COURT OF APPEAL FILE NO. CA44711
Supreme Court File No. S-166217
Supreme Court Registry: Vancouver

COURT OF APPEAL

ON APPEAL FROM the order of Justice Leask of the Supreme Court of British Columbia pronounced on the 8th day of August, 2017

BETWEEN:

THE CANADIAN CENTRE FOR BIO-ETHICAL REFORM

APPELLANT
(PETITIONER)

AND:

SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY

RESPONDENT
(RESPONDENT)

APPELLANT'S FACTUM

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CHRONOLOGY

The appellant, Canadian Centre for Bio-Ethical Reform (“CCBR”), relies upon its Statement of Facts contained in Part 1 of this Factum and, in the interest of avoiding duplication, does not rely upon a separate chronology.

OPENING STATEMENT

This appeal concerns the freedom to make political statements which prompt strong public debate. This Court must choose between applying the Supreme Court's broad protection for freedom of expression which exists precisely to protect the controversial views of the minority, and allow the appeal, or to uphold the ruling below which represents a radical departure from the Supreme Court's jurisprudence.

In this case, a single TransLink official censored a minority political opinion from bus advertisements on the basis that in his "sole discretion," he considered it to be of "questionable taste," "offensive," or to concern "sensitive content." He also relied upon the opinion of a private, non-*Charter* bound entity that the message was "inaccurate or unclear." He fettered his discretion and failed to consider, much less proportionately balance, the appellant's *Charter* rights with TransLink's statutory objectives.

In *Greater Vancouver*,[1] the Supreme Court held that political advertising on busses is protected by the *Charter* and that "bus riders are expected to put up with some controversy in Canadian society." The Supreme Court set out narrow grounds upon which TransLink can refuse political advertising. None of them apply here.

The chambers judge subverted the judicial review process by considering evidence and justifications beyond those relied upon by the original decision maker, based his decision on the contents of a website which was not in evidence (and without even giving notice to the parties or inviting submissions), and upheld the censorship on the basis of a new justification – "psychological harm" – asserted by TransLink for the first time in the course of the litigation, without any evidence in the record.

The *Charter* protects political speech which the majority considers "false" or "repugnant or offensive."[2] The decision below creates a new freestanding power for provincial appointees to censor political speech on precisely these grounds, handing to the majority the ability to prohibit criticism of its orthodoxies, based on the whim of a single political appointee. It is bad law. In order to vindicate the constitutional right of all minorities to express their political views, the appeal must be allowed.

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[1] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, 2009 SCC 31

[2] *R. v Zundel*, [1992] 2 S.C.R. 731; *Saskatchewan (HR Commission) v. Whatcott*, 2013 SCC 11 at para. 57

PART 1 – STATEMENT OF FACTS

A. The Parties

1. The appellant, the Canadian Centre for Bio-Ethical Reform ("CCBR") is a non-profit society engaged in pro-life education across Canada, with a focus on fetal development and abortion. CCBR educates the public through providing literature, visual displays and oral presentations to the public, including high schools, universities and community organizations. In 2015, Nicholas McLeod was the Strategy and Project Director for CCBR.
2. Pursuant to statute, the South Coast British Columbia Transportation Authority ("TransLink") operates the transit system in Metro Vancouver.

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

B. The Decision of TransLink's Jean Beaudoin under Judicial Review

3. On January 26, 2015, Maya Harada, Account Executive for Lamar Transit Advertising, the advertising agency which manages advertising for TransLink, refused to place an ad submitted by Mr. McLeod on behalf of the CCBR for an ad campaign on the exterior of busses.

Appellant's Appeal Book ("AAB"), pp. 5-6

4. Ms. Harada's reasons were that that "<u>any</u> graphic images of any fetuses will be declined" and "We have declined the images of the fetuses specifically due to its sensitive content." She also stated that "We find the images may be too direct and that perhaps using different images may still deliver your message but without the shock value of the image of the fetuses." This reason will be referred to herein as the "Lamar 1st basis: images of fetuses are too direct, shocking and sensitive."

AAB p. 6; emphasis added

5. The ad which the CCBR had applied to post is reproduced at Appeal Book page 30 and a copy is pasted below this paragraph. The ad displayed three graphics. The first two were of <u>healthy</u> pre-born babies, one indicated as being approximately seven weeks old, the second as approximately sixteen weeks. The third picture was a blank red circle, with no other visual image in it. Under the first two pictures, the

captions below said “Growing.” Inside the red circle, the caption read “Gone.” On the right side of the pictures, the ad said “Abortion Kills Children,” with the website address “endthekilling.ca” beneath. The ad does not depict dismembered, aborted fetuses.

AAB pp. 30; see also p. 2 para. 10 and p. 8

6. The ad seeks to educate the public on the subject of abortion, demonstrating through pictures that an abortion results in the loss of life of a pre-born child. The ad was to be part of a campaign which CCBR had commenced in order to educate the public on the subject of abortion. The ad served as an expression of a philosophical and political belief, sincerely held as a matter of conscience, regarding the value of human life, when life begins, and therefore when it should receive legal protection.

AAB p. 2 para. 9

7. On January 26, 2015, Byron Montgomery, Vice-President and General Manager of Lamar Advertising, explained that the refusal was based on section 2 of the Standards and Limitation section of TransLink’s Corporate Policy for Advertising.

AAB pp. 9-10, and p. 2 para. 11-12

8. Section 2 states: “No advertisement shall be accepted which TransLink, in the exercise of its sole discretion, considers to be of questionable taste, or in any way offensive in the style, content, or method of presentation.” This will be referred to herein as the “Lamar 2nd basis: section 2 offensive or of questionable taste.”

AAB p. 12

9. The first page of TransLink’s Corporate Policy for Advertising also expressly references the Supreme Court’s judgment in *Greater Vancouver* and states:

> … if TransLink chooses to accept advertising on the transit system, it must not limit a potential advertiser’s freedom of expression by refusing

> advertisements except as permitted under Section 1 of the *Charter*… The standards and limitations on advertising content set out in this policy must be viewed in the context of TransLink's limited legal ability to deny advertisements under the *Charter* …"
>
> AAB p. 11; [emphasis added]

10. After seeking the opinion of Advertising Standards Canada ("ASC") in regard to the CCBR ad, John Beaudoin, Director, Customer Engagement and Marketing for TransLink, informed CCBR on February 12, 2015, that TransLink refused to post the ad. Mr. Beaudoin gave no further reasons for the refusal beyond adopting the reasons of Ms. Harada of Lamar.

AAB p. 16

11. ASC is a private industry body which is not subject to the *Charter*.

AAB p. 24

12. CCBR, through counsel, asked Mr. Beaudoin for his feedback on any modifications which would make the ad acceptable to TransLink. Counsel also repeatedly requested information about an appeal. Counsel's last email went without response.

AAB pp. 15-18

13. Mr. Beaudoin suggested to CCBR that it could appeal the TransLink decision back to ASC, which had rendered an opinion (at that time still withheld from CCBR) on the ad to TransLink. Mr. Beaudoin did not offer a formal appeal to the CCBR. In any event, TransLink's own evidence and submissions to the chambers judge is that no such appeal would have been available at the time.

AAB p. 3 (paras. 21, 24), pp. 16-18, p. 29 (final paragraph)

14. On February 19, 2015, Mr. Beaudoin forwarded the ASC opinion letter, in which ASC gave the opinion that the ad "would likely raise an issue under Clause 1 (Accuracy and Clarity) [of] the [ASC] Code", because:
    a. in reference to use of the term "Abortion Kills Children," "ASC must be guided by Canadian law, which defines human life as beginning at live birth;" and
    b. "The depiction of a fetus at 7 and 16 weeks, followed by the word 'Gone' conveys the general impression that most abortions are performed after 16 weeks of gestation."

AAB pp. 18-20

15. The ASC letter also stated that if a complaint were received concerning the ad, ASC would entertain the complaint.
16. The basis for this reason will be referred to herein as "ASC basis: inaccurate and unclear re: when life begins and when abortions occur."

AAB pp. 19-20

C. The Reasons of the chambers judge

17. On evidentiary matters, the chambers judge made conflicting rulings:
    a. Allowing CCBR's pre-hearing application and excluding from evidence a new expert report which TransLink developed and sought to adduce for the first time on judicial review which did not exist at the time that Mr. Beaudoin rendered his decision (reasons for judgment, paras. 12-15);
    b. But then, without even giving notice to the parties to permit them to make any argument on the point, considering the contents of CCBR's website which had not been consulted by Mr. Beaudoin and which was not in evidence before the chambers judge (paras. 54-55).
18. On the merits, the chambers judge:
    a. Followed the holding in *Greater Vancouver* that TransLink was subject to the *Charter* (paras. 41-44); and
    b. Found that Mr. Beaudoin's decision to refuse CCBR's ad was constitutional on the basis that its "potentially upsetting images and phrases" could cause psychological harm to children (paras. 51-53), and could cause psychological harm to women (para. 54) who could be offended by the implications of its message, a determination that he found was "bolstered" by his extra-curial review of the petitioner's website (paras. 54-55).

PART 2 – ISSUES ON APPEAL

19. The Decision resulted from TransLink improperly fettering its discretion.
20. The learned chambers judge erred:
    a. On the following preliminary issues on judicial review:

i. In taking judicial notice of the appellant's website, which was neither considered by Mr. Beaudoin nor in evidence before the chambers judge; and

ii. In permitting TransLink to rely a new justification – 'psychological harm' – which was not among Mr. Beaudoin's actual reasons for rejecting CCBR's ad; and

b. On the ultimate issue on judicial review: in finding that the Decision did not limit CCBR's freedom of expression more than was reasonably necessary in order to meet TransLink's statutory objectives.

PART 3 – ARGUMENT

A. Standards of Review

i. Standard of Review applicable to improper fettering

21. The standard of review for improper fettering of discretion is correctness. Alternatively, even if the standard of review is conceived as reasonableness, the courts will not defer to a decision maker who restricts or disables its discretion.

Trinity Western University v. The Law Society of British Columbia, 2015 BCSC 2326 at paras. 97-101, aff'd 2016 BCCA 423 paras. 65-91 (especially para. 91).

Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299 at para. 24

Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61 at paras. 45, 60;

ii. Standard of Review applicable to preliminary judicial review issues

22. The preliminary issues are questions of law, and reviewed on a correctness standard.

Housen v. Nikolaisen, 2002 SCC 33 at para. 36

23. If the chambers judge was wrong to consider CCBR's website and the new ground of psychological harm, this court must correct those errors without deference and perform the *Doré* analysis of the original justifications based upon the original record.

iii. Standard of Review applicable to the ultimate *Charter* issue

24. This is an appeal of a judicial review decision. Accordingly:

> [both] the reviewing judge's choice of standard of review, and the application of the facts to that standard, are questions of law. The Court of Appeal owes the reviewing judge no deference as to these conclusions. … this Court steps into the shoes of the reviewing judge and owes him or her no deference …
>
> *Bentley v. The Police Complaint Commissioner*, 2014 BCCA 181 at para. 29 [emphasis added]

25. The process of 'stepping into the shoes' of the lower court is such that the "appellate court's focus is, in effect, on the administrative decision."

Prophet River First Nation v. British Columbia (Environment), 2017 BCCA 58 at paras. 45-46, citing *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 46

26. The standard of review for determining whether a limitation on a *Charter* right in the administrative context has been demonstrably justified is set out in *Doré v. Barreau du Québec*, 2012 SCC 12 as supplemented by *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12. The Court determines whether the decision maker has proportionately balanced the protected *Charter* right with the applicable statutory objectives being pursued. This proportionality analysis is "robust" and requires that the *Charter* guarantee be limited no more than is necessary.
27. The chambers judge rightly chose the *Doré*/*Loyola* test, but erred in its application. This Court is to step into the shoes of the chambers judge and make its own determination as to whether or not the Decision represents a proportionate (including minimally impairing) balancing of CCBR's *Charter* rights with TransLink's statutory objectives. More will be said about the *Doré/Loyola* test later in this factum in the treatment of the ultimate issue under appeal.

B. Translink improperly fettered its discretion

28. "Fettering of discretion occurs when, rather than exercising its discretion to decide the individual matter before it, an administrative body binds itself to policy…."

Trinity Western University v. The Law Society of British Columbia, 2015

BCSC 2326 at para. 97 and citations therein, aff'd 2016 BCCA 423

29. TransLink had the constitutional responsibility to determine whether posting CCBR's ad would or would not represent a proportionate balance of CCBR's *Charter* rights with TransLink's statutory objectives. Instead of properly considering that question, TransLink rejected the ad out of hand because it contained the photograph of a fetus.
30. Ms. Harada' first e-mail stated: "any graphic images of any fetuses will be declined." It did not matter to TransLink that the photographs were of perfectly healthy fetuses such as routinely appear in textbooks, on informational websites, or in advertisements for expectant mothers to purchase pre-natal 3D ultrasound 'photographs' of their baby in the womb. Mr. Beaudoin adopted Ms. Harada's reasons for having rejected the ad.

AAB, pp. 5-6, 16

31. No statute or regulation empowers TransLink expressly or by necessary implication to censor all ads containing any photographs of a fetus, regardless of whether such an ad could possibly threaten TransLink's ability to provide a safe and welcoming transit environment. By rejecting CCBR's ad due to the mere fact that the ad contained a photograph of a fetus, instead of performing a *Doré* analysis of whether rejecting the ad was consistent with its *Charter* obligations, TransLink through Mr. Beaudoin improperly fettered its discretion, and its decision must be set aside.

C. The learned chambers judge erred on the preliminary judicial review issues

i. The chambers judge erred in taking judicial notice of a website not in evidence, without giving notice to the parties that he would do so.

32. The chambers judge erred in law at para. 55 where he considered the content of portions of CCBR's website and found that they supported the proportionality of TransLink's censorship of CCBR's ad.
33. First, as a matter of law, what CCBR has said elsewhere is irrelevant to whether the Decision to censor the content of the one ad at issue in this proceeding proportionately balanced CCBR's *Charter* rights with TransLink's statutory objective. A speaker is not less entitled to the protection of s. 2(b) for a political view which it wants to express on the basis of what it has said at other times and places. The

inclusion of a website URL on an ad, just like the publication of a hyperlink, is "content-neutral" and only "communicate[s] that something exists, but do[es] not … communicate its content." Accordingly, the Supreme Court's holding that hyperlinks do not constitute publication is equally applicable in this context. The CCBR website was irrelevant to any matter in dispute in this proceeding, and thus inadmissible.

Crookes v. Newton, 2011 SCC 47 at paras. 30-31, 42

34. Second, the website was not in evidence before the chambers judge, and (apart from consulting online maps to determine approximate distances), "[w]ebsite material … is generally not acceptable on any theory of judicial notice."

Canada (Attorney General) v. Misquadis, 2003 FCA 370 at para. 16

R. v. Balen, 2012 ONSC 2209 at para. 61, and citations therein

35. Third, and related to the above, it was a breach of the *audi alteram partem* rule, which the Supreme Court of Canada has identified as "a component of the principles of natural justice and of procedural fairness," for the chambers judge to rule against CCBR on the basis of extra-curial evidence which CCBR had no notice would be considered (and which TransLink had not even asked the chambers judge to consider), as a result of which CCBR was deprived of an opportunity to:
    a. present evidence to contextualize and inform the interpretation of the website portions viewed by the chambers judge; or
    b. present arguments about the interpretation or significance of the website.

JC v. Health Professions Review Board, 2014 BCSC 372 at paras. 41-50, including quotation at para. 42 from *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 SCR 781

R. v. Balen, para. 62

36. Indeed, not only did the chambers judge fail to invite evidence or submissions from CCBR about the portions of the website which the chambers judge proposed to refer to, but the chambers judge did not even identify those web pages in his reasons for judgment. Even today, CCBR does not know which portions of its website the chambers judge is referring to at para. 55, and so CCBR is still handcuffed from being able to make submissions to this court on the issue. By failing to identify the extra-curial evidence of which he took judicial notice, the chambers judge has made

meaningful appellate review impossible.

37. Fourth, there is no evidence that Mr. Beaudoin or anyone at TransLink ever viewed CCBR's website in coming to the Decision under judicial review. If Mr. Beaudoin considered the website or any other evidence in arriving at his decision, TransLink had the right to file an affidavit from Mr. Beaudoin to inform the chambers judge which other documents he consulted.

TD Bank v. British Columbia (Commissioner of Income Tax), 2017 BCCA 159, at para. 53

38. By choosing not to 'fill out' the record actually before Mr. Beaudoin, TransLink has opted to represent to the court that the only relevant material considered by Mr. Beaudoin was limited to the ad, the e-mails exchanged between CCBR/its counsel, and Lamar/TransLink; the opinion of Advertising Standards Canada, and TransLink's Corporate Advertising Policy.

AAB pp. 4-7, 11-20, 30

39. As the CCBR website was not considered by Mr. Beaudoin, it does not form part of the record on judicial review, and the chambers judge was "precluded at law from considering the extraneous material."

Albu v. The University of British Columbia, 2015 BCCA 41 at para. 34; see generally paras. 33-37; reiterated in *Sobeys West Inc. v. College of Pharmacists of British Columbia*, 2016 BCCA 41 at paras. 52-53

40. Parties in constitutional litigation, as in any other litigation, are restricted to the record properly admitted, and can only seek findings of *Charter* infringements, and s. 1 justifications, for which admissible evidence exists. *Charter* arguments unfounded on the record will be dismissed.

Allen v Alberta, 2015 ABCA 277

E.T. v. Hamilton-Wentworth District School Board, 2017 ONCA 893

41. The chambers judge erred in considering the CCBR website which in effect partially converted the judicial review into a trial *de novo*. The website evidence must be excluded from the record by this court prior to analyzing the ultimate issue.

ii. The chambers judge erred in considering a new s. 1 justification which were not relied upon by the original decision maker

42. The chambers judge upheld Mr. Beaudoin's decision largely on the basis that the advertisement could "cause psychological harm" to children (para. 51) and women (para. 54).

43. Not only is this finding unsupported by even a scintilla of evidence, but it was not the basis of the actual Decision under judicial review in this case. TransLink is prohibited, under judicial review principles, from seeking to uphold the impugned administrative decision on the basis of new grounds advanced for the first time during judicial review, which are not found in the reasons for decision of Mr. Beaudoin (namely, the three justifications set out in the Part 1 of this factum):

> This sort of evidence is not admissible on judicial review: *Keeprite Workers' Independent Workers Union et al. and Keeprite Products Ltd.* (1980), 114 D.L.R. (3d) 162 (Ont. C.A.). The decision-maker had made his decision and he was functus: *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. After that time, he had no right, especially after a judicial review challenging his decision had been brought, to file an affidavit that supplements the bases for decision set out in the decision letter. His affidavit smacks of an after-the-fact attempt to bootstrap his decision, something that is not permitted…
>
> *Stemijon, supra.* at para. 41; followed in
>
> *TD Bank v. British Columbia*, 2017 BCCA 159 at para. 53
>
> See also *Ontario (Energy Board) v. Ontario Power Generation Inc.*,
>
> 2015 SCC 44 at paras. 64-65, 69

44. Government entities such as TransLink are restricted on judicial review to asserting the same s. 1 justifications as appear in the original decision, regardless of whether the decision maker was an administrative tribunal or a 'line decision maker.'

E.T. at para. 120

45. The proper approach on judicial review is the same with respect to alleged justificatory grounds as it is with evidence: the court cannot entertain a s. 1 justification for a *Charter* infringement asserted for the first time by legal counsel for government on judicial review, which asserted justification is not contained in the reasons of the decision maker whose decision is being reviewed by the court. The chambers judge erred in converting the judicial review into a partial trial *de novo* in

this respect. The question for this court is whether Mr. Beaudoin's decision satisfied the *Doré* test with reference to the justifications actually identified/asserted by Mr. Beaudoin in 2015, without reference to the newly asserted justification of 'psychological harm,' which must be entirely excluded from the analysis.

D. Ultimate *Charter* Issue: The Decision limited CCBR's freedom of expression more than was reasonably necessary in order to meet TransLink's statutory objectives

i. Doré analysis – analytical framework

46. The ultimate issue for this court is to determine whether the Decision reflects a proportionate balancing of the *Charter* right to freedom of expression with TransLink's statutory objective. Importantly, a proportionate decision is "one that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" and thus restricts *Charter* "no more than is necessary given the applicable statutory objectives." It "works the same justificatory muscles" as the *Oakes* test."

Loyola at paras. 39 and 114; *Doré* at para. 5

47. In setting out the *Doré/Loyola* analytical framework in last year's Trinity Western University law school decision, a unanimous 5-member panel of this court stated:

> [120] The key word is "proportionality"; the reviewing court must ensure that the discretionary administrative decision "interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives." …
> [130] It is instructive to note that even in the case of a standard of review calibrated at "reasonableness", the range of "reasonable" outcomes can be exceedingly narrow indeed, effectively amounting to one correct answer.

48. CCBR submits later in this factum that the Decision fails all three of the inquiries under *Doré*: rational connection, minimal impairment, and proportionality of effects. However, before that proportionality exercise can be undertaken, TransLink's statutory objective must be correctly identified.

ii. the City's statutory objective: a prohibition on only the most extreme

forms of speech which offend existing legal prohibitions

49. Under the *Doré* framework, it is crucial that the statutory objective be precisely defined. A failure to do so risks permitting the state to justify a *Charter* infringement through invocations of vague 'public goods' which are not in fact the objectives of the statutory provisions under whose power the claimant's *Charter* rights have been infringed, and which may even be (as here) beyond constitutional jurisdiction from a federalism perspective.

Lund v. Boissoin, 2012 ABCA 300 at para. 53

50. At para. 47 of the Reasons for Judgment, the chambers judge correctly accepted the finding at para. 76 of *Greater Vancouver* that the relevant statutory objective for the purpose of the *Doré* analysis is the provision of "a safe, welcoming public transit system." However, the chambers judge's reasons for judgment fail to engage with the balance of what the Supreme Court stated in that same paragraph, where the court emphasized that censorship of political speech would only be rationally connected to that statutory objective in very narrow circumstances:

> … 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. [emphasis added]

51. The Supreme Court of Canada went on to state that even if the ban on political advertising had met the rational connection test, it would have failed the minimal impairment and proportionality of effects tests on the following basis:

> [77] … Article 7 … 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. … 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. [emphasis added]

52. Thus, the statutory objective at issue of "a safe, welcoming public transit system" does not mean one free of controversy or offence. Rather, it means a transit system

free of the most extreme types of speech typified by content which is "discriminatory" or which "advocates violence or terrorism" – that is, speech which is validly prohibited by statute. The Supreme Court listed the only types of speech which are validly prohibited by statute: i.e. speech prohibited either under s. 7 of the BC *Human Rights Code* ('discriminatory publications'), or speech prohibited under various provisions of the *Criminal Code*, such as prohibitions on obscenity (s. 163), advocating genocide (s. 318 (1)), or public incitement of hatred (s. 319(1). The list is short precisely because, in a free and democratic society, speech prohibitions which survive constitutional scrutiny are few.

iii. The Decision was not rationally connected to TransLink's statutory objectives

a) No freestanding provincial power to censor 'bad speech'

53. CCBR had argued below that the ad at issue falls into neither of the twin justifications for transit censorship set out by the Supreme Court – the ad clearly offends neither the speech prohibitions in the BC *Human Rights Code* (as read down by the Supreme Court in *Whatcott*), nor any criminal law prohibition – and therefore that TransLink's statutory objective was simply not engaged by the ad at all.

Saskatchewan v. Whatcott, 2013 SCC 11 at para. 57

54. The chambers judge rejected this submission at paras. 49-50 of the Reasons for Judgment, citing the Supreme Court's reference at para. 78 of *Greater Vancouver* to bans on tobacco advertising in *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 ("*JTI*") and then stating "Clearly, tobacco advertising is neither discriminatory nor hateful, so the Supreme Court of Canada could not have meant that these are the only two bases upon which the respondent is permitted to reject advertising." On the purported strength of *JTI*, the chambers judge then upheld the censorship of CCBR's ad on the basis of psychological harm to children (para. 51) and women (para. 54), in the absence of any admissible evidence on the point.

55. The chambers judge's reasoning in this respect suffers from three fatal errors of law. Other sections of this factum focus on two of those errors (1. permitting TransLink to assert a new s. 1 justification – avoidance of 'psychological harm' – which was

manifestly not the actual reason for the Decision under judicial review; and 2. Doing so when there was literally zero evidence in front of, or considered by, TransLink capable of supporting an inference of psychological harm).

56. The third error of law, however, is crucial for the purpose of the present focus on statutory objectives, and it is simply this: the prohibitions on tobacco advertising in *JTI* were grounded in Parliament's exclusive criminal law power (*JTI* at para. 20), whereas TransLink, a creature of provincial statute, can only limit political expression to the extent authorized by a provincial head of power.

57. It is settled law that only the federal Parliament has the legislative competence to prohibit 'bad speech' *qua* speech.

Reference re: Alberta Statutes, [1938] SCR 100 [*Alberta Press Act*] at pp. 133-135 (Duff and Davis JJ.); 144-146 (Cannon J.)

Saumur v. City of Quebec, [1953] 2 SCR 299

Switzman v. Elbling and A.G. of Quebec, [1957] SCR 285

58. That is why Canadian jurisprudence consistently restricts municipal authorities – like TransLink – to regulate the form, but not the content, of expression. Regulating form comes under provincial jurisdiction over matters such as aesthetics, traffic safety, and noise control, whereas content engages the federal criminal law power.

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

59. If the BC legislature in the case at bar had passed a law establishing a new Ministry of Truth that was granted the "sole discretion" to censor political views considered by a state appointee to be of "questionable taste", "offensive", or to concern "sensitive content", or if a non-*Charter* entity opined that the political view was 'inaccurate or unclear' (the various grounds asserted by TransLink in this case, per Part 1 of this factum), that law – in addition to its obvious *Charter* flaws (limit not prescribed by law due to lack of intelligible standard, and s. 2(b) breach not saved under s. 1) – would be struck down under a division of powers analysis; indeed, it would be, on its facts, very similar to *Reference re: Alberta Statutes*.

Re Ontario Film and Video Appreciation Soc. (1984), 45 O.R. (2d) 80 (C.A.)

R. v. Glad Day Bookshops (2004), 70 O.R. (3d) 691 (S.C.J.)

Reference re: Alberta Statutes, *supra*.

60. It follows that the legislative authority for the narrow speech limitations permitted under *Greater Vancouver* must be appurtenant to a provincial head of power.

61. There is recent guidance from the Supreme Court of Canada on precisely this situation. *Whatcott* concerned limitations on what is loosely called 'hate speech' under a provincial human rights code. Since the criminal law power was not engaged, the speech could not be prohibited for containing 'bad ideas' *per se*. The unanimous Supreme Court held at paras. 47 and 62, that the only legislative objective which could be valid under a provincial head of power was one focused not on the speech or the ideas contained within it, but rather on speech which was objectively likely to contribute towards the legislative objective which validly fell within provincial competence, which was the prevention of discriminatory conduct in the province. The Supreme Court explained as follows:

> [48] A prohibition of hate speech will not eliminate the emotion of hatred from the human experience. Employed in the context of human rights legislation, these prohibitions aim to eliminate the most extreme type of expression that has the potential to incite or inspire discriminatory treatment against protected groups on the basis of a prohibited ground. In applying hate prohibitions, courts must assess whether the impugned expression is likely to expose a protected group to hatred and potentially lead to the activity that the legislature seeks to eliminate. This ties the analysis to the legislative purpose and works to prevent the prohibition from capturing more expressive activity than is necessary to achieve that objective.
> [49] … The repugnant content of expression may sidetrack litigants from the proper focus of the analysis.
> [50] [After citing *Irwin Toy*] … If the repugnancy or offensiveness of an idea does not exclude it from *Charter* protection under s. 2(*b*), it cannot, in itself, be sufficient to justify a limitation on expression under a s. 1 analysis. A blanket prohibition on the communication of repugnant ideas would offend the core of freedom of expression and could not be viewed as a minimal impairment of that right.
> [emphasis added; see generally paras. 47-54]

62. The foregoing analytical approach to the statutory objective is crucial in the case at bar. As a result of those principles, the Supreme Court in *Whatcott* directed that human rights tribunals could only find speech to be prohibited by provincial human rights codes based on an objective analysis (para. 56) of likely effects of the expression (para. 58), and that:

> [57] … the legislative term "hatred" or "hatred or contempt" is to be interpreted as being restricted to those extreme manifestations of the emotion described

> by the words “detestation” and “vilification”. This filters out expression which, while repugnant and offensive, does not incite the level of abhorrence, delegitimization and rejection that risks causing discrimination or other harmful effects.

63. The narrow scope given to speech censorship under provincial heads of power in *Whatcott* is instructive for the case at bar. But the power in the case at bar is in fact even narrower than in *Whatcott* for the additional reason that *Whatcott* concerned an express legislative provision censoring speech, whereas the case at bar concerns speech censorship by necessary implication only.

b) Narrow scope of implied power to infringe *Charter* rights

64. The “interpretive presumption of constitutionality” provides that the legislature “is presumed to intend to enact *Charter*-compliant legislation.”

R. v. Ruzic, 2001 SCC 24 at para. 26

R. v. Ahmad, 2011 SCC 6, at para. 32

65. In situations like the case at bar, dealing with broad statutory language where “a statutory provision is capable of an interpretation that is constitutional and one that is not, then the courts should choose the construction that conforms with the *Charter*.”

Ruzic at para. 26.

66. As a result, “it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied,” and “statutory silences should be read down to not authorize breaches of the Charter, unless this cannot be done because such an authorization arises by necessary implication.”

R. v. Conway, 2010 SCC 22 at paras. 41-44, quoting *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1079*i* and *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 3 [emphasis added].

See also: *Schachter v. Canada*, [1992] 2 SCR 679 at 719*i*-720*e*; and *Greater Vancouver* at para. 51, in turn quoting *R. v. Therens*, [1985] 1 S.C.R. 613 at 645b (Le Dain J.) adopted by majority 619a-c.

67. Where the legislative authorization to limit a *Charter* right is only implied, and not express, the scope of that power must, as a matter of logic, be limited to the minimum capable of attaining the objects of the statute. To give a broader scope

than this minimum would be to expand the Supreme Court's doctrine of necessary implication into a doctrine of optional or convenient implication.

68. Nothing in TransLink's constating statute comes anywhere close to expressly authorizing TransLink to censor speech. The Supreme Court, in *Greater Vancouver*, accepted that TransLink had that power by necessary implication only, and set out the two narrow categories upon which TransLink had the legislative mandate to censor speech. The Supreme Court did not identify any further bases upon which speech censorship was legislatively authorized. Neither should this court.

c) Unsupported speculation of 'psychological harm' to children does not supply rational connection

69. At paragraphs 51-53, the chambers judge held that TransLink was justified in prohibiting the ad because "children would be vulnerable to its message." He reasoned that, "given its proposed location, the advertisement could potentially cause psychological harm to children, and, to that extent, its rejection for publication was reasonable on the respondent's part." (para. 51). On this point, he cited *Canadian Centre for Bio-Ethical Reform v. Grande Prairie (City)*, 2016, ABQB 734 (presently on appeal), where an Alberta court of first instance reasoned that it must be reasonable to restrict content in public spaces because children are present.

70. As argued previously under "preliminary issues," psychological harm was never asserted by Mr. Beaudoin as the basis for the Decision, and cannot be relied upon by TransLink on judicial review. What follows in this section is CCBR's alternative argument in the event that the court concludes that it does for some reason need to consider the 'psychological harm' justification.

See citations at para. 43, *supra.*

The presence of children

71. As noted by the Supreme Court in *Greater Vancouver*, "bus riders are expected to put up with some controversy in Canadian society." In saying this, the court was obviously aware that children would be present in all location where bus advertisements would be visible. The reasons of the chambers judge in effect overrule the Supreme Court of Canada on this point, in the absence of any of the

Bedford criteria being met.

72. In *R. v. Zundel*, McLachlin J. (as she then was) noted that the freedom of expression extends to protecting "beliefs which the majority regard as wrong or false", in situations concerning "a contest between the majoritarian view of what is true or right and an unpopular minority view". Her Ladyship noted that "the view of the majority has no need of constitutional protection; it is tolerated in any event."

[1992] 2 SCR 731, para. 22

73. The communication of controversial political messages will occur primarily in public places to which children have access. To prohibit controversial political messages from all places where children might see them is to prohibit political messages from virtually all public places in Canada, including, "The public square [which] is, paradigmatically, a place traditionally used to express public dissent."

Bracken v. Fort Erie (Town), 2017 ONCA 668, citing *Montréal (City) v. 2592-1366 Québec Inc.*, 2005 SCC 62 at para. 61.

74. The presence of children was significant in *JTI* because, of course, children cannot legally purchase tobacco in Canada, and are therefore not even a legitimate target of tobacco advertising. Political opinions are not so restricted.

75. While the presence of children can be considered as part of the total factual matrix in the *Doré*/section 1 analysis, there would need to be, at a minimum, objective evidence of harm – not merely of upset or controversy – to supply a rational connection for censorship of political speech.

speculation about psychological harm does not supply rational connection

76. The chambers judge held that the rejection of the ad was reasonable because "given its proposed location, the advertisement could potentially cause psychological harm to children" (para. 51) as well as women (para. 54).

77. There are at least four fatal errors to the reasoning of the chambers judge, in addition to the fact that it constituted impermissible bootstrapping which should not have been considered in the first place.

78. First, s. 2(b) of the *Charter* exists specifically to protect controversial messages, the

very types of messages which a majority can be tempted to label – without evidence – as likely to cause “psychological harm.” As stated by Justice McIntyre for the majority in *Dolphin Delivery*,

> "If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had power, would be justified in silencing mankind."
> "All silencing of discussion is an assumption of infallibility"
> "… ages are no more infallible than individuals; every age having held many opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions now general will be rejected by future ages, as it is that many, once general, are rejected by the present."
>
> *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573 at 583

79. A recent decision of the Ontario Court of Appeal emphasizes how subjective negative responses to political expression do not constitute ‘harm’ (whether psychological or otherwise) capable of supplying a rational connection for censorship of political opinion.

80. In *Bracken v. Fort Erie (Town),* 2017 ONCA 668, Mr. Bracken protested loudly outside his Town Hall, and Town employees, perceiving him as ‘violent,’ put the Town hall on lockdown and called the police who issued him a trespass notice and removed him in handcuffs. The application judge upheld the trespass notice, finding that assertions of unproven violent protest were enough to justify the Town’s forceful ending of his expression of political opinion. The Ontario Court of Appeal reversed, stating that:

> Political protesters can be subject to restrictions to prevent them from disrupting others, but they are not required to limit their upset in order to engage their constitutional right to engage in protest.
> …In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.
>
> *Bracken* at paras. 49 and 82

81. Controversial messages may provoke upset in listeners who may label it ‘psychological harm’ as a way to seek to justify censorship of the speaker. But in the absence of expert evidence, it is not objective harm capable of justifying censorship of political speech at law.

82. Second, the willingness of the chambers judge to presume that psychological harm would be the result of controversy for children is out of step with repeated pronouncements from the Supreme Court that exposure to opposing viewpoints and resulting minority stress is an unavoidable feature of living in a pluralistic society, for both adults and children:

> The argument based on cognitive dissonance essentially asserts that children should not be exposed to information and ideas with which their parents disagree… But such dissonance is neither avoidable nor noxious. … The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others. … Exposure to some cognitive dissonance is arguably necessary if children are to be taught what tolerance itself involves.
>
> *Chamberlain v. School District No. 36*, 2002 SCC 86, paras. 64-66
>
> See also: *S.L. v. Commission scolaire*, 2012 SCC 7 at para. 40; *E.T.* at para. 94; *TWU v. NSBS*, 2015 NSSC 25, at paras. 8, 180, 204-205.

83. Third, there was no expert evidence before the chambers judge capable of supporting his finding of psychological harm. While the reasoned apprehension of harm test can use common sense and logic to supplement conflicting or inconclusive expert evidence, it is not a wholesale substitute for evidence. Even in areas of great scientific complexity, such as the impact of third party advertising on election fairness, the Supreme Court has gone no further than to state that "logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy." In the case at bar, by contrast there was no expert evidence which could complement logic and reason.

> *Harper v. Canada*, 2004 SCC 33 at para. 79 [emphasis added]
>
> See other leading cases applying the reasoned apprehension of harm test where extensive expert evidence was present: e.g. *R. v. Malmo‑Levine; R. v. Caine*, 2003 SCC 74; *R. v. Butler*, [1992] 1 SCR 452

84. This is of more than formalistic importance. If TransLink can successfully assert "psychological harm" on judicial review without evidence, and without the matter having even been considered by the actual decision maker, it will have a virtually unreviewable power to censor political speech based on mere offensiveness of the

message to some viewers, without any meaningful constitutional analysis. 'Psychological harm' would simply become a dressed up label for what a political appointee subjectively believes will "create controversy" – the very standard which the Supreme Court has expressly rejected as a constitutional justification for censorship of political opinion (*Greater Vancouver* at para. 77).

85. Many transit riders have no doubt been offended when they or their children have been confronted in recent years by TransLink bus ads featuring: women wearing nothing but lingerie; ads for condoms; ads asserting that there is either no God, or advertising religious meetings; ads supporting any politician with whom the viewer vehemently disagrees; or ads denouncing those who eat meat. But the Supreme Court has answered those complaints very simply at para. 77 of *Greater Vancouver*: "bus riders, are expected to put up with some controversy in a free and democratic society."

86. Fourth, it is objectively unreasonable for Mr. Beaudoin to conclude that the ad in this case was likely to cause psychological harm. The ad expresses the straightforward political opinion that a human fetus is a human being and deserving of legal protection. It does not label anyone a murderer. If political speech could be censored on the basis that those who benefit from the *status quo ante* could be offended from the inference that the speaker believes them to be behaving immorally, any advocacy for legal reform could be validly prohibited by those presently in power. This would nullify one of the core purposes of s. 2(b) of the *Charter*: "participation in social and political decision-making." Even if Mr. Beaudoin subjectively perceived a risk of psychological harm, it was not a reasoned perception. The situation is analogous to *Bracken* where "The employees were indeed frightened, but the evidence does not disclose any reasonable basis for their fear."

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927 at 976 followed by the Supreme Court most recently in *Ernst v. Alberta Energy Regulator*, 2017 SCC 1 at para. 156 *Bracken* at para. 46 [emphasis added]

d) Conclusion on rational connection

87. The respondent's statutory objective is the maintenance of a safe, welcoming public

transit system, which necessarily implies a right to censor speech in two categories narrowly defined by unanimous judgments of the Supreme Court in *Greater Vancouver* as read through the lens of *Whatcott* – i.e. the type of extreme speech which is validly prohibited by a statute – namely s. 7 of the BC *Human Rights Code* (as read down in *Whatcott*), and the *Criminal Code*.

88. It is manifestly clear that none of the reasons given by TransLink for the rejection of CCBR's ad fall within these narrow prohibitions. As set out in Part 1 of this factum, the reasons given by the various TransLink operatives up to and including Mr. Beaudoin were that the ad was censored because it was of "questionable taste", "offensive", "inaccurate or unclear, or the images were "sensitive content." The ad falls neither within the *Human Rights Code* prohibition on discriminatory publications (as read down in *Whatcott*), nor within any *Criminal Code* prohibition.

AAB pp. 6, 12, 19-20

89. As none of the justifications asserted by Mr. Beaudoin are rationally connected to TransLink's statutory objectives, the Decision fails the first prong of the *Doré* test and the judicial review must be allowed.

iv. The Decision was not minimally impairing of CCBR's freedom of expression

90. In *R. v. K.R.J.,* the Supreme Court cited *Carter* to state that "the limit on the right [should be] reasonably tailored to the objective" (*Carter*, at para. 102) and where there are alternative, less harmful means of achieving the government's objective 'in a real and substantial manner' that a law should fail the minimal impairment test."

R. v. K.R.J., 2016 SCC 31, para. 70

See also *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, at 99

91. *Bracken* is particularly instructive on this point, holding that when there are many options outside of a complete prohibition on expression, a total prohibition will not be minimally impairing (para. 79). The Court also held that a total ban based on upset on is overbroad (paras. 80-81). Even if TransLink had the legislative competence to censor speech generally:

> [the] statutory obligation to promote workplace safety, and the "safe space" policies enacted pursuant to them, cannot be used to swallow whole *Charter*

> rights. In a free and democratic society, citizens are not to be handcuffed and removed from public space traditionally used for the expression of dissent because of the discomfort their protest causes.
>
> *Bracken* at para. 82

92. The only lesser impairment which TransLink considered in this case was that it would reconsider its decision if CCBR removed the images of the two fetuses. The images in question are simple pictures of babies in utero, similar to what is pictured in high school textbooks, numerous websites frequently consulted by expectant mothers to see the degree of development of their baby, and even by the province on HealthLink BC. But more to the point, the images of the healthy fetuses were the representation of CCBR's message – i.e. that fetuses are human children whose lives should receive legal protection. The situation is analogous to the abolition movement publishing photographs of mistreated slaves to persuade citizens to vote for parliamentarians who would abolish the slave trade. In the same way, the photographs of fetuses in CCBR's ad could not be removed without fundamentally changing the nature of CCBR's constitutionally protected political belief and expression. Demanding a fundamental change in a speaker's political message as a condition of it being 'permitted' cannot constitute a minimal impairment.
93. As set out in Part 1, the respondent prohibited the ad on the following grounds:
    Lamar 1st basis: images of fetuses are too direct, shocking and sensitive;
    Lamar 2nd basis: section 2 offensive or of questionable taste; and
    ASC basis: inaccurate and unclear re: when life begins and when abortions occur.

    AAB p. 6, 12, and 19-20, respectively.
94. Outside of a complete ban, TransLink provided no meaningful alternative to CCBR which would better accord with TransLink's view of its statutory objectives while respecting CCBR's *Charter* rights. TransLink did not respond to CCBR's requests for suggested modifications to the ad, with the result that CCBR remains uninformed to this day as to what ad content would satisfy TransLink.
95. When the respondent refused the appellant's ad, it restricted CCBR's *Charter* right to political expression more than was necessary in order to meet TransLink's statutory objectives, as properly identified. As the Decision is not minimally impairing, the Decision fails the *Doré* test and must be set aside.

v. The Decision had a disproportionate effect on CCBR freedom of expression

96. In any event, the Decision's deleterious effects on freedom of expression are disproportionate to any possible salutary effects with respect to the achievement of the respondent's statutory objective.

a) Severe deleterious effect on freedom of expression

97. The appellant's ad is political speech on a crucial topic of public debate which a unanimous panel of this court has previously recognized falls at the very core of the s. 2(b) protection under the *Charter*:

> [26] Beliefs about the meaning and value of human life are fundamental to political thought and religious belief. Those beliefs find expression in the debate on abortion. Professor Dworkin has said this about the importance of those convictions to most people:
>
> > [neither the religious nor the non-religious] can lead even a mildly reflective life without expressing such convictions. …
>
> [27] It follows that the importance of communicating those ideas and beliefs lies at the "very heart of freedom of expression".
>
> [91] The right to express opposition to abortion is a constitutionally protected right. …
>
> *R. v. Spratt*, 2008 BCCA 340

98. Accordingly, censorship of views about human life, when it begins, and abortion is a severe deleterious effect not only the rights of CCBR and its staff and volunteers, but on the rights of all persons to hear this message, and the functioning of our democracy as a whole through the rough and tumble, and sometimes heated, exchange of ideas and criticisms of current public policy positions. The *Charter* not only protects the right to share, but the right to receive, expressive material.

> *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, para. 10, citing *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at p. 767.

99. The chambers judge fell into error by seeking to downplay the importance of the expression, and the severity of its censorship, by a misguided analysis of the interaction of the nature of the expression (possibly upsetting to certain viewers) with the nature of the place where the ad was to be posted (the sides of busses).

100. Locations are either appropriate for expression and protected by s. 2(b) or they are not. That certain expression may be “upsetting” to certain viewers does not reduce the severity of the s. 2(b) breach.

101. In *Greater Vancouver*, Deschamps J. for the court held that the side of a bus was a location as appropriate for political expression as was a city street. If censorship of political speech on the sides of busses is proportionate because of the nature of the space, then the state can censor political speech on every public sidewalk, city square, and telephone poll in Canada.

102. Similarly, if censorship of political speech on the sides of busses is proportionate because children are able to see it, then the state can censor political speech anywhere that children can go – which is virtually every public space in the country. No street, park, or airport would be free from state censorship.

103. Prohibiting expression on such weak bases goes much too far, flying in the face of consistent appellate jurisprudence which protects even the following:

a. “false” statements (denying the holocaust) on the basis that:

> … The purpose of the guarantee [of freedom of expression] is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false… Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection… the guarantee of freedom of expression serves to protect the right of the minority to express its view… it serves to preclude the majority's perception of `truth' or `public interest' from smothering the minority's perception.
>
> *R v Zundel,* [1992] 2 S.C.R. 731

b. “repugnant or offensive” statements on the basis that:

> However, even if, viewed objectively, the words were to be interpreted as calling for homosexuality to be illegal, the statement is not combined with any representations of detestation and vilification delegitimizing those of same-sex orientation. Rather, as the Court of Appeal determined, these flyers are potentially offensive but lawful contributions to the public debate on the morality of homosexuality.
>
> *Whatcott* at para. 57

c. "extreme and insensitive" and "polemical" comments on the basis that:

> …While his views are expressed in strong, insensitive, and some might say bigoted terms, the words are clearly the expression of his opinion. … Matters of morality, including the perceived morality of certain types of sexual behaviour, are topics for discussion in the public forum. … It is unfortunate when some choose to express their opinions in a crude and offensive manner, but … Freedom of speech does not just protect polite speech…
>
> *Lund v. Boissoin*, *supra*. at paras. 70-72; see also paras. 4, 60

104. The result of broad and ambiguous prohibitions on speech as in this case reflect the concerns of the *Zundel* Court when it emphasized that when government overreaches in restricting free speech, "extending to virtually all controversial statements," a "chilling effect" is imposed and an objective which may seem innocuous at first blush "is capable of almost infinite extension" to prohibit "worthy minority groups." (*Zundel*, paras. 60-67).

105. Freedom of political expression in Canada is far more robust than contended by TransLink. The state cannot pay lip service to freedom of speech while denying it in practice on the basis of a subjective determination of what will be "disturbing" or that children may be present. The fact that expression may be offensive to *one portion* of the public is not a license to prohibit it from being expressed to *all* of the public.

b) Minor salutary effect

106. The *Charter* is presumed to provide at least as great a level of protection as is found in Canada's international human rights obligations. International treaties binding on Canada require Canada to protect freedom of expression, and authorize restrictions on free expression only where "provided by law [and] necessary: (a) For respect of the rights or reputations of others; [or] (b) For the protection of national security or of public order (*ordre public*), or of public health or morals."

Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2017 SCC 54 at para. 65, and citations therein

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), article 19.

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, article 19.

107. It has been argued herein that there is no “right” for viewers to never encounter views with which they disagree, which make them uncomfortable, or which they find offensive, such that the Decision below is not even rationally connected to its valid objective. But if this is wrong, then any salutary effect of the Decision is minimal.

108. The nature of the ad is a straightforward expression of political belief of the humanity of the fetus which is objectively quite ‘tame’ in the spectrum of expressions of political belief regarding abortion – if it can have any impact upon the respondent’s ability to maintain a safe and welcoming transit environment, it is a minimal impact only upon those who wish to insulate themselves from cognitive dissonance in the public square – something which the Supreme Court of Canada has held is not a valid public policy objective even for children.

109. Only the most fragile of personalities can be imagined to select their transit vehicles by which ads they agree with. In a pluralistic democracy, political expression is not limited to what the most fragile – the ‘lowest common denominator’ – is comfortable with; the health of our democracy depends upon robust freedom of political expression. Fragile persons can seek to avoid such expression if they wish, but they cannot call upon the coercive power of the state to eliminate its existence.

Greater Vancouver at para. 77

110. Two Canadian courts have ruled in favour of CCBR’s right to post the same ad at issue in this case, and as a result the very ad at issue ran on the back of Peterborough buses in the summer of 2017. The result in Peterborough was that those with an opposing view also exercised their freedom of expression by posting “pro-choice” messages on Peterborough buses. Assuredly, this result nurtured our functioning democracy rather than eroding it.

Canadian Centre for Bio-Ethical Reform v. Peterborough, 2016 ONSC 1972

Canadian Centre for Bio-Ethical Reform v. Hinton, [2017] A.J. No. 347

111. The only court which has upheld a municipal censorship of the ad at issue in this case is *Canadian Centre for Bio-Ethical Reform v Grande Prairie (City)*, 2016 ABQB 734, relied upon by the chambers judge at para. 52 of the reasons below. The Alberta decision is presently on appeal (hearing scheduled for January 10, 2017).

vi. Conclusion on proportionality

112. The deleterious effects of the Decision on the s. 2(b) rights of CCBR to speak, and members of the public to hear, its message, far outweigh the salutary effects for the respondent's statutory objectives. The Decision fails the *Doré* test and must be set aside.

vii. Conclusion on Ultimate Issue

113. TransLink did not possess either the constitutional or statutory jurisdiction to restrict CCBR's ad on any of the justifications stated by TransLink in 2015.

114. Further, none of the justifications that formed the basis for TransLink's Decision were rationally connected to its statutory objective, nor does the Decision provide for a minimally impairing or proportionate balancing of CCBR's *Charter* rights with TransLink's statutory objective. Therefore, the Decision limited CCBR's freedom of expression more than was reasonably necessary or proportionate to TransLink's statutory objectives. The Decision fails the *Doré*/*Loyola* test, and must be set aside.

E. Remedy

115. If CCBR's arguments on the merits have been accepted, the decision must at a minimum be quashed. The question is whether it should simply be remitted at large, remitted with directions/prohibition or, as CCBR seeks, that a mandamus order should issue.

116. Where, on the record before the original decision maker, there is only one decision which could have been made in keeping with the requirements of the *Charter*, the Supreme Court (and this court) has repeatedly substituted the only constitutionally compliant result by mandamus order.

Canada (Attorney General) v. PHS Community Services Society,
2011 SCC 44, paras. 146-150

Loyola High School v. Quebec (Attorney General),
2015 SCC 12, paras. 163 and 165.

Trinity Western University v. The Law Society of British Columbia,

2016 BCCA 423

Allman v. Amacon Property Management Services Inc.,
2007 BCCA 302 at para. 16, citing *Renaud c. Québec (Commission des affaires sociales)*, [1999] 3 S.C.R. 855
see generally Brown, *Administrative Law in Canada* (looseleaf) §5:2220.

117. If the court is at the point of considering the appropriate remedy in this case, it is because the court has concluded that the admitted infringement of s. 2(b) of the *Charter* is not justified under s. 1 on the *Doré* analysis by any of the justifications asserted by the original decision maker with reference to the record actually before him at the time his decision was made. Accordingly, the only constitutionally compliant response from TransLink was to post the ad upon the payment by CCBR of the standard fee.

118. In both *PHS* and *Loyola*, the Supreme Court issued a mandamus order because "on the facts as found here" (*PHS*); "on the application judge's findings of fact, and considering the record" (*Loyola*) there was only one Constitutional outcome. The Supreme Court rejected the requests of the decision makers in both cases to remit the matter for fresh consideration, even though the decision maker may have been able to gather new evidence which might have supported its original decision.

119. Therefore, a mandamus order should issue. To remit the matter would be to invite TransLink to do indirectly (through a reconsideration) what it is not permitted to do directly on judicial review: seek to bolster its preferred outcome through new evidence or arguments. A state entity which makes an unconstitutional decision which it then defends on judicial review should not be rewarded by having the matter remitted to it in order to give the state entity a second opportunity to achieve its majoritarian ends to censor minority speech, particularly when the victim of the *Charter* breach is a small non-profit which is litigating against the deep pockets of government, and has previously been required to post security for costs in the court below.

120. In the alternative, if the matter is remitted to Translink, it should be decided by a different official whom this court should limit to performing "a reconsideration of the same facts", i.e. TransLink should not be permitted to add to the record.

PHS at para. 148.

PART 4 – NATURE OF ORDER SOUGHT

121. The appellants seek the following orders and declarations:

d. An order setting aside paragraphs 4-6 of the order below;

e. A declaration that the decision of John Beaudoin, TransLink Director, Customer Engagement and Marketing, dated February 11, 2015, to refuse to post CCBR's ad (the "Ad" and "Decision", respectively), violates section 2(b) of the Charter, and is not saved by section 1;

f. An Order that the Decision is quashed and set aside;

g. An order in the nature of mandamus requiring TransLink to post CCBR's ad upon the payment of TransLink's standard fees;

h. An Order in the nature of prohibition enjoining TransLink from violating CCBR's Charter rights in future; and

i. costs in this court and in the court below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 6th day of December, 2017 at Vancouver, British Columbia.

_____

Carol Crosson and Geoffrey Trotter

Lawyers for the appellant

APPENDIX – ENACTMENTS

Human Rights Code, R.S.B.C. 1996, c. 210

7 (1) A person must not publish, issue or display, or cause to be published, issued or displayed, any statement, publication, notice, sign, symbol, emblem or other representation that

(a) indicates discrimination or an intention to discriminate against a person or a group or class of persons, or

(b) is likely to expose a person or a group or class of persons to hatred or contempt

because of the race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression, or age of that person or that group or class of persons.

(2) Subsection (1) does not apply to a private communication, a communication intended to be private or a communication related to an activity otherwise permitted by this Code.

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

163 (1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever; or

(b) makes, prints, publishes, distributes, sells or has in his possession for the purpose of publication, distribution or circulation a crime comic.

Marginal note:Idem

(2) Every one commits an offence who knowingly, without lawful justification or excuse,

(a) sells, exposes to public view or has in his possession for such a purpose any obscene written matter, picture, model, phonograph record or other thing whatever;

(b) publicly exhibits a disgusting object or an indecent show;

(c) offers to sell, advertises or publishes an advertisement of, or has for sale or disposal, any means, instructions, medicine, drug or article intended or represented as a method of causing abortion or miscarriage; or

(d) advertises or publishes an advertisement of any means, instructions, medicine, drug or article intended or represented as a method for restoring sexual virility or curing venereal diseases or diseases of the generative organs.

Marginal note:Defence of public good

(3) No person shall be convicted of an offence under this section if the public good was served by the acts that are alleged to constitute the offence and if the acts alleged did not extend beyond what served the public good.

Marginal note:Question of law and question of fact

(4) For the purposes of this section, it is a question of law whether an act served the public good and whether there is evidence that the act alleged went beyond what served the public good, but it is a question of fact whether the acts did or did not extend beyond what served the public good.

Marginal note:Motives irrelevant

(5) For the purposes of this section, the motives of an accused are irrelevant.

(6) [Repealed, 1993, c. 46, s. 1]

Definition of crime comic

(7) In this section, crime comic means a magazine, periodical or book that exclusively or substantially comprises matter depicting pictorially

(a) the commission of crimes, real or fictitious; or

(b) events connected with the commission of crimes, real or fictitious, whether occurring before or after the commission of the crime.

(8) For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.

Hate Propaganda
Advocating Genocide

318 (1) Every one who advocates or promotes genocide is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

(2) In this section, genocide means any of the following acts committed with intent to destroy in whole or in part any identifiable group, namely,

(a) killing members of the group; or

(b) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction.

Marginal note:Consent

(3) No proceeding for an offence under this section shall be instituted without the consent of the Attorney General.

Marginal note:Definition of identifiable group

(4) In this section, identifiable group means any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability.

Public incitement of hatred

319 (1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Marginal note:Wilful promotion of hatred

(2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or

(b) an offence punishable on summary conviction.

Marginal note:Defences

(3) No person shall be convicted of an offence under subsection (2)

(a) if he establishes that the statements communicated were true;

(b) if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text;

(c) if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true; or

(d) if, in good faith, he intended to point out, for the purpose of removal, matters

producing or tending to produce feelings of hatred toward an identifiable group in Canada.

Marginal note:Forfeiture

(4) Where a person is convicted of an offence under section 318 or subsection (1) or (2) of this section, anything by means of or in relation to which the offence was committed, on such conviction, may, in addition to any other punishment imposed, be ordered by the presiding provincial court judge or judge to be forfeited to Her Majesty in right of the province in which that person is convicted, for disposal as the Attorney General may direct.

Marginal note:Exemption from seizure of communication facilities

(5) Subsections 199(6) and (7) apply with such modifications as the circumstances require to section 318 or subsection (1) or (2) of this section.

Marginal note:Consent

(6) No proceeding for an offence under subsection (2) shall be instituted without the consent of the Attorney General.

Marginal note:Definitions

(7) In this section,

communicating includes communicating by telephone, broadcasting or other audible or visible means; (communiquer)

identifiable group has the same meaning as in section 318; (groupe identifiable)

public place includes any place to which the public have access as of right or by invitation, express or implied; (endroit public)

statements includes words spoken or written or recorded electronically or electro-magnetically or otherwise, and gestures, signs or other visible representations. (déclarations)

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47, art. 18(1).

Article 19

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 18.

Article 19
1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20
1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

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