

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

THE CANADIAN FEDERATION OF STUDENTS -
BRITISH COLUMBIA COMPONENT AND
THE BRITISH COLUMBIA TEACHERS' FEDERATION

PLAINTIFFS

AND:

THE GREATER VANCOUVER TRANSPORTATION
AUTHORITY AND BRITISH COLUMBIA TRANSIT

DEFENDANTS

AND:

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENOR

**CHAMBERS BRIEF NUMBER 2 OF THE INTERVENOR,
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Underhill, Faulkner, Boies Parker
Barristers
1640 - 401 West Georgia Street
Vancouver, BC V6B 5A1
Phone: 604-696-9828
Fax: 604-632-9950

Mark G. Underhill
Counsel for the Plaintiffs

Lawson Lundell LLP
Barristers and Solicitors
1600 - 925 West Georgia Street
Vancouver, BC V6C 3L2
Phone: 604-685-3456
Fax: 604-669-1620

Chris W. Sanderson, Q.C.
**Counsel for the Intervenor, British Columbia
Civil Liberties Association**

David F. Sutherland & Associates
Barristers and Solicitors
1710 Dunbar Street
Vancouver, BC V6R 3L8
Phone: 604-737-8711
Fax: 604-737-8655

David F. Sutherland
**Counsel for the Defendant, The
Greater Vancouver Transportation
Authority (TransLink)**

Gowling Lafleur Henderson LLP
Barristers and Solicitors
901 - 1175 Douglas Street
Victoria, BC V8W 2E1
Phone: 250-995-0391
Fax: 250-995-0390

Clark M. Roberts
**Counsel for the Defendant, British
Columbia Transit**

BACKGROUND

1. This is Chambers Brief No. 2 of the Intervenor, the British Columbia Civil Liberties Association (BCCLA), and should be read in conjunction with Chambers Brief No. 1 of the BCCLA. All capitalized terms used in the Brief have the same meaning as in Chambers Brief No. 1.
2. Chambers Brief No. 1 submitted that the Defendants are governmental entities to which the *Charter* applies and that the Defendants had infringed the rights of the Plaintiffs to free expression in violation of section 2(b) of the *Charter*. This Brief contains the BCCLA's submission that this infringement cannot be justified under section 1 of the *Charter*.

PART 1 –THE FACTS

1. The BCCLA relies on the facts cited in Chambers Brief No. 1 of the Intervenor, British Columbia Civil Liberties Association. The facts set out in that Brief of particular significance to the section 1 analysis and additional facts relevant to the analysis are stated below.
2. The Plaintiffs submitted the Ads for publication on the outside of the Defendants' buses, not on the inside.

Affidavit of Michael Gardiner, paras. 7-9, Exhibit "A" and Exhibit "B"

Affidavit of Moira Mackenzie, paras. 9-10, Exhibit "A" and Exhibit "B"

3. The Ads sought to establish a link between specific issues of concern to the Plaintiffs and the then upcoming provincial election and encouraged the reader to vote in that election in consequence. The Ads that were rejected by the Defendants were run in alternative media and met normal community standards of good taste and appropriateness for public display. The Ads were rejected by the Defendants on the basis that the substance of the message violated policies 7 and 9. The Ads were also rejected by TransLink on the basis that the substance of the message violated policy 2. (These policies are collectively referred to herein as the "Impugned Policies").

Affidavit of Michael Gardiner, paras. 5-6, paras. 14-15

Affidavit of Moira Mackenzie, paras. 8-9, paras. 15-16

Affidavit of John Beaudoin, Exhibit "A"

4. The Impugned Policies of the Defendants were established and applied to assist the Defendants in avoiding any appearance of political alignment with political parties or being seen to take any side with respect to contentious political or partisan issues of the day.

Affidavit of John Beaudoin, paras. 38-40 and 42

Affidavit of Ron Drolet, paras. 10 and 15

PART 2 - THE ISSUES

ISSUE 1 **If sections 7 and 9 of the advertising policy of both TransLink and BC Transit, as well as section 2 of the advertising policy of TransLink, violate the Plaintiffs' right to freedom of expression under section 2(b), can this infringement be justified under section 1 of the *Charter*?**

PART 3 - ARGUMENT

1. **If sections 7 and 9 of the advertising policy of both TransLink and BC Transit, as well as section 2 of the advertising policy of TransLink, violate the Plaintiffs' right to freedom of expression under section 2(b), can this infringement be justified under section 1 of the *Charter*?**

5. Section 1 of the *Charter* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Charter, section 1

6. The BCCLA accepts that sections 7 and 9 of the advertising policy of both TransLink and BC Transit, as well as section 2 of the advertising policy of TransLink, are “limits prescribed by law” within the meaning of those words in section 1 of the *Charter*.

7. If a limit on a subject's right is prescribed by law, in order to establish that the limit is reasonable and demonstrably justified in a free and democratic society, two criteria must be satisfied:

- (a) The limits must be directed at achieving a pressing and substantial objective; and
- (b) The limits used to achieve an objective must be proportional to the effects of the objective.

The proportionality test is comprised of three elements:

- i) there must be a rational connection between the limits and the objective;
- ii) the limits must impair the guaranteed right or freedom as little as reasonably possible (minimal impairment); and
- iii) there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.

R. v. Oakes, 1986 CanLII 46 (S.C.C.), paras. 69-70

8. In determining whether the restriction on freedom of expression is justified under section 1, the Court makes distinctions based on the value of expression that it does not make in

determining whether expression is protected under section 2(b). Thus, the strictness of review varies under section 1 with respect to freedom of expression cases. The Court has spoken of a “core” meaning of freedom of expression, leading to a strict application of section 1 when a form of expression lies at or near that “core”. But when the form of expression at issue is peripheral to the core, legislation imposing limitations is much more likely to survive.

RJR-MacDonald, supra, paras. 71-72
Thomson Newspapers Co. v. Canada (Attorney-General), 1998
CanLII 829 (S.C.C.), para. 71 and paras. 92-94

9. As expressed by LaForest J. in *RJR-MacDonald*:

In *Keegstra* ... at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process.

RJR-MacDonald, ibid, para. 72

10. It is beyond dispute that the Ads constitute a form of expression that lies at the core of the search for truth (the BCTF Ads) and also constructively promote participation in the democratic process (the CFS Ads). If the Ads do not constitute the form of expression that lies at the heart of *Charter* protection, it is difficult to imagine what could.
11. In advancing its beliefs that political expression lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection, the BCCLA relies upon the following statements by Dickson C.J. in *Keegstra*:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

R. v. Keegstra, supra, at para. 89

12. The British Columbia Court of Appeal has recently confirmed the importance of political expression and the need for any limitation on this type of speech to be strictly justified:

Political expression and the promotion of participation in the democratic process are at the core of the s. 2(b) protection of freedom of expression (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199). As the Supreme Court of Canada has said, an infringement of such expression will be more difficult to justify and arguments which seek to do so must be subjected to a "searching degree of scrutiny" (*Ross*, at para. 89). Through the various materials the BCTF asked its members to distribute, teachers voiced their concerns about government policies on issues of particular importance to them. This is, of course, political expression of a kind deserving of a high level of constitutional protection.

***British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, 2005 BCCA 393 (CanLII) at para. 51**

13. Thus, the justification required in this case must be of the most stringent variety.

***British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, *ibid*, para. 51**

14. The stringency that is imposed on government to justify infringements of the right to expression is an essential element of Canada's constitutional protection. Good intentions are not sufficient to justify infringement. Rather, a government must demonstrate with cogent reasoning based on evidence or established truths that the particular limit imposed was justified.

***RJR-MacDonald*, *supra*, paras. 127-129**

15. The BCCLA will now turn to the four-part *Oakes* test to establish that the limits placed by the Defendants on non-commercial advertising are not "reasonable and demonstrably justified in a free and democratic society".

Charter, section 1

(a) **Are the limits directed at achieving a pressing and substantial objective?**

16. The first aspect of the section 1 analysis is to examine the objective of the impugned legislation. Only if the objective relates to concerns that are pressing and substantial in a free and democratic society can the legislative limit on a right or freedom be permissible under the *Charter*.

R. v. Oakes, supra, para. 69

17. Both TransLink and BC Transit suggest that the restriction on non-commercial advertising is in furtherance of its objective of “providing a safe, welcoming public transit system”. The BCCLA accepts that this objective is pressing and substantial. However, the Defendants have identified the creation of a controversy-free environment as the sub-rationale or objective that lies behind the Impugned Policies. The BCCLA does not believe that the Defendants have demonstrated that a controversy-free environment is a necessary element of a “safe, welcoming, public transit system”. Because the only rationale for the prohibition on speech given by the Defendants is to “avoid any appearance of political alignment with political parties or any side of contentious political issues of the day”, it is that objective which the Defendants must demonstrate is pressing and substantial.

RJR-MacDonald, supra, para. 144

18. The BCCLA emphatically rejects the suggestion that the public must be shielded from controversy. Indeed, as a general proposition, the objective of avoiding public controversy is antithetical to the core values of the *Charter*. The more limited proposition that the public should be protected from certain types of expression because the public is easily confused has been summarily dismissed in previous decisions as an insult to the public’s intelligence. For instance, in *Thomson Newspapers*, at issue was a federal law banning the publication of opinion polls in the three days prior to a federal election. The contention that it was desirable to provide voters with a period of rest and reflection, free from opinion polls, was rejected as a pressing and substantial objective. As expressed by Bastarache J.:

Canadian voters must be presumed to have a certain degree of maturity and intelligence... I cannot accept, without gravely insulting the Canadian voter, that there is any likelihood that an individual would be so enthralled by a particular poll result as to allow his or her electoral judgment to be ruled by it.

Thomson Newspapers, supra, para. 101

19. The BCCLA respectfully submits that the suggestion that the public will assume that the Defendants are taking partisan positions if political advertising is permitted on the outside of buses underestimates the public's intelligence in the same way that the ban on polling in *Thomson Newspapers* did. Accordingly, the BCCLA submits that the Defendants have not demonstrated that a pressing and substantial objective exists and thus have failed to provide a section 1 defence for the limitation they have placed on the Plaintiff's right to expression.

Thomson Newspapers, ibid, para. 101

(b) Are the limits used to achieve an objective proportional to the effects of the objective?

20. If the court accepts that "providing a controversy-free environment" is indeed a pressing and substantial objective, the BCCLA submits that the limits used to achieve this objective are not proportional to its effects.
21. In considering the various components of the proportionality test, the onus rests upon the Defendants to prove each element. As expressed by McLachlin J. in *RJR-MacDonald*:

...No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

RJR-MacDonald, supra, para. 129

22. The BCCLA submits that neither TransLink nor BC Transit have provided any evidence to demonstrate that the ban on the Ads is proportional to the infringement on freedom of expression. We will consider the lack of evidence provided by the Defendants with respect to each of the three elements of the proportionality test.

(b)(i) Is there a rational connection between the limits and the objective?

23. The BCCLA submits that the measures adopted by the Defendants are not rationally connected to the objective of “providing a controversy-free environment” in the sense that they have failed to demonstrate that the banned speech would create a “controversial environment”.
24. Both TransLink and BC Transit suggest that the limitation on non-commercial ads minimizes:
- (i) chances of abuse;
 - (ii) the appearance of political favouritism; and
 - (iii) the risk of imposing upon a captive audience.

We will consider each of those allegations in turn.

(i) Minimizing chances of abuse

25. Neither TransLink nor BC Transit give any meaning to the words “chances of abuse”. The Affidavits of Mr. Beaudoin and Mr. Drolet do not suggest that they have any experience with attempts by parties to “abuse” the right to non-commercial expression on the sides of buses. Nor do they indicate what form such abuse might take nor what evil it might create. It is respectfully submitted that the court has been provided with no evidence whatsoever to justify limits on speech on the basis of potential “abuse”.

RJR-MacDonald, ibid, paras. 127-129

(ii) The appearance of political favouritism

26. The Defendants’ concern rests on the proposition that advertising on the side of buses will create the impression that either TransLink or BC Transit adopt the message contained in the advertising. Yet there is no evidence to support this notion, nor does common sense support that allegation.

RJR-MacDonald, ibid, paras. 127-129

27. The evidence in support of political favouritism amounts to no more than untested and unsubstantiated opinions of managers of each of the Defendant corporations. Their wish

to avoid anything that may make the performance of their duties more challenging must be clearly distinguished from a credible concern that there will truly be confusion in the public mind as to the political opinions of the organizations themselves.

28. It is respectfully submitted that there is no more reason to believe that a citizen viewing the Plaintiffs' Ads would consider that the Defendants supported a particular party or position being advertised than they currently consider that specific commercial products have the endorsement of either of the Defendants. In a world where advertising is ubiquitous and appears in public spaces of every description ranging from billboards on private buildings to web pages of private search engines, every citizen has learned to distinguish between the message and the owner of the location where the message is delivered.
29. The BCCLA further submits that if there really was a substantial and pressing objective of avoiding the impression that the Defendants were endorsing political favourites, the means chosen in this case are inappropriate in terms of serving that objective. Many public mediums, including magazines and newspapers, routinely accept political and advocacy advertising, while maintaining editorial and content independence for the newspaper itself.
30. If demonstrating a lack of political favouritism was truly the objective of the Defendants, there are well-used methods for distancing the owner of the medium from the content of the ads without resorting to the blanket prohibition on political speech that has been employed here.

(iii) The risk of imposing upon a captive audience

31. The risk of imposing upon a captive audience has been the subject of much debate in U.S. cases dealing with advertising on the inside of buses. Of course, this case deals only with advertising on the outside of buses and the concern based on the U.S. cases is of much less prominence here than in those cases.

32. However, BC Transit suggests that passengers have to “look for, approach, enter, mount and ride the vehicles and are thus “captive” to the messages on the outside and the inside of transit vehicles”.
33. In fact, there has been no evidence provided by the Defendants to substantiate the proposition that a bus rider is any more “captive” to what is on the side of the bus than other segments of the population, such as other vehicle drivers, pedestrians and residents facing the streets are. Typically, there is no need, and, indeed, often only limited opportunity, for a rider to look at the side of the bus in order to “mount” it. Accordingly, the BCCLA rejects the notion that there is a rational connection between the ban on the Plaintiffs’ Ads and the risk of imposing upon a captive audience.

RJR-MacDonald, ibid, paras. 127-129

34. The BCCLA respectfully submits that both TransLink and BC Transit have failed to adduce any compelling evidence to establish a rational connection between their stated objectives and the advertising limits in issue.

(b)(ii) Do the limits impair the guaranteed right or freedom as little as reasonably possible (minimal impairment)?

35. Under the third element of the *Oakes* test, TransLink and BC Transit must establish that they have impaired the section 2(b) right as minimally as possible. One aspect of this element requires the Defendants to show that they have considered alternatives to the measures in issue.

R. v. Oakes, supra, para. 70

36. To the extent that the Court accepts that there is a pressing and substantial objective to distance TransLink and BC Transit from the content of the Ads on their buses, there are obvious and effective ways to do that without prohibiting expression based on its content.
37. A prominent disclaimer in which TransLink and BC Transit make it clear that the message on the side of buses is paid for advertising that does not necessarily reflect the opinions of the respective corporations would be a simple method for resolving concerns with respect to allegations of political favouritism. Similarly, a policy of providing equal

space on other buses to ensure that the medium does not become the exclusive province of a particular political organization or view could be developed, if it was thought necessary. There is no evidence that these types of significantly less limiting impairments were tried or even considered.

38. In an earlier response to a complaint prohibiting the distribution of campaign literature to the public on TransLink property, TransLink amended Article 12 of its Transit Conduct and Safety Rules to address the concerns of the BCCLA.

Affidavit of Murray Mollard, paras. 11-14, Exhibit “F”

39. In doing so, Ken Dobell, who was the Chief Executive Officer of TransLink at the time, stated in a letter written to Craig Jones, who at that time was the President of the BCCLA:

We believe that it provides a good balance between the rights of individuals to engage in political electioneering activities on transit property and our responsibility to provide our customers with comfortable, safe and convenient transit service.

Affidavit of Murray Mollard, Exhibit “F”

40. Yet, there was no balancing process applied in this case. In short, based on nothing more than the convenience of the organizations and their staff, TransLink and BC Transit have leapt to the most egregious form of impairment of the right of expression – that is, an outright prohibition on the expression insofar as it is political or controversial, without providing any evidence to demonstrate that this complete ban is necessary to achieve their objectives.

Thomson Newspapers, supra, para. 118

41. It will always be more difficult for a defendant to “justify a complete ban on a form of expression than a partial ban: *Ramsden v. Peterborough (City)*, *supra*, at pp. 1105-06; *Ford v. Quebec (Attorney General)*, *supra*, at pp. 772-73”.

RJR-MacDonald, supra, para. 163

42. As expressed by McLachlin J. in *RJR-MacDonald*:

...A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

RJR-MacDonald, ibid, para. 163

43. That the prohibition is aimed at that form of expression which the Courts have held lies at the heart of a free and democratic society makes this prohibition that much more serious.

44. As expressed by Bastarache J.:

The harm which the legislature is seeking to prevent does not warrant a high degree of deference to the legislature. Unlike the situation in *Butler, Ross, Keegstra*, and *Irwin Toy*, the government is not dealing with a vulnerable group which is in danger of manipulation or abuse because of an essential opposition of interests, or because of the nature of the speech itself. There were other measures which would have achieved the government's purpose equally well or even better than the publication ban, and which would have been far less intrusive to the freedom of expression.

Thomson Newspapers, supra, para. 122

45. It thus follows, the BCCLA submits, that the ban on non-commercial advertising by TransLink and BC Transit must fail the minimal impairment test.

46. The Defendants further suggest that the Court should take into consideration the alternative forums for expression available to the Plaintiffs. The BCCLA emphatically rejects that suggestion.

47. The individual's right to choose the forum for expression is integral to the right of expression. Expression is a bilateral or multilateral activity and its societal benefit stems from its effect on both the speaker's right to speak and the listener's right to hear. A guarantee that every citizen has the right to express themselves freely within the confines

of their soundproof cell is a very limited freedom indeed. As Professor Meiklejohn puts it:

“We listen, not because they desire to speak, but because we need to hear”.

Alexander Meiklejohn, *Political Freedom* (New York: Oxford University Press, 1960), page 57, located at para. 45 of Chambers Brief No. 1 of the BCCLA

48. In short, it is not for the Plaintiffs to prove that no other forums are suitable but, rather, for the Defendants to show that they have considered reasonable alternatives. For these reasons, the BCCLA submits that the Defendants’ submissions with respect to the availability of alternative forums for expression do not assist them.

(b)(iii) Is there overall proportionality between the deleterious effects of the measures and the salutary effects of the law?

49. The fourth element of the *Oakes* test requires the Defendants to prove that there is overall proportionality between the deleterious effects of the measures and the salutary effects of the law.
50. The BCCLA submits that, essentially, there is no demonstrated benefit from the ban on non-commercial advertising and, yet, there is a complete ban on political speech, the type of expression which lies at the very heart of section 2(b).

R. v. Keegstra, supra, para. 89

51. The Defendants both rely on *City of Montreal v. 2952-1366 Quebec Inc.* in connection with the reasonable impairment test. It is respectfully submitted that the reliance on paragraph 94 from that case is misplaced.

City of Montreal v. 2952-1366 Quebec Inc., 2005 S.C.C. 62 (CanLII)

52. In *City of Montreal*, the expression in issue was the ambient noise level on the streets of Montreal. The Supreme Court of Canada was attempting to balance the private right of expression of the club owner with the interests of the municipality in protecting the rights of passers-by not to be exposed to unwelcome levels of noise. The BCCLA submits that

the type of expression that was restricted in *City of Montreal* is distinguishable from the type of expression that is being restricted in this case.

City of Montreal, ibid

53. There is always a range of deference to be applied to lawmakers under a section 1 analysis when a section 2(b) violation is established. It varies with the nature of the expression. Broadcasting loud music so that all within earshot must listen, whether they like it or not, is expressive activity that does not lie at the heart of the *Charter's* core values. However, as submitted above, urging people to vote or commenting on one of the main issues in a provincial election clearly is expressive activity at the heart of the *Charter*. The burden of the decision in *City of Montreal* and those cases which have gone before it is that considerable deference should be given to the lawmaker in the former case, but no deference should be afforded in the latter case.

RJR-MacDonald, supra, paras. 71-72
Thomson Newspapers, supra, para. 122

54. Thus, this Court must consider, without deference to the views of the Defendants, whether, overall, the steps taken by the Defendants are reasonably proportional to the deleterious impact on the expressive rights of the Plaintiffs. The fact that there is no evidence or even conjecture provided by the Defendants on the extent of the harm that the limits are said to avoid makes it very difficult for them to maintain that the absolute ban on political speech they have imposed is proportional. They have asked this Court to take into account alternative forums for the Plaintiffs when they have not themselves established on the basis of evidence the level of harm they seek to avoid. It is respectfully submitted that, in these circumstances, the Court has no basis on which to find the Impugned Policies proportional within the meaning of the *Oakes* test.

R. v. Oakes, supra, para. 70

55. In conclusion, the BCCLA respectfully submits that sections 7 and 9 of the advertising policy of both TransLink and BC Transit, as well as section 2 of the advertising policy of TransLink, violate the Plaintiffs' right to freedom of expression under section 2(b), and this infringement cannot be justified under section 1 of the *Charter*.

DATED at Vancouver, British Columbia, this 12th day of December, 2005.

Chris W. Sanderson, Q.C.
Counsel for the Intervenor, British Columbia
Civil Liberties Association