July 15, 2009

Greater Vancouver Transportation Authority v. Canadian Federation of Students

On July 10, 2009, the Supreme Court of Canada delivered reasons in *Greater Vancouver Transportation Authority v. Canadian Federation of Students*.[1] This case is important because it further delineates the right to freedom of expression protected in section 2(b) of the *Canadian Charter of Rights and Freedoms*. Secondly, the Court elaborates on the principles that will be applied in determining whether certain entities will be considered "government" for the purposes of the *Charter*. The following is a brief overview of the Court's decision in this case.

Translink and BC Transit permit and generate revenue from commercial advertisements placed on the inside and outside of buses that are operated in British Columbia. However, the policies that governed these advertisements prohibited advertising on buses that referred to or gave information about politically-oriented viewpoints, meetings, or organizations.

As a result of the advertisement policies, the Canadian Federation of Students (CFS) and the B.C. Teachers Federation (BCTF) were prohibited from using advertisements on B.C. buses to raise awareness about an upcoming provincial election. CFS and BCTF, supported by the British Columbia Civil Liberties Association (BCCLA), challenged the policies on the basis that the prohibition contained in the policies violated the freedom of expression protection in section 2(b) of the *Charter*.

Are Translink and BC Transit "government"?

The first issue in this case was whether the transit organizations were "government" within the meaning of the *Charter*. Madam Justice Deschamps confirmed that government could not shirk its obligation to abide by the *Charter* by creating entities or organizations that were separate from government, and then delegating government functions to those organizations.

The Court held that the *Charter* applies to government in all of its activities, as well as all activities of agencies that are *controlled by government* Secondly, the *Charter* will apply to an organization not controlled by government in respect of *any activities that are governmental in nature*. Madam Justice Deschamps' reasons confirmed Mr. Justice La Forest's previous decisions in *Godbout v. Longueuil (City)*[2] and *Eldridge v. British Columbia (Attorney General)*.[3]

The Court found that the day-to-day operations of Translink were controlled by the Greater Vancouver Regional District (a municipal government body), and that the provincial government

[1] 2009 SCC 31 [*GVTA*].
[2] [1997] 3 S.C.R. 844.
[3] [1997] 3 S.C.R. 624.

had ultimate control over BC Transit through its power to make regulations under BC Transit's enabling statute. As these organizations were controlled by government, Translink and BC Transit were "government" as well, and were bound to act in accordance with the *Charter*.

Does section 2(b) of the Charter protect advertisements on buses?

The second issue was whether expression on the sides of buses was protected by section 2(b) of the *Charter*. Canadian courts have previously held that not all methods or locations of expression enjoy section 2(b) protection. Further, government may choose to exclude groups or individuals from expressive forums on government property. In this case, however, Translink and BC Transit did not distinguish between groups or individuals that were permitted to advertise on buses, but limited the content of the expression of groups that were included in the policies.

The Court went on to consider whether the side of a bus is a location that enjoys section 2(b) protection. The Court found that buses are actually used for commercial expression, and that advertisements do not impede the primary function of the bus (*i.e.*, providing public transportation). Further, the advertisements advance, rather than undermine, the values that underlie the *Charter* right to expression (democratic discourse, truth-seeking and a free marketplace of ideas). The Court observed that buses exist in the public sphere, and do not demand the same privacy and access considerations as might government buildings or offices.

On this basis, the Court concluded that advertisements on public buses are expressions which are protected by section 2(b) of the *Charter*.

Are the advertisement policies "laws"?

The Court found that where a government policy sets out a rule that applies to the public generally and which is sufficiently accessible and precise, the policy is legislative in nature. Therefore, the prohibitions on political advertising contained in the advertisement policies were limits that were "prescribed by law" within the meaning of the *Charter*.

If the advertisement policies limit expression, is the limit justified?

Further, the Court found that there was no evidence that the limit on political advertising imposed by the advertising policies minimally impaired the right to freedom of expression. Instead, the prohibition was a blanket exclusion of a type of expression in a public location. An acceptable limit on bus advertisements might occur when certain advertisements may not be directed toward particular audiences, such as government-imposed limits on tobacco advertisement directed at young people. However, the blanket exclusion of political content contained in the advertisement policies was not a justifiable limit of the rights protected by section 2 (b) in this case.

As a result of the violation of section 2(b) of the *Charter*, the advertisement policies of both Translink and BC Transit policies were struck down as invalid.

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The full text of the judgments in this case may be found using the following links:

British Columbia Supreme Court (2006 BCSC 455):
http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc455/2006bcsc455.html

Court of Appeal (2006 BCCA 529):
http://www.canlii.org/en/bc/bcca/doc/2006/2006bcca529/2006bcca529.html

Supreme Court of Canada (2009 SCC 31):
http://www.canlii.org/en/ca/scc/doc/2009/2009scc31/2009scc31.html