JAN.
2023

ARPA CANADA'S LEGAL ARGUMENTS

IN

ARPA V. HAMILTON

THE CASE TO FIGHT CENSORSHIP OF PRO-LIFE ADS

ARPA CANADA

Court File No.: 23-180-JR

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, and JOHN BOEKEE

Applicants

- and -

CITY OF HAMILTON

Respondent

APPLICATION UNDER rules 14.05(1), 38 and 68 of the *Rules of Civil Procedure* and the *Judicial Review Procedure Act*, RSO 1990, c.J.1, s 2

FACTUM OF THE APPLICANTS

January 24, 2023

THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

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PART 1: OVERVIEW

1. The City of Hamilton's decision ("**the Decision**") to reject the Applicants' pro-life advertisement simply because it referred to a child *in utero* with the pronoun "hers" is unreasonable. The City claims the pronoun is "misleading" because it "implies personhood" and the *Criminal Code of Canada* does not recognize an unborn child as a "human being". (The Ad is included as Appendix 1 to this factum.)

2. The City's Decision (1) must be based on a reasonable application of its policy. (2) Its written reasons for its Decision must be internally coherent and rational. And (3) its Decision must give due weight to the constitutional guarantee of freedom of expression. The City's Decision and reasons satisfy none of these requirements.

The Ad does not violate the City's advertising policy as alleged by the City

3. The Ad is "political advertising" within the meaning of the *Canadian Code of Advertising Standards* ("**CCAS**"), which is part of the City's *Policy for Commercial Advertising and Sponsorship* ("**Policy**"), because it relates to "a political policy or issue publicly recognized to exist in Canada or elsewhere". Thus, according to the CCAS, the Ad should not have been subject to review for "inaccuracy." The CCAS protects consumers from being deceived, not citizens from being persuaded.

4. Even assuming the City properly subjected the Ad to review under the CCAS, the Ad is not misleading. It accurately presents the moral and political views of the Applicants. Moreover, the use of personal pronouns to refer to a child before he or she is born is common, easily understood, and not misleading to any reasonable person.

5. The City arbitrarily chose the definition of "human being" in the *Criminal Code*'s homicide provisions as a *general* authority for the meaning of "human being" and for the "accurate" use (i.e. non-use) of personal pronouns in relation to unborn children. But the Ad neither misstates nor misrepresents Canadian law. The Ad makes

no representations about Canadian law, criminal or otherwise. Furthermore, people are not seeking legal advice from a baby picture and pronoun caption on a bus ad.

6. Even assuming that the *Criminal Code* were somehow relevant, the City's reasons would still be incoherent. According to the City's reasoning, the very *Criminal Code* provision it relies on would be "misleading" because it uses the term "child" – which also "implies personhood" – in relation to prenatal children. Of course, the homicide provisions' definition of "human being" does not dictate "accuracy" or regulate moral, philosophical, scientific, or political debate regarding who or what counts as a human being or a person.

7. The City's affiant explains further that the Ad is misleading for implying that unborn children have "human rights". This is grossly misguided. The terms "rights" and "human rights" are not exclusively or even primarily *legal* terms, but moral and political ones. By the City's logic, any rights advocacy is "misleading" unless the rights being advocated are already entrenched in positive law.

8. As a statutory decision maker, the City must make decisions that are intelligible, reasonable, and justified on the basis of its Policy. Since the Ad does not violate the CCAS as the City claimed, the City had no basis for rejecting the Ad. Its Decision to reject the Ad was therefore unreasonable. This conclusion can be reached even without a *Doré* analysis of the Decision's impact on the Applicants' *Charter* s. 2(b) rights.

The Decision is also incompatible with the *Charter*

9. The Decision also unreasonably restricts freedom of expression. The Ad fulfils all three of the core purposes of this fundamental freedom. The Ad presents a moral and political position – a moral truth claim – regarding a public issue before Parliament and raises awareness of the issue among fellow citizens. It is motivated by the Applicants' religious and moral convictions, not commercial or economic motives.

10. That unborn children are persons possessing rights is the core pro-life belief. It is a legitimate belief to hold and share in a free and democratic society. It would be far less of a threat to democracy for the City to forbid all political messaging than to censor one side of an important public debate, as it has done here.[1]

11. The City has no legitimate interest in preventing people from encountering a moral, philosophical, or political position it does not share. More specifically, it has no legitimate and pressing reason to censor the view that unborn children are humans or persons. Preventing people from being "misled" to agree with the Applicants that unborn children possess moral status and inherent rights is not a legitimate (let alone a pressing) objective in a free and democratic society, it is an odious one.

The Court should order the City to run the Ad

12. Even though the City considered the Applicants' *Charter* s. 2(b) rights – with help from legal counsel – the City nevertheless concluded, in several sets of written reasons issued over the course of several months, that what it considered the Ad's "misleading" nature was ample reason to censor it. Since the City's single purported justification has no merit, there is no reason to return this matter to the City for reconsideration. The Court should order the City to allow the Applicants to run the Ad.

PART 2: FACTS

The Parties

13. The Respondent, the City of Hamilton, is a municipal corporation, incorporated pursuant to the *Municipal Act*, 2001, S.O. 2001, c. 25, and was, at all material times, ultimately responsible for access to advertising space on its municipal transit system.

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[1] See, *Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component*, 2009 SCC 31 at para 81 [***Greater Vancouver Transit***] (Cities forbidding all political messaging on transit systems is unconstitutional) (**ABOA Tab 13**).

14. The Applicants are John Boekee and ARPA Canada. ARPA Canada is a not-for-profit corporation with a mission to educate and equip Reformed Christians in Canada for political engagement and to bring a Christian perspective on political and public policy issues to civil governments.[2]

15. ARPA Canada coordinates and supports 15 affiliated local chapters. These grassroots, volunteer-run associations are comprised of members of local churches who work together to engage on political issues. The Applicant John Boekee has been a volunteer with a local chapter, ARPA Hamilton, since 2021.[3]

ARPA Canada's pro-life beliefs and advocacy

16. ARPA Canada recognizes that every unborn child is a unique human being. ARPA Canada believes human rights belong inherently to all human beings, which includes unborn children. ARPA Canada believes that governments (including the Canadian government) ought to respect and protect human rights. ARPA Canada advocates for changes in law to protect unborn children's rights, including their right to life and sexual equality rights.[4]

17. ARPA Canada considers sex-selective abortion to be a sexual equality and women's rights issue, as it results in fewer women in the world. ARPA Canada has long been aware of studies indicating that sex-selective abortion occurs in Canada.[5]

ARPA Canada's "Defend Girls" campaign and Bill C-233

18. ARPA Canada was active in 2020-2021 in advocating for Bill C-233, the *Sex Selective Abortion Act*, which was introduced in Parliament in February of 2020, debated in April 2021, and voted down at second reading in June of 2021. The bill

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[2] Affidavit of Anna Nienhuis, sworn November 8, 2021, at para 3 [**Nienhuis Affidavit**], Application Record of the Applicant, at 80 [**APAR 80**].
[3] Affidavit of John Boekee, sworn November 8, 2021, at para 3 [**Boekee Affidavit**], APAR 20.
[4] Boekee Affidavit at para 4, APAR at 20.
[5] Nienhuis Affidavit at paras 8-9 and 12, APAR at 82 and 84.

proposed prohibiting a medical practitioner from performing an abortion if the practitioner knows that the abortion is sought due solely to the pre-born child's sex.[6]

19. ARPA Canada advocated for Bill C-233 through its "Defend Girls" campaign, a campaign that provided flyers and lawn signs for volunteers to use and postcards to send to MPs. The campaign included a bus advertisement intended to raise awareness in local communities of the issue and to engage more Canadians in the campaign.[7]

The Advertisement that the City rejected

20. In February of 2021, John Boekee and ARPA Hamilton spoke with ARPA Canada about placing a bus advertisement in Hamilton in conjunction with Bill C-233. ARPA Canada shared the ad design with ARPA Hamilton in February, 2021.[8] On March 9, 2021, John Boekee, on behalf of ARPA Hamilton, sought to place an advertisement on the City's transit system through Streetseen Media, a corporation that facilitates the sale of advertisements on the City's transit system.[9]

21. The ad that John Boekee tried to place was based on ARPA Canada's design – a wide banner for the side of a bus. On the left side of the banner were the words:

We're for women's rights
Defendgirls.com

22. To the right of this, the Ad had four photographs, which were captioned, respectively: ***Hers. Hers. Hers. And Hers.*** The ad had no other text.

23. The four photographs were of: (a) a smiling woman in her twenties; (b) a smiling girl around 11 years old; (c) a smiling girl around 6 years old; and (d) an ultrasound scan of a child *in utero*, easily recognizable as such.

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[6] Exhibit "J" to the Nienhuis Affidavit, APAR at 141.
[7] Nienhuis Affidavit at paras 15-16, APAR 83.
[8] Boekee Affidavit at para 5, APAR at 21.
[9] Boekee Affidavit at para 10, APAR at 22.

24. The Ad also had the logo of ARPA Canada's "We Need a Law" campaign, which is a simple illustrated depiction of a child *in utero*, with no caption.[10]

25. The Applicants' goal with the Ad was to advocate for their belief that the rights of women need to be defended at every age, to advocate for unborn girls, and to present sex-selective abortion as a women's rights issue, which they believe it is.[11]

26. The Ad referred people to defendgirls.com, a webpage created by ARPA Canada, which contained information about the issue of sex-selective abortion, and about Bill C-233 and how to support it. The webpage also had links to various resources, including an essay on the issue of sex-selective abortion from the *Canadian Medical Association Journal* and articles on the subject from CBC News and CTV News.[12]

27. The same Ad at issue in this Application ran on city buses in London, Ontario in March of 2021, when John Boekee tried to run the Ad in Hamilton.[13]

The City rejects the Ad, months later, after consultations with legal counsel

28. The City's draft Advertising and Sponsorship Policy, which the City's affiant says the City relied on, states that when an advertisement is sent by "the Company" (i.e. Streetseen) to the City for review, the City's "Review Panel shall decide whether the proposed advertisement complies with this policy within 15 business days."[14]

29. On May 27, 2021, 79 days after he had asked to place the Ad, Mr. Boekee was contacted via email by Don Pearcey of Streetseen Media, who shared with him an email he had received directly from a City employee, which said:

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[10] Exhibit "A" to the Boekee Affidavit, APAR at 28.
[11] Exhibit "I" to the Boekee Affidavit, APAR at 74. See also, Boekee Affidavit at para 8, APAR at 21, and Nienhuis Affidavit at para 7, APAR at 81.
[12] Exhibits "C," "D," and "H" to the Nienhuis Affidavit, APAR at 92, 95, 129.
[13] Nienhuis Affidavit at para 16, APAR at 83.
[14] Affidavit of Jennie Recine, sworn 1 February 25, 2022, at para 13, and Exhibit "2" to the same [Recine Affidavit], Application Record of the Respondent, at 7, 22 [**APRR 7, 22**]

> Thank you for your patience. Your Advertisement has been reviewed by staff and external counsel, and in order for it to proceed, in keeping with the Canadian Code of Advertising Standards, Clause 1 (Accuracy and Clarity), and the Criminal Code of Canada, the phrase "And Hers." Would need to be revised so as to not reflect personhood in relation to the image on the far right. The recommendation is to revise it to read "All Rights." Or other similar wording.
>
> Thank you,
> Ali Sabourin […][15]

30. But then, on May 28, 2021, Streetseen emailed John Boekee again to say "hang tight" because the City was reviewing the Ad again and things "MAY change" [*sic*]. [16]

31. Bill C-233 was defeated in Parliament at second reading on June 2, 2021.

32. On June 3, 2021, Streetseen Media shared with John Boekee another email it had received from the City, which said the City had checked *again* with staff and counsel, but which then reiterated the same decision and reasons rejecting the Ad. In light of this, Streetseen Media suggested to John Boekee (in its email of June 3, 2021) that he contact the City directly with questions or concerns.[17]

John Boekee writes to the City to explain the Ad and clarify where matters stand

33. On July 23, 2021, John Boekee reached out on behalf of ARPA Hamilton to the City by email, seeking clarity on the City's reasons and asking whether the decision to reject their ad (as is) was final. Mr. Boekee wrote:

> […] I have discussed this with other members of ARPA. We do not understand the issue regarding "accuracy" and the Ad Standards Code, or the Criminal Code. Could you explain more specifically what the legal problem is?
>
> I also do not see how replacing "and hers" with "all rights" in the ad makes sense, as it would make the ad confusing and lose the point we are trying to express.
>
> The ad is intended to respectfully communicate our position on a moral, political and public policy issue that is important to us. We believe every human, female and male equally, has intrinsic moral worth and therefore have rights, both after and before they're born – even if our law doesn't adequately protect them. It's quite simple.

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[15] Exhibit "F" to the Boekee Affidavit, APAR at 64.
[16] Exhibit "G" to the Boekee Affidavit, APAR at 67.
[17] Exhibit "H" to the Boekee Affidavit, APAR at 70.

Is the decision to not accept our ad (as is) final?

Thanks, John Boekee. [18]

34. On September 8, 2021, Ali Sabourin replied to Mr. Boekee, saying the Ad had been reviewed *again* by staff and counsel, but was rejected again for the same reasons – namely for the pronoun "hers" in light of Clause 1 (Accuracy and Clarity) of the CCAS and the *Criminal Code*.[19] This email also mentioned an Ad Standards Council decision which was – at that time – available on the Council's website, and which found a different pro-life ad to be misleading in light of Clause 1 and the *Criminal Code*.

35. The September 8 email was the last Mr. Boekee heard from the City regarding the Ad. The City did not directly answer Mr. Boekee's question of whether the Decision to reject the Ad was final, but Mr. Boekee took the City's reply as effectively answering that question by reissuing the same Decision and reasons yet again.[20]

PART 3: ISSUES

36. The **first issue** in this Application is whether the City's Decision was reasonable. This raises several sub-issues. If the City fails on any one of the issues below, then its Decision to reject the Ad was unreasonable.

a. Did the City reasonably conclude that the Ad violates its Policy?

   i. Should the City have found that the Ad was "political advertising" within the meaning of the CCAS?

   ii. Do the City's written reasons demonstrate internal coherence and a rational chain of analysis, or do they present significant rational flaws?

      1. Is the *Criminal Code of Canada* a relevant authority on the "accurate" use of pronouns for an unborn child in this context?

[18] Exhibit "I" to the Boekee Affidavit, APAR at 73.
[19] Exhibit "J" to the Boekee Affidavit, APAR at 76.
[20] Boekee Affidavit at para 15, APAR at 25.

2. Is using a personal pronoun in reference to an unborn child "misleading" or "inaccurate" for "implying personhood" and thus a violation of Clause 1 of the CCAS?

b. Did the City fail to give due weight to the Applicants' fundamental freedom of expression under section 2(b) of the *Charter* in deciding to reject the Ad?

37. The **second issue** is: If the City's decision to reject the Ad was unreasonable, what is the appropriate and just remedy?

PART 4: ARGUMENT

Issue 1(a) – The City's conclusion that the Ad violated Clause 1 of the CCAS was unreasonable

38. At this stage the question is whether the Ad violates the CCAS at all, provided the CCAS is reasonably interpreted and applied. If the Ad does not violate the CCAS for the reason the City claimed (inaccuracy), then the Decision to reject the Ad was without basis and unreasonable. This issue is logically prior to any *Doré* analysis.

39. Judicial review is concerned with both the outcome of a decision and the reasoning process that led to it. Not only must the outcome be reasonable, the line of reasoning that led to it must also be coherent and rational.[21] The City fails on both.

i. *The Ad constitutes "political advertising" within the meaning of the CCAS*

40. The Supreme Court of Canada struck down a provision that excluded any ad that "*advocates or opposes any ideology or political philosophy, point of view, policy or action*" and another provision that excluded ads "*likely … to cause offence or … create controversy*."[22] The Court concluded that there is nothing problematic *per se*

[21] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 (ABOA Tab 7).
[22] See generally, *Greater Vancouver Transit*, *supra* note 1 (ABOA Tab 13).

with an ad being political, ideological, or controversial and that prohibiting such ads is not rationally linked to preserving a safe and welcoming transit system.[23]

41. The CCAS, which is part of the City's Policy, says it is "not intended [to] govern or restrict the free expression of public opinion or ideas through 'political advertising' or 'election advertising', which are excluded from the Application of this *Code*."[24]

42. The City must interpret and apply the CCAS reasonably, intelligibly, and transparently. As a public actor, the City, like this Court, should interpret the CCAS in a manner that avoids unnecessary conflict with the *Charter*. This means any ambiguity regarding the scope of "political advertising" should be resolved in a manner that safeguards freedom of expression.[25]

43. The CCAS defines "political advertising" as advertising "appearing at any time regarding a political figure, a political party, a government or political policy or issue publicly recognized to exist in Canada or elsewhere, or an electoral candidate."[26]

44. The Ad relates to a political issue publicly recognized to exist in Canada and elsewhere – namely, sex-selective abortion and sexual equality rights. The Ad signals the advertiser's moral and political position ("We're for women's rights…"). The Ad makes an implicit moral and political claim that unborn girls have an inherent right not to be discriminated against because of their sex. The Ad also claims that women's rights need to be recognized and protected before and after birth.[27] In short, the Ad presents sex-selective abortion as a women's rights issue.

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[23] *Greater Vancouver Transit*, *supra note* 1 at para 76 (ABOA Tab 13).
[24] *The Canadian Code of Advertising Standards*, 2019 [*CCAS*], under the heading "Exclusions"
[25] *McKay et al v Canada*, [1965] SCR 798 at 804 (ABOA Tab 18) and *R v Ahmad*, 2011 SCC 6 at paras 28 [*Ahmad*] (ABOA Tab 19).
[26] *CCAS*, under the heading "Definitions" (emphasis added).
[27] Exhibit "I" to the Boekee Affidavit, and Nienhuis Affidavit at para 6, APAR at 73, 81.

45. As Justice Gates of the Alberta Court of Queen's Bench remarked, "In my view, the pro-life/pro-choice issue falls squarely within the *Code's* definition of political advertising as 'an issue publicly recognized to exist in Canada'."[28] And as the B.C. Court of Appeal observed in *R v Spratt*, "Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate on abortion."[29] The Ontario Superior Court has found abortion to be a "matter of important public interest" in light of "the place the abortion debate takes in the Canadian political and social environment."[30]

46. The City plainly understood that the Ad was related to abortion, as the Affidavit of Ms. Recine makes clear.[31] The City's staff and legal counsel surely know that abortion is a political issue "recognized to exist in Canada or elsewhere." Not only did the City's staff and legal counsel understand that the Ad was related to abortion, it is also plain from the Ad that it relates more specifically to sex-selective abortion.

47. The Supreme Court of Canada has recognized sex-selective abortion as a serious moral issue, a potential harm to society, and a legitimate concern for Parliament:

> [99]. […] And the sex of a child may be determined at early stages of development, creating attendant moral concerns.
>
> [100] These developments raise the prospect of novel harms to society, as the Baird Report amply documents. The "commodification of women and children" (p. 718); sex-selective abortions (p. 896) […] are but some of the moral concerns raised in the Report. While the ethical acceptability of these techniques is, of course, debatable […], it cannot be seriously questioned that Parliament is able to prohibit or regulate them.[32]

48. The Ad also points to the defendgirls.ca website. The website name itself is an advocacy statement. It was clear from the website that the Ad related not only to the

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[28] *Lethbridge and District Pro-Life Association v Lethbridge (City)*, 2020 ABQB 654, at para 188 [*Lethbridge Pro-Life*] (ABOA Tab 15).
[29] 2008 BCCA 340 at para 26 (ABOA Tab 20).
[30] *ARPA Canada and Patricia Maloney v R.*, 2017 ONSC 3285, at para 6 (ABOA Tab 1).
[31] Recine Affidavit, at para 38-41, APRR at 14-15.
[32] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 99-100 (ABOA Tab 22).

pressing real-world issue of sex-selective abortion, but also more specifically to a legislative bill on this subject at the time: Bill C-233, *The Sex-Selective Abortion Act*.

49. If that were not enough, John Boekee directly alerted the City to the Ad's political nature weeks before the City sent its third and final reiteration of its Decision and reasons for rejecting the Ad. On July 31, 2021, Mr. Boekee wrote to the City:

> The ad is intended to respectfully communicate our position on a moral, political and public policy issue that is important to us. We believe every human, female and male equally, has intrinsic moral worth and therefore have rights, both after and before they're born – even if our law doesn't adequately protect them. It's quite simple.[33]

50. So, whether the City's staff or legal counsel who reviewed the Ad visited the website defendgirls.ca or not, the City had ample reason to know that the Ad was political. The City should have known that the moral and political position advanced in the Ad was not properly subject to review for "inaccuracy" under the CCAS.

ii. The City's reasons for finding the Ad "misleading" contain serious rational flaws

51. Even assuming that CCAS's exclusion of "political advertising" did not render Clause 1 inapplicable here, the exclusion would still inform how Clause 1 should be interpreted and applied.[34] Viewed in its proper context, Clause 1 is designed to prevent consumers from being deceived, particularly with respect to *products*, *services*, and *events* (terms the CCAS uses frequently). But the CCAS is plainly not designed to prevent citizens from being persuaded to adopt a moral or political position. As with the question of whether the Ad constituted "political advertising" under the CCAS, any ambiguity in the Clause 1 criteria of "inaccurate" or "misleading" should also be resolved in a manner that preserves freedom of expression.[35]

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[33] Exhibit "I" to the Boekee Affidavit APRA at 46.
[34] *Guelph and Area Right to Life v City of Guelph*, 2022 ONSC 43 at para 59(d) (ABOA Tab 14). [***Guelph***]. See also, *Lethbridge Pro-Life*, supra note 28 at para 181-182 (ABOA Tab 15).
[35] *Ahmad*, *supra* note 25 at paras 28 (ABOA Tab 19).

52. As the Alberta Court of Appeal commented on a city's reliance on Clause 1 to reject a strongly-worded anti-abortion ad: "Care must be taken in applying these criteria, because mere differences of opinion, or differences on the moral or social implications of various facts, do not amount to 'inaccuracy' […]."[36] The Court commented further:

> […] people's ideas about 'erroneous impressions', 'false inferences,' and 'demonstrable falsity' may differ widely. In context, is the appellant's depiction of abortion as 'murdering of children' demonstrably false, or merely a graphically expressed opinion?[37]

53. For a pro-life person or group to imply that a female child has moral status, humanity, personhood, or rights before she is born by referring to her with a personal pronoun or by advocating for her rights *does not amount to inaccuracy* under the CCAS. Pro-life advocates cannot help but imply this when advocating for their views, given that the humanity and moral status of an unborn child is the foundational pro-life belief. Of course, this Court need not find as a fact that unborn children are persons (or not) or that they have rights (or not). That is not a debate the City or this Court can or should resolve. Rather, Clause 1 of the CCAS, as part of the City's Policy, sets a legal standard for ads to meet. The Court need only find that the Ad does not violate that standard.

(1) The City's reliance on the definition of "human being" in the *Criminal Code's* homicide provisions is arbitrary and unreasonable

54. Section 223(1) of the *Criminal Code* says that a "child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother […]." The underlined phrase signals the limited relevance of the definition of *human being*. Moreover, the term "human being" only appears in the homicide-related provisions of the *Criminal Code*.[38]

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[36] *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2018 ABCA 154 at para 73 (ABOA Tab 3). [***Grande Prairie***] (emphasis added)
[37] *Ibid*, at para 46 (ABOA Tab 3).
[38] RSC 1985, c C-46. (The first reference to "human being" appears in s. 222. Section 233 (infanticide) drops the term "human being" and uses "newly-born child") [***Criminal Code***].

55. The *Criminal Code* and the definitions contained therein demarcate criminal conduct for prohibition, prosecution, and punishment. They do not enforce orthodox positions in moral, philosophical, political, or scientific debate. More specifically, the purpose of section 223 is not to provide an authoritative scientific, moral, or philosophical definition of "human being", or even a *general* legal definition.

56. The definition of "human being" in the *Criminal Code*, which dates back to the original 1892 statute, is a technical legal one with a specific purpose, namely to define homicide offences and to distinguish them from other offences – including those in which unborn children were victims.[39] Today, section 238 ("Killing unborn child in the act of birth") remains a criminal offence in which an unborn child is the victim.[40]

57. The Law Reform Commission of Canada, in a detailed examination of the *Criminal Code* provisions that relate to unborn children, including its homicide provisions, noted that they were outdated in light of medical and scientific advances,[41] and that the definition of "human being" was at odds with "ordinary intuitions to the product of human conception."[42] Similarly, with respect to the "born alive rule" in common law, Justice Major wrote, "The rule is a legal anachronism based on rudimentary medical knowledge."[43] The born alive rule was and is "a common law evidentiary presumption […] that has long since been overtaken by modern science."[44] Modern technologies "can clearly show us that a foetus is alive and has been or will be

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[39] See *The Criminal Code, 1892*, 55-56 Victoria, c. 29, at sections 219 (when child becomes human being), 271 (Killing unborn child), and 272 (procuring abortion). See also, "Crimes against the Foetus" (1989) Law Reform Commission of Canada Working Paper No 58 online: http://www.lareau-law.ca/LRCWP58.pdf [**Law Reform Commission**] (ABOA Tab 26).
[40] *Criminal Code*, *supra* note 38, s 238.
[41] Law Reform Commission, *supra* note 39 at 25 (ABOA Tab 26).
[42] *Ibid* at 57 (ABOA Tab 26).
[43] *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925 at para 102 [*Winnipeg Child*] (ABOA Tab 24).
[44] *Ibid*, at para 92 (ABOA Tab 24).

injured by conduct of another."[45] Justice Major was writing for the dissent, but the majority did not disagree with this part of his assessment. The majority took the position that any changes to the born-alive rule, a legal rule, ought to be made by legislatures.

(2) The City's reliance on the pronoun "hers" to ground its allegation of inaccuracy is incoherent and self-contradictory

58. According to the City, merely using the pronoun "**hers**" in reference to an unborn child is impermissible because an unborn child is not a "human being" within the meaning of the *Criminal Code*'s homicide provisions. This borders on the absurd. According to the City's reasoning, the *Criminal Code* itself is misleading, as it uses "**child**" in reference to unborn children in the very section the City relies upon. The *Oxford English Dictionary* defines "child" as "1. a young human being below the age of full physical development. 2. a son or daughter of any age."[46] *Merriam Webster* defines child as "1. A young person […] 2. A son or daughter of human parents."[47]

59. In fact, according to the City's reasoning, its own reasons for its Decision are "misleading". Its reasons use the term "**fetus**"[48] – which may similarly imply humanity or personhood. The *Oxford English Dictionary*, for example, uses the phrase "unborn human" in defining *fetus*, while *Merriam-Webster* uses "developing human".[49]

60. According to the City's reasoning, everyday conversations Canadians have about the "baby", "girl", "boy", "son" or "daughter" whose birth they await – each term implying humanity or personhood – are inaccurate and misleading. And an ultrasound

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[45] *Winnipeg Child*, *supra* note 43 at para 109 (ABOA Tab 24).
[46] *Paperback Oxford English Dictionary* 7th ed (Oxford: Oxford University Press, 2012), at 118 [***Oxford Dictionary***] (ABOA Tab 29).
[47] See, *Merriam-Webster.com Dictionary*, (last modified 15 January 2023) online: https://www.merriam-webster.com/dictionary/child [***Merriam-Webster Online***] (ABOA Tab 28).
[48] See Exhibit "J" to the Boekee Affidavit, APAR at 76.
[49] See, *Merriam-Webster Online*, "fetus" online: https://www.merriam-webster.com/dictionary/fetus (ABOA Tab 28).

tech or nurse who says to a pregnant woman, "It's a girl" or "Your baby is doing great" or "She's moving a lot" or "We're watching his heart" is being misleading.

61. Similar problems arise with respect to the City's objection that the Ad "implies personhood". The pronoun "her" does not necessarily imply personhood, but even if it does, "**person**", like "rights", is not exclusively or even primarily a legal term or legal concept. The *Oxford English Dictionary* defines person as: "n. 1. an individual human being." *Black's Law Dictionary* defines person as: "1. A human being."[50] If anything, that an unborn child or fetus is a human being is demonstrably true. When humans reproduce, they produce new humans. This is basic, common knowledge.[51] The plain or common meaning of human being applies to an unborn child or fetus,[52] as does the scientific meaning of human being.[53] Considering the foregoing definitions of *child* and *fetus*, a fetus can reasonably be considered a human being or a person.

62. René Cassin, one of the authors of the *Universal Declaration of Human Rights*, famously noted the problem that "persons existed who had no legal personality."[54] He used "person" here in a moral or ontological sense to say that laws have not always treated persons as *legal* persons with legal rights or even basic legal status. Of course, personhood has been the subject of philosophical debate for millennia. As Jane English, a pro-choice scholar, has noted, because of deep disagreement on a presuppositional

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[50] 9th ed by Bryan A. Garner (Saint Paul: Thompson Reuters, 2009) [*Black's*] (ABOA Tab 25).
[51] See paragraph 57 of this Factum and citations therein.
[52] Though the scientific use of "embryo" and "fetus" can refer to the unborn young of other creatures besides humans, *Merriam Webster Online* notes for both embryo and fetus that they refer in common usage "especially" and "specifically" to "the developing human" (ABOA Tab 28).
[53] See e.g., Dianne Irving, "When do human beings begin? 'Scientific' myths and scientific facts" (1999) 19: 3/4 *Intl J of Sociology & Social Policy* 22-47, where she writes, "[U]pon fertilization, parts of human beings have actually been transformed into something very different from what they were before; they have been changed into a single, whole human being. […] the sperm and the oocyte cease to exist as such, and a new human being is produced." (emphasis added) (ABOA, Tab 34). See also, Law Reform Commission, *supra* note 39, at 25, where it notes that the *Criminal Code* definition of "human being" does not line up with scientific reality (ABOA Tab 26).
[54] Quoted in Thomas Finegan, "Conceptual Foundations of the Universal Declaration of Human Rights: Human Rights, Human Dignity and Personhood," (2012) 37 *Australian J of Leg Philosophy* 182 at 208 [*Conceptual Foundations*] (ABOA, Tab 33).

level, "a conclusive answer to the question whether a fetus is a person is unattainable."[55] Even if the City claims to have a conclusive answer, it is unreasonable for it to enforce its view as "accurate" under Clause 1 of the CCAS.

63. There are many arguments for why one might accord personhood to a fetus, or not. This is not a debate the City can or may "resolve". The state may define "human being" or "person" in a statute *for specific legal purposes* (e.g., to define culpable homicide), but the state can no more dictate the moral or philosophical meaning of "person" than it can dictate the scientific meaning of "human". Some people (for scientific, philosophical, moral, and religious reasons) hold the view that unborn children are "humans" or "persons" and that they have rights, and this view "does not amount to 'inaccuracy'" under Clause 1 of the CCAS.[56]

(3) The City adopts an unreasonably narrow and selective definition of "rights" as a basis for finding the Ad "misleading"

64. Perhaps the City will concede that the pronoun "hers" does not mislead *per se* – though that is what its written reasons say – but argue instead that the use of the personal pronoun is only a problem here because it appears in the Ad along with the term "rights". Though the City's written reasons never mention the term "rights", Ms. Recine explains in her affidavit that she was concerned that the Ad could be taken to imply that the fetus has the same "status" or "human rights" as a "human being."[57]

65. The City's written reasons here fare no better, even with the help that Ms. Recine's affidavit attempts to lend. Yes, the Ad uses the term "rights," but this is not an

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[55] See Jane English, "Abortion and the Concept of the Person" (1975) 5:2 *Can J of Philosophy* 233 at 234 (ABOA, Tab 32). Dr. English notes that "foes of abortion propose sufficient conditions for personhood which fetuses satisfy, while friends of abortion counter with necessary conditions that fetuses lack. But these both presuppose that the concept of a person can be captured in a straitjacket of necessary and/or sufficient conditions."

[56] *Grande Prairie*, *supra* note 36 at para 73 (ABOA 3).

[57] Recine Affidavit, at para 40, APRR at 14.

exclusively or even primarily legal term. According to the *Oxford English Dictionary*, **right** means, "n. 1. that which is morally right. 2 an entitlement to have or do something."[58] According to *Merriam Webster*, a right is "something to which someone has a just claim" or "something that one may properly claim as due".[59] What is justly, morally, or properly due someone is not necessarily what is *legally* due. Accordingly, even *Black's Law Dictionary* defines "right" as follows: "That which is proper under law, morality, or ethics 2. Something that is due to a person by just claim, legal guarantee, or moral principle."[60]

66. The Respondent should have known that "right" is a broad term and can refer to a right in a normative sense, not only a legal sense. When it comes to the term "**human rights**", the Respondent's reasoning is similarly flawed.[61] *Merriam Webster* defines "human right" as a "basic right […] that many societies believe every person should have".[62] *Black's Law Dictionary* uses similar language: "human rights: The freedoms, immunities, and benefits that, according to modern values (esp. at an international level), all human beings should be able to claim as a matter of right in the society in which they live."[63] This is no precise, technical term.

67. Similarly, academic literature recognizes the distinction between the morality of human rights and the law of human rights.[64] In her introduction to *Human Rights as Politics and Idolatry*, Professor Amy Guttman writes:

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[58] *Oxford Dictionary*, *supra* note 46 at 624 (emphasis added) (ABOA Tab 29).
[59] See, *Merriam-Webster Online*, online: https://www.merriam-webster.com/dictionary/right for full list of definitions of this term (ABOA Tab 28).
[60] *Black's*, *supra* note 50 at 1436 (emphasis added) (ABOA, Tab 25).
[61] See the discussion of "human rights" in the Recine Affidavit, at para 38-40, APRR at 14-15.
[62] *Merriam-Webster Online*, online: https://www.merriam-webster.com/dictionary/human%20rights (ABOA Tab 28)
[63] *Black's Law Dictionary*, *supra* note 50 at 809 (emphasis added) (ABOA, Tab 25).
[64] See, for example, Michael J. Perry, "Human Rights as Morality, Human Rights as Law" (2008) 84 Bol Fac Direito U Coimbra 369 (ABOA, Tab 35). Perry notes, at footnote 17, that while he generally brackets the born/unborn distinction, he believes "one who affirms that every born human being has inherent dignity has good reason to affirm as well that every unborn human being has inherent dignity."

> What is the purpose of human rights? What should their content be? […] Is there a single moral foundation for human rights that spans many cultures, or are there many culturally specific moral foundations, or none? In what sense, if any, are human rights universal? These are among the hard and critical questions raised by the human rights revolution […]. Human rights can serve multiple purposes, and those purposes can be expressed in many ways, not only across different societies and cultures, but even within them.[65]

68. In his *Philosophy of Law: A Very Short Introduction*, Professor Raymond Wacks explains the connection between the revival of natural law theory in the mid-twentieth century and the rise of the idea of human rights as a 'higher law', not in the constitutional sense, but as "a benchmark against which to measure positive law."[66] Professor Wacks goes on to observe that "[t]he concept of human rights has acquired a prominent place in contemporary political and legal debate today" and "issues of human rights are ubiquitous."[67] The concept rests on the idea that we possess "inalienable rights – merely by virtue of our belonging to the human race." Moreover, "Whether or not such rights are legally recognized is irrelevant, as is the fact that they may or may not emanate from a 'higher' natural law."[68]

69. This is how human rights declarations and conventions often speak of human rights as well – as existing independently of and, in a sense, "above" positive law. The preamble to the *Universal Declaration of Human Rights* ("UDHR"), for example, speaks of the "inherent dignity" and "inalienable rights of all members of the human family". It speaks of people's "faith in fundamental human rights, in the dignity of worth of the human person and in the equal rights of men and women" and says "human rights should be protected by the rule of law".[69] "Rights talk" is the common language

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[65] Amy Guttman, "Introduction" in Michael Ignatieff ed, *Human Rights as Politics and Idolatry*, (Princeton: Princeton University Press, 2003) at viii (ABOA, Tab 27).
[66] Raymond Wacks, *Philosophy of Law: A Very Short Introduction*, (Oxford: Oxford University Press, 2014) at 14 (ABOA Tab 31).
[67] *Ibid*, at 69 (ABOA Tab 31).
[68] *Ibid* at 70 (ABOA Tab 31).
[69] *Conceptual Foundations*, *supra* note 54 at 185 and footnote 7 (ABOA, Tab 33).

of moral and political debate and nobody (certainly not the City) "owns" these terms. By the City's reasoning, nobody could advocate for any rights without "misleading" people unless the rights in question were already entrenched in positive law.

70. Furthermore, the notion that sex-selective abortion is a human rights and women's rights issue is neither novel nor "misleading". Five UN agencies jointly released a report on sex-selection in 2011, which notes, under the heading "Human rights considerations", that "many pervasive social, political, and economic injustices against women and girls" remain in the world; the report then repeats the UN's call to action from 1994, "which enjoined governments to '…eliminate all forms of [legal or illegal] discrimination against the girl child […], which result in harmful and unethical practices regarding female infanticide and prenatal sex selection.'"[70]

(4) The Ad does not present unborn children as possessing *legal* rights that they do not have under Canadian law

71. The City did not actually claim that the Ad misleads or misinforms people about the current state of Canadian law. And rightly so. The general public do not seek legal advice from a picture and pronoun on a bus ad from an activist group. If the City were concerned that someone might interpret the Ad as claiming that a fetus has the same *legal* rights as women (as odd an interpretation as that would be), then the City would have also taken issue with the image of a 6-year old, who would not yet have many legal rights that women do. But nobody seeing the Ad would be led to believe a 6-year-old is entitled to vote, or that abortion is illegal.

72. So, the City cited the *Criminal Code* definition of "human being" for homicide, but did not say that the Ad implies that abortion is culpable homicide or any other crime.

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[70] *Preventing gender-biased sex selection: An interagency statement, OCHRH, UNFPA, UNICEF, UN Women, and WHO* (World Health Organization, 2011), at 3 (ABOA Tab 30).

The City did not say the Ad implies that abortion (sex-selective or otherwise) is illegal at all. The City said the Ad "implies personhood" – it did not say "*legal* personhood." Ms. Recine's affidavit tries to further explain the Decision, but even then, she only says the Ad could imply that a fetus has the same "status" and "human rights" as (born) "human beings". She does *not* say "legal status" or "legal rights." The City's reliance on the *Criminal Code* attempts to disguise a moral or political difference as a legal one. But there is no disagreement here over what the law is – only what it should be.

73. The Ad obviously presents a moral and political appeal. If preborn girls already enjoyed the legal protections the Applicants promote, why run the ad (or the entire "Defend Girls" campaign)? If the Ad implies anything about Canadian law, it is that it falls short of protecting the rights of women and girls in some way. If it implies anything about unborn girls' *legal* rights, it is that they are sorely lacking in our law.

74. In sum, the City's Decision is unreasonable given the factual constraints (especially the content and context of the Ad) and the legal constraints (the Policy, and the CCAS in particular) that bore upon it.[71] The Ad was political advertising, which the City's Policy and the CCAS are explicitly designed not to suppress.[72] And the Ad is not "inaccurate", but truthfully presents the political and moral position of the Applicants.

Issue 1(b) – The Decision is also an unjustified violation of the Applicants' fundamental freedom of expression under the *Charter*

75. A democratic society is premised on free expression, not only for views that are warmly received by government officials, but for those they disagree with or even detest.[73] As the Supreme Court has said:

> No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the

[71] *Vavilov*, *supra* note 21, at para 101 (ABOA Tab 7).
[72] Definition of "political advertising" in CCAS. See also note 73, *infra*.
[73] *Bracken v Niagara Parks Police*, 2018 ONCA 261, at para 15 (ABOA Tab 2), and *Figueroa v. Canada (Attorney General)*, 2003 SCC 37, at para 28 (ABOA Tab 12).

> top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices […].[74]

76. The Applicants accept that the City conducted a *Charter* (*Doré*) analysis.[75] For this to be done fairly, however, it cannot start with the unreasonable premise that the Ad violates Clause 1 of the CCAS. The Applicants do not expect a detailed s. 2(b) analysis in City emails, but they do expect that, if their message is censored, it will only be for pressing, substantial, and intelligible reasons. The City had no such reasons.

77. Even assuming that the Ad was "misleading" under the CCAS, rejecting the Ad would still be an unreasonable outcome on a *Doré* balancing. The Decision restricted expression on an important public issue.[76] To have any countervailing "weight" on the scale, the City must show that the Ad would mislead people in a manner that legitimately concerns the state. That the Ad might persuade someone to adopt a moral or political position with which a state actor disagrees with is not a legitimate concern.[77]

78. Political participation and debate are at the core of what section 2(b) protects. Reaching large audiences in public spaces is important for meaningful political engagement and advocacy.[78] It would be an immense disadvantage for pro-life Canadians to be shut out from municipal advertising spaces. That the Applicants can find other media through which to communicate their message is irrelevant. The City's Decision violates their *Charter* rights and sends a message to pro-life Canadians that their views are inadmissible in a public forum and beyond constitutional protection.

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[74] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 68 [***Secession Reference***] (ABOA Tab 23).
[75] See, Recine Affidavit at paras 14, 15, 27(c) and (e), 41, and 42 (Where Ms. Recine explains in detail how freedom of expression fits into the City's Policy and review of the Ad) APRR at 4, 8, 12. See also, Exhibits "F," "H," and "J" to the Boekee Affidavit APRA at 40, 44, 48 (Where the City's emails repeatedly indicate assistance from counsel).
[76] See especially, paras 46 and 48 of this factum and the citations therein.
[77] See, *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69 at paras 272-273 (ABOA Tab 16).
[78] *Greater Vancouver Transit*, supra note 1, at paras 41-42 (ABOA Tab 13).

79. It is characteristic of a totalitarian society to regulate the meaning and use of language to entrench uniform political views in society.[79] To say that someone engaged in public advocacy may not use a term in a way that does not align with how a particular government or statute uses the term would stifle debate about what the law should be. Such debate is at the core of what it means to be a free and democratic society.

80. That the City suggested the Ad might be changed to make it acceptable to the City does not mitigate the impact of its Decision on the Applicants' *Charter* rights. The Applicants cannot be expected to change their Ad to satisfy the City's contrived rule that they must not imply that unborn children are human beings or that they have rights. That rule is, in effect, a straightforward ban on pro-life messaging, which is premised on the humanity and rights of the unborn.[80] The City's attempt to regulate how citizens use (or imply) such important and contested concepts is undemocratic and disturbing.

81. The Applicants are free to choose how to communicate their own beliefs. They need not accept state-suggested changes to their message. In any case, the City's suggestion that they change "And Hers" in their Ad to "All Rights" is nonsensical. The Ad is not about "All Rights" – whatever that means – but about the rights of unborn female human beings not to be discriminated against based on their sex. It is also ironic that the City, in proffering this suggested change, appears to have had no "accuracy" problem with using the term "rights" in connection with an image of a baby *in utero* – provided no pronoun is used for that child and the Ad is rendered confusing to viewers.

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[79] See L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139, at p 174-175, and, quoting Cory J, at 181-182 (ABOA Tab 9). See also *CHP v. City of Hamilton*, 2020 ONSC 3690, at para 39 (ABOA Tab 8).

[80] *Secession Reference*, *supra* note 74 at para 68 (ABOA Tab 23).

Issue 2 – The appropriate remedy in this context is to order the City to accept the Ad. In the alternative, the Court should remit the matter to be decided in accordance with the Court's reasons on Issues 1(a) and (b)

82. Mandamus is an available remedy under s. 2 of the *Judicial Review Procedure Act*.[81] It is also a potential remedy under s. 24(1) of the *Charter*.[82] Issuing an order of mandamus does not require the Court to replace the City's reasons with its own. It only requires finding that the sole purported justification the City used to reject the Ad – after reviewing the Ad for compliance with its entire Policy – was unreasonable. Mandamus is also appropriate where the discretion exercised by the decision-maker contradicted the purpose of the applicable regulatory regime,[83] as happened here. This is not even a case where the City's Policy and the *Charter* pull in opposite directions. There is no tension between them. The City's affiant explained how the City's policy was recently revised to ensure it does not hinder political or religious expression.[84] The CCAS itself says it is "not intended […] [to] govern or restrict the free expression of public opinion or ideas through 'political advertising'". The City acted contrary to these purposes by censoring a moral and political view in a public space.

83. The question of remedy is guided in part by respect for the City's statutory authority, but also by concerns regarding the proper administration of justice, fairness to the parties, and expedient and cost-effective decision making.[85] A reviewing court may decline to remit a matter for reconsideration where it is evident that a particular outcome is inevitable and remitting would serve no useful purpose.[86] In this case, since the City's sole purported justification for rejecting the Ad was unreasonable, there is no

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[81] *Judicial Review Procedure Act*, RSO 1990, c J.1.
[82] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, paras 146-150 (ABOA Tab 6) and *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 163 and 165 (ABOA Tab 17).
[83] *Doshi v Canada (Attorney General)*, 2018 FC 710 at paras 30-35 [***Doshi***] (ABOA Tab 11).
[84] Recine Affidavit, at paras 11-15, APRR at 7.
[85] *Vavilov*, at para 140 (ABOA Tab 7).
[86] *Vavilov*, at para 142 (ABOA Tab 7).

need to remit the matter for reconsideration. Remitting the case would serve no useful purpose.[87] The only way the outcome could be something other than accepting the Ad is if the City invents entirely new reasons for rejecting it – reasons that it inexplicably did not discover during lengthy, repeated reviews of the Ad.

84. A crucial factor in deciding whether to remit is "whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question."[88] The City had multiple opportunities. The City subjected the Ad to inordinately lengthy and repeated review for compliance its Policy – with input from multiple staff, advice from legal counsel, and an opinion from Ad Standards.[89] The City should not be given yet another opportunity to invent reasons to reject an Ad it evidently dislikes. Remitting the matter would prolong the "merry-go-round" of decisions and potential judicial reviews, cause further unfairness to the Applicants, and waste public resources.[90]

85. If the City had other reasons besides "inaccuracy" to reject the Ad, it would have provided them.[91] The Ad was not reviewed under Clause 1 only, but under the entire Policy.[92] In *Delta Air Lines*, by contrast, the matter had been dismissed for lack of standing (after the tribunal applied the wrong test for standing) and had not yet been considered on the merits, so remitting the matter was clearly appropriate.[93]

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[87] *Vavilov*, at para 142 (ABOA Tab 7).
[88] *Ibid*, at para 142 (ABOA Tab 7).
[89] See paras 29-34 of this Factum.
[90] *Vavilov*, at para 142 (ABOA Tab 7).
[91] See, *Doshi*, *supra* note 83 at para 94 (ABOA Tab 11).
[92] Recine Affadavit, at paras 25 and 27, particularly 27(b) "[…] if it conflicted with any of Hamilton's policies" and (d) "compliance or otherwise with the Canadian Code of Advertising Standards" APRR at 7-8.
[93] *Delta Air Lines Inc. v Lukács*, 2018 SCC 2, at paras 30-31 (ABOA Tab 10). Cited in *Vavilov* at para 140-141 (ABOA Tab 7).

86. There are several precedents involving municipalities' decisions to reject pro-life or anti-abortion ads.[94] In none of them did the applicants take the position advanced herein, under Issue 1(a), that the Decision was unreasonable strictly on administrative law grounds. Although the other cases were framed differently – not attacking the finding of "inaccuracy", but content to rely on the *Charter* as protecting both accurate and inaccurate speech[95] – it is noteworthy that no court has actually affirmed Ad Standards' line of reasoning regarding the "inaccuracy" of other pro-life ads in light of the *Criminal Code*. Even the Ad Standards Council, despite a history of relying on this trope, was recently divided over the relevance of the *Criminal Code* in this context.[96] In one case, a city simply consented to an order that it accept a pro-life advertisement.[97]

87. When a court reviews a decision-maker's interpretation of a key legal provision, *Vavilov* says that "it may sometimes become clear […] that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision," and that where a different interpretation than the decision maker's was the reasonable one, "it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker."[98] This applies with respect to the City's unreasonable interpretation of "political advertising" and "accuracy" in the CCAS. It also applies with respect to the City's use of s. 223 of the *Criminal Code*, which "fails entirely to consider a pertinent aspect of its text, context or purpose."[99]

88. Requiring the City to post the Ad would also vindicate the Applicants' *Charter* rights and protect the reputation of the administration of justice, whereas sending the

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[94] See *CCBR v South Coast British Columbia Transportation Authority*, 2018 BCCA 344 ["**South Coast**"] (ABOA Tab 5); *Lethbridge Pro-Life*, *supra* note 28 (ABOA Tab 15); *Grande Prairie*, *supra* note 36 (ABOA Tab 3); and *Guelph*, *supra* note 34 (ABOA Tab 14).
[95] See e.g. *Guelph*, *supra* note 34, at paras 40 and 45 (ABOA Tab 14).
[96] See its reasons in *Guelph*, supra note 34, at para 27 (ABOA Tab 14).
[97] *CCBR v City of Peterborough*, 2016 ONSC 1972 (ABOA Tab 4).
[98] *Vavilov*, *supra* note 21, at para 124 (ABOA Tab 7).
[99] *Ibid*, at para 122 (ABOA Tab 7).

matter back for a *fourth* decision by the City may undermine both.[100] The City's lawyers are surely as cognizant of section 2(b) of the *Charter* as aeronautical engineers are of gravity. They would also have been aware of the other pro-life advertisement cases referred to herein. In the other cases – unlike here – the applicants alleged that the decision-maker had failed to consider their *Charter* s. 2(b) rights.

89. In *Guelph*, this Court found as a fact that the city *wholly* based its decision to reject the ads on "rulings" by the Ad Standards Council, a private body subject neither to the *Charter* nor judicial review.[101] Thus, this Court concluded: "As in the many cases referred to [where] a municipality did not engage in the requisite *Doré/Loyola* analysis, in our view the appropriate remedy is to remit the matter back to the City to be decided in accordance with these reasons." In *South Coast*, similarly, the Court of Appeal's decision to remit was informed by the fact that "[the] decision, in light of the record, provides no basis upon which this Court can understand why he made the decision […]."[102] That is not so here. The City clearly communicated its reasons for its decision.

90. The Court need not remit the matter so the City can do a *Doré* balancing exercise. Not only is the City's decision unreasonable even aside from the *Charter* s. 2(b) violation, but the City already considered the Applicants' s. 2(b) rights – with legal advice. The real problem here is that the City's purported justification for limiting freedom of expression is unreasonable. The City should not be rewarded with another "kick at the can" because of its own (possibly deliberate and strategic) failure to include a summary of its s. 2(b) analysis in one of its emails. It would make no difference to the Applicants had the City prefaced an email to Mr. Boekee with a note explaining the importance of his section 2(b) rights. And it would make a mockery of those rights if

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[100] *Vavilov*, para 142 (ABOA Tab 7).
[101] *Guelph*, *supra* note 34, at paras 80, 84, 85 (ABOA Tab 14).
[102] *South Coast*, *supra* note 94, at para 51 (ABOA Tab 5).

the City were to reject the Ad again, but next time pay lip service to the Applicants' freedom of expression. To avoid this, the Court should order the City to accept the Ad.

91. In the alternative, the Court should remit the matter to be decided in accordance with its reasons for judgment in this matter, especially with respect to Issue 1(a) herein. Of course, Issue 1(b) – giving due weight to freedom of expression – is immensely important as well, but the City's lawyers were involved in the Decision and understood its import already. But it was the City's unreasonable interpretation and application of the CCAS that gave rise to the *Charter* violation and this litigation in the first place.

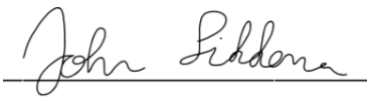
PART 5 – ORDER REQUESTED

92. The Applicants request that the Court issue an Order quashing the Decision and a mandamus Order requiring the City to accept the Ad.

93. The Applicants request, in the alternative, an Order remitting the matter to the City for reconsideration, with appropriate instructions, in light of the Court's reasons.

94. The Applicants also seek an Order for their costs in this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24TH day of January, 2023.



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Greater Vancouver Transportation Authority v Canadian Federation of Students – British Columbia Component, 2009 SCC 31.	13
Guelph and Area Right to Life v City of Guelph, 2022 ONSC 43.	14
Lethbridge and District Pro-Life Association v Lethbridge (City), 2020 ABQB 654.	15
Little Sisters Book and Art Emporium v Canada (Minster of Justice), 2000 SCC 69.	16
Loyola High School v Quebec (Attorney General), 2015 SCC 12.	17
McKay et al v Canada, [1965] SCR 798.	18
R v Ahmad, 2011 SCC 6.	19
R v Spratt, 2008 BCCA 340.	20
Reference re Alberta Statutes, [1938] SCR 100	21
Reference re Assisted Human Reproduction Act, 2010 SCC 61.	22
Reference re Secession of Quebec, [1998] 2 SCR 217.	23
Winnipeg Child and Family Services (Northwest Area) v G(DF), [1997] 3 SCR 925	24

SCHEDULE 2

***Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11**

Guarantee of Rights and Freedoms
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.

Fundamental Freedoms
2 Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

***Judicial Review Procedure Act*, RSO 1990 c J.1**

Applications for judicial review
2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:

1. Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.
2. Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power. R.S.O. 1990, c. J.1, s. 2 (1).

***Criminal Code*, RSC 1985, c C-46**

Homicide
222 (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

Kinds of homicide
(2) Homicide is culpable or not culpable.

Non culpable homicide
(3) Homicide that is not culpable is not an offence.

Culpable homicide
(4) Culpable homicide is murder or manslaughter or infanticide.

Idem
(5) A person commits culpable homicide when he causes the death of a human being,

(a) by means of an unlawful act;

(b) by criminal negligence;
(c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
(d) by wilfully frightening that human being, in the case of a child or sick person.

Exception
(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

When child becomes human being
223 (1) A child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother, whether or not
(a) it has breathed;
(b) it has an independent circulation; or
(c) the navel string is severed.

Killing child
(2) A person commits homicide when he causes injury to a child before or during its birth as a result of which the child dies after becoming a human being.

[…]

Infanticide
233 A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

[…]

Killing unborn child in act of birth
238 (1) Every one who causes the death, in the act of birth, of any child that has not become a human being, in such a manner that, if the child were a human being, he would be guilty of murder, is guilty of an indictable offence and liable to imprisonment for life.
Saving
(2) This section does not apply to a person who, by means that, in good faith, he considers necessary to preserve the life of the mother of a child, causes the death of that child.

The Canadian Code of Advertising Standards (online)

[…]

Definitions
[…]
"Political advertising" is defined as "advertising" appearing at any time regarding a political figure, a political party, a government or political policy or issue publicly recognized to exist in Canada or elsewhere, or an electoral candidate.

Application
The *Code* applies to "advertising" by (or for):

- advertisers promoting the use of goods and services;
- entities seeking to improve their public image or advance a point of view, whether or not the advertising is for a commercial purpose; and
- governments, government departments and crown corporations.

Exclusions
Political and Election Advertising
Canadians are entitled to expect that "political advertising" and "election advertising" will respect the standards articulated in the *Code*. However, it is not intended that the *Code* govern or restrict the free expression of public opinion or ideas through "political advertising" or "election advertising", which are excluded from the application of this *Code*.

[…]

Scope of the *Code*
The authority of the *Code* applies only to the content of advertisements and does not prohibit the promotion of legal products or services or their portrayal in circumstances of normal use. The context and content of the advertisement and the audience actually, or likely to be, or intended to be, reached by the advertisement, and the medium/media used to deliver the advertisement, are relevant factors in assessing its conformity with the *Code*. In the matter of consumer complaints, Council will be encouraged to refer, when in its judgment it would be helpful and appropriate to do so, to the principles expressed in the *Gender Portrayal Guidelines* respecting the representations of women and men in advertisements.

***Code* Provisions**
The *Code* is broadly supported by industry and is designed to help set and maintain standards of honesty, truth, accuracy, fairness and propriety in advertising.

The provisions of the Code should be adhered to both in letter and in spirit. Advertisers and their representatives must substantiate their advertised claims promptly when requested to do so by Council.

> **1. Accuracy and Clarity**
> In assessing the truthfulness and accuracy of a message, advertising claim or representation under Clause 1 of the *Code* the concern is not with the intent of the sender or precise legality of the presentation. Rather the focus is on the message, claim or representation as received or perceived, i.e. the general impression conveyed by the advertisement.

(a) Advertisements must not contain, or directly or by implication make, inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations.
(b) Advertisements must not omit relevant information if the omission results in an advertisement that is deceptive or misleading.
(c) All pertinent details of an advertisement must be clearly and understandably stated.
(d) Disclaimers and asterisked or footnoted information must not contradict more prominent aspects of the message and should be located and presented in such a manner as to be clearly legible and/or audible.
(e) All advertising claims and representations must be supported by competent and reliable evidence, which the advertiser will disclose to Ad Standards upon its request. If the support on which an advertised claim or representation depends is test or survey data, such data must be reasonably competent and reliable, reflecting accepted principles of research design and execution that characterize the current state of the art. At the same time, however, such research should be economically and technically feasible, with regard to the various costs of doing business.
(f) The advertiser must be clearly identified in the advertisement, excepting the advertiser of a "teaser advertisement" as that term is defined in the *Code*.

APPENDIX 1

Exhibit "4" to Racine Affidavit at APRR 31