Greater Vancouver Transportation Authority v. Canadian Federation of Students (2009) – Political Expression on Public Transit

In *Greater Vancouver Transportation Authority v. Canadian Federation of Students*,[1] the Supreme Court of Canada considered freedom of expression and the regulation of political expression on public facilities – specifically, transit buses in British Columbia.

In 2004, the Canadian Federation of Students (CFS) and the British Columbia Teacher's Federation (BCTF) tried to buy advertising space on the sides of BC buses. Their ads would have contained the phrases "Rockthevote.com" and "Your Kids. Our Students. Worth speaking out for." Two transit authorities, TransLink and BC Transit, refused to allow the ads. Their advertising policies permitted commercial advertising but not political messages.

The CFS and BCTF filed a constitutional challenge. They argued that the transit authorities' policies infringed their freedom of expression, guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. The CFS and BCTF wanted the courts to declare the advertising policies of no force and effect. When the appeal of the case came before them, the Supreme Court had to resolve several complex questions:

- Are the policies of transit authorities subject to the *Charter*?
- Is the side of a public bus a place where expressive activity is protected by the *Charter*?
- Did the transit authorities' policies violate freedom of expression and if so, can they be justified as reasonable limits on this *Charter* right?

The Court was unanimous in accepting the constitutional arguments of the CFS and the BCTF. Justice Deschamps wrote the main decision for the Court. Justice Fish agreed with the outcome but differed in his analysis, so he wrote concurring reasons.

Are the Transit Authorities Subject to the *Charter*?

The *Charter* only applies to governments. Therefore the first question the Court had to decide was whether the transit authorities are part of government. Justice Deschamps concluded that governments exercise enough control over both transit authorities to make them governmental in nature. BC Transit is established by a provincial law and its day-to-day activities are substantially controlled by the government. TransLink is controlled by a local government entity, the Greater Vancouver Regional District.[2] Therefore the *Charter* applies to the transit authorities' advertising policies and the operation of their buses.[3] To rule otherwise, Justice Deschamps emphasized, would allow a government to

avoid its constitutional responsibilities simply by delegating their authority onto another entity – in this case the transit authorities.[4]

Do the Advertising Policies Infringe Freedom of Expression?

Generally, any attempt to convey meaning is considered a form of expression protected by the *Charter*. The*Charter* protects the rights of individuals to express themselves in public places. While this right is broad, there are limits. Governments may restrict certain types of expression, for example violent expressions. As well, not all government property must be made available for expression.[5] The CFS and BCTF argued that they have a constitutional right to purchase advertising space on buses, without undue interference with the content of the ads. The transit authorities argued that the CFS and BCTF were trying to use the *Charter* to require them to make their buses available as a platform for expression. They described the case as a "positive rights claim" that demanded their "support or enablement" of expression – in contrast to a negative rights claim that the transit authorities must stop interfering with expression.[6] If the judges interpreted the case as a demand for active government support of expression – that is, providing a platform, not just removing an impediment – it would be more difficult for the CFS and BCTF to prove that their *Charter* rights were infringed. Justice Deschamps rejected the "positive right" interpretation of the transit authorities. The CFS and BCTF were already entitled to advertise on buses. They were simply not allowed to use bus ads for political expression.[7] Justice Deschamps described the CFS and BCTF as seeking "the freedom to express themselves – by means of an existing platform they are entitled to use – without undue state interference with the content of their expression."[8] Having dealt with the "positive rights" argument, Justice Deschamps applied the test set out by the Supreme Court in *City of Montreal*[9] to decide if freedom of expression was infringed. To apply this test, the Court needed to consider three questions:

- Do the advertisements have expressive content, which would bring them within the protection of freedom of expression?
- If so, does the location or method of the expression remove the protection for expression?
- If the expression is protected, do the policies deny that protection to the CFS and BCTF?[10]

Justice Deschamps found the first and third questions easy to deal with. The advertisements clearly had expressive content, and the specific purpose of the advertising policies was to restrict expression on buses.[11] The second question – the location of the advertising on the sides of public buses – posed more of a challenge for the Court. The key factor was that the advertising would be on government-owned property. Is government property a public place where someone would expect constitutional protection for free expression? Would expression in that public place conflict with the underlying rationales of freedom of expression (democratic discourse, truth finding and self-fulfillment)? To answer the question, two factors must be considered:

- First, the historical or actual function of the place.
- Second, whether other aspects of the place suggest that expression there would undermine the values of free expression.[12]

If the "historical function" of a public place includes public expression, it is a good indication that free expression has constitutional protection there. Justice Deschamps found that buses have a history of being used for public expression. She added that political expression would not impede the primary function of buses as public transportation.[13] The harder question is whether the function of the location is *incompatible* with expression, or if "expression within it would undermine the values underlying free expression."[14] Justice Deschamps saw the side of a bus as a location where one would expect constitutional protection for free expression. She emphasized that buses are public places, operated on public city streets, so passengers are always exposed to messages on the sides of buses. Therefore, buses could potentially *enhance*, not undermine, the purposes of freedom of expression by "furthering democratic discourse, and perhaps even truth finding and self-fulfillment."[15] Based on this reasoning, Justice Deschamps concluded that the transit authorities' advertising policies infringed freedom of expression.[16]

Is the Infringement Justified?

Although there was a *Charter* infringement, it might be justified under section 1 of the *Charter*, which permits "reasonable limits prescribed by law" that can be "demonstrably justified in a free and democratic society." The Court had to decide whether the advertising policies of the transit authorities qualify as "law" under section 1. This step was necessary because only if it is "prescribed by law" can a "reasonable limit" on a Charter right be upheld by the courts. Justice Deschamps acknowledged that government policies may or may not be "law" in this context, depending on whether they are "legislative" or "administrative" in nature.[17] Administrative policies focus on "indoor management" – meaning they are intended to guide the internal operations of a government body.[18] A policy may be "law," however, if it sets a standard that applies to the public at large (not just people working in government), it is enacted by a government in accordance with its rule-making authority, and it is sufficiently accessible and precise.[19] Under provincial law, both BC Transit and TransLink have authority to create rules regulating their affairs. Justice Deschamps found that the policies on advertising are "rules that establish the rights of the individuals to whom they apply." She also found the policies to be "general in scope" because they set standards for anyone who wanted to advertise on the transit authorities' buses. Therefore, the advertising policies qualified as "law" and satisfy the "prescribed by law" requirement.[20] A legal limitation on a *Charter* right under section 1 must be "demonstrably justified in a free and democratic society." To satisfy this requirement, the limitation must meet the requirements of the "Oakes Test." The court analyzed the transit policies using section 1 and concluded that they placed an unjustifiable limit on freedom of expression.[21] Justice Deschamps accepted that the policies were meant to provide a "safe, welcoming public transit system," and she saw this purpose as important enough that it *might* justify some limits on expression, including political expression.[22] In previous

freedom of expression cases, courts have found that location and audience are important "contextual" considerations: "Thus, a limit which is not justified in one place may be justified in another." Similarly, the likelihood of children being present may be a factor, or the audience's ability to choose whether or not to be in that particular place.[23] However, the policies of the transit authorities prohibited all political advertising. They were not limited to particular kinds of political expression that could jeopardize safety or make people feel unwelcome.[24]Justice Deschamps found that the policies were a "blanket exclusion of a highly valued form of expression in a public location."[25] She ruled that this restriction is not a minimal impairment of freedom of expression, so it cannot be justified under the "reasonable limits" section. The Court therefore declared the policies to be of no force or effect.[26]

Concurring Reasons

Justice Fish agreed with Justice Deschamps that the transit authorities are government entities, and so subject to the *Charter*. He also agreed that the advertising policies infringed freedom of expression, and this limit could not be justified under section 1 of the *Charter*. However, he had a different analysis of how the advertising policies infringed freedom of expression, and he did not rely on the negative versus positive right distinction. In Justice Fish's analysis, freedom of expression is subject to internal and external limits. External limits on freedom of expression occur where the government may place a reasonable limit on that right, justified under section 1 of the *Charter*.[27] Internal limits are narrow exceptions to the otherwise broad scope of freedom of expression. They may occur if the expressive activity imposes a "significant burden" on the government involved, or if it is "manifestly incompatible" with the place where the expression would be exercised.[28] Justice Fish found that neither of these exceptions applied in this case.
Tracy Clark (July 15, 2010)

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[1] *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, 2009 SCC 31. [2] *Ibid*. at paras. 17, 21. [3] *Ibid*. at paras. 24-25. [4] *Ibid*. at para. 22. [5] *Ibid*. at paras. 27- 28. [6] *Ibid*. at para. 26. [7] *Ibid*. at paras. 31-32, 35. [8] *Ibid*. at para. 35. [9] *Montreal (City) v. 2952-1366 Quebec Inc.*, 2005 SCC 62 . [10] *Supra* note 1 at para. 37. [11] *Ibid*. [12] *Ibid*. at para. 39, citing *City of Montreal*, *supra* note 9 at para. 74. [13] *Ibid*. at paras. 41-42. [14] *Ibid*. at para. 42. [15] *Ibid*. at para. 43. [16] *Ibid*. at para. 47. [17] *Ibid*. at para. 58. [18] *Ibid*. at para. 63. [19] *Ibid*. at paras. 64-65. [20] *Ibid*. at para. 72. [21] *Ibid*. at para. 80. [22] *Ibid*. at para. 76. [23] *Ibid*. at para. 78. [24] *Ibid*. at para. 76. [25] *Ibid*. at para. 77. [26] *Ibid*. at para. 90. [27] *Ibid*. at para. 98. [28] *Ibid*. at para. 97.