

**VANCOUVER**

**JUN 1 8 2006**

Court of Appeal File No. CA033921

**COURT OF APPEAL  
COURT OF APPEAL  
REGISTRY**

ON THE APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA, FROM THE JUDGMENT OF THE HONOURABLE MR. JUSTICE HALFYARD MADE THE 22ND DAY OF MARCH, 2006

BETWEEN:

THE CANADIAN FEDERATION OF STUDENTS – BRITISH COLUMBIA COMPONENT and THE BRITISH COLUMBIA TEACHERS' FEDERATION

Appellants  
(Plaintiffs)

AND:

THE GREATER VANCOUVER TRANSPORTATION AUTHORITY and BRITISH COLUMBIA TRANSIT

Respondents  
(Defendants)

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**FACTUM OF THE INTERVENOR,**

**BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

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**INDEX**

|  | <b><u>PAGE</u></b> |
|--|--------------------|
| <b>PART 1 – STATEMENT OF FACTS</b>     | <b>1</b>           |
| <b>PART 2 – ERRORS IN JUDGMENT</b>     | <b>2</b>           |
| <b>PART 3 – ARGUMENT</b>               | <b>3</b>           |
| <b>PART 4 – NATURE OF ORDER SOUGHT</b> | <b>11</b>          |
| <b>LIST OF AUTHORITIES</b>             | <b>13</b>          |

**PART 1**

**STATEMENT OF FACTS**

1. The Intervenor, BCCLA, adopts the facts as set out by the Appellant. Unless otherwise defined, all capitalized terms will have the same meaning in this Factum as they are defined to have in the Appellants' Factum.
  
2. The key factual determinations made by the learned summary trial judge on the evidence before him were as follows:
  - (a) The ads in this case contained non-violent expressive content that was deemed by the Respondents to be of a political or advocacy nature; and
  - (b) The Respondents' policies had the effect of restricting the political or advocacy expression sought to be conveyed by the Appellants.
  
3. The learned summary trial judge concluded that the Respondent government entities had the right to control the content of the expression that took place on the side of buses, either because the side of a bus was not a public place within the meaning of section 2(b) of the *Charter* or because the historical use of the space for expressive purposes extended only to certain types of expression and a reasonable person would not expect the right to display political and other advocacy advertising there.

**Reasons for Judgment, paras. 90-91.**

**PART 2****ERRORS IN JUDGMENT**

4. The BCCLA accepts the statement of the errors in judgment as set out in the Appellants' Factum. The BCCLA will focus its submissions exclusively on the first error alleged by the Appellants. The BCCLA adopts the submissions of the Appellants on the second error alleged by the Appellants.

### **PART 3**

### **ARGUMENT**

#### **OVERVIEW**

1. The learned summary trial judge concluded that the Respondents were government entities, that they permitted public expression on the outside of buses and that the proposed location or method of expression on the outside of buses did not detract from the values that the *Charter* was designed to promote. In the BCCLA's respectful submission, having made these determinations, the learned summary trial judge ought to have concluded that there had been an infringement of the Appellants' section 2(b) rights, which would only be permissible if justified under section 1 of the *Charter*.

*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter the "Charter"]*.

2. The learned summary trial judge concluded that the infringement could not be justified under section 1. Therefore, the only conclusion properly available to him was that the Appellants' section 2(b) rights had been improperly infringed and that the policies doing so should be struck down.

3. However, notwithstanding this determination, the learned summary trial judge held that section 2(b) did not protect the Appellants' right to express themselves on the side of buses. He held that the sides of buses are not public places, apparently because he concluded reasonable people would not expect to have the right to display political and advocacy advertising there. In so finding, he preferred the proprietary

rights of government to control the use of the location in question over the expressive right of the public. It is respectfully submitted that this is no basis in law for the application of this test.

4. The tension between the government's proprietary interest in public places and the expressive rights of the public has been at the heart of at least three Supreme Court of Canada decisions: *Ramsden v. Peterborough (City)*, *Committee for the Commonwealth of Canada v. Canada* and *Montreal (City) v. 2952-1366 Quebec Inc.* The methodology for resolving that tension is authoritatively laid out in *City of Montreal*. It is respectfully submitted that this methodology makes no reference to the expectations of reasonable people and is otherwise inconsistent with the approach adopted by the learned summary trial judge. By declining to follow the approach mandated in *City of Montreal*, the learned summary trial judge fell into error.

**Reasons for Judgment, para. 90.**

***Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62.**

***Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 [hereinafter "*Committee for the Commonwealth*"].**

***Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 [hereinafter "*Ramsden*"].**

## **THE CITY OF MONTREAL TEST**

5. The BCCLA accepts the Appellants' submission in paragraph 37 of their Factum that the learned summary trial judge correctly described the methodology set out in *City of Montreal*. That methodology establishes that to determine whether the government must permit expression on its property, regard must be had to:

- (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;

***City of Montreal, supra at para. 82.***

6. That methodology makes no reference to the expectations of reasonable people with respect to political or advocacy advertising in the place in question. Rather, the “expectation” referred to in *City of Montreal* relates to whether the expression in that place would conflict with the purpose of free expression predicted by section 2(b). The learned summary trial judge failed to analyze that question according to the methodology required by *City of Montreal*.

#### **FORM VS CONTENT**

***City of Montreal, supra at para. 74.***

7. The test applied by the learned summary trial judge focussed on the content of the expression rather than its location or method. That test conflicts with a long series of Supreme Court of Canada decisions considering section 2(b) and directly conflicts with *City of Montreal* in particular.

8. The distinction between government control of the form of expression as opposed to its content is well-established in Canadian *Charter* jurisprudence. The courts have consistently held that all communications which convey or attempt to convey a meaning, through a non-violent form of expression, have expressive content and therefore fall within the scope of section 2(b); and that it is not until the section 1

stage of the analysis that the content of the expression is examined to determine whether or not infringement of the expression is justified.

***R. v. Keegstra*, [1990] 3 S.C.R. 697 at 729, 760;  
*R. v. Butler*, [1992] 1 S.C.R. 452 at 487-89;  
*R. v. Zundel*, [1992] 2 S.C.R. 731 at 753.**

9. In *City of Montreal*, the Supreme Court of Canada again clearly rejected the argument that the content of the expression is relevant to the question of whether the expression at issue falls within the scope of section 2(b), and instead examined whether the “medium” or means of the expression would subvert the values of section 2(b). McLachlin C.J. and Deschamps J. stated:

The argument that the emissions of noise onto a public street in this case did not serve the values underlying the freedom of expression rests on its content, and cannot be considered in addressing the issue of whether the method or location of the expression itself is inimical to s. 2(b).

***City of Montreal, supra* at para. 68.**

10. The BCCLA adopts the submissions of the Appellants with respect to the inapplicability of *Lehman v. City of Shaker Heights*. It is respectfully submitted that the learned summary trial judge was correct in concluding that *Lehman* is not authoritative in Canada, but erred when he nevertheless applied it based on what appears to be an incorrect interpretation of *Ramsden* and *City of Montreal*. In *Ramsden*, Iacobucci J. acknowledged the significance of the historical use of space for expression purposes in determining whether it was a public place. However, there is nothing in the judgment of Iacobucci J. that would suggest that the content of expression was relevant to his consideration. Rather, he simply observed that past use

of a government controlled space by the public was an indicator that the place was indeed a public place for the purposes of expression.

**Reasons for Judgment, para. 86.**

***Lehman v. City of Shaker Heights* (1974), 418 U.S. 298 [hereinafter “*Lehman*”].**

***Ramsden, supra* at 1096, 1101-02.**

11. The only aspect of the reasoning in *Lehman* that continues to be useful in a Canadian context after the decision in *City of Montreal* is the use of historical evidence to determine if past method or location of expression in a particular place favours permitting public expression. In light of the cases cited above, *Lehman* cannot be relied upon to justify consideration of the content of the expression that the public has used the location for during the section 2(b) analysis. In Canada, government space is either available for public use or it is not. If it is available, government cannot determine or limit the content of the expression unless it can justify doing so under section 1.

12. Accordingly, the BCCLA respectfully submits that the learned summary trial judge erred when he considered the content of past speech that had been permitted on buses as opposed to merely the fact that the location has been used for public speech in the past. The history of the use of government owned or controlled property is relevant only to determine whether use of the space for expressive purposes is consistent with the promotion of Charter values. There is no place for consideration of the content of the public expression that has occurred in determining that issue.

13. The approach adopted by the learned learned summary trial judge would yield results not supported by the case law and not compatible with common sense.

For instance, in *Committee for the Commonwealth*, the trial judge found that except in the instance of veterans selling poppies in November, public activities of all kind, whether political, religious or otherwise, had always been uniformly prohibited at the airport in question. Applying the learned summary trial judge's analysis, the absence of any historical use of the airport for political expression would have precluded the Court in *Committee for the Commonwealth* from coming to its ultimate conclusion that the expression under consideration was protected by s. 2(b).

***Committee for the Commonwealth of Canada v. Canada*, [1985]  
2 F.C. 3 at para. 7 (T.D.).**

14. The City of Vancouver does not prohibit political or advocacy advertising on bus shelters in the City of Vancouver. Moreover, the Toronto, Quebec, Calgary and Edmonton transit authorities do not prohibit political or advocacy advertising on their transit vehicles. The effect of the test the learned summary trial judge seeks to introduce would be to allow a particular government entity to determine what content of expression is permissible on the property it owns or controls, without regard to what content of expression is permissible on similar if not identical locations owned or controlled by other government entities. The result would be that the content of the expressive right protected by the Charter would vary according to the whims of distinct government entities. Such a result would undermine the values fundamental to the concept of free speech.

**Affidavit of Catherine J. Boies Parker, paras. 2-6, 8 and  
Exhibits A-C, E.**

15. Here, the fact that advertising for commercial use is allowed by TransLink and BC Transit demonstrates that one historical and actual function of the

space on the side of the bus has been for expression. Further, the fact that the Respondents actively encouraged the Appellants' use of the space for advertising is indisputable proof that the expression in the space would not interfere with the values that underlie free expression. It is clear from the Affidavits of Mr. Beaudoin and Mr. Drolet that the Respondents did not seek to prohibit the Appellants' speech, but rather to control it. The Respondents' purpose was "to restrict the content of expression by singling out particular meanings that are not to be conveyed." Such a purpose cannot survive section 2(b) scrutiny.

**Affidavit of John Beaudoin, paras. 38-40.**

**Affidavit of Ron Drolet, paras. 14-16, para. 30.**

***Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 974.**

16. Indeed, it is clear from McLachlin J.'s original analysis of the application of section 2(b) to property owned or controlled by government at 238-39 of *Committee for the Commonwealth*, that it was unnecessary in this case for the learned summary trial judge to consider the question McLachlin C.J. later posed in *City of Montreal* of whether the location serves the values underlying section 2(b), because the restriction at issue in this case is content-based rather than content-neutral. A restriction on content is generally impermissible under section 2(b), and must be justified under section 1.

## GOVERNMENTAL CONTROL OF EXPRESSIVE CONTENT

17. The BCCLA respectfully submits that attempts by government to control the meaning of speech attract the highest level of scrutiny from the courts under the *Charter*. Here, where the clear meaning of the speech relates to topics that are at the core of the *Charter's* values, there can be no doubt an infringement of section 2(b) has occurred and the governmental actions that gave rise to the infringement, as well as the policies under which they were taken, should be set aside, unless the Respondents can justify that infringement under section 1 of the *Charter*.

***British Columbia Public School Employers' Assn. v. British Columbia Teachers Federation* (2005), 44 B.C.L.R. (4<sup>th</sup>) 1 at paras. 51, 93 (C.A.), 2005 BCCA 393, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 455.  
*City of Montreal, supra* at para. 74.**

18. The proper place to take into account the content of the expression is at the section 1 stage of the analysis. Given that the Ads were intended to encourage participation in the democratic process and political expression of this sort lies at the heart of the guarantee of freedom of expression, the content-based restrictions in the impugned provisions of the policies would be extremely difficult to justify under section 1. The BCCLA therefore submits that the learned summary trial judge correctly held that Standards 7 and 9 of the policies constitute an unjustified interference with the Appellants' freedom of expression.

**PART 4****NATURE OF ORDER SOUGHT**

19. The Intervenor requests that the appeal be allowed and that the Court issue a declaration that:

- (a) Standard 9 of the policies is inconsistent with the protection of freedom of expression under the *Charter* and of no force and effect; and
- (b) Standard 7 of the policies is inconsistent with the protection of freedom of expression under the *Charter* and of no force and effect to the extent that it excludes advertisements because they are political, but are otherwise inoffensive.

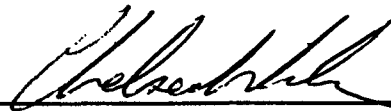
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Vancouver this 16<sup>th</sup> day of June, 2006.



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Chris W. Sanderson, Q.C.



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Chelsea D. Wilson

Counsel for the Intervenor, British  
Columbia Civil Liberties Association

**LIST OF AUTHORITIES**

**PAGE**

**Statutes**

1. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11....*3-10

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4. *Committee for the Commonwealth of Canada v. Canada*, [1985] 2 F.C. 3 at para. 7 (T.D.).....8
5. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.....9
6. *Lehman v. City of Shaker Heights* (1974), 418 U.S. 298.....6-7
7. *Montreal (City) v. 2952-1366 Quebec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62.....4-5, 10
8. *R. v. Butler*, [1992] 1 S.C.R. 452.....5-6
9. *R. v. Keegstra*, [1990] 3 S.C.R. 697.....5-6
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