Court of Queen's Bench of Alberta

Citation: Lethbridge and District Pro-Life Association v Lethbridge (City), 2020 ABQB 654

2020 ABQB 654 (CanLII)

Date: 20201029
Docket: 1906 00035
Registry: Lethbridge

Between:

Lethbridge and District Pro-Life Association

Applicant

- and -

The City of Lethbridge

Respondent

Reasons for Decision
of the
Honourable Mr. Justice M. David Gates

Introduction and Overview

[1] The Applicant, Lethbridge and District Pro-Life Association ("the Applicant") seeks to quash the November 7, 2018 decision of the Respondent, the City of Lethbridge ("the City") refusing to post five advertisements on the exterior of Lethbridge buses, bus shelters and benches. The Applicant seeks a declaration that the decision infringes section 2(b) of the *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 ("the *Charter*"), and is not saved by section 1 of the *Charter*.

[2] In its Originating Application for Judicial Review filed on January 14, 2019, the Applicant contends that the decision is unreasonable and asks the court to order the posting of the Applicant's advertisements or, in the alternative, asked that the matter be remitted back to the City for re-consideration. The Applicant alleges bias, improper purpose and irrelevant consideration on the part of the City.

[3] In support of its application, the Applicant filed the affidavit of Duane Konynenbelt, the President of the Applicant.

[4] This application was heard by me on October 10, 2019, at Lethbridge, Alberta. At the conclusion of oral argument, I reserved my decision. These are my reasons for decision.

Preliminary Issue – The Admissibility of Affidavit Evidence

[5] By way of preliminary issue, the Respondent takes issue with the affidavit of Konynenbelt filed in support of the application. Specifically, the Respondent challenges the introduction of evidence relating to events prior to April 2018, including prior correspondence between the Applicant, the City, and Pattison Outdoor Advertising ("Pattison"), the City's advertising agent, and the removal of one of the Applicant's advertisements from City transit property in April 2018. The Respondent says that the Applicant has not obtained leave of the court to file this affidavit evidence in accordance with Rule 3.22, *Alberta Rules of Court,* AR 124/10 (*"*the *Rules")*. The Respondent also maintains that the application for judicial review relates only to the City's decision of November 7, 2018, not any other decisions taken with respect to the Applicant's proposed advertising or the earlier removal of the Applicant's advertising. The Respondent contends that all of these other actions fell outside the six-month limitation period applicable to applications for judicial review: Rule 3.15(2).

[6] In its written brief, the Respondent takes the position that the Court should refuse to consider the contents of Konynenbelt's affidavit, relying on the decision of Slatter J, as he then was, in ***Alberta Liquor Store Assn v Alberta (Gaming and Liquor Commission)***, 2006 ABQB 904. While the Respondent's objection is largely procedural based on the Applicant's alleged failure to seek leave of the court prior to filing the affidavit, the Respondent also says that affidavit evidence is generally not admissible in an application for judicial review.

[7] During the course of oral argument, counsel for the Respondent conceded that his objection was largely procedural. Counsel for the Respondent indicated that he had no objection to the court's receipt of the affidavit as providing background information or context, but took issue with what it describes as opinion evidence relating to lobbyist activities. Specifically, the Respondent challenges the "lobbyist" characterization by Mr. Konynenbelt of individuals who contacted the City regarding the Applicant's earlier advertisements. As such, the Respondent says that this is opinion evidence that ought not to be considered in the resolution of this matter.

[8] The Applicant, on the other hand, urges that the term "lobbyist" is a colloquial term that, according to the Cambridge Dictionary (Cambridge Dictionary: https://dictionary, Cambridge.org/dictionary/English/lobbyist) means "someone who tries to persuade a politician or official group to do something" or "one who conducts activities aimed at influencing or swaying public officials and especially members of a legislative body on legislation: a person engaged in lobbying public officials (Merriam Webster online: https://www.meriam-webster.com/dictionary/lobbyist). As more fully described in the analysis that follows, I am of the view that nothing turns on the use of the word "lobbyist" in Konynenbelt's affidavit or in the

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Applicant's submissions. I do, however, take the Respondent's objection in this regard into account. In general, I agree that opinion evidence is not generally permitted in affidavits other than those prepared by expert witnesses.

[9] The authority for the Court to consider evidence on judicial review comes from *Rule* 3.22, which provides:

> When making a decision about an originating application for judicial review, the Court may consider the following evidence only:
>
> a) The certified copy of the record of proceedings of the person or body that is the subject of the application, if any;
> b) If questioning was permitted under rule 3.21, a transcript of that questioning;
> c) Anything permitted by any other rule or by an enactment;
> d) Any other evidence permitted by the court.

[10] Subsection (d) provides a general discretionary power to the court to consider evidence not specifically listed. The limits of this discretion are outlined in the case law, including ***Alberta Liquor Store Assn***, as well as the decisions of the Alberta Court of Appeal in ***Al-Ghamdi v Peace Country Health Region***, 2017 ABCA 155, at para 4; ***Tran v College of Physicians and Surgeons***, 2018 ABCA 95; and ***Gowrishankar v JK,*** 2019 ABCA 316.

[11] The use of affidavits on judicial review is generally not allowed, especially if it relates to the merits of the decision: ***Gowrishanka*** at para 60; ***Alberta Liquor Store Assn*** at para 42, but the Court can exercise its discretion to allow the evidence in "exceptional" circumstances: ***Tungland v Edmonton (City) Subdivision Authority***, 2017 ABQB 246 at para 10; ***Yuill v Alberta (Workers' Compensation Appeals Commission)***, 2016 ABQB 369 at para 60; ***White v Alberta (Workers' Compensation Board Appeals Commission)***, 2006 ABQB 359 at para 35.

[12] The purpose of the general rule is that a judicial review is meant to review the decision based on the record before the decision-maker, rather than attempting to consider the previous conclusion based on an expanded version of the record: ***Gowrishankar*** at para 60. Further, allowing new evidence threatens "to extend the review process indefinitely": ***Alberta College of Pharmacists v Sobeys West Inc***, 2017 ABCA 306 at para 69. The purpose is not to show that a better decision was possible than the one made by the tribunal: ***White*** at para 35. This general rule is not restricted to findings of fact, but also includes refusing new evidence going to questions of law, or concerning the tribunal's statutory authority: ***Alberta Liquor Store Assn*** at para 42, quoting S Blake, *Administrative Law in Canada* (4th ed), at p 198.

[13] I would note that in ***Alberta Liquor Store Assn,*** Slatter J held (at para 25) that "[W]henever it may be appropriate to file affidavits on judicial review applications one thing is clear: the applicants are not entitled to turn the judicial review application [into] a trial *de novo* on the merits of the issue before the tribunal… ."

[14] Despite the general rule, there are three exceptions where affidavit evidence may be considered. None of the exceptions apply to information relating to the merits of the decision. The three exceptions were outlined in ***Alberta College of Pharmacists*** at para 65:

> (i) evidence to establish a breach of natural justice not apparent on the face of the record;
> (ii) some background information mainly to establish standing; and

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(iii)where no transcript was made of a quasi-judicial proceeding.

[15] The decided cases provide additional detail as to the scope of these three exceptions. The first exception includes evidence showing that there was bias: ***White*** at para 35, or evidence demonstrating delay in providing reasons: ***Tran v College of Physicians and Surgeons of Alberta***, 2017 ABQB 337 at para 28, aff'd 2018 ABCA 95. What these examples illustrate is that the permitted new evidence did not relate to the specific issues decided by the board or tribunal. Rather, the new evidence gave rise to a valid ground for judicial review: ***Alberta Liquor Store Assn*** at para 44.

[16] The second exception relates to evidence led to establish standing. An example of this can be seen in ***Tungland*** at para 11, where affidavit evidence was allowed as purchasers of the property were not parties before the Subdivision Authority, but now were affected as subsequent purchasers of the property. It may also be appropriate to rely on affidavit evidence to establish standing if standing has been challenged: ***Alberta Liquor Store Assn*** at para 35.

[17] Finally, the third exception involves situations where no transcript was made of the proceedings giving rise to the decision under review. Essentially this refers to instances where a tribunal made no record, or an inadequate record, of the proceedings: ***Alberta Liquor Store Assn*** at para 41. The Court in ***White*** explained, at para 35, that this can mean providing the facts that are needed to establish the grounds for the application for judicial review, which is distinct from trying to supplement the factual record. The Court went on to explain that affidavit evidence can sometimes be used to show that a decision was patently unreasonable based on the evidence before the decision maker if it was not apparent on the existing record. Further, the Court in ***Yuill*** held that new affidavits can be used to show a complete absence of evidence on an essential point: at para 60. There is also a limited ability to call evidence on the meaning of technical terms: ***Alberta Liquor Store Assn*** at para 49. It may also be appropriate to allow new affidavit evidence where reasons were not given: ***Alberta's Free Roaming Horses Society v Alberta***, 2019 ABQB 714 at para 25.

[18] Some of the cases cited above considered part of an affidavit only on the basis of one of the specified exceptions, while striking out or giving no weight to other portions of the same affidavits: ***Tungland*** at para 13; ***Alberta Liquor Store Assn*** at para 51; ***Tran*** at paras 27-28.

[19] I am satisfied that the affidavit of Konynenbelt sets forth a detailed history of the proceedings and, to some significant extent, duplicates the materials subsequently placed before the court by the Respondent through the Record of Proceedings filed on August 1, 2019. As such, it assists in establishing the background facts which underlie the grounds for this judicial review. I would also allow the affidavit evidence because it may establish evidence of a breach of natural justice given the allegation of bias raised by the Applicant.

[20] In my view, the Respondent's objections regarding opinions offered by Konynenbelt in his affidavit are well-founded. To the extent that the affidavit contains personal opinions, or involves material that was not before the decision-maker, I would disregard these aspects of the affidavit. However, I agree with the Applicant that the affidavit does provide context or background to the issues now before the court in a situation where there was obviously no transcript made of the proceedings giving rise to the decision under review. As previously indicated, the Respondent concedes this point.

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[21] The content of the actual decision under review contains a number of references to past events and previous interactions between the parties relative to other instances when the Applicant sought the Respondent's approval to post similar advertisements. All of this material was obviously before the decision-maker and, as previously indicated, has been included to some extent by the Respondent in the Record of Proceedings.

[22] Subject to the limitations set out above, I would allow the Applicant to file this affidavit in these proceedings.

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Facts

[23] The Applicant is a registered charity incorporated in 1977 under the *Societies Act*, RSA 2000, c S-14. It carries on business in Lethbridge, Alberta. Its mission is "to proclaim the inherent value of human life from conception until natural death". The Applicant seeks to fulfill this mission by providing referrals to pregnancy support and post-abortion counselling, educational information and resources, training; activities and presentation; and media campaigns.

[24] The City is a corporation incorporated pursuant to the *Municipal Government Act*, RSA 2000, c M-26.

[25] On March 21, 2007, the City entered into a written shelter advertising agreement with Pattison relating to the sale of advertising space on Lethbridge buses and shelters. By the terms of the agreement, the City granted Pattison the exclusive right to sell advertising. The agreement was subsequently extended to February 28, 2022. Clause 6.0 of the contract addressed the issue of advertising content in the following terms:

> 6.01 Any advertisement to be placed in or on the buses or shelters of the City shall be of a moral and reputable character and the Contractor [Pattison] agrees that it will forthwith remove from any bus any advertisement which the City, in the reasonable exercise of its discretion, hereby desires removed.
>
> 6.03 The content of advertising shall comply with the Advertising Standards Council of the Canadian Advertising Advisory Board:
>
> > 6.03.1 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.
> >
> > 6.03.1(ii) All federal or provincial political advertising will indicate that the advertisement is paid for by a party or candidate so as to avoid giving the impression that the City is supporting a given party or candidate.
> >
> > 6.03.3 No Municipal political advertising is permitted.

[26] Between October 18, 2016, and June 2017, the Applicant communicated with Pattison in order to place advertisements on the exterior of the City's buses, bus shelters, and benches.

[27] The proposed advertisement contained a healthy foetus in utero with the caption, "Unborn Babies Feel Pain/Say NO to Abortion." Beneath the caption was a link to the website "DoctorsonFetalPain.com". At one point, the first word in the caption was changed from

"Unborn Babies Feel Pain/Say NO to Abortion" to "Preborn Babies Feel Pain/Say NO to Abortion". According to the affidavit of Konynenbelt, Pattison initially advised that the proposed advertisement could be posted if the Applicant's website was included in the proposed advertisement.

[28] On December 13, 2016, Pattison advised the Applicant that Lethbridge Transit was fine with the proposed advertisement if the "Feel Pain" and website address were removed. Pattison advised of the existence of a contract between itself and the City, a term of which included the requirement that advertising comply with Advertising Standards Canada's Canadian Code of Advertising Standards ("ASC"), ("the *Code")*. Pattison then referred to the City Solicitor's opinion that "due to omissions required under the *Code*, [the proposed advertisement] does not meet the requirements of the Advertising Standards Council of the Canadian Advertising Advisory Board; therefore is unacceptable to Lethbridge Transit at this time".

[29] From February to June 2017, the Applicant attempted to revise its advertisement to satisfy the City. On June 19, 2017, Pattison informed the Applicant that while the revised proposed advertisement no longer breached section 1(f) of the *Code*, it continued to violate sections 1(a), 8 and 11 of the *Code*. No explanation was provided as to how the proposed advertisement violated any of these clauses of the *Code*. In response, the Applicant inquired as to what modification of the proposed advertisement would satisfy Lethbridge Transit. The Applicant also asked to communicate directly with the decision-maker at Lethbridge Transit.

[30] Pattison responded on June 21, 2017, advising that clients were required to go through their agency regarding any type of transit advertising related request. Pattison also agreed to try and find out the reasons for the denial of the proposed advertisement. On June 23, 2017, Pattison wrote to the Applicant asking for confirmation that an actual doctor was making the claims regarding unborn children experiencing pain, and confirming that the listed website was Canadian. The Applicant responded on June 28, 2017, providing confirmation of the Canadian origin of the website and referring to links on the website to 11 international studies, including the names of the doctors involved in each study.

[31] Between June 2017 and August 2017, Pattison advised the Applicant that the City had concerns with the title of the proposed advertisement and the link to the website "DoctorsOnFetalPain.com". The Applicant thereafter revised the proposed advertisement to remove the website link.

[32] On August 31, 2017, Pattison contacted the Applicant to advise that the first line of the proposed advertisement was still in breach of sections 1(a), 8 and 11 of the *Code*. Through September and October, Pattison advised the Applicant that it was continuing to seek an explanation from the City as to the reasons for the refusal. On October 17, 2017, Pattison agreed to forward the link on the Applicant's website to the City Solicitor for her review. Pattison also advised that it was prepared to privately run the advertisement on its own billboards in Lethbridge. Konynenbelt requested the contact information for the City Solicitor so that he could contact her directly.

[33] On November 9, 2017, Randy Otto, President of Pattison, forwarded a letter to Konynenbelt from the City again rejecting the proposed advertisement on the basis of an alleged violation of sections 1(a), 1(f), 8 and 11 of the *Code*, but without any detailed explanation as to the nature of the alleged violation. Pattison then asked the Applicant if it wished to forward the proposed advertisement without the first copy line, but the Applicant declined on the basis that

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such a revised advertisement would not communicate any message and would just contain a picture of a preborn baby. The Acting City Solicitor's letter to Pattison made it clear that the City would not approve the advertisement until it was presented without the referenced tagline.

[34] On December 12, 2017, counsel retained by the Applicant wrote to the City seeking reasons for the continued rejection of the advertisement. On January 24, 2018, the City Solicitor advised the Applicant that the City accepted the proposed advertisement without any changes for posting. Pattison sent the Applicant a contract for the posting of the advertisement commencing February 20, 2018 and running until May 20, 2018. As per the agreement, the City posted the advertisement.

[35] On March 27, 2018, the Applicant received a letter from ASC indicating that a letter of complaint had been received relative to the posted advertisement. The letter of complaint alleged breaches of section 1 of the *Code* (accuracy) and section 14 (unacceptable depictions and portrayals).

[36] On April 4, 2018, the Applicant became aware that the City was planning to remove the advertisements from City property "due to adverse community reaction". The City reported that it had received over 100 emails and social media complaints, a large majority of which opposed the advertisement. The Applicant says that it became aware around this time through social media that two individuals had initiated pro-choice coordinated efforts to persuade the City to remove the advertisements. The Applicant also became aware that two petitions, one signed by 1,917 individuals and the other signed by 1,281 individuals not members of the Applicant, were forwarded to the City raising concern about the Applicant's right to freedom of expression and challenging the removal of the advertisement.

[37] According to the Applicant, two individuals worked with two pro-choice groups, Alberta Pro-Choice Coalition ("AB Pro-Choice") and Abortion Coalition of Canada ("ARCC") to persuade the City to remove the advertisement. In the latter part of March, 2018, ARCC provided advice on its website on how to convey to the City the desire to have the Applicant's advertisements removed. ARCC also posted on-line and via social media a message encouraging Albertans to complain to ASC about advertisements such as those sponsored by the Applicant.

[38] On March 27, 2018, the City responded to one of the pro-choice individuals involved in the lobbying efforts by acknowledging receipt of the concerns raised in her tweets and that they had been shared "with appropriate people internally". The response also indicated that "[W]e will review and respond by next week". On the same date, the City responded to the same individual and one other as follows: "We recognize there is a range of values and views in the community about pro-life messaging. If you feel the ads don't meet advertising standards, we encourage you to contact Advertising Standards Canada at: adstandards.ca & email your concerns to transit@lethbridge.ca."

[39] On April 4, 2018, the City tweeted that it had made an "administrative decision to remove the pro-life advertisement from Lethbridge Transit buses, shelters and benches due to adverse community reaction." The tweet included @kallie3000 and @Walliekapow, two of the individuals who had previously raised concerns regarding the ads.

[40] On April 5, 2018, the Applicant asked Pattison to contact the City regarding a new proposed advertisement that Pattison has previously posted privately. The new advertisement contained two pictures, one of a pregnant woman, and the second a picture of the same woman

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holding a baby. The accompanying caption stated "Human rights should not depend on where you are". The Applicant received no response to its request to post this advertisement.

[41] The Applicant followed up with Pattison on April 9, 2018, inquiring as to whether the April 4th decision to take down the advertisements had been made by City Council or by an administrator. The Applicant also sought clarification as to any official communication from the City as to the reasons for the decision to remove the advertisements.

[42] On April 9, 2018, the Applicant received another letter from ASC asking for a response to the concerns raised in their earlier letter of March 27, 2018. The Applicant responded that it believed that various individuals had been spearheading a campaign to complain about the advertisement.

[43] On May 14, 2018, counsel for the Applicant wrote to the City Solicitor seeking information as to the existence of any appeal from the decision of the City to remove the advertisements. The City Solicitor responded on May 22, 2018, advising that there was no appeal available.

[44] ASC sent a letter to the Applicant dated May 30, 2018, outlining ASC's opinion that:

a) The Applicant's advertisement contained images and words that were inaccurate because they convey the impression that the "preponderance of scientific evidence appears to refute the statement that all foetuses feel pain at all stages of their development" and that such a message contravened section 1(a) of the Code;

b) The Applicant's advertisement "demeaned women by implying that all women who decide to terminate their pregnancy intentionally inflict pain on their unborn foetus", contrary to section 14(c) of the Code.

[45] On June 2, 2018, the Applicant contacted Pattison and accepted Pattison's earlier offer to post the advertisement privately. A contract was entered into whereby Pattison agreed to post the advertisement during the period June 18 to July 15, 2018. However, on July 3, 2018, Pattison wrote to the Applicant to advise that it planned to remove the advertisement that same week on the basis of the ASC opinion that the advertisement breached the ASC *Code*.

[46] On August 7, 2018, the Applicant's counsel wrote to the City Solicitor asking whether the City would consider posting a modified advertisement. The City Solicitor responded on August 15, 2018, reiterating the two concerns raised in the ASC opinion and advised that the City would review any revised advertisement to determine if these issues had been addressed.

[47] On August 16, 2018, counsel for the Applicant again wrote to the City Solicitor. In her letter, the Applicant's counsel expressed the view that the City's decision to remove the advertisement was based on adverse community reaction. The letter also attached a modified advertisement that was stated to address the two concerns raised in the ASC opinion. The Applicant sought a final decision from the City by August 27, 2018. The City Solicitor responded on August 24, 2018, advising that the modified proposal had been submitted to Pattison, the authority responsible for vetting all advertising proposed for Lethbridge Transit property. The modified advertisement contained the caption "PreBorn Babies Feel Pain 20 weeks after conception". It also included the Applicant's website and a ProLife symbol, as well as the statement that "we offer support to pregnant women and help to those who have had an abortion."

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[48] On August 24, 2018, Konynenbelt received a telephone call from Pattison advising that the proposed new advertisement had been rejected as the changes did not make any difference relative to the two concerns raised previously. A request for a confirmatory follow-up email was made, but nothing was ever received. Counsel for the Applicant then wrote to the City Solicitor on August 30, 2018, asking if the City would entertain any appeal from this decision. The City Solicitor responded on September 6, 2018 advising that the City was unaware of any decision from Pattison and asking that further inquiries be directed to Pattison. Counsel for the Applicant responded on September 7, 2018, suggesting that the responsibility for the decision rested with the City, and requesting that the City either uphold or overrule the Pattison decision and provide reasons.

[49] On September 13, 2018, the City Solicitor wrote to counsel for the Applicant to advise that the City rejected the modified advertisement for the following reasons:

(a) The Revised Ad does not promote a safe, efficient, inclusive and customer-focused transit system;

(b) The changes made to the ad do not address the decision of the Advertising Standards Council (ASC) related to your client's original ad, and as a result, the City has determined the Revised Ad continues to breach the ASC standards, namely:

a. The images of the foetus is in the later stage of development and not representative of when most abortions take place.

b. The scientific claim remains misleading and is not as conclusive and settled as is being portrayed.

c. The Revised Ad continues to demean and disparage women who have had, or are considering, an abortion.

[50] On October 17, 2018, the Applicant submitted five new proposed advertisements to the City. The five proposed advertisements contained the following words and images:

1. Human Rights Should Not Depend on Who You Are – On one side was a picture depicting a pregnant woman, while a second picture depicted the same woman holding a new born baby;
2. Three pictures – picture #1 a foetus with the caption "Me"; picture #2 – a foetus at a later stage of development with the caption "Me Again"; picture #3 – a newborn baby with the caption "Still Me". Beneath the third photograph is the caption "Say No To Abortion";
3. A photograph of a pregnant woman in silhouette with the caption "Equality Should Begin In the Womb – Say No to Abortion So Every Child Makes Their Mark";
4. A photograph of a sleeping newborn baby with the caption: "Birth Did Not Transform Me Into A CHILD – Say No to Abortion;
5. A photograph of a sleeping newborn baby with the caption: "Life Should Be The Most Fundamental Human Right – Say No To Abortion".

[51] On November 7, 2018, the City rejected all five proposed advertisements, providing detailed reasons for the rejection. On November 27, 2018, the City Solicitor wrote to the Applicant's counsel indicating that there was no appeal from this decision.

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The Decision

[52] At issue in this proceeding is the November 7, 2018 decision of the City rejecting the Applicant's five proposed advertisements for posting on the City's transit property. The decision was relayed to the Applicant in a letter written by S. Shigehiro, Acting City Solicitor. In reaching this decision, the City indicated that it had taken into consideration the following factors:

i) The Canadian Code of Advertising Standards;
ii) The content and implied/perceived content of the proposed advertisements;
iii) The Applicant's branding and website;
iv) The City's statutory objective to develop and maintain a safe and viable community;
v) Community response when the Applicant's previous advertisement was run on Lethbridge Transit property;
vi) The City's contract with Pattison Outdoor Advertising; and
vii) Case law.

[53] The decision contained detailed reasons for the determination that none of the proposed ads "are appropriate for advertising on Transit Property". The City provided a series of justifications/explanations for its decisions, some related to all of the proposed advertisements and other related to individual proposed advertisements.

Common Reasons

[54] The City's common reasons relating to all of the proposed advertisements were stated as follows:

1. Each Proposed Ad contained LPL's [Lethbridge and District Pro-Life Association] name and logo, which is branded and attached to LPL's initiative of opposing abortion and euthanasia. An internet search of the name "Lethbridge Pro-Life" leads quickly and easily to the LPL website, which the City has reviewed in its decision-making process. On its landing page, the LPL website contains the ad that was run on Lethbridge Transit property in February and March, 2018 ("Previous Ad") and subsequently removed due to public outcry, and links to statements and other websites purporting to have scientific bases, when in fact, they do not. The "scientific claims" on the LPL website and linked websites are misleading and not as conclusive and settled as they are being portrayed on the LPL website, in contravention of section 1(a) of the *Code*.

2. Given that the Previous Ad was pulled due to reports from community members as to the emotional harm and psychological distress it was causing them, the City is cognizant of a heightened awareness and sensitivity to the LPL brand. The City must balance those community members' correlative *Charter* rights, namely the right to listen, with LPL's right. As you are aware, buses are unique in relation to advertising and can be seen by drivers, pedestrians, children and even individuals inside their homes. The City has concluded that running any of the Proposed Ads would not contribute to the City's statutory objective to provide a safe and viable community because of the feedback to the Previous Ad.

3. Finally, the City contracts with Pattison Outdoor Advertising that require all advertising on Lethbridge Transit property to be in compliance with the *Code*. As

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the City has determined that the Proposed Ads contravene the *Code*, they cannot be placed on Transit Property. The City has determined that the expression contravenes the *Code*.

The Individual Reasons

[55] The City's decision relative to the individual proposed advertisements primarily reference the *Code*. These reasons can be grouped into three main categories:

a) The expression is inaccurate under the *Code* because a fetus is not recognized under law in the fashion LPL depicts;

b) The expression is inaccurate under the *Code* because it implies that late abortions are the norm in Canada;

c) The expression breaches the *Code* because it is negative in some fashion because of its implied meaning.

[56] The City's reasons relating to the individual proposed advertisements were expressed in the following terms:

Proposed Ad #1 – Human Rights should not depend on where you are

In the City's determination, this Proposed Ad contravenes section 1(a) of the Code by being misleading as to the current state of Canadian law. Pursuant to the Criminal Code of Canada and caselaw from the Supreme Court of Canada, there is no life separate from the mother to attach human rights to, given that a child does not become a human being until it leaves its mother's body (see *Dobson (Litigation Guardian of) v Dobson*, 1999 Carswell NB248 SCC)).

The Proposed Ad implies late term abortion, which is not the norm in Canada. This is a misleading and inaccurate implication, another contravention of section 1(a) of the Code.

Finally, this Proposed Ad also contravenes section 14(c) of the Code, by demeaning and denigrating women who have had or are considering an abortion, by equating them with human rights violators.

Proposed Ad #2 – Me. Me Again. Still Me

In the City's determination, this Proposed Ad is misleading and contravenes section 1(a) of the Code. There is a legal difference between the final image on the right, and the two images on the left (per *Dobson*).

The middle image is not representative of when fetuses are usually aborted, suggesting late term abortions, which is not the norm in Canada and is therefore a misleading and inaccurate implication in contravention of section 1(a) of the Code.

The proposed Ad also contravenes section 14(c) of the Code by implying and equating women who have had an abortion with those who would commit infanticide – a demeaning and denigrating statement. As a result of the imagery and messaging, the City believes this ad would cause psychological harm to a number of community members, similar to the Previous Ad, to which the City

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received correspondence from almost 100 community members, detailing the pain and angst the Previous Ad caused them.

Proposed Ad #3 – Equality should begin in the womb

In the City's determination, this Proposed Ad contravenes section 1(a) of the Code. The statement "So every child makes their mark" is incorrect and inaccurate under Canadian law – given that life does not being until live birth, there is no "child**"** to make a mark. Additionally, since a fetus is not a child, there is no entity to attach rights to, nor will every fetus go on to become a living child.

Also misleading in this Proposed Ad is the representation of a woman in the later stages of pregnancy, implying that this is when abortions take place, which is not the norm. This is another contravention of section 1(a) of the Code.

This Proposed As also contravenes section 14(c) of the Cody by implying that women who have made the legal choice to have an abortion are violating the fetus' rights, and in turn denigrates and demeans women who have had, or are considering, an abortion.

Proposed Ad #4 – Birth did not transform me into a child

In the City's determination, this Proposed Ad is misleading and contravenes section 1(a) of the Code. The statement "Birth did not transform me into a child" is incorrect and misleading. Under Canadian law, it is precisely birth that transforms the fetus into a child.

Proposed Ad #5 – Life Should be the Most Fundamental Human Right

In the City's determination, this Proposed Ad contravenes section 1(a) of the Code. It is misleading and inaccurate with respect to Canadian law, which states that life does not begin until live birth. The Proposed Ad is also misleading in implying that fetuses with cleft lips and/palates or other deformities or disabilities are singled out for abortion.

By portraying and implying that those women who have had an abortion, or are considering an abortion, are human rights violators, the Proposed Ad is demeaning and denigrating towards them, and therefore a contravention of section 14(c) of the Code.

Issues

[57] The following issues arise for determination in this application:

a) Was the Applicant's section 2(d) *Charter* right to freedom of expression infringed by the City?

b) Did the City limit the Applicant's right to freedom of expression no more than was reasonably necessary in the fulfillment of the City's objectives?

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Standard of Review

[58] It is common ground between the parties that the standard of review is reasonableness in circumstances where an administrative decision is being reviewed for *Charter* compliance. In such circumstances, if the decision is determined to infringe a *Charter* protected right, the reviewing court must consider whether the decision reflects a proportionate balancing between the affected *Charter* rights and the statutory objectives of the decision-maker. The test set out in ***R v Oakes***, [1986] 1 SCR 103. relating to the application of section 1 of the *Charter* does not apply: ***Doré v Barreau du Quebec***, 2012 SCC 12 at paras 45 and 55-58; ***Loyola High School v Quebec (Attorney General)***, 2015 SCC 12 at paras 3-4 and 39-41; ***Law Society of British Columbia v Trinity Western University,*** 2018 SCC 32, ***Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)***, 2018 ABCA 154.

[59] Following oral argument in the within matter, the Supreme Court of Canada released its decision in ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65. The decision sets out the framework to be followed on judicial review and the requisite standard to be applied in each case. Counsel obviously did not have the benefit of this decision when presenting their written and oral submissions.

[60] In my view, the decision in ***Vavilov*** does not alter the proper approach to judicial review in a case of this nature. At para. 57, the Court addressed the standard of review previously set in ***Doré*** in the following terms:

> Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para.65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

[61] There are, however, aspects of the Court's reasons in Vavilov that are of assistance in resolving the matter before me. First, the Court in ***Vavilov*** urged reviewing courts to respect the legislature's decision to empower the administrator with the decision-making responsibility and not to engage in "disguised correctness", that is to create your own yardstick and then use that yardstick to assess the decision under review: at para 83. Second, ***Vavilov*** offers some important directions on the proper approach to the consideration of a decision-maker's reasons.

[62] As previously indicated, the parties agree that the decisions in ***Doré*** and ***Loyola*** establishes the appropriate standard of review in circumstances calling for the review of a decision-maker's discretionary decision in circumstances involving the application of the provisions of the *Charter*. The Supreme Court had an opportunity to review and confirm this so-called ***Doré/Loyola*** analysis in ***Trinity Western University***.

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[63] In ***Doré***, the applicant alleged that article 2.03 of the Code of ethics of advocates of the Barreau du Quebec, violated the protections afforded to freedom of expression in section 2(b) of the *Charter.* In that instance, the applicant was disciplined by the Barreau after writing a "personal" letter to a judge following a court appearance in which he called the judge "loathsome, arrogant and fundamentally unjust."

[64] The Barreau's Disciplinary Council suspended Doré for 21 days after concluding that the letter was "likely to offend and is rude and insulting": ***Doré*** at para 16, rejecting Doré's argument that art. 2.03 violated s 2(b) of the *Charter*. An appeal to the Tribunal des professions was dismissed as was an application for judicial review. An appeal to the Court of Appeal was also dismissed, though the Court found that the Disciplinary Council's decision was a breach of s 2(b), but justified under s 1 of the *Charter.* The Court of Appeal undertook a full section 1 analysis in concluding that the effects of the decision were proportionate to its objectives.

[65] The Supreme Court's decision in ***Doré*** was written by Abella J who, after extensively reviewing the Supreme Court's evolving approach to the proper role of administrative tribunals in the application of *Charter* values, outlined, at paras 55-58, the approach to be undertaken by administrative decision-makers in applying *Charter* values in the exercise of statutory discretion:

> How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake,* for instance, the importance of Canada's international obligations, its relationship with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individuals' liberty interest was justified (para. 19).
>
> Then, the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this court recognized in *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 Can LII 64 (SCC), [1995] 3 SCR 199, at para 160, 'courts must accord some leeway to the legislator' in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure 'falls with a range of reasonable alternatives'. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, 'falls within a range of possible, acceptable outcomes' (at para 47).
>
> On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, '[t]he issue becomes one of proportionality' (para. 155), and calls for integrating the spirit of

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> s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a 'margin of appreciation', or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
>
> If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

[66] Abella J also addressed the issue of deference (at para 54), where she stated:

> Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values on the specific facts of the case. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[67] The Supreme Court confirmed the approach set out in ***Doré*** in ***Loyola***. In that instance, Loyola High School sought a ministerial exemption from the teaching of a mandatory Program on Ethics and Religious Culture ("ERC") established by the Minister of Education, Recreation and Sports that required the teaching of beliefs and ethics of different world religions from an objective and neutral perspective. Loyola High School was a private, English-speaking, Catholic high school for boys founded in the 1840's and administered by the Jesuit Order. The Minister refused the requested exemption, finding that Loyola's proposed alternative program involved the delivery of the program content from a Catholic perspective. However, the Superior Court quashed the decision on the basis that the refusal infringed Loyola's right to religious freedom. The decision was reversed by the Court of Appeal, which found that the decision was reasonable and did not result in any *Charter* breach. On further appeal to the Supreme Court, the appeal was allowed and the matter sent back to the Minister for re-consideration.

[68] Of note, the majority decision in ***Loyola*** was written by Abella J, the same judge who authored the Court's decision in ***Doré***. At paras 3-4, she summarized the decision in ***Doré i***n the following terms:

> The result in *Dore* was to eschew a literal s. 1 approach in favour of a *robust* proportionality analysis consistent with administrative law principles.
>
> Under *Dore*, where a discretionary administrative decision engage the protections enumerated in the *Charter* – both the *Charter's* guarantees and the foundational values they reflect – the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.

[69] In the result, the Supreme Court set aside the decision of the Court of Appeal, finding that the Minister's decision was unreasonable in all of the circumstances. The majority of the Court held that the matter should be remitted to the Minister for re-consideration, though in a concurring decision, McLachlin CJC was of the view that the request for an exemption should be granted, finding it unnecessary to refer the matter back to the Minister for re-consideration.

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The Statutory Framework

(i) The Municipal Government Act

[70] It is common ground between the parties that the Respondent's decision must be considered in light of the legislative framework for that decision and the applicable provisions of the *Charter.* Section 3 of the *Municipal Government Act*, RSA 2000, c M-26, provides as follows:

> s. 3 The purposes of a municipality are
>
> (a) to provide good government,
> (a.1) to foster the well-being of the environment,
> (b) to provide services, facilities or other things that, in the opinion of counsel are necessary or desirable for all or a part of the municipality, and
> (c) to develop and maintain safe and viable communities.

[71] According to the Respondent, it relied on the statutory requirement for it "to develop and maintain safe and viable communities" in reaching the decision now under review. In it's written reasons, the City also refers to the Lethbridge Transit's values statement which states that it "operates a safe, efficient, inclusive and customer-focused service that helps create a vibrant and environmentally sustainable Lethbridge."

[72] As Slater JA found in ***Grande Prairie***, another case considering advertising on city buses by a public interest group focused on the issue of abortions, "[S]ection 6 [*Municipal Government Act*] gives a municipality the powers of a natural person, unless otherwise limited. Section 7, 8 and 9 give a municipality a wide mandate, and extensive powers to discharge that mandate": at para 4. As in the within matter, in ***Grande Prairie***, the City operated a bus system in accordance with sections 1(1)(y)(iii) and 7(g) of the *Act.* To help defray the cost of the bus system, Grande Prairie, like Lethbridge, sells advertising to be placed on buses. In the case of Lethbridge, advertising is also sold on bus shelters and city benches.

(ii) The Scope of Section 2(b) of the *Charter*

[73] Section 2(b) of the *Charter* provides as follows:

> Everyone has the following fundamental freedoms ...
>
> (b) freedom of thought, belief, opinion and expressions, including freedom of the press and other media of communication;

[74] The Applicant relies on a series of authorities, including ***Doré***, ***Slaight Communications Inc v Davidson***, [1989] 1 SCR 1038; ***R v Conway***, 2010 SCC 22; ***RWDSU v Dolphin Delivery Ltd***, [1986] 2 SCR 573; ***R v Zundel***, [1992] 2 SCR 731; ***Wilson v University of Calgary (Board of Governors)***, 2014 ABQB 190; ***Greater Vancouver Transport Authority v Canadian Federation of Students-British Columbia Component***, [2009] 2 SCR 295.

[75] In ***Slaight***, Lamer J (as he then was) dissenting in part, explained the interplay between *Charter* protected rights and the decisions of statutory decision-makers in the following terms:

> As the Constitution is the Supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or

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> necessarily implied...Accordingly, an adjudicator exercising delegated power does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so: at p 1078.

[76] Abella J reached a similar conclusion in ***Conway***, at para 78.

[77] Before turning to consider the Respondent's reasons for denying the Applicant's request to post its advertising on city buses, I propose to briefly consider the scope of the right protected under section 2(b).

[78] On behalf of the majority in ***Dolphin Delivery***, McIntyre J explained the underlying values behind the *Charter*'s protection of freedom of expression in the following terms (at paras 3-14):

> The importance of freedom of expression has been recognized since early times: see John Milton, Areopagitica; A Speech for the Liberty of Unlicenc'd Printing, to the Parliament of England (1644) , and as well John Stuart Mill, "On Liberty" in On Liberty and considerations on Representative Government (Oxford 1946), at p. 14:
>
> > If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.
>
> And, after stating that "All silencing of discussion is an assumption of infallibility", he said at p. 16:
>
> > Yet it is as evident in itself, as any amount of argument can make it, that ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present.
>
> Nothing in the vast literature on this subject reduces the importance of Mill's words. The principle of freedom of speech and expression has been firmly accepted as a necessary feature of modern democracy.

[79] The Supreme Court addressed the scope of s 2(b) of the *Charter* again in ***Zundel***; ***Irwin Toy Ltd v Quebec (Attorney General),*** [1989] 1 SCR 927, and ***R v Keegstra***, [1990] 3 SCR 697. The majority decision of McLachlin J (as she then was) in ***Zundel*** provides a comprehensive discussion of the scope of s 2(b). Zundel was, of course, a criminal case involving a charge of spreading false news, contrary to s 181 of the *Criminal Code*. In that instance, the alleged "false news" related to a pamphlet published by Zundel in which he suggested that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy. At his first trial, he was convicted, but the conviction was overturned on appeal and a new trial directed. His conviction following a second trial was affirmed by the Court of Appeal. On a further appeal, the Supreme Court accepted Zundel's contention that s 181 of the *Code* infringed his s 2(b) *Charter* guarantee of freedom of expression and that the provision was not saved by s 1. In the result, the Court found s 181 to be unconstitutional.

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[80] At pp 752-53, McLachlin J stated:

> This Court has held that s. 2(*b*) is to be given a broad, purposive interpretation: *Irwin Toy, supra*. Even prior to the *Charter*, this Court recognized the fundamental importance of freedom of expression to the Canadian democracy; see *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285. I can do no better than to quote the words of my colleague Cory J., writing in *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at p. 1336:
>
> > It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the *Charter* set forth s. 2(*b*) in absolute terms which distinguishes it, for example, from s. 8 of the *Charter* which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(*b*) should therefore only be restricted in the clearest of circumstances.
>
> The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfillment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy, supra*, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event...
>
> The jurisprudence supports this conclusion. This Court in ***Keegstra*** held that the hate propaganda there at issue was protected by s. 2(*b*) of the *Charter*. There is no ground for refusing the same protection to the communications at issue in this case. This Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by s. 2(*b*), unless the physical form by which the communication is made (for example, by a violent act) excludes protection: *Irwin Toy*, *supra*, at p. 970, *per* Dickson C.J. and Lamer and Wilson JJ. In determining whether a communication falls under s. 2(*b*), this Court has

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> consistently refused to take into account the content of the communication, adhering to the precept that it is often the unpopular statement which is most in need of protection under the guarantee of free speech: see, e.g., *Keegstra*, *supra*, at p. 828, *per* McLachlin J.; *R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452, at p. 488, *per* Sopinka J.

[81] The Court of Appeal in ***Grande Prairie*** acknowledged that the decision in ***Keegstra*** stands for the proposition that s.2(b) protects unpopular even disturbing speech, and that false statements do not fall outside the scope of protection "because false statements can themselves sometimes have value, and conclusively determining total falsity is inherently difficult": ***Grande Prairie*** at para 44.

[82] In ***Grande Prairie***, the Court of Appeal referred to two decisions of the Supreme Court dealing with tobacco advertising, ***RJR-Macdonald Inc v Canada (Attorney General)***, [1995] 3 SCR 199, and ***Canada (Attorney General) v JTI-Macdonald Corp***, 2007 SCC 30, as involving instances where limits on freedom of expression were found to be justified. The Court stated:

> The decision demonstrates, however, that some limits based on the content of advertising can be constitutionally justified. Nevertheless, this is a slippery slope, because 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?: at para 46.

[83] The Applicant also points to the Supreme Court's decision in ***Greater Vancouver***. Given the factual similarities between ***Greater Vancouver*** and the within matter, I propose to set out in some detail the factual underpinnings and context in that case.

[84] In ***Greater Vancouver***, the transit authorities had enacted policies banning political advertising on municipal buses. Deschamps J, writing for the majority, held that the transit authorities which operated the public transit systems were subject to the *Charter*, that the policies adopted by those transit authorities infringed the respondents' right to freedom of expression, and that the policies were not saved by s 1. Specifically, Deschamps J accepted the Trial Judge's finding that the impugned policies had the objective of providing "a safe, welcoming public transit system" and that this was sufficiently important to justify placing a limit on freedom of expression. She did not, however, accept that the limits on political advertising established in the policies were rationally connected to the objective. At para 76, she stated: "I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users." She went on to find (again at para 76):

> It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the objective of providing a safe and welcoming transit system will be undermined.

[85] While not obliged to go further in the s 1 analysis, Deschamps J nevertheless found that the means chosen in this instance were neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their s 2(b) right to freedom of expression.

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With respect to the community standards referred to in article 7 of the transit authorities' policy, she held (at para 77): "[W]hile a community standard of tolerance may constitute a reasonable limit on offensive advertising, excluding advertisements which 'create controversy' is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society." In finding that the policies did not constitute minimal impairment of freedom of expression, Deschamps J concluded: "[I]n sum, the policies amount to a blanket exclusion of a highly valued form of expression that serves as an important place of public discourse": at para 76.

[86] I note the decision of Horner J of this court in ***Wilson***, a case involving a pro-life display located on the University of Calgary campus. At para 157, she held:

> The expressive value in such displays was commented on by the British Columbia Court of Appeal in ***R v Watson***, 2008 BCCA 340 (CanLII), 2008 BCCA 340 at paras 26-27:
>
> > 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....It follows that the importance of communicating these ideas and beliefs lies at the "very heart of freedom of expression".

[87] Finally, given its factual and legal similarity, I would return to the decision in ***Grande Prairie***, in which the Court of Appeal concisely summarized the applicable constitutional principles that applied in that instance. It is common ground between the parties that these principles apply in this instance. At para 101, the Court stated:

> The applicable principles of constitutional law can be summarized as follows:
>
> a) The respondent offers advertising on the sides of its buses, and its ability to reject advertisements is governed, for the present purposes, by the *Charter*, and a reasonable balancing of *Charter* rights with other municipal objectives: ***Greater Vancouver Transportation***.
>
> b) It is not open to the respondent to adopt a policy of "advertising neutrality, in the sense that the respondent could not reject advertising on contentious issues generally, or on a particular social or political issue: ***Greater Vancouver Transportation***.
>
> c) The respondent has a limited ability to reject advertisements on the basis of content that is objectively offensive, but it must be remembered that the protection of unpleasant and disagreeable speech is a fundamental objective of the *Charter* right to free expression.
>
> d) The respondent can reject advertising that is unlawful, in the sense that it violates criminal, or quasi-criminal prohibitions (such as the prohibition on "hate speech"), standards analogous to those prohibitions, or human rights laws and standards.
>
> e) Advertising that is excessively graphic or disturbing can be rejected. Any decision by the respondent to reject advertising on that basis will be reviewed to

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see whether it reflects a proportionate balancing of *Charter* rights with legitimate municipal objectives: ***Doré***.

Analysis

Was the Applicant's section 2(d) *Charter* right to freedom of expression infringed by the City?

[88] The City concedes the applicability of the *Charter*, specifically that the proposed advertisements are protected by the *Charter* right to freedom of expression found in section 2(b). The City also concedes that the decision infringes the Applicant's s 2(b) *Charter right*, but that the real issue is whether the decision in refusing the five advertisements is reasonable. According to the Respondent, this question is governed by the decision in ***Grande Prairie***.

Did the City limit the Applicant's right to freedom of expression no more than was reasonably necessary in the fulfillment of the City's objectives?

[89] It is common ground between the parties that the Respondent bears the onus of demonstrating that its decision minimally impairs the Applicant's *Charter* right to freedom of expression. The Applicant, relying on ***Doré*** at para 7, maintains that if any of the City's stated justifications fails to meet the minimal impairment standard, the decision itself must be found to have breached the *Charter*. The Respondent rejects the Applicant's contention that if the decision fails to limit the section 2(b) right no more than reasonably necessary that the decision is therefore unreasonable.

[90] The Applicant advances a number of arguments in support of its argument that the decision fails to meet the minimal impairment requirement. First, the Applicant urges the court to find that the City did not actually undertake any minimal impairment analysis in the course of reaching the decision to reject the proposed advertisements. In the absence of a positive finding of minimal impairment, as per the ***Doré/Loyola*** test, the Applicant says that the decision must be set aside.

[91] Second, the Applicant says that the decision improperly relies on the content of its website, as well as the inclusion of its logo on the proposed advertisement, as part of the ***Doré/Loyola*** analysis.

[92] Third, the Applicant challenges the City's determination that the website materials were inaccurate, or referred to material that was either inconclusive or unsettled. The Applicant maintains that s 2(b) of the *Charter* extends to the controversial and unpopular message and not just the message that is capable of verification or proof of the accuracy of its content.

[93] Fourth, the Applicant maintains that the public distress alleged by the City to have followed the posting of the prior advertisement is not rationally connected to the City's statutory public safety mandate. Further, the Applicant says that the City's written decision fails to account for the favourable public response also generated.

[94] Fifth, the Applicant maintains that the actions of the City have, effectively, imposed a total ban on any of its advertising that may have provoked past expressions of concern or complaint. The Applicant contends that the City's sensitivity to past negative public response to its advertisements distorted its actual consideration of the five proposed advertisements involved in the specific decision under review.

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[95] Sixth, the Applicant says that the City has placed undue reliance on the Canadian Code of Advertising in its refusal to accept the Applicant's proposed advertisements.

[96] Seventh, the Applicant challenges the City's contention that the proposed advertisements inaccurately reflect the current state of the law as regards human fetuses. The Applicant says that the advertisements, properly construed, reflect an aspirational view as to what the law should be, not as it currently exists.

[97] Finally, the Applicant says that the City made the decision while operating under a reasonable apprehension of bias, for an improper purpose and on irrelevant considerations.

[98] The Respondent contends that this case is governed by the decision of the Court of Appeal in ***Grande Prairie***. The Respondent does not dispute the application of the *Charter* to the decision-making process that gave rise to the decision now under review. Likewise, the Respondent does not dispute the scope of the freedom of expression provision set out in s 2(b) of the *Charter*. Rather, according to the Respondent, the real issue to be determined in this instance is whether or not the City reasonably concluded that there was a reasonable apprehension of harm if it posted the proposed advertisements.

[99] Further, the City engaged in a robust analysis, and took into consideration a variety of factors, before determining that the proposed advertisements were not in accordance with the City's objective to provide welcoming and safe transit.

[100] Next, the Respondent maintains that the its decision represents a proportional balancing of the Applicant's *Charter* right to freedom of expression and the City's statutory objective to provide a safe and viable community. As such, the City advances three reasons for its refusal of the five proposed advertisements:

a) The location of the proposed advertisements;
b) A reasonable apprehension of harm if the advertisements were posted; and
c) The contravention of the Canadian Code of Advertising Standards by each of the proposed advertisements.

[101] The City maintains that it acted in furtherance of its statutory objectives and not for an improper purpose. It denies that its decision amounts to a blanket refusal to post the Applicant's advertisements. The City also says that the allegation of reasonable apprehension of bias is not supported by the facts.

[102] The Respondent maintains that there are some limits on the content of advertising that can be demonstrably justified in a free and democratic society. The Respondent challenges the Applicant's contention that restrictions on advertising can only be justified if the content is illegal, either on the basis of being discriminatory, or advocating for genocide or inciting hatred. The Respondent relies on the Court of Appeal's decision in ***Grande Prairie***, at para 66, and the decision of the Supreme Court of British Columbia in ***The Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority***, 2017 BCSC 1388, at paras 49-50, rev'd on other ground 2018 BCCA 344.

[103] The Respondent rejects the Applicant's contention that proposed advertisements involve the expression of an opinion. Rather, the City maintains that the proposed advertisements contain factually misleading statements. Finally, the City says that the decision is reasonable and should be upheld.

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(i) The City's written reasons – the ***Doré/Loyola*** *analysis*

[104] In ***Vavilov***, at para 81, the Supreme Court emphasizes that the reasons provided by the decision maker are the primary method through which to analyze the decision: at para 81. In situations where there are no written reasons or gaps in the reasons, the record before the decision-maker may shed light on the reasoning process; at paras 91, 97. An unreasonable decision is one that fails to be internally rational or is "untenable in light of the relevant factual and legal constraints that bear on it": at para 101. Further, the Court in ***Vavilov*** urged reviewing courts not to embark on a "line-by-line treasure hunt for error": at para 102. Rather, reviewing courts should look for "sufficiently serious shortcomings" that are "more than merely superficial or peripheral to the merits of the decision" or flaws that are "sufficiently central or significant": at para 100.

[105] The City indicated, at p 1 of its written decision, that it "carefully weighed the Applicant's *Charter* rights, as well as the rights of other individuals in the community, in an effort to ensure the Applicant's *Charter* rights are impaired as minimally as possible". The City further noted that it considered community members' *Charter* rights, being "the right not to listen", in light of heightened sensitivity and awareness of the Applicant's brand and the impossibility of avoiding transit advertising. It is unclear, however, how the City specifically considered the impact of the limit on the Applicant's *Charter* rights.

[106] The Court of Appeal in ***Grande Prairie*** noted that the ***Doré*** reasonableness standard of review is applicable to the initial decision-maker, however, that standard is based on an administrative decision-maker that has expertise and specialization, particularly with familiarity in balancing *Charter* values: ***Grande Prairie,*** at para 25. The standard of review must be applied "having a realistic view of the decision maker involved": ***Grande Prairie,*** at para 25. It is unreasonable to expect a transit system manager to provide reasoning behind a decision or a detailed ***Doré*** analysis, because "it is unrealistic to expect that all municipal administrators will be constitutional lawyers": ***Grande Prairie,*** at para 38. The Court of Appeal noted that the transit manager did not have expertise in balancing *Charter* considerations and, indeed, never undertook a *Charter* analysis in the course of reaching his decision to reject the proposed advertisement.

[107] The circumstances in this case are, in my view, very different. Here, the City's reasons were provided through the City's Acting City Solicitor. While not a constitutional expert, the City's senior solicitor must be taken to have more knowledge regarding the application of the *Charter* than the transit manager who issued the decision in ***Grande Prairie***. Moreover, the City clearly indicated in its written reasons that it had completed a *Charter* analysis, including balancing the rights of the Applicant and other individuals.

[108] Having carefully considered the written reasons, I am not satisfied that a *Charter* analysis was actually undertaken relative to the five proposed advertisements that were before the City for consideration. The City's lengthy and detailed reasons contain but a single sentence that refers to the *Charter*, but no mention of the right to freedom of expression guaranteed by s 2(b). The single sentence reads as follows: "The City has carefully weighted LPL's Charter rights, as well as the rights of other individuals in the community, in an effort to ensure LPL's Charter rights are impaired as minimally as possible." While this particular passage says that the City has carefully weighed the Applicant's *Charter* right, the detailed analysis that follows does not include any discussion of the scope of the right or the minimal impairment analysis that the City

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was required to undertake in the circumstances. In other words, the reasons indicate that a *Charter* analysis was undertaken, but the same reasons do not reveal any such analysis.

[109] In reaching this conclusion, I am mindful of the Supreme Court's words in ***Vavilov*** that a reviewing court should approach a decision-maker's reasons "holistically and contextually in order to understand 'the basis on which a decision was made'": ***Vavilov***, at para 97. Similarly, I caution myself that I should not be looking for the perfect decision, nor should I conduct a "line-by-line 'treasure hunt for error": ***Vavilov*** at para 102. However, I find the City's reasons for this decision to be highly problematic given the absence of any minimal impairment analysis before denying the Applicant's request to post its proposed advertisements.

[110] Administrative decision makers are subject to the *Charter* and its values: ***Trinity Western University***, at para 57. Transit authorities are government entities, and the *Charter* applies to all activities including the operation of buses and advertising on transit property: ***Greater Vancouver***, paras 18, 24, 47. Under the ***Doré/Loyola*** analysis, the decision-maker must ensure that their statutory objectives are proportionately balanced with ensuring *Charter* compliance: ***Doré,*** at paras 55, 56; ***Loyola,*** at para 4.

[111] Under the ***Doré*** analysis, the statutory objective being promoted must first be considered, and then the reasonableness of the decision, meaning it is proportional to the statutory objective and minimally impairing to the right, is determined: ***Grande Prairie,*** at paras 64-65. Unless a conclusive factor, such as criminalized pornography, hate speech, or statements inciting violence or vandalism, supports a justifiable limit, multiple factors may be considered: ***Grande Prairie,*** at para 66. The Court in ***Grande Prairie*** considered whether the advertisement amounts to hate speech, whether other *Charter* values were at issue, the accuracy of the advertisement, industry advertising standards, and harm arising from the advertisement. Based on those considerations, the Court found that rejecting the advertisement was reasonable.

[112] This type of analysis is missing from the reasons issued by the City in this instance. Beyond the mere assertion that the City engaged in a robust analysis of the various competing interests, the City is unable to point to any portion of the written reasons that discuss the minimal impairment of the Applicant's *Charter* rights. Rather, the City refers to the other bases upon which it seeks to support the decision, a number of which are also challenged by the Applicant, as more fully discussed below. In my view, this is a fatal gap in the City's fulfillment of its legal obligations under ***Doré/Loyola***. As such, I agree with the Applicant that the decision must be set aside for this reason alone.

(ii) The Applicant's logo and website

[113] A web address on an advertisement is logically included in order to invite readers to visit the website, thus making the website an extension of the advertisement: ***Grande Prairie,*** at para 8. In ***American Freedom Defence Initiative v Edmonton (City)***, 2016 ABQB 555, at para 95, the Court stated that it was proper to consider "such things as logos, website addresses and the websites referred to" and that to ignore those things would "allow advertisers to incorporate references to draw the audience without impunity, to discriminatory or otherwise unacceptable content". However, in ***Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority***, 2018 BCCA 344, a case in which a Pro-Life advertisement included a reference to its website, Frankel JA held that the reviewing judge erred in relying on the website content when the decision-maker had not taken this material into consideration: at para 59. Justice Frankel also appears to suggest that consideration of the content of the website is

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only appropriate in circumstances where the advertisement actually refers to the website: at para 59.

[114] In this case, the City indicated in its written reasons that one of the items it considered in reaching its decision was the Applicant's brand and website. As such, the City maintains that an internet search of "Lethbridge Pro-Life" quickly and easily leads to the Applicant's website.

[115] The proposed advertisements did not contain any website links but they did include the Applicant's logo and the name of the organization. Since a web address was not included on the advertisement, as it was in ***American Freedom*** and ***Grande Prairie***, I am not prepared to find that the logo alone somehow invited the advertisement's audience to view the website. In my view, the presence of the Applicant's logo without any reference to the website does not thereby render the website a logical extension of the advertisement. In this regard, I do not accept the City's argument that the inclusion of the logo encouraged people to find out more about the Applicant. I would simply add that I am not persuaded that reference to the name of the Applicant organization and the presence of its logo is an implicit invitation to search out the Applicant's website. Such a search requires a conscious choice to seek out such additional information. This seems to stand in stark contrast to the public advertisement itself, where members of the public have a much more limited "choice" as to whether to view the advertisement or not.

[116] In both ***American Freedom*** and ***Grande Prairie***, the advertiser's website was an important factor to support rejecting the advertisement. In ***American Freedom***, the advertisement purported to offer a helpline to Muslim women in Edmonton who were facing a threat of domestic violence by way of honour killing. The court concluded that this offer of help suggested that additional information was available by going to the listed website. However, the advertisement actually linked them to an American website advocating extreme anti-Muslim positions that Gill J found many Canadians would find offensive, discriminatory, and demeaning (at paras 111 and 112). In that instance, the website was particularly important to show that the limit on the advertiser's freedom of expression was justifiable.

[117] Slater JA described the advertising at issue in ***Grande Prairie*** in the following terms:

> The first image is a circle with a coloured picture of a fetus at approximately 7 weeks development, the second of a fetus at approximately 16 weeks development, and the third a blank red circle with no image. Under the first image is the caption "7-weeks – GROWING...", under the second image the caption states "16-weeks – GROWING...", and inside the third blank red circle is the word "GONE". To the right of the images is the statement "ABORTION KILLS CHILDREN" followed by a wed address **END**THE**KILLING**.ca", and the name of the appellant: at para 6 (emphasis in original).

[118] In ***Grande Prairie***, the content of the website revealed the intentionally shocking purpose and graphic nature of the advertisement. Slater JA described the content of the website as follows:

> The web address "**END**THE**KILLINGS**.ca" leads one to the appellant's home page. That page promotes "an abortion-free Canada" in blunt terms. It refers to hospitals and abortion clinics as "killing centres". It describes the appellant's use of "graphic image-based projects" as a deliberately selected tactic to end abortion.

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> It states, for example, that "...we must use images of the atrocity of abortion to tear away the flimsy façade of "choice" and reveal *what is being chosen*: the decapitation, dismemberment, and disembowelment of an innocent pre-born child". It invites readers of the home page to give their support to the appellant.
>
> While the content of the homepage is not directly found in the proposed advertisement, that content is a legitimate part of the legal context: ***American Freedom Defence Initiative v Edmonton (City)***, 2016 ABQB 555 at para 95, 44 Alta LR (6th) 121. The only purpose of the web address in the advertisement is to invite readers to visit that web address, making the contents of the web address a logical extension of the advertisement: see for example ***Archdiocese of Washington v Washington Metropolitan Area Transit Authority***, 282 F Supp (3rd) 88 a pp. 109-10 (US Dis Ct, Dist of Columbia, 2017: at para 7-8.

[119] The website indicated that the advertisement was deliberately hard-hitting and disturbing, and that the organization's objective was "to portray abortion as the decapitation, dismemberment, and disembowelment of an innocent pre-born child": ***Grande Prairie,*** at para 84. These facts supported the Court's finding that the advertisement caused harm: ***Grande Prairie,*** at para 84.

[120] The Applicant's website, included in the Certified Record, states on its home page that the Applicant's mission is "to proclaim the inherent value of human life from conception until natural death", with the image of an infant displayed behind that statement. The website lists services that the Applicant offers, including Post-Abortion Counseling, Educational Information, Pro-Life Training, Alternatives to Abortion, Awareness Activities and Presentations, Referrals for Pregnancy Support and Post-Abortion Counseling, and Media Campaigns. It also states that abortion is legal in Canada throughout all nine months of pregnancy. The website includes links to and excerpts from various studies regarding fetal development, and articles for teenagers about abstaining from sex. It also includes event and campaign information and pictures of advertisements that the Applicant has displayed in various locations. The content of this website is, in my view, very different from that under consideration in ***Grande Prairie***.

[121] Even assuming that the City properly considered the content of the Applicant's website, I am satisfied that the website is not comparable to those under scrutiny in ***American Freedom*** or ***Grande Prairie***, where the websites were extremely discriminatory, falsely purported to provide a help-line, or indicated an intention to display harmful and disturbing messages. This website is aimed at providing support and information to individuals considering an abortion, who have had and may regret their abortion, and to those who may be interested in learning about or joining the Pro-Life cause.

[122] Here, the City seeks to support its decision by referring to the fact that the website includes the advertisement previously approved by the City, but subsequently removed at the direction of the City. The City says that it considered the Applicant's website, specifically the original advertisement that the City had posted and removed, as well as links to other statements and other websites that, according to the City, make false claims to a valid scientific foundation.

[123] I have some difficulty with the City's reliance on the inclusion of the Applicant's previous advertisement on its website as affording support for the City's decision to reject the five proposed advertisements in this instance. The City approved the previous advertisement and allowed it to be posted on city buses in February and March 2018. Given the City's contractual

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arrangement with Pattison, this previous advertisement must have been determined to have been in compliance with the ACS *Code* if Pattison and the City had agreed to post the advertisement in the first place. It is significant, in my view, that the City only directed the removal of that advertisement when it received negative feedback from certain members of the community.

[124] Further, while the website includes the previous advertisement and other similar advertisements, those advertisements are not located on buses where they cannot be avoided, but rather on a website that requires active steps to view. As previously indicated, I find it somewhat disingenuous for the City to now seek to somehow rely on the prior advertisement as supporting the decision to refuse the proposed advertisements when the prior advertisement was approved by the City.

[125] With regards to the challenged scientific information listed on the website, the Supreme Court of has noted that accuracy is difficult to determine, and that inaccurate information, and even deliberate lies, should still be afforded protection under section 2(b) of the *Charter:* ***Zundel***, at para 22. As such, I agree with the Applicant that factual accuracy or scientific verification is not a pre-condition to the benefit of the right to freedom of expression guaranteed by the *Charter*.

[126] To conclude on this point, I would reiterate my reservations about the inclusion of the Applicant's website in the City's decision-making process. Even assuming that this was properly a matter before the City, I am of the view, for the reasons set out above, that the website content, properly construed, is a factor carrying minimal weight in the balancing exercise.

(iii) Content of the message and the website must be accurate, conclusive and settled

[127] This branch of the Applicant's argument is briefly addressed in the previous section of these reasons.

[128] In its written decision, the City refers to the *Code* requirement that advertisements "must not contain, or directly or by implication make, inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations": *Code*, section 1(a). It then goes on to refer to the Applicant's website and states: "...and links to statements and other websites purporting to have scientific bases, which in fact, they do not. The "scientific claims" on the LPL website and linked websites are misleading and not as conclusive and settled as they are being portrayed on the LPL website, a contravention of section 1(a) of the *Code*": Reasons, p 3.

[129] The Applicant contends that limiting expression cannot be justified on whether the decision-maker concludes the proposed expression to be "accurate", "conclusive" or "settled". In ***Zundel,*** McLachlin J (as she then was) found that protecting freedom of expression extends to protecting "beliefs which the majority regard as wrong or false" and that this will frequently involve "a contest between the majority view of what is true or right and an unpopular minority view". She went on to find that "the view of the majority has no need for constitutional protection; it is tolerated in any event": at para 22.

[130] The Applicant urges that facts can be established as true or false, but opinion is not susceptible to such determination in terms of establishing accuracy, conclusiveness or being settled. In ***Reference Re Alberta Statutes***, [1938] SCR 100, the Court found that the state is prohibited from regulating the "accuracy" of opinion.

[131] The Applicant also relies on the decision of Cory J in ***R v Kopyto***, 1987 CanLII 176 (Ont CA), in which he held as follows (at pp 90 and 91):

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> The exchange of ideas on important issues is often framed in colourful and vitriolic language. So long as comments made on matters of public interest are neither obscene nor contrary to the laws of criminal libel, citizens of a democratic state should not have to worry unduly about the framing of their expression of ideas. The very life-blood of democracy is the free exchange of ideas and opinions. If these exchanges are stifled, democratic government itself is threatened.
>
> History has repeatedly demonstrated that the first step taken by totalitarian regimes is to muzzle the media and then the individual in order to prevent the dissemination of views and opinions that may be contrary to those of the government. The vital importance of freedom of expression cannot be over-emphasized. It is important in this context to note that s. 2(b) of the Charter is framed in absolute terms, which distinguishes it, for example, from s. 8 of the Charter, which guarantees the qualified right to be secure from unreasonable search. The rights entrenched in s. 2(b) should therefore only be restricted in the clearest of circumstances.

[132] By way of response to this argument, the City simply reiterates its contentions regarding the contents of the Applicant's website as containing references and links to scientific materials of questionable accuracy, acceptance or certainty. Further, the City emphasizes the fact that the contents of the website violate the accuracy requirements of the *Code*.

[133] I accept the Applicant's caution on the imposition of limits to freedom of expression by insisting on factual accuracy, and the challenges associated with such a standard when it comes to matters of opinion. Even in matters pertaining to science, the ever-changing body of knowledge at our disposal means that what may be scientifically certain today, may not be so certain tomorrow. Let us not forget that it was once universally accepted that the world was flat and that the sun revolved around the earth. Absolute proof may well be an unattainable requirement for this or any other purpose.

[134] In its representations to the court, the City repeatedly sought to characterize the proposed advertisements as statements of inaccurate and misleading fact. As such, the City challenges the Applicant's assertions that the advertisements represent aspirational statements as to how the law should treat fetuses. While I will acknowledge that this distinction may well raise interesting philosophical questions, I would not constrain the notion of freedom of expression on the basis of such a distinction, even assuming that such a distinction can be established. In ***Irwin Toy***, Cory J expressed a similar view when he stated, at p 968: "[F]reedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream."

[135] It seems clear from the City's written reasons that alleged breach of various provisions of the *Code* lie at the heart of its decision to refuse the proposed advertisements. As previously indicated, I am concerned that the City's position on this issue has not been consistent over time, particularly given its admission regarding the inconclusive opinion received from the ASC relative to these five proposed advertisements and the City's acceptance of a previous, similar advertisement. The City's reliance on the *Code* is discussed in greater detail later in these reasons. However, for the purposes of this branch of the Applicant's argument, I accept the

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Applicant's contention that the jurisprudence relative to the right to freedom of expression does not support the contention that the expression must be widely accepted, accurate or scientifically verifiable.

> (iv) Is there a rational connection between the City's statutory objective and public response?

[136] The Applicant urges the court to find that the City has failed to adduce proper evidence establishing a connection between its statutory objective and its refusal to post the five proposed advertisements. The Applicant points out that considerable support in favour of the Applicant's right to freedom of expression was sent to the City once the prior advertisement was taken down. As such, the Applicant contends that the City was unduly influenced by adverse public response and failed to take into consideration that there was extensive public response that favoured the prior advertisement. Further, the Applicant contends that there is no established rational connection between the upset complained of by some community members relative to the previous advertisement, the proposed new advertisements, and the City's statutory mandate to develop and maintain safe and viable communities.

[137] The Applicant relies on two decisions of the Ontario Court of Appeal, ***Bracken v Fort Erie (Town)***, 2017 ONCA 668, and ***Bracken v Niagara Parks Police***, 2018 ONCA 261, as support for the proposition that public upset is not a sufficient basis to displace the right to freedom of expression. It is not justifiable to limit expression on the basis of upset. Both cases concerned Bracken, a self-described "citizen journalist" who shared his views publicly either vocally in person or on signs.

[138] In ***Fort Erie***, Bracken's expression took the form of public shouting with the aid of a megaphone in front of the Fort Erie Town Hall. Bracken was well-known to municipal employees for aggressively questioning people at close range and was noted by the Court of Appeal that he could be "confrontational, loud, agitated and excitable. He is a large man and some people find him intimidating": at para 1. On the date of a Town Council meeting to consider a by-law to permit a medical marihuana facility to be constructed across from Bracken's home, he attended in front of the Town Hall and shouted "kill the bill". He also accused a senior town official of being a liar and a communist and demanded that he be fired. Bracken was arrested and issued a trespass notice and a provincial offence ticket for failing to leave a public place. The trespass notice restricted Bracken's access to various town properties for a period of one year. While the provincial offence ticket was ultimately withdrawn, Bracken brought an application challenging the constitutionality of the trespass notice under sections 2(b) and 7 of the *Charter*. The application was dismissed at first instance, but allowed on appeal. The application judge characterized Bracken's acts as crossing the line of peaceful protest and amounting to acts of violence not protected by section 2(b).

[139] The Court of Appeal rejected the finding that the protest was violent. Indeed, the Court suggested (at para 76), that the assembled town employees who claimed to have been alarmed "were alarmed too easily". Further, at para 49, the Court held:

> Violence is not the mere absence of civility. The application judge extended the concept of violence to include actions and words associated with a traditional form of political protest, on the basis that some Town employees claimed they felt "unsafe". This goes much too far. A person's subjective feeling of disquiet,

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> unease, and even fear, are not in themselves capable of ousting expressions categorically from the protection of s. 2(b).

[140] In ***Niagara***, Bracken was issued two tickets under the *Niagara Parks Act*, RSO 1990, c N-4, for disturbing others and using abusive and insulting language following a confrontation with police officers. He refused to leave a plaza in Niagara Parks after being challenged for carrying a sign that read "Trump is right. Fuck China. Fuck Mexico". Bracken was also issued with an oral trespass notice. He challenged the tickets and the trespass notice on several grounds. The application judge dismissed his application seeking a declaration that the trespass notice violated section 2(b) of the *Charter*.

[141] On appeal, the Court of Appeal, the Court offered, at para 15, the following observations on public "upset" as a possible justification for the restriction of section 2(b) rights:

> The Supreme Court [in ***Irwin Toy***] cautioned against restricting protection to only those ideas that are warmly received by the public, citing the European Court of Human Rights:
>
> > [freedom of expression] is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society".

[142] The Court continued (at para 31):

> The inquiry presumes that members of the public have some resilience, particularly concerning political speech, and are required to tolerate public expression of a wide range of views on matters of public life, including those views that are inconsistent with their own beliefs, choices, and commitments. Mere offence at a message, particularly a message advocating for some vision for the better advancement of the public good, is not enough. The public is not required to endure personalized invective, but nothing in the sign's message could be characterized in this way. As the application judge below noted, the contents of Mr. Bracken's sign, even with its profanity, came nowhere near close to the line. The officer's concern that citizens of Mexico or China who happened upon the sign might be offended by it, was well wide of the mark. The sign, which effectively stated that the national interests of other countries should be subordinate to domestic interests, disparaged no one. Even if Mexican or Chinese nationals took offence, or others took offence on their behalf, such offence could not bring the sign within the meaning of "abusive or insulting language".

[143] Finally, at para 93, the Court explained:

> Political messages are always provocative. They imply that others are wrong, perhaps through ignorance, mistake, negligence, or even moral failure. They frequently risk offending those with contrary views. But in a free society individuals are permitted to use open public spaces to address the people assembled there – to challenge each other and to call government to account. The idea that the Parks are somehow different – that they are categorically a "safe

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> space" where people are to be protected from exposure to political messages – is antithetical to a free and democratic society and would set a dangerous precedent.

[144] In ***Fort Erie***, the Court expressed similar views regarding the appropriately high burden required to displace the *Charter* protected right to freedom of expression. Citing the Supreme Court's decision in ***Irwin Toy Ltd***, at pp 968 and 969, the Court held:

> Freedom of expression was entrenched in our Constitution and is guaranteed … so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (*Palko v. Connecticut*, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (*Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at p. 306).

[145] Finally, I would refer to one further passage from the ***Fort Erie*** (at paras 82 and 83):

> The statutory obligation to promote workplace safety, and the "safe space" policies enacted pursuant to them, cannot be used to swallow whole *Charter* rights. In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.
>
> The conclusion must be that "the deleterious effects are out of proportion to the public good achieved by the infringing measure": *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 78.

[146] What I take from these decisions is that public upset and alarm are not sufficient to tip the balance away from the protection of freedom of expression. To paraphrase the Ontario Court of Appeal in ***Fort Erie***, we cannot lightly "swallow whole *Charter* rights" The long line of cases that have considered the issue underscore that a strong and healthy democracy requires a willingness on the part of the public to accept that the expression of opinions and ideas may, at times, shock, offend and even disturb them. In ***Greater Vancouver***, the Supreme Court suggested that the objective of providing a safe and welcoming transit system is undermined if "the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism": at para 76. In ***Grande Prairie***, the Court of Appeal offered other examples of what it described as "unlawful expression" that would justify limits on free expression, including "criminalized pornography, statements inciting violence or vandalism, discriminatory comments, and 'hate speech'": at para 66. Referring to the tobacco advertising cases, ***RJR-MacDonald Inc v Canada (Attorney General)***, [1995] 3 SCR 199, and ***Canada (Attorney General) v JTI-Macdonald Corp***, 2017 SCC 30, Slatter JA observed that limits based on advertising content can also be justified. However, he cautioned that: "[N]evertheless, this is a slippery slope because people's ideas about 'erroneous impressions', 'false inferences' and 'demonstrably falsity' may differ widely": at para 46.

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[147] While the foregoing categories of recognized limits on the reach of freedom of expression are not exhaustive, they underscore the significance of the right and the necessary rigours of the proportionality analysis flowing from the decisions in ***Doré*** and ***Loyola.*** Furthermore, restrictions on freedom of expression must be justified.

[148] The Certified Record includes some emailed complaints and social media conversations regarding the Applicant's previously posted advertisement. (The proposed advertisements were never posted and, as such, no public response to these advertisements was ever received.) The City conceded during oral argument that the Certified Record does not include the petitions it received from those supporting the advertisement, copies of which are found at Tab L of the Konynenbelt affidavit.

[149] On all of the material before me, it is clear that there was both unfavourable and favourable responses to the prior advertisement. While it is clear that public response to the previous advertisement posted by the Applicant generated complaints from some members of the public, it is important to bear in mind that the public debate that emerged also involved expressions of support for the Applicant's right to advance its message. As previously indicated, the City's decision to remove the prior advertisement received public response in the form of two petitions containing over three thousand signatures that raised concerns relative to the Applicant's right to freedom of expression.

[150] In its written brief, the City cites eight specific responses, four of whom were from women who had suffered spontaneous abortions. One of the messages was from a woman who had undergone a compassionate abortion relative to an unborn child with a fatal genetic disease. Several complaints reference the impact arising from the advertisements, including reminders of past trauma and psychological pain, extreme offence, frustration that taxpayer-funded transit is displaying a partisan message, feelings of shame, and emotional pain for women who had experienced miscarriages or submitted to medically necessary abortions.

[151] The City urges the Court to find that some of the individuals who responded to the earlier advertisement suffered emotional and psychological damage, and that it was reasonable for the City to conclude that the proposed advertisements, though containing different messages and different language, would create similar harm particularly with respect to women that have had or are considering an abortion. According to the City, the complaints received provided the City with clear evidence of the harm created by the previous advertisement. The City maintains that this was more than mere upset.

[152] In ***Grande Prairie***, the application judge found that the proposed advertisement was likely to cause harm to children and to cause psychological harm to women. With respect to children, she found (at para 82):

> It is also likely to cause fear and confusion to children who may not fully understand what the ad is trying to express. They may not be familiar with the word abortion, but they can read and understand that 'something' kills children. Expression of this kind may lead to emotional responses from the various people who make use of public transit and other users of the road, creating a hostile and uncomfortable environment. The creation of such an environment is antithetical to the statutory objective of providing a safe and, in particular, a welcoming transit system, within the greater context of providing services and developing and maintaining a safe and viable community.

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[153] In finding that the proposed advertisement was likely to cause psychological harm to women, the applications judge held (at paras 80 and 82):

> 80. I have taken a similar approach and gone beyond the ad in this case. The CCBR's proposed ad directs viewers to the website "endthekilling.ca". The website discusses the CCBR's "overarching strategy" to use "graphic image-based projects" to end abortion in Canada. The website contains commentary such as "now is the time to put an end to the slaughter. Now is the time to look evil in the face and say, enough. Now is the time to join together, and lend our voices to those who had theirs brutally taken from them." These are strong statements that vilify women who have chosen, for their own reasons, to have an abortion; they are not merely informative or educational ...
>
> 82. ... I find the ad is likely to cause psychological harm to women who have had an abortion or who are considering an abortion.

[154] On appeal, the majority found that the application judge's inference regarding psychological harm was reasonable. As such, the Court of Appeal rejected the argument that medical or other specific evidence was required to support the inference of harm, noting, at para 84, that: "[I]n a *Charter* analysis of this type, concrete scientific proof is not required, and a 'reasoned apprehension of harm' suffices: ***R v Sharpe***, 2001 SCC 2 at paras 85, 89; ***Saskatchewan (Human Rights Commission) v Whatcott***, 2013 SCC 11 at paras. 132-5; ***Alberta (Aboriginal Affairs and Northern Development) v Cunningham***, 2011 SCC 37 at para 74."

> ...the inference drawn by the reviewing judge is nevertheless reasonable. The appellant, after all, admits that the ad is intended to be disturbing; its website discloses that hard-hitting messages are a deliberate tactic. Its objective is to portray abortion as "the decapitation, dismemberments, and disembowelment of an innocent pre-born child". It is well within the scope of judicial notice for a reviewing judge to conclude that such advertising would be likely to cause harm to some women: at para 84.

[155] In my view, the circumstances in ***Grande Prairie*** are significantly different from those currently before the court. These differences are evident from the Court of Appeal's description of the advertisement at issue in that instance:

> The content of the appellant's tendered advertisement, consisting of full colour depiction of fetuses, with the graphics "abortion kills children' and "ENDTHEKILLING" was sufficiently disturbing, on an objective basis, to entitle the respondent to consider whether the advertisement should be accepted: at para 102 (emphasis in original).

[156] First, the content of the proposed advertisements in this instance are very different than the one under consideration in ***Grande Prairie***, particularly the statement "Abortion Kills Children" and the website reference "Endthekillings.ca". In this regard, I note that the City does not seek to support its decision on the basis that the proposed advertisements would likely cause harm to children. Second, it seems clear from the reasons of Anderson J that her conclusion regarding the likely psychological harm to some women was premised on the graphic content of the organization's website, as well as her finding that the website's content was not simply informational and educational. In this instance, there is no reference to the organization's website

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on any of the proposed advertisements, a point discussed earlier in these reasons. I am also satisfied that the proposed advertisements were not comparable to the ***Grande Prairie*** advertisement in terms of graphic content.

[157] I have serious reservations about simply adopting the inferences drawn and the conclusions reached by Anderson J and the Court of Appeal in ***Grande Prairie*** given the significant factual differences at play in this instance. While the various judges who carefully considered the factual underpinnings and overall circumstances in ***Grande Prairie*** were willing to infer possible psychological harm to some women in the event that advertisement was posted, I am not prepared to draw the same inference in this instance.

[158] Here, unlike ***Grande Prairie***, the City's determination of reasonable apprehension of harm was based on actual public response to the prior posted advertisement. The existence of this evidence assists in assessing the nature and extent of this negative public response. I note that only eight complaints were specifically advanced by the City in support of its contention in this regard. While this is not a "numbers game", the extent of the adverse public response, as well as the reported manifestations of the response, are certainly factors to be taken into consideration in determining whether the apprehension of harm was or was not reasonable in these circumstances. Similarly, it is important to recognize that public response to contentious issues covers a broad spectrum and is doubtless content-driven. In other words, the highly graphic words and images in both the advertisement and the organization's website in ***Grande Prairie*** clearly supported an inference of apprehended psychological harm. In my view, the more subtle, much less graphic, presentation in this instance does not.

[159] In considering the extent of negative public response, this is in no way to diminish the significance of the human experience reflected in that evidence. However, in honouring that evidence, we cannot lose sight of the fact that this was presented to the court as anonymous, untested assertions advanced to displace a fundamental societal right to freedom of expression. However compelling these expressions of human experience may be, care must be taken to ensure that they do not overwhelm, let alone displace, our well-established body of law surrounding the reception and weighing of evidence within our legal system.

[160] This is, admittedly, an exceedingly difficult issue for Canadians. As the Court of Appeal in ***Grande Prairie*** acknowledged:

> Access to and the legal status of abortions raise contentious moral, social and legal issues. Some passionately and sincerely support the "Right to Life", and others are the equally passionate and sincerely supporters of the "Right to Choose". Whatever one's views may be on the subject, access to abortion remains an open topic of public debate: ***R v Watson and Spratt***, 2008, BCCA 340 at paras. 26-7. Given the complexity and importance of the issue, it is to be expected that the debate will at times be passionate: at para 78.

[161] At the end of the day, the issue to be determined is where do we draw the line between acceptable, respectful freedom of expression and expression that must give way to other competing societal interests. The stark reality of the tension between competing views on highly contentious issues is brought squarely into focus in this case. While I have concluded that this decision must be set aside, I am sympathetic to the extraordinarily difficult situation that confronted the City in this instance.

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[162] The complaints are a relevant factor for the City to consider in seeking to meet its statutory objective of a safe and welcoming transit system. However, it should be noted that the complaints are not specific to these proposed advertisements, and that there was community response, both favourable and unfavourable to the prior advertisement. These are factors that impact the weight properly attributed to the complaints in the proportionality analysis.

[163] As noted above, I agree with the Respondent that public response was a relevant factor for the City's consideration in its minimal impairment analysis. However, I do not agree with the City's assertion that its assessment of whether or not there was a reasonable apprehension of harm in posting the proposed advertisements was the key or ultimate issue to be addressed in this instance. ***Doré/Loyola*** required that the reasonableness of the decision be assessed through a balancing of the City's statutory obligations with the Applicant's right to freedom of expression. At the end of the day, the City was required to determine whether its decision minimally impaired the Applicant's *Charter* rights in such circumstances. A consideration of a reasonable apprehension of harm, if properly established, would obviously have been a factor in the City's consideration of its statutory objectives as part of the minimal impairment analysis but was not, as contended by the City, the ultimate issue to be addressed.

[164] In ***Greater Vancouver***, the judge of the British Columbia Supreme Court, 2006 BCSC 455, found that a prohibition on political advertising was not connected to the attainment of the objective of a safe, welcoming public transit system. At para 114, he held:

> ...In *R v Oakes* (at p. 147 of 24 CCC (3d)), Chief Justice Dickson stated that the standard of proof on s. 1 issues is "a very high degree of probability." Without relying on the evidence presented by the plaintiffs, I am not persuaded that the necessary rational connection has been proved, between the safety objective and the advertising restriction. The restrictions would obviously tend to prevent controversy (on political and other social issues) among people who read advertisements on the outside of buses. But I am not satisfied that the kind or extent of the controversy that might be provoked by such advertisements could create a safety risk. There are numerous reasonable standards in the defendants' advertising policies which must me met, before any advertisement is accepted.

[165] When the matter reached the Supreme Court, this portion of the earlier decision was referred to with approval, the Supreme Court holding:

> I accept that the policies were adopted for the purpose of providing "a safe, welcoming public transit system", and that this is a sufficiently important objective to warrant placing a limit on freedom of expression. However, like the trial judge, I am not convinced that the limits on political content imposed by articles 2, 7 and 9 are rationally connected to the objective. I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or it advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the objective of providing a safe and welcoming transit system will be undermined.

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[166] In this instance, some of the language in the complaints is very similar. The similar or duplicate complaints that are found in the Certified Record could be a result of the same individual complaining or they could arise from a pro-choice organization's posted offer to provide a message of complaint for those interested in complaining. Proponents for the pro-choice and pro-life groups are both experienced and well-organized groups focused on advancing their respective points of view. The City's reasons do not contain any analysis of any of the feedback received relative to the prior advertisement. There was certainly no attempt made to try and balance the negative feedback with the positive expressions of support for the Applicant. As previously indicated, the City takes the position that any expression of support for the Applicant's right to freedom of expression was irrelevant to its decision.

[167] The City maintains that it reasonably apprehended harm if it permitted the proposed advertisements to be posted. Even assuming the correctness of the City's position in this regard, its written reasons fail to reveal how this reasonable anticipation of harm was balanced against the Applicant's *Charter*-protected rights.

[168] While I accept that these expressions by members of the public were properly taken into consideration by the City, they do not, without more, rise to the level of a high degree of probability of actual harm adversely impacting the maintenance of a safe and viable community, as described by Dickson CJC in ***Oakes***. In this regard, I am also mindful of the words of Deschamps J in ***Greater Vancouver*** that "[C]itizens, including bus riders, are expected to put up with some controversy in a free and democratic society": at para 77. In ***Grande Prairie***, the Court of Appeal made a similar observation:

> One implication of the constitutional protection of free expression is that the public must accept a certain amount of unpleasant, disagreeable, and even repugnant speech. *Charter* protection is not limited to pleasant and benign expression: ***United Food and Commercial Workers*** (ABCA) at para. 66. The *Charter* requires a certain amount of resilience in the audience of the free speech***:*** ***Greater Vancouver Transportation*** at para. 77.

[169] I accept the Applicant's contention that vigorous disagreements are unavoidable in a pluralistic society, as underscored by Bowman CJBC in ***Trinity Western University v The Law Society of British Columbia,*** 2016 BCCA 423 at para 188:

> The balancing of conflicting *Charter* rights requires a statutory decision-maker to assess the degree of infringement of a decision on a *Charter* right. While there is no doubt that the Covenant's refusal to accept LGBTQ expressions of sexuality is deeply offensive and hurtful to the LGBTQ community, and we do not in any way wish to minimize that effect, there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs, absent the kind of "hate speech" described in *Whatcott* that could incite harm against others (see paras. 82, 89-90 and 111). Disagreement and discomfort with the views of others is unavoidable in a free and democratic society.

[170] In ***Greater Vancouver***, the Supreme Court found that providing a safe and welcoming transit system is a legitimate statutory objective under the ***Loyola/Doré*** framework: at para 76. However, I am not persuaded that the City has established that the necessary rational connection exists between this legitimate safety objective and the advertising restrictions flowing from the City's decision. In accordance with the decision in ***Grande Prairie***, at para 64, I am not satisfied

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that the City has shown that the advertising material can objectively be described as highly offensive or disturbing. Freedom of expression is meant to protect minority opinions from being drowned out by the majority: ***Zundel***, at para 22. As such, the existence of complaints alone are not sufficient to justify the refusal to post the proposed advertisements.

(v) Effective imposition of a total ban on the Applicant's advertising

[171] The Applicant's points to the Certified Record and the affidavit of Konynenbelt as revealing the recent history of its interactions with the City regarding permissible advertising content. The Applicant urges the court to find that this "history" reasonably leads to the conclusion that the City's decision actually represents a total ban on its advertising. The Applicant contends that this conclusion also finds support in the City's decision to first approve and then order the removal of the prior advertisement. Further, the Applicant says that the City's decision to refuse all five proposed advertisements notwithstanding the inconclusive, but at least partially favourable, opinion of ASC, confirms that the City had a highly negative view of the Applicant's brand. When viewed together, the Applicant says that the City's past record and the current decision reveal that the City was not prepared to approve any advertisement advanced by the Applicant.

[172] The City, on the other hand, denies that its decision, properly construed, imposed a ban on any advertising that might be submitted by the Applicant in the future. While acknowledging that its written reasons record that the Applicant's brand is subject to heightened awareness as a result of the prior advertisement and the ensuing complaints, the City insists that the decision only relates to the five proposed advertisements submitted. Specifically, the City maintains that the decision simply determined that running any of the proposed advertisements would not contribute to its statutory objective of providing a safe and viable community.

[173] In ***Grande Prairie***, Slatter JA, referring to the decision in ***Greater Vancouver***, suggested that,

> One consequence of Greater Vancouver Transportation is that public authorities cannot adopt a "content neutral" policy with respect to political advertising. It is not just a matter of a public authority no being able to accept advertising on one side of an issue, but not the other; total bans based on political content are generally not proportional. The Canadian law differs in this respect from American law: at para 53.

[174] Further, at para 87, the Court in ***Grande Prairie*** found that "[A] blanket advertising policy of 'issue neutrality' is, however, not in compliance with the *Charter*: ***Greater Vancouver Transportation***. Thus, the respondent could not adopt a policy of refusing any and all advertising commenting on social or political issues."

[175] Throughout these reasons, I have made repeated reference to the decision in ***Grande Prairie***. In my view, this decision of our Court of Appeal is helpful for a variety of reasons, a number of which have already been cited in these reasons. Of particular note, the Court discussed the shared responsibility of the City of Grande Prairie and the pro-life organization to work together to find a way to balance their respective objectives. In this regard, the Court noted, at para. 93: "[T]he parties had a joint obligation to find a *Charter* compliant balance of the competing objectives." The Court also noted that the parties "never took the step, by following up on the appellant's suggestion that it 'adjust the creative'. They never explored the type of

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advertising that might be acceptable to the respondent, yet allow the appellant to convey its message."

[176] In this instance, I would note that the Applicant tried repeatedly to engage the City and its advertising agent, Pattison, in a discussion regarding a form of advertising that would meet the City's requirements. It submitted different proposals on a virtually on-going basis between October 2016, and October 2018.

[177] Moreover, as previously indicated, I am not satisfied that the City actually conducted the required minimal impairment analysis mandated by ***Doré*** and ***Loyola*** before denying the Applicant's request to post its advertisements. Likewise, as discussed in the previous section of these reasons, I am also not satisfied that the City had before it the type of evidence of actual apprehended harm that could even potentially outweigh the importance of protecting the Applicant's *Charter* right to freedom of expression.

[178] While I am satisfied that Pattison made some real efforts to act as a facilitator and go-between relative to the Applicant's efforts to communicate with the City regarding acceptable advertising content, these efforts largely unproductive. Again, I am sympathetic to the highly-charged, polarized nature of this issue, but the City had an obligation to engage with the Applicant to try and find some common ground. The City failed to do so. The history of discussions between the parties, combined with the content of the City's written reasons, led the Applicant to the view that the City was not prepared to post any of its advertisements. In my view, this was a reasonable conclusion reached by the Applicant in these particular circumstances.

(vi) Reliance on the Canadian Code of Advertising

[179] The City's contractual relationship with Pattison for the exclusive sale of advertising space on Lethbridge buses and shelters included the requirement that all advertising comply with the ASC *Code*. I accept the City's contention that whether or not the proposed advertising complies with the *Code* is a relevant consideration under the ***Doré/Loyola*** analytic framework: ***Greater Vancouver*** at para 79; ***Grande Prairie*** at para 75; ***South Coast*** at paras 35, 56. However, I would underscore the fact that this is one factor only. A decision-maker in circumstances such as those presented to the City in this instance cannot simply defer to an ASC opinion or *Code* non-compliance in conducting a ***Doré/Loyola*** proportionality analysis.

[180] The *Code*, revised October 2016, includes the following provisions that are referenced in the decision:

> **1.Accuracy and Clarity**
>
> In assessing the truthfulness and accuracy of a message, advertising claims 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.
>
> Advertisements must not contain, directly or by implication make, inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations;

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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.

8. Professional or Scientific Claims

Advertisements must not distort the true meaning of statements made by professions or scientific authorities. Advertising claims must not imply that they have a scientific basis that they do not truly possess. Any scientific, professional or authoritative claims or statements must be applicable to the Canadian context, unless otherwise clearly stated.

11. Superstitions and Fears

Advertisements must not exploit superstitions or play upon fears to mislead the consumer.

14. Unacceptable Depictions and Portrayals

It is recognized that advertisements may be distasteful without necessarily conflicting with the provisions of this Clause 14; and the fact that a particular product or service may be offensive to some people is not sufficient grounds for objecting to an advertisement for that product or service.

Advertisements shall not

(c) demean, denigrate or disparage one or more identifiable persons, group of persons, firms, organizations, industrial or commercial activities, professions, entities, products or service, or attempt to bring it or them into public contempt or ridicule;

[181] Of note, political and election advertising are specifically excluded from the *Code.* 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". Likewise, "election advertising" is defined to include "'advertising' about any matter before the electorate for a referendum, 'government advertising' and 'political advertising' any of which advertising is communicated to the public within a time-frame that starts the date after a vote is called and ends the after the vote is held. In this definition, a 'vote' is deemed to have been called when the applicable writ is issued."

[182] The political and election advertising exemption is expressed in the following terms:

> 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 though 'political advertising' or 'election advertising', which are excluded from the application of this *Code.*

[183] I accept the Applicant's contention that ASC is a private business regulator which produces the *Code* as a guide. As a private body, ACS is not subject to the *Charter*. ACS has no authority to regulate expression even though a number of entities, including the Respondent, voluntarily have determined that they will submit to its opinions. There is no suggestion that the Code, or any opinion provided by ACS, included any consideration of the *Charter* provisions or,

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indeed, any statutory objectives or associated values that the City was obliged to consider in making the challenged decision.

[184] As previously indicated, in ***Greater Vancouver***, the Court held that the City may refer to the Code as a guide for its advertising:

> Thus, limits on advertising are contextual. Although we are not required to review the proposed standards, the Canadian Code of Advertising Standards, which is referred to in the transit authorities' advertising policies, could be used as a guide to establish reasonable limits, including limits on discriminatory content or on ads which incite or condone violence or other unlawful behaviour. Given that the transit authorities did not raise s. 1, however, the above comment is intended merely to provide guidance on what may be justified, but the determination of what is justified will depend on the facts in the particular case: at para 79 (emphasis added).

[185] In ***Grande Prairie***, the Court of Appeal held, referring to ***Greater Vancouver***, that "it seems clear that objectively developed advertising standards can provide guidance on the boundaries of permissibly restrictions on political advertising": at para 52.

[186] The Applicant's argument with respect to the City's reliance on the *Code* has two different branches. First, the Applicant challenges what it says is the City's failure to even consider the *Code's* exemption for so-called "political advertising". Second, the Applicant points to the fact that the City received an opinion from ASC that there likely would be issues with proposed advertisements #2, #3 and #4, but that proposed advertisement #1 appeared to meet the *Code* requirements. The ASC offered no view relative to proposed advertisement #5. Notwithstanding these opinions, the City rejected all of the proposed advertisements.

[187] The City concedes that the opinion that it obtained from ASC with respect to the proposed advertisements did not provide a clear response and, as such, was of little or no assistance to the City in the decision-making process. The City was, accordingly, required to apply the provisions of the *Code* itself in reaching this decision. The City also maintains that, relying on ASC Interpretation Guideline #6, it was not required to consider the political advertising exemption in this instance as the pro-life/pro-choice issue was not then a current subject of debate at any level of government: Record of Proceedings, Tab 6, p. 0049.

[188] I agree with the Applicant that the political advertising exemption set out in the *Code* should have been considered by the City in reaching this decision. As the Applicant properly points out, abortion was the subject of animated discussion during the televised Leaders' Debate on October 7, 2019, held in conjunction with the 2019 Federal General Election. While there was no federal election campaign on-going in November 2018, at the time the decision under review was made, the fact that it was a campaign issue some eleven months later lends strong support to the notion that it has been an on-going public issue at least since the Supreme Court of Canada struck down Canada's then abortion law in 1988 in ***R. v Morgentaler***, [1988] 1 SCR 30. 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". As such, the possible application of this exemption should have been considered by the City in its determination of the Applicant's request to post these five advertisements.

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[189] I also agree with the Applicant that the City placed undue reliance on the *Code* in reaching the decision. A careful review of the City's written reasons reveals that alleged non-compliance with the *Code's* requirements was the single most important factor in the decision-making process. The City's decision refers to the *Code* as a "clear and objective standard for appropriate advertising". However, it could not be the only factor given the requirement to balance the City's statutory objectives and the Applicant's *Charter* right to freedom of expression. In my view, the reasons disclose no such balancing exercise or minimal impairment analysis having taken place. I would simply add that I am troubled by the reasons' silence on the existence and content of the ASC opinion that cast doubt on whether some or all of the proposed advertisements actually violated the *Code*.

(vii) The proposed ads inaccurately depict the current state of the law as regards human fetuses.

[190] The Applicant says that its proposed advertisements were intended to challenge the status quo. The purpose of the expression was not to present strictly factual advertisements that speak to the present state of the law, but rather to provide an opinion that advocates for change. The Applicant maintains that the proposed advertisements advocate for a change in the law, and that such form of expression falls squarely within the scope of s 2(b) of the *Charter*.

[191] The City, on the other hand, vigorously challenges the accuracy of what it describes as expressions of fact, not opinion. In its written reasons, the City describes the proposed advertisements as inaccurate, misleading, and as not a proper representation of the current state of the law in Canada.

[192] Whether an advertisement is misleading or inaccurate was discussed in ***Grande Prairie*** in the following terms:

> One relevant factor in the ***Dore*** analysis would be whether the advertisement is inaccurate or misleading. 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": ***Keegstra*** at p. 766. As ***Zundel*** noted at p. 753 the right to free expression "...serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception". The core of the right to free expression is to allow citizens to have different views about different facts. Any argument about inaccuracy must therefore be based on objectively verifiably facts, not opinions about those facts.

[193] The Applicant concedes that the current state of the law does not accord legal rights to fetuses or that fetuses are human beings or have human rights. The Applicant also acknowledges, referring to s 223(1) of the *Criminal Code* and the decision in ***R v Demers***, 1999 CanLII 6632 (BCSC), that a fetus is not recognized in Canadian law as a "child" and a "human being" until it is born alive. However, the Applicant goes on to say that four of the five proposed advertisements do not purport to be factual. Rather, the Applicant maintains that proposed advertisements #1, #2, #3, and #5 are opinion advertisements not intended to communicate facts, but rather to advocate what the law should be. According to the Applicant, these proposed advertisements simply convey the message that fetuses should have human rights and that life should be the most fundamental human rights, accurately representing that such is not the case at present.

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[194] I accept the Applicant's contention that only proposed advertisement #4 purports to be factual in its assertion that "birth did not transform me into a child." I agree with the Applicant that this assertion is consistent with section 223(1) of the *Criminal Code*. As such, I share the Applicant's view that the Respondent's reasons for rejecting proposed advertisement #4 appear to be based on an incorrect interpretation of this provision of the *Criminal Code*.

[195] The City placed considerable emphasis in its written materials and during oral argument before the court on alleged inaccuracies in the statements contained in the proposed advertisements. In my view, the City overemphasizes the *Code* provision dealing with accuracy of an advertisements content. The City's insistence on factual accuracy is, I suggest, somewhat misplaced given the latitude accorded to free expression by the *Charter.* In this context, accuracy – or the City and even ACS's interpretation of accuracy – may well have to yield to the Applicant's right to freedom of expression. This is, admittedly, a difficult balancing exercise imposed on a decision maker. However, this is precisely what the City failed to do in this instance in placing undue reliance on *Code* non-compliance and failing to undertake the required minimal impairment analysis.

[196] I would reiterate my comments earlier in these reasons that accuracy is often difficult to determine. Further, the Supreme Court in ***Zundel*** made it clear that s. 2(b) of the *Charter* affords protection to inaccurate information and even deliberate lies.

Reasonable Apprehension of Bias

[197] The Applicant contends that the City did not approach this decision with an open mind; that its reasons demonstrate a lack of impartiality; and that it based its decision on its prior decision to take down an earlier and different advertisement. In all of the circumstances, the Applicants says the decision is tainted by a reasonable apprehension of bias.

[198] The Respondent, on the other hand, advances a number of arguments in urging the court to find that this allegation has not been established. First, the City says that it properly took into consideration the fact that several individuals contacted the City to express concern regarding the prior advertisement. As such, this community response "provided the City with insight into the harm that could be created by the Proposed Advertisement." Further, the City denies that the decision in the present instance was pre-determined. Next, the City maintains that the fact that certain members of the community supported the Applicant's right to freedom of expression relative to the prior advertisement "has no place in the ***Doré/Loyola*** analysis" and that support for the Applicant is irrelevant": Respondent's Written Brief, paras 98 and 100.

[199] The parties agree that the test for the existence of a reasonable apprehension of bias is set out in ***Committee for Justice and Liberty v Canada (National Energy Board)***, [1978] 1 SCR 369, as follows:

> ...the apprehension of bias must be a reasonable one held by reasonable and right minded people, applying themselves to the question and obtaining thereon the required information...[T]he test is "what would an informed person viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker] whether consciously or unconsciously, would not decide fairly: at p 394.

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[200] The City also relies on the decision in ***Nguesso v The Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness***, 2015 FC 880, as support for the proposition that a mere suspicion is not sufficient to ground a finding of reasonable apprehension of bias. Rather the grounds must be serious and substantial.

[201] In ***Baker v Canada (Minister of Citizenship and Immigration)***, [1999] 2 SCR 817, L'Heureux-Dube J, citing ***Newfoundland Telephone Co v Newfoundland (Board of Commissioners of Public Utilities)***, [1992] 1 SCR 623, and ***Old St Boniface Residents Assn Inc v Winnipeg (City)***, [1990] 3 SCR 1170, held that standards for reasonable apprehension "may vary, like other aspects of procedural fairness, depending on the context and the type of function performed by the administrative decision-maker involved: ***Baker***, at para 47.

[202] As the Supreme Court stated in ***Newfoundland Telephone***, "an unbiased appearance is, in itself, an essential component of procedural fairness": at page 636. Procedural fairness demands "decisions be made free from a reasonable apprehension of bias by an impartial decision-maker": ***Baker*** at para 45. The Court in ***Newfoundland Telephone*** also discussed the broad range of administrative decision-makers and the types of decisions that they are called upon to make:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their function will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popular elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient: at p 638.

[203] Earlier in these reasons I found that it was appropriate for the City to take into consideration public response to the Applicant's prior advertisement when conducting a ***Doré/Loyola*** analysis in relation to the proposed advertisements. This required the City to consider all public response, not just the response that was negative or unfavourable. It is clear from the City's written reasons that it only considered the negative community input. Indeed, the City takes the position that community support for the Applicant's freedom of expression was "irrelevant" to the decision on the proposed advertisements. At the same time, it asks the court to find that the reasons for the prior decision are not before the court and, further, that the prior decision is not the subject of this judicial review.

[204] In my view, this argument is illogical and, as such, not persuasive. While I agree that the prior decision is not before the court as part of this application, public response to that prior decision is, as outlined above, a relevant consideration. The City cannot, however, only look at some of the public response – the unfavourable part – and not also take into consideration the public response which was supportive of the Applicant's right to post its advertisements as a component of freedom of expression. In effect, the City is saying that it can make a decision after having heard one side of the argument only. In my view, such an approach raises questions regarding procedural fairness and bias.

[205] The City compounds this erroneous approach when it suggests that there was "public outcry" to the prior advertisement. In my view, this statement does not accurately reflect the materials that form part of the Record in this regard. Likewise, it is not balanced in any way

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through any form of recognition of other public response favourable to the Applicant that was received after the prior advertisements were removed.

[206] In my view, there are other considerations that must be factored into the determination of whether or not a reasonable apprehension of bias has been established in this instance. First, I take into consideration the fact that the City relied on alleged breaches of the CSC *Code* in the face of an opinion provided by SCS that took no issue with one of the proposed advertisements; failed to offer any opinion relative to another; and suggested that there would likely be issues, none of which were identified, with respect to the other proposed advertisements. The written reasons failed to disclose the existence of this opinion at the time the decision was taken, or the fact that the City conducted its own assessment of the proposed advertisement's compliance with the *Code* notwithstanding the ACS opinion.

[207] Second, the City's written reasons fail to undertake any analysis of the nature and scope of the Applicant's right to freedom of expression. While the reasons state that this has been taken into consideration, a fulsome reading of those reasons contains no actual analysis. Likewise, there is not mention made of the requirement to determine whether the Applicant's rights have been minimally impaired in furtherance of the City's statutory objective to maintain a safe and viable community. In my view, the City's failure to conduct a proper ***Doré/Loyola*** analysis is a significant factor in determining the issue of reasonable apprehension of bias.

[208] Third, the City assumed harm from the emails received from the members of the community who expressed strong opposition to the prior advertisement and alleged upset and distress prompted by the prior advertisement evocation of painful memories. As previously discussed in these reasons, I find that the Record does not support the City's conclusion that it reasonably apprehended harm if the proposed advertisements were permitted. In my view, the City's assumption that harm would result from posting the proposed advertisements is also a factor in the determination of reasonable apprehension of harm.

[209] Overall, I think the informed person viewing the matter objectively would determine that the City's decision in this instance were tainted by a reasonable apprehension of bias. As such I am satisfied that an informed person viewing the matter objectively would conclude that that the City did not undertake an independent, open-minded evaluation of the five proposed advertisements. I agree with the Applicant that the City failed to undertake the required minimal impairment analysis and based its decision largely on the basis of the receipt of negative community feedback related to the prior advertisement. While I have already found that this decision cannot stand for a number of reasons previously articulated, I am also satisfied that the Applicant's have established that the decision is tainted by a reasonable apprehension of bias on the record before me.

The City's Arguments

(a) The decision in *Grande Prairie* governs the matter

[210] As noted earlier in these reasons, the City maintains that the issues in this case are governed by the Court of Appeal's decision in ***Grande Prairie***. While I agree that I am bound by the legal principles articulated by the Court of Appeal in that instance, I am of the view that the actual application of those principles leads to a different result in this instance.

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(b) The location of the proposed advertisements

[211] I accept the City's contention that the location of the proposed advertisements is a factor properly taken into consideration in the analysis. This was an issue addressed in both ***Greater Vancouver*** and ***Grande Prairie***. In *Greater Vancouver*, Deschamps J found that "limits on advertising are contextual", and that location and audience are factors that must be taken into consideration: at para 79. In ***Grande Prairie***, Slatter JA held, at para 81:

> While Greater Vancouver Transportation rejected the principle of "advertising neutrality" that was adopted in Shaker Heights, it did not hold that the location of the proposed advertising is irrelevant. The law accepts that advertising which is acceptable in one place may not be acceptable in another, and that where the audience includes children more extensive restrictions can be justified: Greater Vancouver Transportation at para. 78.

[212] Anderson J also made reference to location of the proposed advertisement, properly in my view, in ***Grande Prairie***, when she suggested that: [E]veryone sees a city bus, from the youngest to the oldest citizens of a municipality. Consequently, the messages carried on city buses must be appropriate for such a diverse audience": at para 70.

[213] The Applicant does not seriously dispute the fact that advertising may be acceptable in one location but not another. I agree. In my view, the inherent value of bus advertising is that it is not static and, as such, involves broad public exposure as buses proceed along pre-determined bus routes. The reach of this particular form of advertising is, accordingly, very much an appropriate consideration in a ***Doré/Loyola*** analysis.

(c) A reasonable apprehension of harm if the advertisements were posted

[214] The City's argument in this regard was addressed extensively throughout these reasons.

(d) The contravention of the Canadian Code of Advertising Standards by each of the proposed advertisements.

[215] As previously indicated, I accept the City's contention that it was entitled to rely on the *Code* as a guide on permissible restrictions. However, for the reasons outlined above, I find that the City placed undue reliance on the *Code* provisions and, indeed, reached conclusions that were contrary to the opinion provided by ACS relative to at least some of the proposed advertisements.

Conclusion

[216] In ***Grande Prairie***, the Court of Appeal found that there were "many reasons justifying the Respondent's rejection of this advertisement": at para 91. It then cited the advertisement's "hateful nature, its likely audience, its potential for harm, possibly its inaccuracy, it's non-compliance with industry standards and its extreme tone": at para 51.

[217] In my view, for the reasons outlined above, I am not persuaded that the Applicant's five proposed advertisements in this instance were comparable to the advertisement at issue in ***Grande Prairie***. In particular, I find that the "hateful nature" and "extreme tone" determined to exist in ***Grande Prairie*** do not exist in this instance. As such, I am satisfied that the decision in

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Grande Prairie, while helpful in establishing the applicable framework and legal principles applicable to this case, do not dictate the same result.

[218] I am satisfied that the City failed to conduct the required minimal impairment analysis in its consideration of these five advertisements. As such, the City failed to properly balance the attainment of its statutory objectives with the Applicant's *Charter* protected right to freedom of expression. For all of these reasons, the Applicant has persuaded me that the City's decision is unreasonable.

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Remedies

[219] The Applicant seeks two forms of relief in the event that it is successful in this application. First, it seeks to quash the City's decision denying the approval of the proposed advertisements. Second, it seeks an order in the nature of *mandamus* to compel the City to post the Applicant's five advertisements.

[220] The Applicant urges the court to find that there is no reason to remit the matter back to the City for reconsideration. According to the Applicant, there is only one constitutionally reasonable outcome. Further, the Applicant says that a finding of reasonable apprehension of bias cannot be remedied and that it would not, in light of such a finding, be appropriate to remit the matter back to the same body that made the decision in the first place. In this regard, the Applicant urges the court to find that there is not more than one constitutionally reasonable outcome from the ***Doré/Loyola*** analysis so as to warrant judicial deference to the administrative decision-maker appointed pursuant to statute.

[221] The Applicant relies on a series of decisions, including ***Doucet-Boudreau v Nova Scotia (Minister of Education)***, 2003 SCC 63; ***Renaud c Quebec (Commission des affairs sociales)***, 1999 CanLII 642 (SCC); ***Canada (Attorney General) v PHS Community Services Society***, 2011 SCC 44.

[222] In ***Renaud***, the reviewing court determined that the record before it rendered it impossible to arrive at any other conclusion but that the compensation payable under the *Automobile Insurance Act* should be paid to the appellant in that instance. In the very brief oral reasons delivered from the bench, the Court acknowledged the very exceptional circumstances of the case. McLachlin J, dissenting on this point, reached a similar conclusion in ***Loyola*** and would have granted the requested ministerial exemption and declined to remit the matter back to the Minister for re-consideration. While I accept the Applicant's contention that remitting a matter back to the decision-maker is sometimes not the appropriate remedy, the authorities suggest that this is the most usual remedy granted.

[223] Section 24(1) of the *Charter* provides a remedy where a government act violates *Charter* rights, as opposed to a law or policy, as was the case in (***GVTA*** at para 90; ***R v Ferguson***, 2008 SCC 6 at para 61). A remedy should vindicate the violated *Charter* rights in a responsive and effective manner: ***PHS*** at para 142, citing ***Doucet-Boudreau*** at para 25).

[224] In ***PHS***, the Minister was found to have violated *Charter* rights by failing to extend a legislative exemption to a safe injection facility for intravenous drug users. The Supreme Court characterized the infringement as serious, in that is threatened the health of affected individuals.

In such circumstances, the Court determined that a bare declaration requiring the Minister's reconsideration on the same facts was not sufficient. Accordingly, it made an order in the nature of *mandamus* on the basis that the only constitutional response was to grant the application. The Court concluded that there was nothing to gain but much risk in sending the matter back for reconsideration. The Court noted that their order did not fetter future decisions related to applications for exemptions. Guidelines for the exercise of ministerial discretion in future cases were also provided.

[225] In ***South Coast***, the British Columbia Court of Appeal quashed the decision of the transit authority denying it advertising space for a pro-life advertisement on public buses. In remitting the matter back to the original decision-maker for reconsideration, the Court of Appeal found that the reasons failed to disclose whether the decision-maker engaged in the required proportionate balancing exercise. The court found that mandamus was not appropriate because the circumstances were not such that any decision refusing the advertisement would be unreasonable (at para 60). Somewhat similarly, in ***Grande Prairie***, the Court of Appeal noted that if the original decision were to be set aside because the municipality's given reasons were too narrow, the appropriate remedy would be to remit the issue back for reconsideration (at para 41, citing ***Delta Air Lines Inc v Lukacs***, 2018 SCC 2 at para 31).

[226] In the alternative, the Applicant invites the court to quash the decision and to remit the matter back to the City for reconsideration. In the event that the court elects to grant such a remedy, the Applicant urges the court to provide directions to the City on the reconsideration process to be followed. The Applicant says that the directions issued by the court should include a prohibition order to prohibit the City for rejecting the five proposed advertisements on any unconstitutional grounds.

[227] The Respondent, on the other hand, maintains that the proper remedy is to quash the decision and remit the matter back to the decision-maker in the event that the court finds in the Applicant's favour. As such, the City contents that *mandamus* should be reserved for exceptional circumstances, such as the decision-maker's jurisdiction has no foundation in law; only one interpretation or solution is possible; the decision-maker is no longer fit to act; or returning the matter to the decision-maker would be pointless: ***Gigue v Chambre des notaires du Quebec,*** 2004 SCC 1. Further, the City rejects the Applicant's contention that an order of prohibition would be appropriate in the circumstances.

[228] In my view, this is not a proper case for *mandamus*. As in ***South Coast***, this is not a situation where I am prepared to conclude that any decision refusing the Applicant's proposed advertisements would be unreasonable. The decision is, accordingly, quashed and the matter remitted back to the City for re-consideration. Given my findings regarding reasonable apprehension of bias, I would strongly recommend that the City identify an alternative decision-maker when dealing with this matter anew.

Costs

[229] The Applicant is entitled to the costs of this application. If the parties are unable to agree on the matter of costs, they may seek the Court's direction within 30 days of the release of these reasons.

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Heard on the 10th day of October, 2019.
Dated at the City of Lethbridge, Alberta this 29th day of October, 2020.

M. David Gates
J.C.Q.B.A.

Appearances:

C. Crosson
for the Applicant

M. Solowan
for the Respondent

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