

# The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



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## ***Canadian Federation of Students v. Greater Vancouver Transportation Authority, 2009 SCC 31***

<http://scc.lexum.org/en/2009/2009scc31/2009scc31.html>

*This case dealt with whether a regulation banning "political" advertisements on buses violated freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms.*

**Date Released: July 10, 2009**

### **The Facts**

The public transportation authorities in British Columbia permit and generate revenue from commercial advertisements placed on the inside and outside of buses that operate in the province. The policies prohibit advertising that presents politically-oriented viewpoints, meetings, or organizations.

#### **Transit Authorities' Advertising Policies**

2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy.

9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office.

In the summer and fall of 2004 the Canadian Federation of Students, British Columbia Component (CFS) and the British Columbia Teachers' Federation (BCTF) attempted to purchase advertising space on the sides of buses operated by the transit authorities. The CFS wanted to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting ads about the election on buses. In accordance with their advertising policies, the transit authorities refused to post the advertisements of the CFS and BCTF, which promoted an upcoming provincial election. The CFS and BCTF challenged the advertising policies on the grounds that articles 2, 7 and 9 violated their freedom of expression as protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

***Canadian Charter of Rights and Freedoms***

2. Everyone has the following fundamental freedoms:
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The trial judge dismissed the action, finding that the respondents' right to freedom of expression had not been infringed. The majority of the Court of Appeal for British Columbia reversed the judgment and declared the relevant sections of the advertising policies to be of no force or effect. The decision was appealed to the Supreme Court of Canada (SCC).

**The Decision****Whether the Charter Applies to the Transit Authorities**

The first issue addressed by the SCC was whether the transit authorities should be considered "government" within the context of the *Charter*. In order to make a claim under the *Charter*, the infringing body or organization must be considered part of the government.

***Canadian Charter of Rights and Freedoms***

32. (1) This Charter applies
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Court held that the *Charter* applies to government in all of its activities, as well as the activities of all agencies that are controlled by government. Additionally, the *Charter* applies to organizations that are controlled by government if their activities are "governmental in nature." Here, the transit authorities were considered "government" because the day-to-day operations were controlled by government; thus, the transit authorities had to act in accordance with the *Charter*.

**Whether Freedom of Expression is Infringed**

The Court then assessed whether the expression on the sides of buses should be protected by s. 2(b) of the *Charter*. Canadian courts have held that not all methods or locations of expression enjoy protection under s. 2(b); however, the courts have also recognized that s. 2(b) protects an individual's right to express him or herself in certain public places.

The Court held that buses are used for commercial expression and that the advertisements do not impede the primary function of the bus as a vehicle for public transportation. The Court held that the bus is a public place and passengers are exposed to the messages on the sides of a bus in the same way as a message on a utility pole or in any public space in the city. Therefore, advertisements on public buses are expressions protected by s. 2(b) of the *Charter* and the transit authority policies limited freedom of expression, contrary to s. 2(b).

**Whether Transit Policies Reasonably Limit Freedom of Expression**

The Court also assessed whether the limit on freedom of expression was justified under s. 1 of the *Charter*, as an infringement that is reasonable in a free and democratic society.

***Canadian Charter of Rights and Freedoms***

1. 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.

In determining whether the infringement of s. 2(b) was justified under s. 1 of the *Charter*, the court applied the *R. v. Oakes* test, which is used to weigh whether a particular limitation on an individual's rights and freedoms should be allowed in a free and democratic society. It seeks to balance the benefits of the purpose of the law with the harmful effects of the infringement. The *Oakes* test requires the government to convince the court that the law is justified:

- (1) There is a "pressing and substantial" objective that justifies infringement of the right;
- (2) The way it has chosen to obtain the objective is reasonable, which involves a three-step "proportionality test":
  - a. The measure used must be carefully designed, or "rationally connected", to achieve the objective;
  - b. The measure used should impair the right as minimally as possible; and
  - c. The negative effects of the measure must be balanced by the actual benefits of that result from it.

In applying the *Oakes* test, the Court ruled that while the stated purpose of providing "a safe, welcoming public transit system" is a sufficiently important public purpose to allow for limits on freedom of expression, the limits imposed by the regulations are not rationally connected to that purpose. The Court found that the transit authorities' policies set out a blanket exclusion of political advertising, and held that this exclusion was so wide that it did not minimally impair the right to freedom of expression. In other words, the court found that the infringement on freedom of expression was not justified under s. 1 of the *Charter*.

Therefore, the advertisement policies were not a justifiable limit and, as a result of the violation of s. 2(b), the policies were struck down as invalid. This meant that the political advertisements qualified as a constitutionally protected form of expression and were therefore allowed on the buses.

## Discussion Issues

1. Writing for the majority, Justice Deschamps noted that the ban on political advertising was not rationally connected to the aim of providing a “safe, welcoming public transport system”:

“It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the object of providing a safe and welcoming transit system will be undermined.”

Do you agree or disagree with her statements? Why or why not? Can you think of examples where the government could reasonably limit bus advertisements?

2. The courts have progressively recognized more public places as having protection under s. 2(b) of the *Charter*, including utility poles, town squares and the sides of buses. What implications do you think this ruling will have for expression in other public places? Can you think of examples of public places where freedom of expression might come into play?
3. In examining freedom of expression under the *Charter*, the location where the expressive activity takes place matters. Does the audience matter? Does it make a difference that bus riders are a captive audience and may have difficulty avoiding the advertising? Consider the demographic of bus passengers and the ability to choose whether to take public transportation or not.
4. Discuss whether a commercial aspect to freedom of expression exists? In this case, removing the political ban will likely increase the advertising revenues for the public transit authorities.
5. Why is freedom of expression so sacred in contemporary society?