed in more general terms, the benefits of providing a safe and welcoming transit system outweigh the deleterious effects of the City's policy limiting offensive or discriminatory advertising on its public transport.

### **D Summary**

[115] In summary, I find that the limit imposed by the City was prescribed by law in furtherance of a pressing and substantial objective. It was proportionate in that it was rationally connected to the City's objective and the means chosen minimally impaired the s. 2(b) right. The harm caused is outweighed by the importance of promoting a safe and welcoming public transit system by prohibiting offensive and discriminatory advertisements on the City's public transport.

**VII Conclusion**

[116] For all of the above reasons, I conclude that the City's policy constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

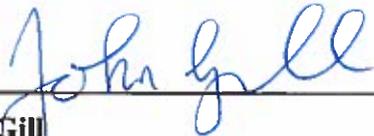
[117] The application is dismissed.

**VIII Costs**

[118] As requested, the City is awarded costs.

Heard on the 23<sup>rd</sup> day of September, 2016.

**Dated** at the City of Edmonton, Alberta this 4<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
**J.J. Gill**  
**J.C.Q.B.A.**

**Appearances:**

J. Cameron

Justice Centre for Constitutional Freedoms.

for the Applicant, American Freedom Defence Initiative

Brad G. Savoury

for the City of Edmonton, Respondent