SUPREME COURT OF CANADA

CITATION: Greater Vancouver Transportation Authority *v.* Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295

DATE: 20090710
DOCKET: 31845

BETWEEN:

Greater Vancouver Transportation Authority
Appellant
and
Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation
Respondents
- and -
Attorney General of New Brunswick, Attorney General of British Columbia, Adbusters Media Foundation and British Columbia Civil Liberties Association
Interveners

AND BETWEEN:

British Columbia Transit
Appellant
and
Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation
Respondents
- and -
Attorney General of New Brunswick, Attorney General of British Columbia, Adbusters Media Foundation and British Columbia Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Bastarache,* Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 91) Deschamps J. (McLachlin C.J. and Binnie, LeBel, Abella, Charron and Rothstein JJ. concurring)

CONCURRING REASONS: (paras. 92 to 139) Fish J.

* Bastarache J. took no part in the judgment.

Greater Vancouver Transportation Authority *v.* Canadian Federation of Students — British Columbia Component, 2009 SCC 31, [2009] 2 S.C.R. 295

Greater Vancouver Transportation Authority *Appellant*

v.

Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation *Respondents*

and

Attorney General of New Brunswick, Attorney General of British Columbia, Adbusters Media Foundation and British Columbia Civil Liberties Association *Interveners*

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British Columbia Transit *Appellant*

v.

Canadian Federation of Students — British Columbia Component and British Columbia Teachers' Federation *Respondents*

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Indexed as: Greater Vancouver Transportation Authority *v.* Canadian Federation of Students — British Columbia Component

Neutral citation: 2009 SCC 31.

File No.: 31845.

2008: March 25; 2009: July 10.

Present: McLachlin C.J. and Bastarache,[*] Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Application of Charter — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Actions brought alleging that transit authorities' policies violated freedom of expression — Whether entities which operate public transit systems "government" within

[*] Bastarache J. took no part in the judgment.

meaning of s. 32 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Freedom of expression — Advertisements on buses — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Whether advertising policies infringing freedom of expression — If so, whether infringement can be justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b).

Constitutional law — Charter of Rights — Reasonable limits prescribed by law — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Policies infringing freedom of expression —Whether policies are "law" within meaning of s. 1 of Canadian Charter of Rights and Freedoms.

Constitutional law — Charter of Rights — Remedy — Transit authorities' advertising policies permitting commercial but not political advertising on public transit vehicles — Policies unjustifiably infringing freedom of expression — Declaration that policies are of "no force or effect" sought — Whether declaration ought to be based on s. 52 of Constitution Act, 1982 or s. 24(1) of Canadian Charter of Rights and Freedoms — Whether policies are "law" within meaning of s. 52 of Constitution Act, 1982.

The appellant transit authorities, the Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("BC Transit"), operate public transportation systems in British Columbia. They refused to post the respondents' political advertisements on

the sides of their buses on the basis that their advertising policies permit commercial but not political advertising on public transit vehicles. The respondents commenced an action alleging that articles 2, 7 and 9 of the transit authorities' policies had violated their right to freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. 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 reversed the trial judgment and declared articles 7 and 9 of the advertising policies to be of no force or effect either on the basis of s. 52(1) of the *Constitution Act, 1982* or on the basis of s. 24(1) of the *Charter*.

Held: The appeal should be dismissed.

Per McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ.: Both BC Transit and TransLink are "government" within the meaning of s. 32 of the *Charter*. On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. BC Transit is a statutory body designated by legislation as an "agent of the government" and it cannot operate autonomously from the provincial government, since the latter has the power, by means of regulations, to exercise substantial control over its day-to-day activities. Although TransLink is not an agent of the government, it is substantially controlled by a local government entity — the Greater Vancouver Regional District — and is therefore itself a government entity. Since the transit authorities are government entities, the *Charter* applies to all their activities, including the operation of the buses they own. [14] [17] [21] [24-25]

The s. 2(*b*) claim should not be resolved using the *Baier* framework. The transit authorities' policies do not prevent the respondents from using the advertising service as a means of expression. Only the content of their advertisements is restricted. Thus, their claim cannot be characterized as one against underinclusion. Nor can it be characterized as a positive right claim. The respondents are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded. They seek 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. [26] [32] [35]

In order to determine whether the expression should be denied s. 2(*b*) protection on the basis of location, the *City of Montréal* framework should be applied. This inquiry leads to the conclusion that the transit authorities' policies infringe the respondents' freedom of expression. The proposed advertisements have expressive content that brings them within the *prima facie* protection of s. 2(*b*), and the location of this expression — the sides of buses — does not remove that protection. Not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression. The space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2(*b*). The side of a bus is therefore a location where expressive activity is protected by s. 2(*b*) of the *Charter*. Finally, the very purpose of the impugned policies is to restrict the content of expression in the advertising space

on the sides of buses. The wording of articles 2 and 7 clearly limits the content of advertisements. Article 9 is even more precise in excluding political speech. [36-38] [42] [46]

The limits resulting from the policies are "limits prescribed by law" within the meaning of s. 1 of the *Charter*. Where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law". Here, a review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink. Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. The policies are not administrative in nature, as they are not meant for internal use as an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and satisfy the "prescribed by law" requirement as the transit authorities' advertising policies are both accessible and worded precisely enough to enable potential advertisers to understand what is prohibited. [65] [67] [71-73]

The limits resulting from the policies are not justified under s. 1 of the *Charter*. The policies were adopted for the purpose of providing "a safe, welcoming public transit system" and this is a sufficiently important objective to warrant placing a limit on freedom of expression.

However, the limits on political content imposed by articles 2, 7 and 9 are not rationally connected to the objective. It is difficult to see how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. Moreover, the means chosen to implement the objective was neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their right under s. 2(*b*) of the *Charter*. The policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression. Advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities have failed to minimize the impairment of political speech, which is at the core of s. 2(*b*) protection. To the extent that articles 2, 7 and 9 prohibit political advertising on the sides of buses, they place an unjustifiable limit on the respondents' right under s. 2(*b*) of the *Charter*. [76-77] [80]

With respect to remedy, the transit authorities' policies clearly come within the meaning of "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. The transit authorities used their delegated rule-making power to adopt policies which unjustifiably limited the respondents' freedom of expression. Those policies are binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses. Since ensuring the largest numbers of potential claimants and beneficiaries of a constitutional challenge is in keeping with the spirit of the supremacy of the *Charter*, the appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982,* and not s. 24(1) of the *Charter*. As the transit authorities' advertising

policies are "law" within the meaning of s. 52(1) of the *Constitution Act, 1982*, they are therefore declared of no force or effect to the extent of their inconsistency. [89-90]

Per Fish J.: There is agreement that the transit authorities are subject to the *Charter*, that their advertising policies infringe s. 2(*b*) of the *Charter*, that this infringement cannot be justified under s. 1, and that the respondents are entitled to a declaration that the policies are of no force or effect. But there is disagreement with the analytical framework adopted in circumscribing freedom of expression under s. 2(*b*). [93] [100] [137]

Freedom of expression enjoys broad but not unbounded constitutional protection in Canada. It is subject to internal limits which allow government to curtail expressive activity that is inherently inconsistent with the object and purpose of s. 2(*b*), and it is subject as well to "external" limitation in virtue of s. 1 of the *Charter*. Two recognized internal limits are relied on by the transit authorities: the significant burden exception and the manifest incompatibility exception. Under the first, expressive activity will not normally be protected where it imposes on the government a significant burden of assistance, in the form of expenditure of public funds, or the initiation of a complex legislative, regulatory, or administrative scheme or undertaking. Government expenditures and initiatives may be undertaken to advance *Charter* rights and freedoms in innumerable ways, but given finite resources, it is generally considered to be a matter for the legislature and not the judiciary to determine which social priorities are to receive government assistance. Second, expressive activity will also fall outside the protected zone of s. 2(*b*) where it is manifestly incompatible with the purpose or function of the space in question. Governments should not bear the burden of strictly prescribing by law and justifying limits on

those kinds of expression that are so obviously incompatible with the purpose or function of the space provided. Freedom of expression is also subject to an external limitation: even if an expressive activity falls within the protected zone of s. 2(*b*), it may be validly curtailed in virtue of s. 1 of the *Charter* pursuant "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". [95-98] [103] [105] [130-131]

Neither the significant burden nor the manifest incompatibility exception to the general rule of broad protection enshrined in s. 2(*b*) applies in this case. The respondents' request would not impose a significant burden on the transit authorities. Little change is needed to remove the infringing restrictions and the steps that would have to be taken require no meaningful expenditure of funds and no new operating initiatives of significance. They involve no administrative reorganization, restructuring or expansion that can reasonably be characterized as "burdensome". Also, advertisements conveying a political message are not incompatible — let alone manifestly incompatible — with a commercial and public service advertising facility. Having chosen to make the sides of buses available for expression on such a wide variety of matters, the transit authorities cannot, without infringing s. 2(*b*) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law. There is no inherent conflict between political advertisements on the sides of buses and orderly transportation. [97] [116-117] [121] [123]

Cases Cited

By Deschamps J.

Applied: *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; **distinguished:** *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; **referred to:** *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Therens*, [1985] 1 S.C.R. 613; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3; *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *R. v. Oakes*, [1986] 1 S.C.R. 103;

Canada (Attorney General) v. JTI-Macdonald Corp., 2007 SCC 30, [2007] 2 S.C.R. 610; *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728; *R. v. Tremblay*, [1993] 2 S.C.R. 932; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96.

By Fish J.

Referred to: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992).

Statutes and Regulations Cited

British Columbia Transit Act, R.S.B.C. 1996, c. 38, ss. 2(5), 3(1)(c), 4(1), (4)(e), 32(2).

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), 15, 24(1), 32.

Constitution Act, 1982, s. 52.

Criminal Code, R.S.C. 1985, c. C-46, s. 83.02.

Greater Vancouver Transportation Authority Act, S.B.C. 1998, c. 30, ss. 2(4), 8(1), (2), 14(3), (4), 25(3), 29(5), 29.1(5), 133(5).

Local Government Act, R.S.B.C. 1996, c. 323, ss. 2, 5 "local government", 173, 174, 266(1), 783(1), 796(1), 803(1).

South Coast British Columbia Transportation Authority Act, S.B.C. 1998, c. 30.

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Holland, Denys C., and John P. McGowan. *Delegated Legislation in Canada*. Toronto: Carswell, 1989.

APPEAL from a judgment of the British Columbia Court of Appeal (Southin, Prowse and Lowry JJ.A.), 2006 BCCA 529, 275 D.L.R. (4th) 221, [2007] 4 W.W.R. 575, 233 B.C.A.C. 81, 386 W.A.C. 81, 64 B.C.L.R. (4th) 29, 148 C.R.R. (2d) 203, [2006] B.C.J. No. 3042 (QL), 2006 CarswellBC 2887, reversing a decision of Halfyard J., 2006 BCSC 455, 266 D.L.R. (4th) 403, 139 C.R.R. (2d) 148, [2006] B.C.J. No. 729 (QL), 2006 CarswellBC 865. Appeal dismissed.

David F. Sutherland and *Clark Roberts*, for the appellant the Greater Vancouver Transportation Authority.

George K. Macintosh, Q.C., and *Timothy Dickson*, for the appellant the British Columbia Transit.

Mark G. Underhill and *Catherine J. Boies Parker*, for the respondents.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Neena Sharma and *Jennifer J. Stewart*, for the intervener the Attorney General of British Columbia.

Ryan D. W. Dalziel and *Audrey Boctor*, for the intervener the Adbusters Media Foundation.

Chris W. Sanderson, Q.C., and *Chelsea D. Wilson*, for the intervener the British Columbia Civil Liberties Association.

The judgment of McLachlin C.J. and Binnie, LeBel, Deschamps, Abella, Charron and Rothstein JJ. was delivered by

[1] DESCHAMPS J. — Can government entities, in managing their property, disregard the right of individuals to political expression in public places? The appellant transit authorities answered this question in the affirmative and refused to post the respondents' political advertisements on the sides of buses on the basis that their advertising policies permit commercial but not political advertising on public transit vehicles. This appeal raises the issues

of whether those policies must comply with the *Canadian Charter of Rights and Freedoms* and, if so, whether they violate the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression and whether such a breach can give rise to a declaration that the policies are invalid under s. 52 of the *Constitution Act, 1982*.

1. Facts and Judicial History

[2] The appellants, the Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("BC Transit"), are corporations that operate public transportation systems in British Columbia. TransLink is responsible for running the transit system in the area under the jurisdiction of the Greater Vancouver Regional District ("GVRD"), whereas BC Transit operates in British Columbia communities outside the GVRD. For years, the appellants (the "transit authorities") have earned revenue by posting advertisements on their buses.

[3] In the summer and fall of 2004, the respondents, 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, a society which represents thousands of college and university students in B.C., sought to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting, on buses, advertisements about the election. The first advertisement, which was to run the length of the bus, would have depicted a silhouette of a crowd at a concert with the following text:

> Register now. Learn the issues. Vote May 17, 2005.
> ROCKTHEVOTEBC.com

The second advertisement was a "banner ad" placed along the top of the bus which would have read in one long line as follows:

> Tuition fees ROCKTHEVOTEBC.com Minimum wage ROCKTHEVOTEBC.com Environment ROCKTHEVOTEBC.com

The BCTF, a society and trade union which is the exclusive bargaining agent for more than 40,000 public school teachers in B.C., sought to voice its concern about changes in the public education system by posting the following message:

> 2,500 fewer teachers, 114 schools closed.
> Your kids. Our students. Worth speaking out for.

[4] The transit authorities refused to post the respondents' advertisements on the basis that such advertisements were not permitted by their advertising policies. The transit authorities had adopted essentially identical advertising policies, which included the following provisions:

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

. . .

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;

[5] The respondents commenced the present action, alleging that articles 2, 7 and 9 of the transit authorities' policies had violated their right to freedom of expression guaranteed by s. 2(*b*) of the *Charter*. The respondents restricted their claim for relief to a declaration, "pursuant to s. 52 of the *Constitution Act, 1982*, that [articles] 2, 7 and 9 of the advertising policies are unconstitutional and of no force and effect".

[6] Halfyard J. of the British Columbia Supreme Court dismissed the action (2006 BCSC 455, 266 D.L.R. (4th) 403). He determined that both BC Transit and TransLink were subject to the *Charter* since they were "government" within the meaning of s. 32 of the *Charter*. However, he concluded, on the basis of the factors set out in *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 ("*City of Montréal*"), and in *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), that the respondents' right to freedom of expression had not been infringed. In his view, since there was no history of permitting political or advocacy advertising on the sides of buses, the location was not a "public place".

[7] Halfyard J. went on to state that, had he found that the transit authorities' policies

infringed the respondents' freedom of expression, he would have concluded that the total ban on political and other advocacy advertising was not a reasonably minimal impairment of freedom of expression and that the alleged benefits of the advertising restrictions did not outweigh their detrimental effects. Nevertheless, he would have found that the advertising policies failed the s. 1 test on the basis that the limits they imposed were not limits prescribed by law.

[8] The British Columbia Court of Appeal reversed the trial judgment (2006 BCCA 529, 64 B.C.L.R. (4th) 29). On the question of freedom of expression, Prowse J.A., writing for the majority, concluded that the trial judge had erred in finding that the transit authorities' advertising policies did not infringe the respondents' right to freedom of expression. In her view, Halfyard J. had erred, in applying *City of Montréal*, in considering the content of the advertisement and had mistakenly elevated the historical use of the sides of buses from a potential indicator that a place is a "public place" to an actual prerequisite for finding that it is. According to Prowse J.A., BC Transit and TransLink had a history of permitting advertising on their buses, and expression in this location could not therefore be viewed as inimical to the function of the buses as vehicles for public transportation.

[9] Regarding s. 1 of the *Charter*, Prowse J.A. declined to embark on her own analysis of whether the transit authorities' policies were "law" within the meaning of s. 1, and she neither accepted nor rejected the trial judge's finding on the issue. She felt that it was inappropriate to engage in this discussion given that the parties' submissions on s. 1 were insufficient. On a similar basis, she chose not to rule definitively on the issues of remedy, merely stating that if the policies were "law" within the meaning of s. 1, she could make an order under s. 52, and if they were not

"law", she also had jurisdiction under s. 24(1) to make a similar order. Thus, she declared, without identifying the remedial provision upon which her order was actually based, that articles 7 and 9 of the advertising policies were of no force or effect. Although the validity of article 2 was raised before the trial judge, it was not referred to in the conclusion of the Court of Appeal.

[10] Southin J.A., dissenting, would have dismissed the appeal. In her view, what was at issue was the freedom of expression of both the transit authorities and the respondents. According to Southin J.A.'s interpretation, s. 2(*b*) includes a freedom not to publish a message or, in other words, it does not confer a right of access to "media of communication". Furthermore, in her view, there were no signs of state oppression in the transit authorities' refusal to post the respondents' advertisements.

[11] The transit authorities sought and were granted leave to appeal to this Court with respect to the constitutional validity of articles 2, 7 and 9 of the transit authorities' policies.

2. Issues

[12] There are four issues in this appeal: (1) whether the entities which operate the public transit systems in the GVRD and elsewhere in British Columbia are subject to the *Charter*; (2) if so, whether the impugned policies adopted by these entities infringe the respondents' right to freedom of expression; (3) if so, whether the limits imposed by those policies are "reasonable limits prescribed by law" within the meaning of s. 1 of the *Charter*; and (4) whether a declaration can be made under s. 52 of the *Constitution Act, 1982* with respect to the policies.

3. Analysis

3.1 *Section 32 of the Charter: The Principles*

[13] Section 32 identifies the entities to which the *Charter* applies. It reads:

> **32.** (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[14] On the face of the provision, the *Charter* applies not only to Parliament, the legislatures and the government themselves, but also to all matters within the authority of those entities. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, La Forest J. explained the rationale for the broad reach of s. 32 as follows (at para. 48):

> Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are — as a simple matter of fact — governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies. In other words, Parliament, the provincial legislatures and the federal and provincial executives could simply create bodies distinct from themselves, vest those bodies with the power to perform governmental functions and, thereby, avoid the constraints imposed upon their activities through the operation of the *Charter*. Clearly, this course of action would indirectly narrow the ambit of protection afforded by the *Charter* in a manner that could hardly have been intended and with consequences that are, to say the least, undesirable. Indeed, in view of their fundamental importance,

> *Charter* rights must be safeguarded from possible attempts to narrow their scope unduly or to circumvent altogether the obligations they engender. [Emphasis added.]

[15] In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, La Forest J. reviewed the position the Court had taken in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 (university), *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (university), *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (hospital), *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570 (college), and *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 (college), on the issue of the status of various entities as "government". Writing for a unanimous Court, he summarized the applicable principles as follows (at para. 44):

> . . . the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize the quality of the act at issue, rather than the quality of the actor. If the act is truly "governmental" in nature — for example, the implementation of a specific statutory scheme or a government program — the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[16] Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the

government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.

3.1.1 Application of the Principles to the Transit Authorities

[17] In this Court, BC Transit does not address the trial judge's conclusion that it is itself "government" within the meaning of s. 32 of the *Charter*. It is clearly a government entity. It is a statutory body designated by legislation as an "agent of the government", with a board of directors whose members are all appointed by the Lieutenant Governor in Council (*British Columbia Transit Act*, R.S.B.C. 1996, c. 38, ss. 2(5) and 4(1)). Moreover, the Lieutenant Governor in Council has the power to manage BC Transit's affairs and operations by means of regulations (s. 32(2)). Thus, BC Transit cannot be said to be operating autonomously from the provincial government, since the latter has the power to exercise substantial control over its day-to-day activities.

[18] As for TransLink, it argues that the trial judge and the majority of the Court of Appeal erred in finding that it is "government" within the meaning of s. 32 of the *Charter*. Prowse J.A. found that because TransLink is controlled by the GVRD, which itself is "government" within the meaning of s. 32, it is an apparatus of government. She based her finding that the GVRD was governmental in nature on s. 5 of the *Local Government Act*, R.S.B.C. 1996, c. 323 ("LGA"), which defines "local government" as "the council of a municipality" and "the board of a regional district". She added that regional districts are corporations (s. 173), that they are governed by boards (s. 174) and that the boards consist of municipal directors and electoral area directors (s. 783(1)).

Furthermore, the LGA describes regional districts as "independent, responsible and accountable order[s] of government within their jurisdiction" and states that a regional district is intended to provide "good government for its community" (s. 2(a)). The GVRD therefore clearly falls within the definition of "local government".

[19] One might add to the criteria upon which Prowse J.A. based her conclusion the facts that, subject to specific limitations established in the LGA, a regional district may operate any service that the board considers necessary or desirable for its geographic area (s. 796(1)), and that it may recover the costs of its services (s. 803(1)). Moreover, the board of a regional district has the power to make bylaws which are enforceable by fine or by imprisonment (s. 266(1)). Consequently, not only is the GVRD designated as "government" in the LGA, but the legislature has granted it powers consistent with that status.

[20] Having established that the GVRD is "government", Prowse J.A. went on to conclude that the GVRD exercises substantial control over TransLink:

> . . . the GVRD has substantial control over the day-to-day operations of TransLink which, when combined with the GVRD's powers to appoint the vast majority of the members of TransLink's board of directors, satisfies the control test posited by the authorities. To the extent that the GVRD does not have complete control over TransLink, control is shared by the provincial government. In either case, I conclude that TransLink cannot be viewed to be operating independently or autonomously in a manner similar to either universities or hospitals. It has no independent agenda other than that provided in its constituent *Act* and no history of being an entity independent of government. [para. 93]

[21] Prowse J.A. came to this conclusion after reviewing the *Greater Vancouver*

Transportation Authority Act, S.B.C. 1998, c. 30, and remarking that the GVRD must appoint 12 of the 15 directors on TransLink's board (s. 8(1) and (2)) and must ratify TransLink's strategic transportation plan (s. 14(4)), that TransLink must "prepare all its capital and service plans and policies and carry out all its activities and services in a manner that is consistent with its strategic transportation plan" (s. 14(3)), and that the GVRD must ratify bylaws relating to a variety of taxes and levies (ss. 25(3), 29(5), 29.1(5) and 133(5)). Although TransLink is not an agent of the government, Prowse J.A. concluded that it is substantially controlled by a local government entity — the GVRD — and is therefore itself a government entity. The control mechanisms are substantial, and I agree with Prowse J.A.'s analysis and conclusion on this issue.

[22] The conclusion that TransLink is a government entity is also supported by the principle enunciated by La Forest J. in *Eldridge* (at para. 42) and *Godbout* (at para. 48) that a government should not be able to shirk its *Charter* obligations by simply conferring its powers on another entity. The creation of TransLink by statute in 1998 and the partial vesting by the province of control over the region's public transit system in the GVRD was not a move towards the privatization of transit services, but an administrative restructuring designed to place more power in the hands of local governments (B.C.C.A. reasons, at paras. 75-79). The devolution of provincial responsibilities for public transit to the GVRD cannot therefore be viewed as having created a "*Charter*-free" zone for the public transit system in Greater Vancouver.

[23] At this point, I should mention that the legislation considered by the courts below has been repealed since the time of the events at issue in this case. Pursuant to the *South Coast British Columbia Transportation Authority Act*, S.B.C. 1998, c. 30, TransLink's activities are now

conducted by the South Coast British Columbia Transportation Authority. The provisions of the new statute are not before the Court, and I need not comment on them here.

[24] In summary, both BC Transit and TransLink are "government" within the meaning of s. 32 of the *Charter*. Consequently, it is not necessary to enquire into the nature of individual activities, because all their activities are subject to the *Charter*, regardless of whether a given activity can correctly be described as "private" (*Eldridge*, at para. 44).

3.2 *Section 2(b) of the Charter*

[25] Since I have established that, for the purposes of s. 32 of the *Charter*, the transit authorities are government entities, it follows that the *Charter* applies to all their activities, including the operation of the buses they own. As I mentioned above, the transit authorities have earned revenues from advertising posted on their buses for years. BC Transit has permitted advertising inside its buses since the 1980s and on the outsides for over a decade, and TransLink has permitted advertising on the outsides of its buses ever since it came into existence in 1998. The transit authorities' policies, which regulate both the content and the form of advertisements, are at the heart of the debate. The respondents sought to post various advertisements on the sides of buses, and their requests were rejected by the transit authorities on the basis that articles 2, 7 and 9 of the policies prohibited political advertisements or advertisements of a controversial nature.

[26] The respondents submit that articles 2, 7 and 9 unjustifiably infringe their rights under s. 2(*b*) of the *Charter*. In the respondents' view, their claim centres on the use of government

property for public expression without undue state interference with the content of their expression, and should therefore be resolved using the analysis for public space expression set out by this Court in *City of Montréal*. The transit authorities counter that the respondents are seeking to gain access to a particular platform for expression and that they are invoking the *Charter* to place these government entities under a positive obligation to make buses available for their expression. More specifically, BC Transit describes the respondents' claim as one of underinclusion on the basis that they are seeking to have the scope of the advertising service extended to include political advertising. In addition, both BC Transit and TransLink characterize the claim as a positive rights claim on the basis that the respondents cannot engage in the expression at issue without their support or enablement. Accordingly, the transit authorities state that the claim should be resolved using the framework set out in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, rather than by applying the *City of Montréal* test, as the trial judge and the majority of the Court of Appeal have done in the case at bar.

[27] This Court has long taken a generous and purposive approach to the interpretation of the rights and freedoms guaranteed by the *Charter* (*Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295). It has not departed from this general principle in the context of s. 2(*b*): *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 588; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 748-49 and 766-67; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697. An activity by which one conveys or attempts to convey meaning will *prima facie* be protected by s. 2(*b*) (*Irwin Toy*, at pp. 968-69). Furthermore, the Court has recognized that s. 2(*b*) protects an individual's right to express him or herself in certain public places (*Committee for the Commonwealth of Canada v.*

Canada, [1991] 1 S.C.R. 139 (airports); *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 (utility poles); and *City of Montréal*, at para. 61 (city streets)). Therefore, not only is expressive activity *prima facie* protected, but so too is the right to such activity in certain public locations (*City of Montréal*, at para. 61).

[28] However, s. 2(*b*) of the *Charter* is not without limits and governments will not be required to justify every restriction on expression under s. 1 (*Baier*, at para. 20). The method or location of expression may exclude it from protection: for example, violent expression or threats of violence fall outside the scope of the s. 2(*b*) guarantee, and individuals do not have a constitutional right to express themselves on *all* government property.

[29] As well, although s. 2(*b*) protects everyone from undue government interference with expression, it generally does not go so far as to place the government under an obligation to facilitate expression by providing individuals with a particular *means* of expression (*Haig v. Canada*, [1993] 2 S.C.R. 995). Thus, where the government creates such a means, it is generally entitled to determine which speakers are allowed to participate. A speaker who is excluded from such means does not have a s. 2(*b*) right to participate unless she or he meets the criteria set out in *Baier*. Of course, other constitutional obligations — those under s. 15 of the *Charter*, for example — still apply.

[30] In *Baier*, Rothstein J., writing for the majority, summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or "platform" for, expression to a particular group or individual. In that case,

schoolteachers were challenging Alberta legislation which prohibited them from running for election as school trustees. Rothstein J. observed that the teachers, by seeking access to a government-created platform for expression, were asking the government to enable their expressive activity and were therefore asserting a positive right. The question that must be answered in the case at bar, therefore, is whether the *Baier* analysis is triggered.

[31] The transit authorities' advertising policies authorize any "[a]dvertisements . . . which communicate information concerning goods, services, public service announcements and public events" (article 2). The policies are designed to enable a large number of speakers to reach a large audience. The respondents sought to post political advertisements on buses by means of the transit authorities' advertising service. The *content* of their expressive activity was the political message and the *means* of expression was the advertising service enabling expression on the sides of the buses. The advertisements were rejected on the basis of their political content, not on the basis that the advertising service was not available to the respondents.

[32] At first glance, since the respondents are not themselves excluded from access to the advertising service, it seems difficult to characterize their claim as one against underinclusion. The advertising service is not a platform created for a limited group of individuals or for a very narrow purpose. Rather, it is accessible to anyone who wishes to advertise and is willing to pay a fee. According to BC Transit, however, the respondents are challenging the underinclusive scope of the platform for expression on the basis that it excludes *political* advertising. Care must be taken not to confuse the notion of an underinclusive platform for expression with government limits on the content of expression. I do not need to revisit here the factors set out in *Dunmore v. Ontario*

(Attorney General), 2001 SCC 94, [2001] 3 S.C.R. 1016, at paras. 24-26 and 31-33, and summarized in *Baier*, at para. 27 — suffice it to say that to succeed in its argument that the respondents' claim is one of underinclusiveness, BC Transit had to at least demonstrate that the respondents themselves were excluded from the particular means of expression. But this is not what the respondents are arguing. The policies do not prevent them from using the advertising service as a means of expression. Only the content of their advertisements is restricted. Thus, their claim cannot be characterized as one against underinclusion. In contrast, in *Baier*, school trusteeship was the very means of the expressive activity, and the claimants were being denied access to that means.

[33] However, both BC Transit and TransLink also characterize the claim as one for a positive right on the basis that the respondents required their support and enablement to convey the messages in question. A few comments are in order.

[34] In *Baier*, Rothstein J. stated (at para. 35):

> To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.

The words "act to support or enable", taken out of context, could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or

enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.

[35] When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a distinction was drawn between placing an obligation on government to provide individuals with a particular platform for expression and protecting the underlying freedom of expression of those who are free to participate in expression on a platform (para. 42). Consequently, the transit authorities' interpretation of the notion of a positive rights claim is overly broad and was in fact rejected in *Baier*. The respondents seek 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. They are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they are excluded.

[36] I find that the transit authorities have not shown that the respondents' claim falls under the *Baier* analysis. I must now determine whether the expression should be denied s. 2(*b*) protection on the basis of location. This inquiry is conducted pursuant to the analytical framework developed in *City of Montréal*.

3.2.1 Application of *City of Montréal*

[37] In order to determine whether the transit authorities' advertising policies infringe s. 2(*b*) of the *Charter*, three questions must be asked: First, do the respondents' proposed advertisements have expressive content that brings them within the *prima facie* protection of s. 2(*b*)? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(*b*), do the transit authorities' policies deny that protection? (*City of Montréal*, at para. 56) If the policies are found to have infringed s. 2(*b*) of the *Charter*, the analysis then shifts to determining whether the infringement is justified under s. 1 of the *Charter*.

[38] The answer to the first question is not in issue. The proposed advertisements unquestionably have expressive content. The answer to the third question is also uncontroversial, although the question is not, as the trial judge suggested, whether all *political* speech is prohibited, but whether either the purpose or the effect of the government measures is to place a limit on expression. In the instant case, the very purpose of the impugned policies is to restrict the content of expression in the advertising space on the sides of buses. The wording of articles 2 and 7 clearly limits the content of advertisements. Article 9 is even more precise in excluding political speech. As the majority of the Court of Appeal stated, the transit authorities "sought to prohibit political advertising precisely because it was political" (para. 133).

[39] Regarding the second question, the analysis is somewhat more elaborate. In *City of Montréal*, the majority of the Court set out the following test for determining whether expression in a government location is protected by s. 2(*b*) of the *Charter* (at para. 74):

> The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(*b*) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:
>
> (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.

[40] In the case at bar, the trial judge and the Court of Appeal came to opposite conclusions with respect to the first factor. The trial judge found that there was no history of *political* advertising on the sides of buses (trial judgment, at para. 87). For him, this finding was pivotal. However, content is not relevant to the determination of the function of a place.

[41] The fact that the historical function of a place included public expression or that its current function includes such expression is a good indication that expression in that place is constitutionally protected. Thus, a podium erected in a park for public use would necessarily be regarded as having a function that does not conflict with the purposes s. 2(*b*) is intended to serve; in fact, the very purpose of this public place would be to enhance the values underlying s. 2(*b*). However, the use of public property for expression will very rarely be questioned on the basis of such facts. The circumstances will usually be more complex. The airport, utility poles and streets at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal* are examples of places whose primary function is not expression.

[42] The question is whether the historical or actual function or other aspects of the space are

incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth of Canada*, *Ramsden* and *City of Montréal*, where the Court found the expressive activities in question to be protected by s. 2(*b*). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use — both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.

[43] The second factor from *City of Montréal* is whether other aspects of the place suggest that expression within it would undermine the values underlying the constitutional protection. TransLink submits that its buses should be characterized as *private* publicly owned property, to which one cannot reasonably expect access. This position is untenable. The very fact that the general public has access to the advertising space on buses is an indication that members of the public would expect constitutional protection of their expression in that government-owned space. Moreover, an important aspect of a bus is that it is by nature a public, not a private, space. Unlike the activities which occur in certain government buildings or offices, those which occur on a public bus do not require privacy and limited access. The bus is operated on city streets and forms an integral part of the public transportation system. The general public using the streets, including people who could

become bus passengers, are therefore exposed to a message placed on the side of a bus in the same way as to a message on a utility pole or in any public space in the city. Like a city street, a city bus is a public place where individuals can openly interact with each other and their surroundings. Thus, rather than undermining the purposes of s. 2(*b*), expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment.

[44] The test crafted in *City of Montréal* was intended to be flexible enough to allow courts to take into consideration factors that might become relevant to the use of old or new places for public expression (at para. 77):

> Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

Changes in society or technology, or even changes in policy, may affect both the primary and incidental functions of government property. Where the government allows its property to be used for certain expressive activities, it does not commit itself to that use indefinitely. However, if a change in the function of a public place affects fundamental *Charter* rights, any constitutional requirements which attach to the new function must be met.

[45] In sum, this is not a case in which the Court must decide whether to protect access to a space where the government entity has never before recognized a right to such access. Rather, the question is whether the side of a bus, as a public place where expressive activity is already occurring, is a location where constitutional protection for free expression would be expected.

[46] I do not see any aspect of the location that suggests that expression within it would undermine the values underlying free expression. On the contrary, the space allows for expression by a broad range of speakers to a large public audience and expression there could actually further the values underlying s. 2(*b*) of the *Charter*. I therefore conclude that the side of a bus is a location where expressive activity is protected by s. 2(*b*) of the *Charter*.

[47] Consequently, I conclude that since the transit authorities' policies limit the respondents' right to freedom of expression under s. 2(*b*), the government must justify that limit under s. 1 of the *Charter*.

3.3 *Is the Limit Justified Under Section 1 of the Charter?*

[48] In order to justify the infringement of the respondents' freedom of expression under s. 1 of the *Charter*, the transit authorities must show that their policies are "reasonable limits prescribed by law" that can be "demonstrably justified in a free and democratic society". I will first address the question whether the limits imposed by the impugned policies are "prescribed by law".

[49] Although the trial judge had found that the transit authorities' advertising policies did not infringe the respondents' freedom of expression, he nevertheless went on to consider s. 1 of the *Charter*. He concluded, *inter alia*, that the impugned policies were not "law" for the purposes of s. 1 and that the infringement of s. 2(*b*) was therefore not a limit "prescribed by law". He reached this conclusion on the basis that the policies "were not made or administered in the exercise of a

‘governmental’ power or in the performance of a ‘governmental’ duty, and [that] the government had no involvement in the making or implementation of those policies” (trial judgment, at para. 140). Prowse J.A., writing for the majority of the Court of Appeal, declined to embark on her own analysis of the “prescribed by law” issue because the transit authorities had made no submissions on the matter. She neither accepted nor rejected the trial judge’s conclusion on this issue. In this Court, the transit authorities made no submissions on the “prescribed by law” issue, while the respondents agreed with the trial judge’s findings.

3.3.1 Case Law on the “Prescribed by Law” Requirement

[50] In its decisions on the “prescribed by law” requirement in s. 1, the Court has distinguished between challenges to government acts and challenges to “laws” (*Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Eldridge*, at para. 20). This case raises the latter type of claim: the policies are being challenged, not the decision made by the transit authorities pursuant to the policies. In assessing whether the impugned policies satisfy the “prescribed by law” requirement, it must first be determined whether the policies come within the meaning of the word “law” in s. 1 of the *Charter*. To do this, it must be asked whether the government entity was authorized to enact the impugned policies and whether the policies are binding rules of general application. If so, the policies can be “law” for the purposes of s. 1. At the second stage of the enquiry, to find that the limit is “prescribed” by law, it must be determined whether the policies are sufficiently precise and accessible. Professor Peter W. Hogg describes the rationale behind the “prescribed by law” requirement in *Constitutional Law of Canada* (5th ed. 2007), vol. 2, at p. 122:

> The requirement that any limit on rights be prescribed by law reflects two values that are basic to constitutionalism or the rule of law. First, in order to preclude arbitrary and discriminatory action by government officials, all official action in derogation of rights must be authorized by law. Secondly, citizens must have a reasonable opportunity to know what is prohibited so that they can act accordingly. Both these values are satisfied by a law that fulfils two requirements: (1) the law must be adequately accessible to the public, and (2) the law must be formulated with sufficient precision to enable people to regulate their conduct by it, and to provide guidance to those who apply the law.

[51] In *R. v. Therens*, [1985] 1 S.C.R. 613, the Court emphasized that the "prescribed by law" requirement safeguards the public against arbitrary state limits on *Charter* rights. Le Dain J. set out the Court's initial interpretation of the expression "prescribed by law" in s. 1 of the *Charter* (at p. 645):

> The requirement that the limit be prescribed by law is chiefly concerned with the distinction between a limit imposed by law and one that is arbitrary. The limit will be prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements.

[52] Thus, the Court does not require that the limit be prescribed by a "law" in the narrow sense of the term; it may be prescribed by a regulation or by the common law. Moreover, it is sufficient that the limit simply result by necessary implication from either the terms or the operating requirements of the "law". (See also *Irwin Toy*; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *R. v. Swain*, [1991] 1 S.C.R. 933; and *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3.)

[53] The Court has also implicitly recognized other forms of limits that were not originally

identified in *Therens* as being prescribed by law, including limits contained in municipal by-laws (*Ramsden* and *City of Montréal*), provisions of a collective agreement involving a government entity (*Lavigne*) and rules of a regulatory body (*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591). Such limits satisfy the "prescribed by law" requirement because, much like those resulting from regulations and other delegated legislation, their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply. In these regards, they satisfy the concerns that underlie the "prescribed by law" requirement insofar as they preclude arbitrary state action and provide individuals and government entities with sufficient information on how they should conduct themselves.

[54] The Court has likewise taken a liberal approach to the precision requirement. The majority in *Irwin Toy* explained this as follows (at p. 983):

> Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

The Court emphasized in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-97, that the standard is not an onerous one. Unless the impugned law "is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools", it will be deemed to have met the "prescribed by law" requirement (p. 94).

[55] These cases show that the Court has chosen to take a flexible approach to the "prescribed by law" requirement as regards both the form (e.g., statute, regulation, municipal by-law, rule of a regulatory body or collective agreement provision) and articulation of a limit on a *Charter* right (i.e., a standard intelligible to the public and to those who apply the law). In the end, the Court has emphasized, as in *Therens*, the need to distinguish between limits which arise by law and limits which result from arbitrary state action; those resulting from arbitrary state action continue to fail the "prescribed by law" requirement.

[56] This inclusive approach is based on a recognition that a narrow interpretation would lead to excessive rigidity in a parliamentary and legislative system that relies heavily on framework legislation and delegations of broad discretionary powers. McLachlin J. (as she then was) commented on this as follows in *Committee for the Commonwealth of Canada* (at p. 245):

> From a practical point of view, it would be wrong to limit the application of s. 1 to enacted laws or regulations. That would require the Crown to pass detailed regulations to deal with every contingency as a pre-condition of justifying its conduct under s. 1. In my view, such a technical approach does not accord with the spirit of the *Charter* and would make it unduly difficult to justify limits on rights and freedoms which may be reasonable and, indeed, necessary.

See also *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 137.

[57] Bearing in mind the broad interpretation given the "prescribed by law" requirement and the principles underlying the Court's approach, I must now consider whether limits resulting from policies of a government entity satisfy the "prescribed by law" requirement.

3.3.2 Government Policies and the "Prescribed by Law" Requirement

[58] Government policies come in many varieties. Oftentimes, even though they emanate from a government entity rather than from Parliament or a legislature, they are similar, in both form and substance, to statutes, regulations and other delegated legislation. Indeed, as a binding rule adopted pursuant to a government entity's statutory powers, a policy may have a legal effect similar to that of a municipal by-law or a law society's rules, both of which fall within the meaning of "law" for the purposes of s. 1. Other government policies are informal or strictly internal, and amount in substance merely to guidelines or interpretive aids as opposed to legal rules. The question that arises is this: Does a given policy or rule emanating from a government entity satisfy the "prescribed by law" requirement? It can be seen from the case law that a distinction must be drawn between rules that are legislative in nature and rules that are administrative in nature.

[59] In *Committee for the Commonwealth of Canada*, the Court was divided on the issue of whether the internal directives or policies applied by the airport managers in administering the regulatory scheme at issue in that case were "law". In addition to provincial legislation regulating the matter, the airport administration had "an enduring and intransigent policy prohibiting all forms of solicitation and advertising" (p. 185). The trial judge found that an airport manager had been acting in accordance with this established policy when he prohibited the claimants from disseminating political messages at the airport. Lamer C.J., writing for himself and Sopinka J., expressed the opinion that because of their informal and internal nature, including the fact that they were not known to the public, the internal directives or policies could not possibly qualify as "law"

prescribing the government action (p. 164).

[60] McLachlin J. (La Forest J. concurring) was of the view that the internal directives or policies were "law" because they were made pursuant to the Crown's common law right to manage its property (at p. 244):

> . . . I would incline to the view that the act of the airport officials in preventing [the claimants] from handing out leaflets and soliciting members constitutes a limit prescribed by law because the officials were acting pursuant to the Crown's legal rights as owner of the premises.

[61] The decision ultimately turned on the constitutional validity of the regulations, and the question whether internal directives or policies can be considered to be "law" within the meaning of s. 1 was left without a definitive answer.

[62] The issue was again addressed in *Little Sisters*, a case concerning the use of internal guidelines by custom officials in administering the *Customs Act*. The guidelines which were in the form of a memorandum, interpreted standards set out in the legislation. Binnie J., writing for the majority, stated (at para. 85):

> . . . the Memorandum . . . was nothing more than an internal administrative aid to Customs inspectors. It was not law. It could never have been relied upon by Customs in court to defend a challenged prohibition. . . . It is the statutory decision . . . not the manual, that constituted the denial [of the claimants' freedom of expression]. It is simply not feasible for the courts to review for *Charter* compliance the vast array of manuals and guides prepared by the public service for the internal guidance of officials. The courts are concerned with the legality of the decisions, not the quality of the guidebooks, although of course the fate of the two are not unrelated.

[63] What *Committee for the Commonwealth of Canada* and *Little Sisters* demonstrate is a concern about the administrative nature of the policies and guidelines of the government entities in question. Administrative rules relate to the implementation of laws contained in a statutory scheme and are created for the purpose of administrative efficiency. The key question is thus whether the policies are focussed on "indoor" management. In such a case, they are meant for internal use and are often informal in nature; express statutory authority is not required to make them. Such rules or policies act as interpretive aids in the application of a statute or regulation. They cannot in and of themselves be viewed as "law" that prescribes a limit on a *Charter* right. An interpretive guideline or policy is not intended to establish individuals' rights and obligations or to create entitlements. Moreover, such documents are usually accessible only within the government entity and are therefore unhelpful to members of the public who are entitled to know what limits there are on their *Charter* rights. No matter how broadly the word "law" is defined for the purposes of s. 1, a policy that is administrative in nature does not fall within the definition, because it is not intended to be a legal basis for government action.

[64] Where a policy is not administrative in nature, it may be "law" provided that it meets certain requirements. In order to be legislative in nature, the policy must establish a norm or standard of general application that has been enacted by a government entity pursuant to a rule-making authority. A rule-making authority will exist if Parliament or a provincial legislature has delegated power to the government entity for the specific purpose of enacting binding rules of general application which establish the rights and obligations of the individuals to whom they apply (D. C. Holland and J. P. McGowan, *Delegated Legislation in Canada* (1989), at p. 103). For the purposes of s. 1 of the *Charter*, these rules need not take the form of statutory instruments. So long as the

enabling legislation allows the entity to adopt binding rules, and so long as the rules establish rights and obligations of general rather than specific application and are sufficiently accessible and precise, they will qualify as "law" which prescribes a limit on a *Charter* right.

[65] Thus, where a government policy is authorized by statute and sets out a general norm or standard that is meant to be binding and is sufficiently accessible and precise, the policy is legislative in nature and constitutes a limit that is "prescribed by law".

[66] The question which now remains is whether the transit authorities' advertising policies meet the "prescribed by law" requirement under s. 1 of the *Charter*.

3.3.3 Application of the Principles to the Transit Authorities' Policies

[67] A review of the enabling legislation suggests that the transit authorities' policies were adopted pursuant to statutory powers conferred on BC Transit and TransLink.

[68] Section 3(1)(c) of the *British Columbia Transit Act* authorizes BC Transit's board of directors, with the Minister's approval, "to pursue commercial opportunities and undertake or enter into commercial ventures in respect of those systems and the authority's assets and resources". According to s. 4(4)(e) of the Act, the board of directors

> must supervise the management of the affairs of the [transit] authority and may . . . by resolution . . . establish rules for the conduct of their affairs . . . .

[69] A similar authority is conferred on TransLink's board under s. 2(4) of the *Greater Vancouver Transportation Authority Act*:

> **2**(4) The authority may carry on business, and, without limiting this, may enter into contracts or other arrangements, adopt bylaws, pass resolutions, issue or execute any other record or sue or be sued under a name prescribed by regulation of the Lieutenant Governor in Council, and any contract, bylaw, resolution or other arrangement or record entered into, adopted, passed, issued or executed, as the case may be, and any suit brought, by the authority under the prescribed name is as valid and binding as it would be were it entered into, adopted, passed, issued, executed or brought by the authority under its own name.

[70] The enabling statutes thus confer broad discretionary powers on each entity's board of directors to adopt rules regulating the conduct of its affairs, including the generation of revenue for the public transportation system through advertising sales. Further, according to documents filed in the record, the policies were "reviewed and adopted" by the boards of both entities (Appellants' Joint Record, at pp. 179 and 326). The policies therefore appear to have been adopted in a formal manner.

[71] Where a legislature has empowered a government entity to make rules, it seems only logical, absent evidence to the contrary, that it also intended those rules to be binding. In this case, TransLink is empowered to "establish rules" and to "enter into contracts", "adopt bylaws" and "pass resolutions". Bylaws and contracts are intended to bind. In the context of the enabling provisions, it follows that resolutions have the same binding effect as the other enumerated instruments.

[72] The policies are not administrative in nature, as they are not meant for internal use as

an interpretive aid for "rules" laid down in the legislative scheme. Rather, the policies are themselves rules that establish the rights of the individuals to whom they apply. Moreover, the policies can be said to be general in scope, since they establish standards which are applicable to all who want to take advantage of the advertising service rather than to a specific case. They therefore fall within the meaning of the word "law" for the purposes of s. 1 and will satisfy the "prescribed by law" requirement provided that they are sufficiently accessible and precise.

[73] In my view, the transit authorities' advertising policies are both accessible and precise. They are made available to members of the general public who wish to advertise on the transit authorities' buses, and they clearly outline the types of advertisements that will or will not be accepted. Thus, the limits on expression are accessible and are worded precisely enough to enable potential advertisers to understand what is prohibited. The limits resulting from the policies are therefore legislative in nature and are "limits prescribed by law" within the meaning of s. 1 of the *Charter*.

3.3.4 Are the Limits Justified in a Free and Democratic Society?

[74] The next step in the analysis is to determine whether the infringement is justified in a free and democratic society. The principles were set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. For ease of reference, I will now reproduce the text of the impugned policies once again:

POLICY:

. . .

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

. . .

Standards and Limitations

. . .

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;

[75] The trial judge accepted, albeit with some hesitation, the transit authorities' submission that their policies had a sufficiently pressing and substantial objective of providing "a safe, welcoming public transit system" (para. 110). However, he went on to conclude that the policies were not rationally connected to the purported objective of ensuring safety, as it was doubtful that "the kind or extent of the controversy that might be provoked by such advertisements could create a safety risk" (para. 114). He also found that the total ban on political and other advocacy advertising did not constitute a minimal impairment of freedom of expression and that the alleged benefits of the advertising restrictions did not outweigh their detrimental effects (paras. 122 and 131). The Court of Appeal did not address this issue.

[76] I accept that the policies were adopted for the purpose of providing "a safe, welcoming public transit system" and that this is a sufficiently important objective to warrant placing a limit on

freedom of expression. However, like the trial judge, I am not convinced that the limits on political content imposed by articles 2, 7 and 9 are rationally connected to the objective. I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. 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 it advocates violence or terrorism — regardless of whether it is commercial or political in nature — that the objective of providing a safe and welcoming transit system will be undermined.

[77] Had I found a rational connection between the objective and the limits imposed by articles 2, 7 and 9, I would nevertheless have concluded that the means chosen to implement the objective was neither reasonable nor proportionate to the respondents' interest in disseminating their messages pursuant to their right under s. 2(*b*) of the *Charter* to freedom of expression. The policies allow for commercial speech but prohibit all political advertising. In particular, article 2 of the policies limits the types of advertisements that will be accepted to "those which communicate information concerning goods, services, public service announcements and public events", thereby excluding advertisements which communicate political messages. Article 7, on the other hand, refers to prevailing community standards as a measuring stick for whether an advertisement is likely "to cause offence to any person or group of persons or create controversy". While a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which "create controversy" is unnecessarily broad. Citizens, including bus riders, are expected to put up with some controversy in a free and democratic society. Finally, article 9 represents the most overt restriction on political advertisements, as it bans all forms of political content regardless of

whether the message actually contributes to an unsafe or unwelcoming transit environment. In sum, the policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse. They therefore do not constitute a minimal impairment of freedom of expression.

[78] The fact that the limits are overbroad in the instant case does not mean that the government cannot limit speech in bus advertisements. It is clear from this Court's s. 1 jurisprudence on freedom of expression that location matters, as does the audience. Thus, a limit which is not justified in one place may be justified in another. And the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place. In *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at paras. 93-94, one of the provisions at issue limited tobacco advertising that was appealing to young people or was published in places frequented or publications read by young people. This provision was held to be justified on the basis of the need to protect youths because of their vulnerability. In the criminal law context, this Court has held that the concept of indecency in the *Criminal Code* depends in part on location in that conduct that is indecent in one place may not be indecent in another more private place: *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728, at paras. 42-43; *R. v. Tremblay*, [1993] 2 S.C.R. 932, at pp. 960-61.

[79] Thus, limits on advertising are contextual. Although we are not required to review the proposed standards, the Canadian Code of Advertising Standards, which is referred to in the transit authorities' advertising policies, could be used as a guide to establish reasonable limits, including limits on discriminatory content or on ads which incite or condone violence or other unlawful

behaviour. Given that the transit authorities did not raise s. 1, however, the above comment is intended merely to provide guidance on what may be justified, but the determination of what is justified will depend on the facts in the particular case.

[80] In sum, advertising on buses has become a widespread and effective means for conveying messages to the general public. In exercising their control over such advertising, the transit authorities have failed to minimize the impairment of political speech, which is at the core of s. 2(*b*) protection. I conclude that, to the extent that articles 2, 7 and 9 prohibit political advertising on the sides of buses, they place an unjustifiable limit on the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression.

4. Remedy

[81] In light of the conclusion that the impugned policies violate the respondents' rights under s. 2(*b*) of the *Charter*, an appropriate remedy must be granted. The majority of the Court of Appeal declared that articles 7 and 9 of the transit authorities' advertising policies were of "no force and effect". Prowse J.A. granted the declarations sought by the respondents either on the basis of s. 52(1) of the *Constitution Act, 1982* if the policies are "law" within the meaning of that section, or on the basis of s. 24(1) of the *Charter* if they are not, as she was satisfied that the language of s. 24(1) is broad enough to encompass the remedy sought by the respondents. In this Court, BC Transit has not addressed the issue of remedy. As for TransLink, it briefly states, on the basis that the policies are not "law" for the purposes of s. 52(1) and that the respondents did not seek a declaration under s. 24(1) at trial, that no remedy is available to the respondents.

[82] McLachlin C.J., writing for a unanimous Court in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, stated that "[a] court which has found a violation of a *Charter* right has a duty to provide an effective remedy" (para. 34). The question is whether the declaration ought to be based on s. 52(1) of the *Constitution Act, 1982* or on s. 24(1) of the *Charter*.

4.1 *Choice Between Section 24(1) of the Charter and Section 52(1) of the Constitution Act, 1982*

[83] In *Ferguson*, McLachlin C.J. explained that remedies for *Charter* violations are governed by s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, and that each of them serves different remedial purposes:

> Section 52(1) provides a remedy for *laws* that violate *Charter* rights either in purpose or in effect. Section 24(1), by contrast, provides a remedy for *government acts* that violate *Charter* rights. It provides a personal remedy against unconstitutional government action and so, unlike s. 52(1), can be invoked only by a party alleging a violation of that party's own constitutional rights: *Big M*; *R. v. Edwards*, [1996] 1 S.C.R. 128. Thus this Court has repeatedly affirmed that the validity of laws is determined by s. 52 of the *Constitution Act, 1982*, while the validity of government action falls to be determined under s. 24 of the *Charter*: *Schachter*; *R. v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575, 2001 SCC 81. [Emphasis in original; para. 61.]

[84] The respondents are challenging the constitutional validity of the impugned advertising policies. They do not seek a declaration that the transit authorities' decision to refuse to post their advertisements is of no force or effect. In other words, they are not challenging the validity of "government action" taken in administering a valid legislative scheme. Rather, the respondents are challenging the validity of the policies upon which the refusal was based, and therefore seek a declaration that the impugned policies themselves are of "no force or effect". On the face of the

approach proposed by McLachlin C.J. in *Ferguson*, the question is whether the policies are "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. If they are, the remedy will lie in s. 52(1), not s. 24(1).

[85] Section 52(1) reads:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

[86] Section 52(1) guarantees the supremacy of the Constitution of Canada. In order to ensure that supremacy, this Court has consistently espoused a broad interpretation of the concept of "law" in this context. In *Dolphin Delivery*, the Court held that s. 52(1) applies to the common law. In *Douglas/Kwantlen Faculty Assn.*, the majority held that an arbitrator had jurisdiction under s. 52(1) to remedy a *Charter* violation resulting from a provision of a collective agreement.

[87] The question, therefore, is whether binding policies of general application adopted by a government entity can be characterized as "law" for the purposes of s. 52(1). While the broad wording of s. 24(1) would appear to permit a declaration with an effect similar to that of one made under s. 52(1), it is more appropriate to deal with rules made by government entities under s. 52(1). There are two reasons for this. First, as this Court emphasized in *Ferguson*, it is important to deal with invalid "laws" under s. 52(1) and thereby ensure that inconsistent provisions are "not left on the books" (*Ferguson*, at paras. 65-66):

> The presence of s. 52(1) with its mandatory wording suggests an intention of the framers of the *Charter* that unconstitutional laws are deprived of effect to the extent of their inconsistency, not left on the books subject to discretionary case-by-case remedies . . . .
>
> As pointed out in *Seaboyer*, if the unconstitutional effects of laws are remediable on a case-by-case basis under s. 24(1), in theory all *Charter* violations could be addressed in this manner, leaving no role for s. 52(1). . . . [T]he risk is that the role intended for s. 52(1) would be undermined and that laws that should be struck down — over-inclusive laws that pose a real risk of unconstitutional treatment of Canadians — would remain on the books, contrary to the intention of the framers of the *Charter*.

[88] Second, because the public law requirements for jurisdiction and standing under s. 52(1) are less strict, the possibility of someone seeking a declaration of constitutional invalidity of a law is stronger in terms both of the number of potential claimants and of the number of possible fora. A binding rule of general application is not an individualized form of government action like an adjudicator's decision or a decision by a government agency concerning a particular individual or a particular set of circumstances. Rules of general application can have wide-ranging effects, which means that the broader remedy is more appropriate than an individual remedy under s. 24(1).

[89] Ensuring the largest numbers of potential claimants and beneficiaries of a constitutional challenge is in keeping with the spirit of the supremacy of the *Charter*. I conclude, therefore, that the appropriate remedy for an invalid rule of general application is one under s. 52(1) of the *Constitution Act, 1982*, not s. 24(1) of the *Charter*.

4.2 *Application of the Principles to the Transit Authorities' Policies*

[90] The transit authorities' policies clearly come within the meaning of "law" for the purposes of s. 52(1) of the *Constitution Act, 1982*. They were adopted by government entities pursuant to a rule-making power. On the facts of the case, the transit authorities used their delegated rule-making power to adopt policies which unjustifiably limited the respondents' freedom of expression. Those policies are binding rules of general application that establish the rights of members of the public who seek to advertise on the transit authorities' buses. In my view, the transit authorities' advertising policies are "law" within the meaning of s. 52(1) of the *Constitution Act, 1982* and can therefore be declared of no force or effect to the extent of their inconsistency.

5. Conclusion

[91] I would dismiss the appeal with costs on the basis that the respondents' right under s. 2(*b*) of the *Charter* to freedom of expression was violated by articles 2, 7 and 9 of the transit authorities' advertising policies. Accordingly, the Court of Appeal's order is varied by the addition of a declaration that article 2 is also inconsistent with the protection of freedom of expression guaranteed under the *Charter* and of no force and effect. I would answer the constitutional questions as follows:

> 1. Does the *Canadian Charter of Rights and Freedoms* apply, pursuant to section 32 of the *Canadian Charter of Rights and Freedoms*, to clause 2 and the Standards and Limitations numbered 7 and 9 of the transit authorities' advertising policies?
>
> Answer: Yes.
>
> 2. If so, do clause 2 and the Standards and Limitations numbered 7 and 9 of the transit

authorities' advertising policies infringe section 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

3. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

The following are the reasons delivered by

FISH J. —

I

[92] In order to raise revenues, the appellants sold advertising space on the outside of the buses they control. Pursuant to their separate but virtually identical advertising policies, they rejected the respondents' proposed advertisements on the ground that they conveyed "political" messages.

[93] I agree with Justice Deschamps that the appellants (the "Transit Authorities") are both "government entities" and therefore subject to the *Canadian Charter of Rights and Freedoms*. I agree as well that their advertising policies infringed the respondents' freedom of expression and thereby contravened s. 2(*b*) of the *Charter*. And finally, on the record before us, I agree that this

infringement cannot be justified under s. 1 of the *Charter*.

[94] With respect, however, I have followed a different and more direct route in concluding that the appellants' advertising policies contravene s. 2(*b*) of the *Charter*.

[95] My point of departure is this: In virtue of s. 2(*b*), freedom of expression enjoys broad but not unbounded constitutional protection in Canada. It is a freedom that extends to any activity that conveys or attempts to convey a meaning: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 969. But the *Charter* cannot have been intended to protect all expression, so broadly defined, at all times in every "space" or "place" under governmental control. Freedom of expression under s. 2(*b*) has therefore been made subject to limitation in two respects.

[96] The first can be conceptually characterized as "internal": Some forms of expression may be validly curtailed by government because they are inherently inconsistent with the object and purpose of s. 2(*b*) of the *Charter*. They are for that reason left unsheltered by its constitutional umbrella.

[97] This internal limit on freedom of expression consists in narrowly construed exceptions to the general rule of broad protection enshrined in s. 2(*b*). Two recognized exceptions, or exclusions, are relied on by the Transit Authorities. One concerns expressive activity that would impose a *significant burden* on the government entity concerned; the other, expressive activity that is *manifestly incompatible* with the space or place where it is sought to be exercised. I shall later deal more fully with these exclusions; for the moment, it will suffice to say that neither applies in

this case.

[98] Second, freedom of expression is subject to an "external" limitation as well: Even if an expressive activity falls within the protected zone of s. 2(*b*) of the *Charter*, it may be validly curtailed in virtue of s. 1 pursuant "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". In this regard, I agree with Justice Deschamps that the appellants' impugned advertising policies do not pass constitutional muster. They may be properly characterized as a limit "prescribed by law" within the meaning of s. 1. As mentioned earlier, however, they are not demonstrably justified in a free and democratic society like our own.

[99] In short, the appellants' impugned advertising policies prevented the respondents from exercising the freedom of expression guaranteed to them by s. 2(*b*) of the *Charter*. This rejection of the respondents' proposed advertisements, moreover, was not merely an *effect* of the restrictive advertising policies; rather, it was their very *purpose*.

[100] It is essentially on this basis that I would dismiss the appellants' appeal. And though it is apparent from what I have already said, I feel bound to state explicitly, from the outset, that I respectfully disagree with the analytical framework adopted by Justice Deschamps in circumscribing freedom of expression under s. 2(*b*) of the *Charter*.

[101] More particularly, I am unable to share my colleague's application in this case of the Court's decisions in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, and *Montréal (City) v.*

2952-1366 Québec Inc., 2005 SCC 62, [2005] 3 S.C.R. 141 ("*City of Montréal*"). In my view, *Baier* rests on its own factual foundation and was not intended to break fresh constitutional ground. Again with respect, I find that my colleague's application of *City of Montréal* adds undue complexity to the constitutional analysis required under s. 2(*b*) of the *Charter*. It unnecessarily introduces as well real risks of "overinclusion" *and* "underinclusion", which are both best avoided.

II

[102] I turn now to consider the two internal limits on free speech invoked by the Transit Authorities: First, they argue that acceptance of the respondents' advertisements would subject them to a *significant burden*; second, they submit, in effect, that the proposed advertisements are *manifestly incompatible* with the space where the respondents wish them to appear — the sides of buses used for public transportation. As mentioned earlier, I am satisfied that neither exception applies in this case.

[103] The first exception concerns freedom of expression that cannot be respected without imposing on the government *a significant burden of assistance*, in the form of expenditure of public funds, or the initiation of a complex legislative, regulatory, or administrative scheme or undertaking. This internal limitation on constitutionally protected freedom of expression was recognized and applied by the Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336; *Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at paras. 25-26; and *Baier*.

[104] The "significant burden" exception is itself subject, however, to an exception that has no application here, but should nonetheless be noted for the sake of completeness: A significant burden *can* be imposed on government where the claimant meets the exacting criteria set out in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and particularly well summarized by Rothstein J. in *Baier*, at para. 27.

[105] The significant burden exception is firmly rooted in Canada's constitutional terrain. Under our system of government, the judiciary cannot be seen to direct the legislative branch to expend scarce public resources in order to satisfy *Charter* claims in a particular manner. Clearly, government expenditures and initiatives may be undertaken to advance *Charter* rights and freedoms in innumerable ways, but given finite resources, it is generally considered to be a matter for the legislature and not the judiciary to determine which social priorities are to receive government assistance. The *Dunmore* exception to this general principle is limited, and essentially arises only where a fundamental right cannot otherwise be exercised.

[106] The significant burden exception responds as well to another important concern. Judges are ill-equipped to supervise the implementation of court orders that require complex and ongoing responses on the part of state actors. Any attempt to do so may well trench on the autonomy of the executive and legislative branches of government.

[107] Justice Deschamps finds (at para. 30) that *Baier* established "the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual". According to my

colleague (at para. 32), the same concern is not present in this case, because here the policies in question exclude a particular kind of expressive *content*, not a particular *group* of individuals. Since the concern in this case is content discrimination, not group underinclusion, *Baier* does not apply.

[108] With respect, as mentioned earlier, I would hesitate to ascribe to *Baier* a constitutional significance unsupported by its particular factual foundation. *Baier* affords no principled basis for permitting group discrimination in the freedom of expression analysis. And *Baier* provides no authority for the proposition that transit authorities (or other government actors) can refuse to accept *all* advertisements from a particular group but cannot refuse to publish *some* of the group's advertisements *because of their political content*. On any view of the matter, a purposive reading of s. 2(*b*) of the *Charter* hardly favours the exclusion of a particular group over the suppression of a particular message.

[109] Indeed, except artificially, it seems difficult to divorce content discrimination from group discrimination, since many groups are bound together by the content of their shared convictions or concerns — that is, by the "message" they aspire to communicate. To still the messenger is to suppress the message.

[110] Accordingly, unlike my colleague, I do not believe that *Baier* required the Transit Authorities "to at least demonstrate that the respondents themselves were excluded from the particular means of expression" in issue here (reasons of Justice Deschamps, at para. 32 (emphasis added)). Nor do I find a "positive rights analysis" helpful in this regard.

[111] Again with respect, I see no principled basis for restricting freedom of expression under the *Charter* according to whether the claim concerns a "means", a "platform" or a "statutory scheme". All three are equally subject to *Charter* scrutiny. Nor would I distinguish, in the present context, between "platforms", "forums", "spaces" and "places". Unless otherwise indicated, or the context otherwise requires, no one term is meant to exclude the others.

[112] Moreover, not every claim can be comfortably shoehorned into one preconceived slot or another: As this case demonstrates, it is not always apparent whether a particular claim seeks access to a "public space", to a government-created "platform", or to a "statutory scheme". Nor is it easy to draw explicit and conclusive distinctions between the "means", "form", or "content" of a disputed expressive activity: see Lamer J. in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at pp. 1181-82.

[113] I think it preferable to ask instead whether the respondents' claim would impose on the Transit Authorities a significant burden of assistance, as earlier defined, or otherwise involves expression that is excluded by a recognized exception from the protected zone of s. 2(*b*) of the *Charter*.

[114] The "significant burden" criterion provides a pragmatic and functional standard that responds well to constitutional concerns regarding the scope of freedom of expression in s. 2(*b*) of the *Charter*. And it is firmly rooted in prior decisions of the Court.

[115] Here, the Transit Authorities complain of four "active steps" that the respondents' claim would compel them to take: The rewriting of their advertising policy; the negotiation of new advertising contracts; the production and installation of the advertisements; and the provision of space and maintenance. I am satisfied that these four "active steps", individually or cumulatively considered, do not impose on the Transit Authorities a *significant burden* within the meaning of that phrase in the context of a s. 2(*b*) claim under the *Charter*.

[116] This is a case where the appellants have denied the respondents access to a commercial advertising programme already in place. Little change is needed to remove the infringing restrictions complained of by the respondents. In any event, contrary to the appellants' submission, a claim under the *Charter* can hardly be defeated on the ground that the infringing law or policy would have to be modified in order to end the infringement.

[117] The three other "active steps" invoked by the Transit Authorities are all entirely routine tasks which they already perform (or delegate to a third-party media company) on a regular basis in the normal course of their advertising programmes. They require no meaningful expenditure of funds — on the contrary, removing the impugned restriction would *increase* the appellants' advertising revenues. They require no new operating initiatives of significance. And they involve no administrative reorganization, restructuring or expansion that can reasonably be characterized as "burdensome".

[118] I would therefore reject the appellants' submission that the respondents' claim would impose a significant burden on them and is therefore unprotected by the freedom of expression

guaranteed by s. 2(*b*) of the *Charter*.

III

[119] The appellants rely as well on a second exception to the freedom of expression guaranteed by s. 2(*b*) of the *Charter*. Essentially, they submit that the rejected advertisements are manifestly incompatible, on account of their "political" messages, with the function or purpose of the appellants' programme permitting advertisements on the sides of their buses.

[120] One of the advertising policies adopted by both appellants states:

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

[121] The addition of political messages to these broad and diverse categories of permitted advertisements cannot reasonably be thought to undermine the function or purpose of the sides of buses made publicly accessible by the Transit Authorities for paid advertising. Advertisements conveying a political message are not incompatible — let alone *manifestly* incompatible — with a commercial and public service advertising facility of that sort. Having chosen to make the sides of buses available for expression on such a wide variety of matters, the Transit Authorities cannot, without infringing s. 2(*b*) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law.

[122] Moreover, the purpose or function of the "space", "place" or "platform" where freedom

of expression has been restricted is for the courts to ascertain, and not for government entities to unilaterally and finally determine. Depending on the circumstances, the relevant purpose or function will be established by reference to its current or ordinary use, to historical and traditional practice, to reasonable public expectations, to clear government intent, and to other like considerations. In this case, the acknowledged purpose of the scheme for advertising on the sides of buses is to raise revenue. And the function of the buses themselves is safe, clean, and orderly transportation. But in neither respect is there an obvious incompatibility with political advertisements.

[123] On the contrary, permitting political advertising would serve *the very purpose for which the sides of buses were made generally and publicly accessible for a price* — to raise revenue. And there is no inherent conflict between political advertisements on the sides of buses and orderly transportation. If there is some other objective in limiting political advertisements that is not related to these functions and purposes of the transit system and the advertising scheme, it should fall to be considered at the s. 1 justification stage of a challenge under s. 2(*b*) of the *Charter*.

[124] Unlike Justice Deschamps (at paras. 37-47), I do not believe that *all* expressive activity attracts s. 2(*b*) protection in every government-controlled place or forum where one would expect "free expression" to be protected. In my respectful view, freedom of expression under s. 2(*b*) of the *Charter* cannot be characterized as an "all or nothing" proposition. The constitutional inquiry on a s. 2(*b*) challenge should instead focus on whether the *particular* expressive activity that has been restricted by a governmental entity enjoys protection in the space, place or forum concerned.

[125] This will preclude overinclusion in some cases and underinclusion in others. Expressive

activity that is in form or content manifestly incompatible with the purpose or function of the space in question would otherwise be "piggy-backed" into the protected zone by expressive activity that is not manifestly incompatible. Conversely, a meritorious claim of infringement would be doomed by the exclusion of any expressive activity that lies outside the protected zone.

[126] For Justice Deschamps (at para. 40), "content is not relevant to the determination of the function of a place". My colleague's view may be thought to rest on *Irwin Toy*, where the Court stated (at p. 969):

> We cannot . . . exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.

[127] The issue in *Irwin Toy*, however, was whether the expressive content in question (commercial advertising directed at children) could be restricted generally, *in any location.*

[128] Here, on the other hand, the question is whether the expression is required to be permitted in a particular space. And that question is best answered by determining whether the infringed expressive activity (advertisements with a political message) is manifestly incompatible with the purpose and function of the space in question (the sides of buses open to commercial and public service advertising generally). If it is, s. 2(*b*) protection will be denied, exactly as it would be under the test favoured by Justice Deschamps, but without any need to resort to a complex variation of the test adopted in another context in *City of Montréal*.

[129] The *manifestly incompatible* test is, moreover, entirely consistent with the Court's conclusions in prior public space expression cases, notably *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, and *City of Montréal*.

[130] I think it important to emphasize that expressive activity will fall outside the protected zone of s. 2(*b*) only if it is *manifestly* incompatible with the purpose or function of the space in question. Where the alleged incompatibility is not manifest, the infringed expressive activity falls within the freedom of expression guaranteed by s. 2(*b*) of the *Charter*. It would remain open to the government, of course, to establish that the infringement is constitutionally permissible, under s. 1 of the *Charter*, as a limitation that is imposed by law and demonstrably justified in a free and democratic society such as ours.

[131] But where the alleged incompatibility *is* manifest, the matter should be disposed of at the s. 2(*b*) stage of the analysis. Governments should not bear the burden of strictly prescribing by law and justifying limits on those kinds of expression that are so obviously incompatible with the purpose or function of the space provided, as the *Charter* cannot possibly have been intended to invite litigation in such obvious cases.

[132] As Peter W. Hogg suggests, "If the courts give to the guaranteed rights a broad interpretation that extends beyond their purpose, it is inevitable that the court will relax the standard of justification under s. 1 in order to uphold legislation limiting the extended right" (*Constitutional Law of Canada* (5th ed. 2007), at p. 116).

[133] By extending to manifestly incompatible expressive activity the freedom of expression guaranteed under s. 2(*b*) of the *Charter*, we would in this way lower the justification threshold under s. 1. And unnecessarily obliging the government to resort to s. 1 would unduly proliferate statutory and regulatory restrictions on freedom of expression, invite hopeless claims of infringement, and lengthen and complicate trials.

[134] Finally, I do not wish to be taken to suggest that the *significant burden* and the *manifest incompatibility* exceptions invoked by the appellants are the only expressive activities that fall outside the protected zone of s. 2(*b*) of the *Charter*. At least two other exceptions need to be noted.

[135] I have already alluded (at para. 121) to one: Expressive activity restricted by a government actor on the basis that it is prohibited under a statute that is not constitutionally challenged. Thus, for example, the appellants could properly refuse to carry on the sides of their buses an advertisement seeking donations to a designated terrorist organization, in violation of s. 83.02 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[136] Likewise, expression may be excluded from the scope of s. 2(*b*) protection solely because its form is unprotected, as in the case of expression by means of violence: see *Irwin Toy*, at p. 970; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 733 and 829; and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 105. Beyond the example of violence, the majority in *Irwin Toy* did not delineate precisely what other forms of expression will

be unprotected under this rubric. And it would be inappropriate to attempt to do so here, since this exception is not at issue in this case.

[137] I would also leave for another day the relevance, on a s. 2(*b*) challenge, of the American distinction between limitations on "subject matter" and limitations on "viewpoint": see, for example, *R. A. V. v. City of St. Paul*, 505 U.S. 377 (1992). Our concern here is with a restriction on *all* political messages, and I have dealt with the issues in that light.

IV

[138] For all of these reasons, I agree with Justice Deschamps that the appellants' impugned advertising policies infringed the respondents' freedom of expression and thereby contravened s. 2(*b*) of the *Charter*.

[139] And I agree as well that the appellants' advertising policies constitute a limitation prescribed by "law" within the meaning of s. 1; that the appellants have not demonstrated that the infringing provisions of their advertising policies are demonstrably justified in a free and democratic society such as ours; and that the respondents are therefore entitled, pursuant to s. 52(1) of the *Constitution Act, 1982*, to a declaration that the appellants' advertising policies, to the extent of their inconsistency with s. 2(*b*), are of no force or effect.

Appeal dismissed with costs.

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