CITATION: People for the Ethical Treatment of Animals, Inc. v. City of Toronto, 2020 ONSC 2356
DIVISIONAL COURT FILE NO.: 138/19
DATE: 20200420

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

M.G.J. Quigley, Trimble and Favreau JJ.

B E T W E E N :	
PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC. Applicant	*Gary Grill* and *Leo Salloum* for the Applicant
– **and** –	
CITY OF TORONTO AND ASTRAL MEDIA OUTDOORS L.P. Respondents	*Amy Murakami* and *Jennifer Boyczuk* for the Respondent City of Toronto *Steven Mason* and *Richard Lisius* for the Respondent Astral Media Outdoors L.P.
– **and** –	
ANIMAL JUSTICE CANADA Intervenor	*Arden Beddoes, Camille Labchuk* and *Kaitlyn Mitchell* for the Intervenor Animal Justice Canada
	Heard: October 15, 2019

REASONS FOR DECISION

BY THE COURT:

<u>Overview</u>

[1] In 2018, the applicant, People for the Ethical Treatment of Animals, Inc. ("PETA"), launched a publicity campaign that targeted the coat manufacturer, Canada Goose. As part of the campaign, PETA placed “counter-advertisements” on four bus shelters in Toronto.

[2] The bus shelters are built, owned and maintained by the respondent, Astral Media Outdoors L.P. ("Astral"). Astral leases the space for the shelters from the City of Toronto ("Toronto"), which is also a respondent on the application. The agreement between Astral and Toronto provides that Toronto is to receive a percentage of Astral's advertising revenues from the bus shelters.

[3] On the day PETA posted the ads, Canada Goose made a complaint to Astral. Astral immediately removed the ads.

[4] PETA brings an application to judicially review Astral's decision to remove the ads and Toronto's decision not to direct Astral to re-place the ads. PETA argues that both decisions were procedurally unfair and breached its section 2(b) *Charter* rights.

[5] As explained below, the application for judicial review is dismissed on the basis that the Divisional Court does not have the jurisdiction to quash the decisions or to require Astral or Toronto to re-place the ads targeting Canada Goose.

<u>Background facts</u>

Agreement between Astral and Toronto

[6] On July 20, 2007, Astral and Toronto entered into a twenty year "street furniture" agreement. "Street furniture" includes bus shelters, litter and recycling receptacles, benches and public washrooms. Under the contract, Astral has the right to build street furniture at various locations in Toronto. Astral owns the street furniture and is responsible for maintaining it.

[7] The agreement gives Astral the right to earn revenue by selling advertising space on its street furniture and requires Astral to pay 8.5% of its advertising revenue to Toronto.

[8] The agreement contains some controls over the contents of the advertising. For example, Astral is to reserve some space for public notices by Toronto and Astral is to make some of the space available for specific purposes such as short-term local business promotions.

[9] The agreement also requires Astral to comply with advertising standards and provides that Astral is not to post advertising that is "offensive to the public on religious, racial or other grounds":

> All advertising on Caissons in or on Street Furniture shall be in accordance with the regulations and standards set by the Advertising Standards Council of Canada, in accordance with good taste, and shall not include any content, including tobacco products, which is prohibited or restricted by the policies of City Council or Applicable Law. In addition, the Company shall not permit the placing of any

> advertising which is, in the opinion of the General Manager, offensive to the public on religious, racial or other grounds.

[10] The agreement creates a mechanism that allows Toronto to review advertisements that Astral is concerned may not comply with the requirements agreed to:

> The Company shall review all advertising prior to its installation on the Elements to identify any advertising which may not comply with the requirements of Article 10. The Company shall submit the proposed advertising to a panel of Councillors for signoff prior to posting. The panel will consist of three Councillors, being the Chair and two other members of the Public Works and Infrastructure Committee (or any successor committee of Council whose responsibilities include the oversight of this Agreement). The panel will then provide direction to the General Manager with respect to any action to be taken by the City under this Article. Decisions of the panel shall be made within three (3) Working Days of the receipt of all required information from the Company, failing which, the Company may choose to permit the placing of the advertisement, subject to the requirements of this Article and any subsequent public complaint under this Article.

[11] Finally, the agreement gives Toronto the power to direct Astral to remove prohibited or offensive advertisements:

> Where the City makes a request to the Company to remove any prohibited or offensive advertising, the Company shall, at its sole expense, immediately remove the advertisement and hereby releases and indemnifies the City with respect to any claim, loss or damage arising as a result of such removal.

[12] Other than the specifically listed content Astral is required to include in its advertising, the agreement does not give Toronto any power to require Astral to post the advertisements of a particular company or organization or to review a decision made by Astral not to post advertising.

Agreement between Astral and PETA

[13] In August 2018, Astral and PETA entered into an agreement under which Astral agreed to display advertisements made by PETA on four bus shelters.

[14] The agreement between Astral and PETA included a term that allowed Astral to remove any material it deemed "unacceptable":

> Astral reserves the right to reject all or part of the Advertising material before displaying or to remove the Advertising material once displayed if it is deemed by Astral to be unacceptable, improper or contrary to its trade policies (including the policies of its partners), or in violation of any laws, by-laws or standards in force at the time of the display.

[15] The agreement also provides that, in the event Astral rejects or removes PETA’s advertising, Astral is to refund PETA:

> In the event Astral rejects or removes Advertising materials, it shall immediately notify Advertiser and provide to Advertiser a refund prorated as of the date of rejection or removal and/or discharge any outstanding payment obligation pro rata as of the date of rejection or removal.

[16] The evidence on the application is that this last provision was added at PETA's request after it inquired about what would happen if Astral rejected one of its ads.

PETA's ads and their removal

[17] PETA's ads were posted on September 17, 2018. PETA refers to these ads as “counter-advertisements”.

[18] There were two different ads. The first one depicts the head of a goose next to a caption stating: "I'm a living being, not a jacket filling". The advertisement also includes a modified Canada Goose logo that shows an animal with its leg in a trap. The bottom of the advertisement states "Boycott Canada Goose". The second advertisement depicts a wolf and includes the caption "I'm a living being, not a piece of fur trim". It also includes the modified Canada Goose logo and the "Boycott Canada Goose" statement.

[19] Soon after the advertisements were posted, Astral received a complaint from Canada Goose. Astral decided to remove the four advertisements on the day they were posted and sent PETA the following email:

> Your campaign launched today and since it was posted very early this morning we have received numerous complaints through our internal communications line as well as through the city's help line. Unfortunately with our partnership with the city once there are complaints we need to remove the creative ASAP.

[20] While Astral's email stated that there had been numerous complaints, including complaints made to Toronto, the evidence on the application is clear that the only complaint Astral received was from Canada Goose and that Toronto only became aware of the issue after Astral decided to remove the advertisements. Toronto played no role in Astral’s decision to remove PETA’s ads.

[21] In the affidavit filed on behalf of Astral on the application, the deponent provides the following explanation for the removal of PETA's ads:

> On the day the Advertisements were posted, Astral received a complaint from Canada Goose's advertising agency.
>
> When the complaint was received, it was escalated within Astral, and the decision was made to remove the Advertisements because they disparaged another organization, because of the modified Canada Goose logo, and because the agreement with PETA contemplated that if there were complaints then the Advertisements would be removed (and there was such a complaint).

[22] In addition, the deponent explains that the author of the email sent to PETA on the day the ads were posted and then removed was "a junior employee who was mistaken about the source of

the complaint and the explanation for Astral's decision". Astral's evidence is also that it did not charge PETA for the advertisements.

[23] Toronto had no involvement with PETA's ads until after the ads were posted and removed. On November 17, 2018, PETA sent a letter to Toronto requesting that Astral be directed to run its ads. Toronto responded in a letter dated November 19, 2018, that it would not do so because it could not “determine that any actions taken to date are not in compliance with applicable law”.

Positions of the parties

[24] PETA seeks to judicially review Astral's decision to remove the ads and Toronto’s decision not to compel Astral to reinstate them. Specifically, PETA asks for an order requiring Astral or Toronto to re-place the ads on bus shelters for four weeks, as originally provided for in the contract between PETA and Astral.

[25] Animal Justice Canada (“Animal Justice”) was granted leave to intervene as a friend of the court. Animal Justice supports PETA’s position on the application.

[26] PETA and Animal Justice argue that Astral and Toronto breached a duty of procedural fairness owed to PETA, and that they also breached PETA’s section 2(b) rights under the *Charter*. Relying on this Court’s decision in *Christian Heritage Party of Hamilton v. City of Hamilton*, 2018 ONSC 3690 (Div. Ct.), they argue that the decision-making process that led to the removal of the ads was unfair because PETA was not notified before the ads were removed. In addition, they argue that Astral and Toronto breached PETA’s right to freedom of expression, relying on several decisions that have found that political messages on the side of public buses are a form of speech protected by section 2(b) of the *Charter*; see *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31; and *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2018 ABCA 154.

[27] Toronto and Astral argue that the decisions at issue are not subject to judicial review because they arise from a private contract between PETA and Astral. They further argue that no *Charter* rights are engaged given the private character of the dispute. Finally, they argue that, even if the decisions were subject to judicial review and the *Charter* applies, there has been no breach of procedural fairness or of the *Charter* in this case.

Analysis

[28] We find that the decisions at issue are not subject to judicial review and that this Court does not have jurisdiction over the application. It is therefore not necessary to deal with the other issues raised by PETA and Animal Justice.

Applicable test

[29] Section 2(1) of the *Judicial Review Procedures Act*, R.S.O. 1990, c.J.1, sets out this Court's jurisdiction to hear an application for judicial review:

> 2 (1) On an application by way of originating notice, which may be styled "Notice of Application for Judicial Review", the court may [...] grant any relief that the applicant would be entitled to in any one or more of the following:
>
> 1.... [A]n order in the nature of mandamus, prohibition or certiorari…

[30] In this case, PETA seeks orders in the nature of *certiorari* and *mandamus*.

[31] As held in *Trost v. Conservative Party of Canada*, 2018 ONSC 2733 (Div. Ct.), at para. 11, the *Judicial Review Procedure Act*, does not specify when these remedies are available. Rather, the common law provides guidance on this issue.

[32] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26, at para. 14, the Supreme Court explained the limited reach of public law remedies:

> Not all decisions are amenable to judicial review under a superior court's supervisory jurisdiction. Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character. Even public bodies make some decisions that are private in nature - such as renting premises and hiring staff - and such decisions are not subject to judicial review: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 (CanLII), [2013] 3 F.C.R. 605, at para. 52. In making these contractual decisions, the public body is not exercising "a power central to the administrative mandate given to it by Parliament", but is rather exercising a private power (ibid.). Such decisions do not involve concerns about the rule of law insofar as this refers to the exercise of delegated authority.

[33] In *Setia v. Appleby College*, 2013 ONCA 753, at para. 20, the Court of Appeal for Ontario emphasized that the prerogative remedies are available to supervise public decision makers:

> The prerogative remedies brought together by the *JRPA* (*mandamus*, prohibition and *certiorari*) constitute the mechanisms that have been used by the courts to ensure that public decision makers observe the principles and rules of public or administrative law by which they must function. While the notion of public law defies full and precise definition, the courts use the prerogative remedies to supervise persons and bodies that derive their powers from statute in their performance of functions of a public or governmental nature.

[34] In *Air Canada v. Toronto Port Authority and Porter Airlines Inc*., 2011 FCA 347, at para. 60, the Federal Court of Appeal listed a number of factors that are relevant to determining whether a dispute falls within the scope of public law such that it can be subject to judicial review:

> a. The character of the matter for which review is sought. Is it a private commercial matter, or is it of broader import to members of the public?...
>
> b. The nature of the decision maker and its responsibilities. Is the decision-maker public in nature, such as a Crown agent or statutorily-recognized administrative body, and charged

> with public responsibilities? Is the matter under review closely related to those responsibilities?
>
> c. The extent to which a decision is founded in and shaped by law as opposed to private discretion...
>
> d. The body's relationship to other statutory schemes or other parts of government...
>
> e. The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity...
>
> f. The suitability of public law remedies...
>
> g. The existence of compulsory power...
>
> h. An "exceptional" category of cases where the conduct has attained a serious public dimension...

[35] These factors have been applied by the Court of Appeal for Ontario and this Court in deciding whether a decision has a sufficiently public character to warrant public law remedies; see, for example, *Setia*, at para. 34; *Trost*, at para. 13; *Beaucage v. Métis Nation of Ontario*, 2019 ONSC 633 (Div. Ct.), at para. 26, review denied 2020 ONSC 483 (Div. Ct.); and *Weld v. Ottawa Public Library*, 2019 ONSC 5358 (Div. Ct.), at para. 12.

[36] At the hearing before us, counsel for Animal Justice argued that the principles in *Wall* and *Setia* and the test in *Air Canada* have no application here because *Charter* rights are at issue. They argue that the test established by the Supreme Court of Canada in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 to determine whether the *Charter* applies is the appropriate test in this case. We disagree. The first threshold issue here is whether this case can proceed as an application for judicial review in the Divisional Court. There may be overlap in what the court is to consider in determining whether a case is appropriately brought as an application for judicial review and in determining whether the *Charter* applies, but these are not identical considerations. Notably, there are certainly situations in which the *Charter* applies, but not by way of an application for judicial review; see, for example, *Williams Estate v. Trillium Gift of Life Network*, 2019 ONSC 6159 (Sup. Ct.).

[37] Given that PETA challenges two decisions, namely the decisions of Astral and Toronto, we apply the test in *Air Canada* separately to both decisions. However, there is necessarily significant overlap in the analysis that applies to both decisions.

Astral's decision to remove PETA's advertisements

[38] Based on a review of the *Air Canada* factors, Astral's decision does not have a sufficiently public character to make it susceptible to judicial review. Several of the *Air Canada* factors weigh heavily in making this determination.

[39] First, with respect to the character of the matter, this is essentially a contractual dispute between Astral and PETA. In *Air Canada*, at para. 60, the Federal Court of Appeal noted that administrative law principles should not be relied on to resolve what is essentially a matter of private commercial law. In this case, Astral and PETA entered into a contract that contained specific terms giving Astral the ability to remove an advertisement “if it is deemed by Astral to be unacceptable, improper or contrary to its trade policies (including the policies of its partners), or in violation of any laws, by-laws or standards in force at the time of the display”. PETA agreed to these terms and the issue of whether Astral breached the terms of the agreement by removing the ads is a matter of private contract law.

[40] PETA and Animal Justice rely on a number of decisions involving advertising on public buses to argue that this case has a public law character. However, in our view, those cases are distinguishable. In *Greater Vancouver Transportation Authority*, a teachers’ union and a student group challenged a municipal policy that prevented political advertising on buses. The Supreme Court of Canada held that the policy violated the challenging parties’ section 2(b) rights under the *Charter*. The Supreme Court held that the transit authority was “government” and that the *Charter* therefore applied to its activities. In addition, the Court found that advertising on buses was constitutionally protected speech and that the limits placed on advertising were not justified under section 1 of the *Charter*. Relying on this decision, in *Canadian Centre for Bio-Ethical Reform*, the Alberta Court of Appeal also found that a municipal policy regarding advertising on public buses was susceptible to a section 2(b) *Charter* challenge.

[41] Unlike the circumstances in the cases relied on by PETA and Animal Justice, in this case PETA does not challenge a policy made by the City of Toronto but rather a decision made under a private contract between PETA and Astral. In addition, while the advertisements are located in public places, they are placed on bus shelters owned and managed by Astral.

[42] Relying on the Supreme Court of Canada’s decision in *Eldridge*, Animal Justice argues that Toronto cannot contract out of its *Charter* obligations and, therefore, the contract between Astral and PETA cannot protect the decision from *Charter* scrutiny. We note that this is an argument made by the Intervenor and that PETA does not in fact challenge Toronto’s decision to contract with Astral. In any event, in *Eldridge*, at paras. 42-43, the Court held that the *Charter* will only apply to the activities of private actors when they are acting in furtherance of a specific governmental program: “… the mere fact that an entity performs what may loosely be termed a ‘public function’, or the fact that a particular activity may be described as ‘public’ in nature, will not be sufficient to bring it within the purview of ‘government’”. In this case, advertising on bus shelters or other street furniture is not akin to a specific government or municipal program. Astral owns and maintains the bus shelters, and Astral’s ability to make money from selling advertising on bus shelters for revenue is a term of the contract between Astral and Toronto, and not the implementation of a government program.

[43] Considering the second factor in *Air Canada* with respect to the nature of the decision maker, Astral is not a public body, but a private corporation.

[44] Third, the decision is not shaped by law but by Astral's discretion under its contract with PETA. In *Air Canada*, at para. 60, the Court stated that "[m]atters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review". In this case, in its agreement with PETA, Astral retained the discretion to remove the ads posted by PETA if it "deemed" that they were "unacceptable" based on specified criteria. Therefore, the removal of the ads was based on Astral's contractual discretion and not based on legislation, a regulation or a by-law.

[45] Fourth, Astral's role is not part of a statutory scheme or other part of government. In *Air Canada*, at para. 60, the Court held that "[i]f the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter". Astral does not function as part of government under its contract with Toronto.

[46] Fifth, Astral does not act as Toronto's agent. Under the contract between Astral and Toronto, Astral agreed to specific terms regarding the type of advertising that could be placed on street furniture and also agreed that Toronto could direct that certain advertisements be removed, but Astral owns the street furniture, enters into agreements with advertisers on its own and manages those contracts. Toronto has no ability to select specific ads or advertisers (other than for its own public notices), or to direct Astral to post specific advertisements by private advertisers.

[47] Sixth, public law remedies are not appropriate because the relationship between PETA and Astral is governed by a contract.

[48] Seventh, this is not a case in which Astral has any compulsory power over PETA. As in *Trost*, at para. 23, Astral's power to remove PETA's ads derives from the contract that PETA entered into voluntarily with Astral. Astral was not exercising any kind of state compulsory power when it removed PETA's ads.

[49] Finally, the dispute between PETA and Astral does not fall into the "exceptional" category identified at para. 60 of *Air Canada*. Astral's decision does not "have a very serious, exceptional effect on the rights of a broad segment of the public" such that it is of "great public moment".

Toronto's decision not to compel Astral to re-post the ads

[50] Toronto had no involvement in Astral's decision to enter into the contract with PETA or to remove PETA's ads. These decisions were made by Astral on its own.

[51] Toronto only became involved in the matter after Astral removed the ads and when PETA requested in its letter of November 17, 2018 that Toronto require Astral to re-post the ads. Toronto denied this request in its letter of November 19, 2018.

[52] This decision is also not subject to judicial review for many of the same reasons reviewed above.

[53] The character of the matter is a contractual dispute between Astral and PETA. There is no contractual or other legal relationship between PETA and Toronto. While Toronto is a government body, its involvement in the dispute between PETA and Astral is not related to any of its public responsibilities. PETA reached out to Toronto to ask it to intervene, but Toronto had no statutory or other authority to do so. Its only relationship with Astral is contractual, and under that contract Toronto had no power to compel Astral to re-post the ads.

[54] In *Trost*, at para. 33, Swinton J. made the point that not all decisions made by government actors are suitable to public law remedies:

> Not all decisions of a governmental actor are subject to review by way of *certiorari*. Some, such as decisions of a contractual nature, are subject to private law remedies (see the discussion of government contracting in *Setia* at para. 22). The factors set out in *Setia* are used to determine whether public law remedies or private law remedies are available in respect of a particular exercise of power by a governmental decision maker or a decision maker who derives power from government. Those factors were not meant to be used to subject the decisions of private actors to judicial review.

[55] This applies equally here. PETA asked Toronto to intercede in its contractual dispute with Astral. Toronto refused to do so. These are matters of private law not suited to judicial review.

Conclusion

[56] Accordingly, the application for judicial review is dismissed because the Divisional Court does not have jurisdiction over the dispute between these parties.

[57] As agreed between the parties, PETA is to pay each of the respondents $7,500 in costs, for a total of $15,000. There are no costs to or against Animal Justice.

Favreau J

for M.G.J. QUIGLEY J.

Favreau J

for TRIMBLE J.

Favreau J

FAVREAU J.

RELEASED: April 20, 2020

CITATION: People for the Ethical Treatment of Animals, Inc. v. City of Toronto, 2020 ONSC 2357

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Intervenor

REASONS FOR JUDGMENT

BY THE COURT

RELEASED: April 20, 2020