

April 29, 2022

City of Salmon Arm
Box 40, 500 – 2 Avenue N.E.
Salmon Arm, BC V1E 4N2

via Email: [REDACTED]@salmonarm.ca

Attn: Erin Jackson

Dear Ms. Jackson:

Re: Advertising on City bus benches – Shuswap Pro-Life Society

We write on behalf of Ms. Hildegard Krieg and the Shuswap Pro-Life Society, who you invited to respond to your April 20, 2022 email. That email appears to conclude that the City of Salmon Arm is justified in infringing Ms. Krieg's, the Society's and the general public's *Charter* freedom of expression so long as the City's policies or actions do not constitute a "radical frustration" of the Society's freedom of expression, ostensibly relying on the case of *Toronto (City) v. Ontario (Attorney General)*, 2021 SCC 34.

As this letter explains further below, your email inappropriately seeks to apply the legal standard applicable in rare cases where persons seek access to a statutory platform (e.g. school trustee,¹ city councillor²) instead of the legal test applicable to circumstances where government seeks to restrict persons' expression in a place where they are otherwise entitled to engage in expression (e.g. a public street³ and advertising on the side of buses⁴). The Supreme Court of Canada has already held that government policies permitting commercial but not political advertising on transit property are unjustifiable limits on freedom of expression.⁵

To avoid legal action for imposing an unconstitutional limitation on public expression, the City of Salmon Arm must amend its policy for advertising on City bus benches and permit the Society to continue advertising on those bus benches.

Discussion

As you are aware, Ms. Krieg, who is the president of the Shuswap Pro-Life Society, has paid for advertising on the City of Salmon Arm transit bus benches for the past 14 years. The advertisements were recently removed on April 2, 2022, however, due to a new City policy prohibiting any public advertisements that are not considered "commercial".

¹ See *Baier v. Alberta*, [2007 SCC 31](#).

² See *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#) [Toronto].

³ See *Montréal (City) v. 2952-1366 Québec Inc.*, [2005 SCC 62](#).

⁴ See *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009 SCC 31](#) [GVTA].

⁵ GVTA at para 80.

We have reviewed your response to Ms. Krieg's request that she be allowed to exercise her constitutional right to freedom of expression and be allowed to continue advertising on City bus benches. In particular, in your email dated April 20, 2022, the City acknowledges and upholds the notion that "the right to hold and freely express beliefs is entrenched in the *Canadian Charter of Rights and Freedoms*".

Toronto (City) v. Ontario (Attorney General)

In regard to the *Toronto* case you referred to in your email, the Court explained that legal claims based on the *Charter* section 2(b) freedom of expression are characterized as "negative" or "positive". The Court held that a claim is "characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage".⁶ In "certain circumstances", section 2(b) of the *Charter* may impose positive obligations on government to facilitate expression.⁷

The *Toronto* case involved a positive claim, wherein the Province of Ontario passed legislation reducing the size of Toronto city council from 47 to 25 wards, thereby limiting the platform in which the respondents could exercise their freedom expression. The respondents filed a "positive" claim challenging the constitutionality of the new legislation, seeking to have the size of Toronto city council returned to 47 wards.

The matter currently at issue, however, does not address a limitation or removal of a platform used for public expression. In other words, the City's impugned policy did not remove or reduce the number of City bus benches on which members of the public may exercise freedom of expression. On the contrary, the City of Salmon Arm's impugned policy restricts or excludes the content of certain messages, thereby preventing Ms. Krieg from exercising her constitutionally protected right to freedom of expression. As such, this matter is characterised as a "negative" claim, and the *Toronto* case is not applicable.

Greater Vancouver Transportation Authority v Canadian Federation of Students

Challenging a government limit on permitted expression on advertisements is a negative claim per the leading Supreme Court of Canada case in *Greater Vancouver Transportation Authority v Canadian Federation of Students*.⁸ The Canadian Federation of Students ("CFS") attempted to purchase advertising space to encourage young people to vote, on the sides of buses operated by the transit authorities.⁹ The transit authority refused to post the advertisements proposed by CFS on the basis that their policy excluded advertisements that advocated for or opposed any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event.¹⁰

⁶ *Toronto* at para 16.

⁷ *Toronto* at para 17

⁸ GVTA.

⁹ GVTA at para 3

¹⁰ GVTA at para 9

The CFS commenced a court challenge, alleging that the transit authorities violated their right to freedom of expression guaranteed under s. 2(b) of the *Charter*.¹¹ The Court, in its *GVTA* decision noted that the advertisements were rejected on the basis of their political content, not on the basis that the advertising service was not available to the CFS.¹² The Court held that the policies did not prevent CFS from using the advertising service as a means of expression. Only the content of their advertisement was restricted.¹³ CFS sought the freedom to express themselves by means of an existing platform they were entitled to use without undue state interference with the content of their expression.¹⁴ Accordingly, the claim in this case was deemed to be a negative claim.

The Court in the *GVTA* case went on to address the issue of whether the platform on which CFS sought to exercise its right to freedom of expression was a public place where one would expect constitutional protection for free expression and looked at two factors: a) the historical or actual function of the place, and b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.¹⁵

The Court acknowledged the fact there was a history of and current use of city buses as a platform for public expression. Furthermore, the expressive activity did not impede the primary function of the bus as a vehicle for public transportation, nor did it undermine the values underlying freedom of expression.¹⁶ The Court found that like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings. Thus, rather than undermining the purposes of s. 2(b), expression on the sides of buses could enhance them by further democratic discourse, and perhaps even truth-finding and self-fulfillment.¹⁷

The Court concluded that advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities failed to minimize the impairment of political speech, which is at the core of s. 2(b) protection.

Conclusion

The City of Salmon Arm has implemented a policy that prevents any advertisements that are not commercial in nature.¹⁸ The City bus benches have long been used as a platform for public expression, as demonstrated by the fact Ms. Krieg has paid for advertisements for the past 14 years. The history of advertisements of Shuswap Pro-Life Society placed on a bus bench have not impeded the function, operation or purpose of the City public transit system.

The City of Salmon Arm has failed to minimize the impairment of the public's constitutionally protected freedom of speech by preventing all advertisements that are not "commercial" according to their policy.

¹¹ *GVTA*, at para 5

¹² *GVTA*, at para 31

¹³ *GVTA*, at para 32

¹⁴ *GVTA*, at para 35

¹⁵ *GVTA*, at para 39

¹⁶ *GVTA*, at para 42

¹⁷ *GVTA*, at para 43

¹⁸ City of Salmon Arm, *Expression of Interest, Transit Bus Benches*, August 11, 2021

On behalf of Ms. Krieg and the Shuswap Pro-Life Society, we request that the City of Salmon Arm rescind its policy only permitting “commercial” advertisements on City bus benches, cease interference with Ms. Krieg’s constitutional right to freedom of expression on City bus benches, and grant Ms. Krieg’s request to place an advertisement on a City bus bench.

In the event the City of Salmon Arm refuses to grant these requests, the City should a court petition to be filed challenging the constitutionality of the City’s policy and decision.

Please provide your response to the above requests to our office and my attention no later than May 13, 2022.

Yours truly,



Marty Moore
Barrister and Solicitor

MM/lc

CC: Hildegard Krieg and Shuswap Pro-Life Society