

Court of Queen's Bench of Alberta

Citation: American Freedom Defence Initiative v Edmonton (City), 2016 ABQB 374

Date: 20160629
Docket: 1403 06143
Registry: Edmonton

Between:

American Freedom Defence Initiative

Plaintiff/Applicant

- and -

City of Edmonton

Defendant/Respondent

- and -

Charles Stolte

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee**

Introduction

[1] The Applicant, American Freedom Defence Initiative (“AFDI”) seeks an order in morning Justice Chambers requiring the production of unredacted copies from the Questioning of the Respondent City of Edmonton’s representative; and for an order that certain answers to other questions that were objected to during the Questioning be provided.

[2] This matter involves the removal of bus ads from Edmonton Transit System (“ETS”) buses that were paid for by the Applicant. These ads displayed the photos of seven young Muslim women with the following caption:

“Muslim Girls Honor Killed by Their Families,” then asked “Is your family threatening you? Is there a Fatwa on Your Head?”

[3] Finally, contact information where help could be found was given.

[4] On or about October 21, 2013 the AFDI advertisements were placed on the back of ETS buses. On October 29, 2013 AFDI was informed by a representative of the City of Edmonton that the advertisements were removed, in response to a number of complaints.

[5] AFDI then filed an Originating Application on April 28, 2014 applying to this Court for a declaration that the decision of the City of Edmonton to cancel the AFDI advertisements infringed section 2(b) of the *Canadian Charter of Rights and Freedoms*. Section 2(b) guarantees the right to freedom of expression. AFDI also sought an Order enjoining the City of Edmonton for violating the Applicant’s *Charter Rights* in the future. These matters will be heard in approximately three months on September 23, 2016.

The Redacted Letters

[6] Questioning occurred on the Affidavit of a former Branch Manager of ETS on October 15, 2015. In response to a request for sealed letters from the former Branch Manager to ETS employees relating to the approval of the bus ads by the Applicant, the Respondent produced the subject letters, but with substantial redactions. The said letters it is submitted by the Applicant are material and relevant to the current litigation, and the Respondent has asserted no reason, proper or otherwise for the redactions.

Objections

[7] During the same questioning of the former Branch Manager of ETS, the Respondent objected to the following questions, which it is submitted are proper:

a. Objection 13: To a question does the witness recognize the ad marked as exhibit A for identification (the back of a bus with a proIslamic message advertised on it);

b. Objection 14: To a question does the witness recognize the ad attached as Exhibit D to Ms. Geller’s Affidavit (the back of a bus with a pro-Islamic message advertised on it);

c. Objection 15: To a question in the witness’ time as branch manager of ETS, does he recall pro-Islamic ads on buses in Edmonton.

[8] It is submitted that the questions objected to are relevant and material to the within litigation in that they explore the issue of whether ETS has been neutral in its approval of ads on ETS buses, or whether it has been partial with its use of public space.

The Respondent City of Edmonton's Position

[9] The Respondent City of Edmonton takes the position that the redacted letters eliminated only portions that related to future expectations of the two staff who approved the bus ads, and as such these counselling/discipline letters are not relevant or material to the Applicant's present *Charter* litigation.

[10] With respect to the Questions objected to, Objection 15 deals with a question with respect to the witness's time as Branch Manager of ETS and whether he recalled pro-Islamic ads on buses in Edmonton. The Respondent City of Edmonton takes the position that it is not able to discern what a "pro-Islamic" ad is. It also submits that whatever ads may have been approved at a different time and in different circumstances is irrelevant to the present proceedings.

The Applicable Rule of Court

[11] The relevant *Rule of Court* is as follows:

5.30(1) If, during questioning, a person answering questions

(a) does not know the answer to a question but would have known the answer if the person had reasonably prepared for questioning, or if as a corporate representative the person had reasonably informed himself or herself, or

(b) has under the person's control a relevant and material record that is not privileged,

the person must undertake to inform himself or herself and provide an answer, or produce the record, within a reasonable time.

(2) After the undertaking has been discharged, the person who gave the undertaking may be questioned on the answer given or record provided.

5.25(4) If an objection to a question cannot be resolved the Court must decide its validity.

Analysis

The Redacted Letters

[12] I have reviewed the redacted letters from the then Branch Manager of ETS Transportation Services addressed to the two employees who approved the ads. These letters are both dated November 12, 2013. The City of Edmonton's purpose was clearly primarily to provide these two employees its expectation of them on a go forward basis with respect to lines of communication and responsibilities. The question is whether the redacted portions are also relevant for purposes of the *Charter* litigation at hand, which will be heard in late September 2016.

[13] The applicant argues that the redacted portions of the letters are relevant because they may indicate future expectations of the City of Edmonton with respect to their employees in this area, and may relate to matters that are potentially at least material and relevant to the actions that those employees took with respect to the bus ads in question. The purpose and effect these counselling/discipline particulars also could affect the future *Charter* violations which the Applicant is also seeking to enjoin.

[14] The problem with the Applicant's position is that this redacted information is only relevant and material if one assumes that there has been a *Charter* violation. Whether there has been a *Charter* violation has yet to be determined. Accordingly the redacted portions which only contain personnel discipline/counselling particulars is not presently relevant and material until a *Charter* violation has been found. The redacted portion only deal with personnel matters, and are not relevant or material to any *Charter* violations.

[15] As such I conclude that the application with respect to the redacted letters is dismissed

Objections to Questioning

[16] When the former Branch Manager of ETS was Questioned, the Respondent City of Edmonton objected in the following manner, as is indicated at page 70 beginning at line 25 and ending on page 73 at line 9 as follows:

Q MR. CAMERON: Mr. Stolte, I am going to show you a picture. I'm going to ask if you recognize it. And I will show it to your legal counsel.

MR. SAVOURY: Don't answer this question until I review it. What is your question?

Q MR. CAMERON: Do you recognize this ad?

MR. SAVOURY: Objection. Don't answer that.

OBJECTION NO. 13

Q MR. CAMERON: Mr. Stolte, If I told you that this was an Edmonton Transit bus, would you dispute that?

A I don't know.

Q You don't know if you would dispute it?

A Well, I can't tell you if it is or It isn't.

Q Why is that?

A Because there's lots of standard buses like that throughout Canada.

Q Okay.

A And I can't see the license plate, whether it is Alberta or not. There's no defining --

Q Well, the license plate does say Alberta.

A Okay, so it could be Calgary.

Q Okay.

A Could be Red Deer. Could be anywhere.

Q I am going to send you back to Ms. Geller's affidavit, to Exhibit D. Do you see that there, sir, Exhibit D?

MR. SAVOURY: Which page?

MR. CAMERON: It is the only -- well, that is the first page in Ms. Geller's affidavit.

Q MR. CAMERON: Do you see that there, sir?

A M-hm.

Q Is that an Edmonton bus?

A I don't know because the lights on the top are different than the lights on this one here.

Q That is not what I'm asking you.

A Well, I don't know if it's an Edmonton bus.

Q Do you have any reason to think it is not an Edmonton bus? Look at the top of the sheet there. It says, EDMPM contract number. This is the sheet that I referred to you earlier from Pattison.

MR. SAVOURY: So what is the question?

Q MR. CAMERON: Are these Edmonton buses?

MR. SAVOURY: He said he doesn't know.

Q MR. CAMERON: Okay. Do you recognize the ad of the picture that I'm showing you, the one that has the ad that says, Islam, you deserve to know?

MR. SAVOURY: What is the question? Sorry.

Q MR. CAMERON: Do you recognize this ad?

MR. SAVOURY: Don't answer that. Objection.

MR. CAMERON: What is the basis of that objection?

MR. SAVOURY: It is not relevant to his affidavit or this case. You may think it is, but it is not.

OBJECTION NO. 14

Q MR. CAMERON: Okay, so let me ask you this. In your time as branch manager at ETS, do you recall pro-Islamic ads on buses in this city?

MR. SAVOURY: Don't answer that.

MR. CAMERON: Again, what is the basis of your objection?

MR. SAVOURY: Irrelevant.

OBJECTION NO. 15

Q MR. CAMERON: Do you recall pro-Christian ads--

MR. SAVOURY: Don't answer that.

Objections 13 and 14

[17] These questions deal with whether a City of Edmonton bus is pictured containing the ad in question. The objection raised by the City lawyer was with respect to relevance; and that the question had already been answered, that is, the witness did not know whether a City of Edmonton bus was being pictured.

[18] It is correct that with respect to objections 13 and 14, the former Manager of Edmonton Transit appears to say that he does not know whether or not the picture depicts an Edmonton Transit Bus. At page 71 the former ETS Manager talks about standard buses throughout Canada presumably looking the same as that picture. He mentions that he cannot see the licence plate, and even though it is pointed out that the licence plate does say Alberta, the former ETS Manager says it could be a Calgary or Red Deer Bus.

[19] At page 72 he was specifically asked if these are Edmonton Buses, based on the colour and lights shown in the picture. The City's counsel then objects to the question, reiterating that the witness does not know the answer.

[20] It is correct that the witness may have answered the questions related to whether or not a City of Edmonton bus is depicted in the photos that form objection 13 and 14. However it is a requirement in Rule 5.30(1)(a) that where a person during Questioning does not know the answer, but would have known the answer if the person had reasonably prepared for Questioning, he must undertake to inform himself within a reasonable time.

[21] In this case it seems clear to me that the former ETS Manager would know what an ETS bus looks like, and that the buses depicted in the pictures put to this witness depict an ETS bus in all likelihood. It may not be an absolute certainty, but there is a high probability that an ETS bus is depicted in the pictures. This is essentially conceded by present counsel for the City of Edmonton in argument before me, although relevance is still being challenged.

[22] Accordingly while the former ETS Manager has answered that he does not know whether an ETS bus is depicted in the pictures that he was shown, I conclude that that is not sufficient given that the former ETS Manager is required to reasonably inform himself and prepare to answer the question within a reasonable time. As such objections 13 and 14 are improper and the former ETS manager will answer those questions to the best of his ability, after informing himself as to what an ETS bus looks like. The relevance of the bus ads displayed will likely follow the answer.

Objection 15

[23] The question here is with respect to whether the former ETS Manager recalled buses displaying "pro-Christian" ads in the past. The application presently before me characterizes the question as whether the former ETS Manager recalled "pro-Islamic" ads appearing on buses in Edmonton previously, but in fact a closer reading of the actual transcript at page 73 line 1 (as opposed to line 7) shows the term "pro-Islamic" ads used interchangeably with "pro-Christian" ads. For purposes of this decision however I am satisfied that the Questioning was with respect to past "pro-Islamic" ads, which it is submitted by the Applicant is relevant and material because the City characterized its ads as "anti-Islamic".

[24] Counsel for the City of Edmonton objects to the question about other ads of a “pro-Islamic” or “pro-Christian” nature because it is irrelevant as those previous ads would involve different buses at different times in different circumstances.

[25] However I conclude that previous ads appearing on City of Edmonton buses that were considered to be “pro-Islamic” or “pro-Christian”, even though they would have appeared on different buses at different times is material and relevant to the present *Charter* application. The City has clearly taken the position that the present ads that were removed by the City of Edmonton buses were essentially “anti-Islamic”. This is clear from one of their redacted letters dated November 12, 2013 to the disciplined employees which begins as follows:

Recently, I spoke to you about the ETS Advertisement that targeted the Muslim Faith, which was purchased by the American Freedom Defense Initiative. When the advertisements went up on our buses there was justifiable outcry from community members, and associated media coverage resulting in the advertisements being removed. However, the ads caused a great deal of embarrassment to Edmonton Transit and did not portray Edmonton Transit or the City of Edmonton positively. You were interviewed by the media and indicted that the City does not get involved in approving ads on the bus and that the ad met standards. This information was false and put both the City and Pattisons reputation at stake.

[Underlining Added]

[26] As such I am satisfied that the City has opened up the issue which is the subject matter of objection 15 when it characterized the removed ads as targeting the Muslim faith. Accordingly the City essentially characterized those removed ads as “anti-Muslim” as it continued in its counselling/discipline letter quoted above, so the City should be able to discern what a “pro-Islamic” ad consists of in its opinion.

[27] Therefore having characterized the removed ads in that manner, it is relevant and material whether or not the City has previously allowed “pro-Islamic” or “pro-Christian” ads to be placed on City of Edmonton buses. The Applicant is entitled to analyze what policy conclusions or considerations the City is making in this area, when and if it accepted these types of ads in the past. For example, is the City being fair in treating what it considers “anti-Islamic” ads in the same way that it treats “pro-Islamic” or “pro-Christian” ads. This is a material and relevant line of questioning, and the City of Edmonton must answer this question.

Conclusion

[28] The application with respect to the redacted letter by the Applicant is dismissed as the portions of the redacted letters are not relevant or material to the present *Charter* application. Their purpose and effect is essentially with respect counselling and discipline of two specific employees. They do not have an affect on future dealings between the Applicant and the City, unless and until a *Charter* violation is actually been determined. The alleged *Charter* violation is essentially an allegation at this point, so these personnel counselling and reporting matters have no direct relevance to the *Charter* application itself.

[29] With respect to objections 13 and 14 in the Questioning of the former ETC Manager, while the questions have been answered as to whether or not he recognizes the buses depicted in

the photos as being an ETS bus, I conclude that the City's representative will have to answer these questions again after reasonably informing himself as required by Rule 5.30(1)(a). I conclude that the former ETS Manager has not reasonably informed himself and/or has not reasonably prepared for these questions, and as such he will have to provide an answer to these questions again within a reasonable time after having reasonably prepared and reasonably informed himself.

[30] As for objection 15, it is quite clear from the Respondent's correspondence that they viewed these bus ads as objectionable in part because they were considered to be "anti-Muslim" in nature. Having taken this position, the Respondent cannot now object to a Question about the Branch Manager's recall of whether "pro-Islamic" ads appeared on buses in Edmonton. If the Respondent takes the position as it appears to have that the Applicant's ads were "anti-Muslim" then it is relevant and material for purposes of the litigation what the City of Edmonton may have considered to be "pro-Islamic" ads appearing on buses in Edmonton. Having raised the distinction in the first place, the Respondent should be able to respond to a Question about whether the Branch Manager of ETS recalled "pro-Islamic" ads appearing on buses in the past in Edmonton. This answer could also allow for a better understanding of the City's policy comparatively with respect to these types of ads, which would be relevant to the *Charter* application.

[31] As such I conclude that the Branch Manager of ETS will answer the Question which is the subject of objection 15.

Heard on the 26th day of May, 2016.

Dated at the City of Edmonton, Alberta this 29th day of June, 2016.

Donald Lee
J.C.Q.B.A.

Appearances:

Marty Moore, J.D.
Justice Centre for Constitutional Freedoms
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