Section 2(b) Advertising Rights on Government Property: Greater Vancouver Transportation Authority, A New Can of Worms and the Liberty Two Step?

Elaine Craig
Schulich School of Law

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The Supreme Court’s recent decision in Greater Vancouver Transportation Authority, A New Can of Worms and the Liberty Two-Step?

The Supreme Court’s recent decision in Greater Vancouver Transportation Authority is problematic for two reasons. First, the majority adopts an analytical framework for determining whether a claim triggers the positive rights Dunmore/Baier analysis, which means that policies restricting expressive rights based on groups rather than content could be less likely to fall within the scope of section 2(b). A better approach would be to characterize section 2(b) cases based on the nature of the claim rather than the nature of the restriction and to apply the positive rights Dunmore/Baier criteria only where the claim is for an audience with the government or access to government funding. Second, the Court’s section 1 analysis provides sparse and problematic guidance for addressing the now opened can of worms that is sure to arise from the government sale of private advertising in a legal context that draws the censorship line above controversial content but below offensive content.

L’arrêt récent de la Cour suprême Greater Vancouver Transportation Authority pose problème pour deux motifs. Tout d’abord, la majorité adopte un cadre d’analyse pour déterminer si une allégation déclenche l’analyse des droits positifs établie dans les arrêts Dunmore et Baier, ce qui signifie que les politiques qui imposent des restrictions à l’activité expressive en fonction de groupes plutôt qu’en fonction du contenu du message pourraient être moins susceptibles d’être visées par l’al. 2b). Une approche préférable serait de caractériser les affaires qui invoquent l’al. 2b) en se fondant sur la nature de l’allégation plutôt que sur la nature de la restriction, et d’appliquer les critères énoncés dans les arrêts Dunmore et Baier pour déterminer les droits positifs uniquement lorsque la demande vise un accès au gouvernement ou l’accès au financement par le gouvernement. De plus, l’analyse que fait la Cour de l’article 1 ne donne que des indications vagues et problématiques pour traiter la pléthore de questions litigieuses qui ne manqueront pas d’être soulevées par la vente de publicité privée par le gouvernement dans un contexte juridique qui trace la ligne de censure au-dessus du contenu portant à controverse mais sous le contenu offensant.

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Introduction
Are public transit authorities allowed to censor from public buses an advertisement denying the existence of God? What about a pro-life advertisement depicting an aborted fetus or one that quotes Leviticus 20:13? These are the types of issues with which transit authorities have begun, and will undoubtedly continue, to grapple in light of the Supreme Court of Canada’s recently released decision1 upholding expressive rights to private advertising on publicly owned property.2

2. This controversy has already come to the fore across Canada; public transit authorities in cities such as Halifax and Victoria have refused to post the Humanist Society of Canada’s advertisements declaring that “you can be good without God” (see: “Good without God’ ad campaign raises questions in Vancouver” CBC News (3 February 2009), online: CBC News <http://www.cbc.ca/canada/british-columbia/story/2009/02/03/ce-good-without-god-ads.html>). In Halifax the ad was rejected because the Halifax public transit policy refuses ads that are objectionable to any moral standard or that do not meet acceptable community standards of good taste, quality and appearance. Similar reasoning was given by B.C. transit authorities in Victoria. The Halifax transit authorities reversed their position after the Vancouver Transportation Authority decision was released in July, 2009 (In the United Kingdom and Australia humanist organizations have launched publicity campaigns with bus ads declaring that “there is probably no God so relax and enjoy life.” (See <http://www.atheistcampaign.org> accessed September 1, 2009). The type of advertisement quoting Leviticus 20:13 has been the subject of controversy in the private sphere. See Owens v. Saskatchewan (Human Rights Commission), 2005 SKCA 103, 2005] S.J. No. 515 where a human rights complaint was made against an individual who quoted Leviticus 20:13 in an anti-gay advertisement in a Saskatchewan newspaper. The human rights claim was dismissed on appeal. A determination that these types of ads do not constitute hate speech and do not violate human rights code protections, in conjunction with the Court’s ruling in Vancouver Transportation Authority, could open the door for those interested in posting such advertisements on the sides of public buses.
In *Greater Vancouver Transportation Authority v. Canadian Federation of Students* the Court struck down Vancouver transit authority policies that stipulated that advertising on public buses could not have political or controversial content. BC Transit and Translink, both determined by the Supreme Court of Canada to be government actors for purposes of *Charter* application, had for a number of years earned revenues by selling advertising space on their buses. Both BC Transit and Translink had adopted written policies that stipulated that they would only accept advertisements that communicated information about goods, services, public events and public service announcements. Under the policies of both transit authorities, advertisements that included political speech or advertisements that were, in light of prevailing community standards of tolerance, likely to create controversy or cause offence, were not to be accepted.

In the summer and fall of 2004 the Canadian Federation of Students and the British Columbia Teachers' Federation tried to purchase advertising space on the sides of buses operated by BC Transit and Translink. They wanted to post advertisements encouraging young people to vote in the upcoming provincial election. The transit authorities did not accept their advertisements on the basis that their content was not permitted by the advertising policies. The British Columbia Teachers' Federation and the Canadian Federation of Students commenced an action alleging that the transit authorities' policies violated their right to freedom of expression under section 2(b) of the *Charter*. The trial judge denied their claim on the basis that the sides of buses did not constitute a "public space" for

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3. The Canadian Federation of Students wanted to place two advertisements. The first advertisement would have run the length of the side of the bus and included the following text: "Register now. Learn the issues. Vote May 17, 2005. ROCKTHEVOTEBC.com." The second would have said: "Tuition fees ROCKTHEVOTEBC.com Minimum wage ROCKTHEVOTEBC.com Environment ROCKTHEVOTEBC.com." The British Columbia Teachers' Federation sought to place an advertisement stating: "2,500 fewer teachers, 114 schools closed. Your kids. Our students. Worth speaking out for." (Vancouver Transportation Authority, supra note 1 at para. 3).
purposes of section 2(b). However, their claim was successful on appeal. The majority of the British Columbia Court of Appeal found that the trial judge had erred in considering the content of the desired advertisement when determining whether the sides of buses constituted a public place. “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.”

The transit authorities sought and were granted leave to appeal to the Supreme Court of Canada. The Court, both the majority and Justice Fish in concurrence, held that the transit policies did violate section 2(b) and that these violations could not be justified under section 1 of the Charter. There are two problematic aspects of the Court’s reasoning in Vancouver Transportation Authority.

The first difficulty pertains to the analytical framework adopted by the majority to address the transit authorities’ assertions that the claim made by the respondents would place a positive obligation on the government. Justice Deschamps, writing for the majority, determined that the respondents’ claim did not trigger a positive rights analysis because the transit authorities’ policies targeted content, not groups, and because the claim was not tied to a particular government-created means of expression.

4. He drew this conclusion because there was no history of their ever having permitted political or advocacy advertising on the sides of buses. He relied, in part, on Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) in order to arrive at this conclusion. As pointed out by the British Columbia Court of Appeal in this case, Canadian courts have not followed the doctrinal approach adopted in American public forum cases like Lehman. In Montreal (City of) v. 2952-1366 Quebec Inc., 2005 SCC 62, 3 S.C.R. 141 [City of Montreal] the Court determined, at para. 74, that restrictions to the scope of protection for expressive rights on government property should be assessed based on “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.” In answering that question, courts are to consider the historical or actual function of the place and whether there are other aspects of the place to suggest that expression within it would undermine the values underlying freedom of expression. The content of the actual expression at issue is not considered at this stage of the analysis. As an aside, this test is somewhat confusing. It almost suggests duelling zones/scopes of expressive protection. It works for the example of the Prime Minister’s office but is less sensible in the context, for example, of the air traffic control tower. Is it really that section 2(b) protection does not extend to the air traffic control tower because expression in that place would conflict with the promotion of democratic discourse and truth finding given the air traffic control tower’s actual function or rather is it that we do not want airplanes to crash? This question raises a separate issue with section 2(b) which is not the focus of this paper and which was the source of debate in the Court’s earlier decisions on section 2(b) (see for example Justice Lamer’s approach and Justice L’Heureux-Dubé’s approach in Committee for the Commonwealth of Canada v. Canada, [1991] I S.C.R. 139 [Committee]. But see Richard Moon’s critique of Justice Lamer’s strictly functional approach in Richard Moon, The Constitutional Protection of Freedom of Expression (Toronto: University of Toronto Press, 2000).

5. Vancouver Transportation Authority, supra note 1 at para. 4.
Justice Fish wrote a concurring opinion in which he agreed that the claim was not for a positive right but disagreed with the majority in terms of how they arrived at this conclusion. Recall that the respondents, the Canadian Federation of Students and the British Columbia Teachers' Federation, had both tried to purchase advertising space encouraging citizens to vote in the upcoming provincial election. BC Transit and TransLink argued that what the respondents were claiming was a positive right to a government-created means of expression. As discussed below, in previous cases the Court determined that claims for an expressive right that can be characterized as claims of underinclusion in a government-created platform for expression (a claim for a positive right) will only be protected in very limited circumstances. As such, the outcome can turn on whether a claim is one that will fall under the Court's positive rights section 2(b) analysis. Unfortunately, in this case, in determining what types of section 2(b) cases will engage a positive rights analysis (an analysis which severely limits the scope of protection under section 2(b)), the majority relied on a puzzling and potentially problematic analytical distinction between excluding speakers (restrictions targeted at groups) and excluding speeches (restrictions targeted at content).

The second difficulty with the reasoning in Vancouver Transportation Authority pertains to the section 1 analysis adopted by the majority (and endorsed by Justice Fish) with respect to justifying the exclusion of some content from advertising space sold by the government. The Court determined that while government actors can justifiably censor offensive content from the advertising space that they sell, they cannot justifiably censor controversial content. In order to distinguish between offensive and controversial content the Court acknowledged that a community standards of tolerance test might offer the appropriate guidance. The forecasted problems to come, such as those suggested in the opening paragraph, stem from the difficulty in relying on a community standard of tolerance test to determine a principled and just distinction between what are offensive advertisements on government-owned property and what are merely controversial advertisements on government-owned property. Unfortunately, as will be discussed below, this is a challenge that the Court's decision did not meet. While the Court focused primarily on political advertising (as that was what was at issue in Vancouver Transportation Authority) they drew conclusions and made suggestions which, when considered in the context of advocacy advertising, are problematic.

The first part of this discussion will examine and critique the majority's approach to determining whether a particular claim is for a positive right
under section 2(b). The second part of the discussion will consider their section 1 analysis and the difficulty with the suggestion that distinctions between offensive (justifiably censored) advertising and controversial (unjustifiably censored) advertising on government-owned property be made based on community notions of public decency.

I. The majority's section 2(b) analysis

The majority divided its section 2(b) analysis into two sections. The first section of their analysis addressed the transit authorities' argument that the respondents were seeking to gain access to a particular government-created platform for expression and that this claim of underinclusion, were it successful, would place government entities under a positive obligation with respect to the respondents' expressive rights. In other words, the transit authorities argued that the respondents' claim for a right to the advertising space triggered the "positive rights" analysis that the Court has adopted in prior cases. Section 2(b), but for the exceptional circumstances discussed below, does not protect claims characterized as seeking a positive right. After rejecting the transit authorities' suggestion regarding the positive nature of the right claimed, the majority determined that the method or location of the expression (advertising on the sides of government-owned buses) did not remove the prima facie protection of section 2(b)—as dictated by the test adopted by the Court in Montreal (City of) v. 2952-1366 Québec Inc. It is the first part of the majority's section 2(b) analysis—the part addressing the issue of positive rights to government-created platforms of expression—that will be focused on in the paragraphs to follow.

After acknowledging the traditionally generous and purposive but not unlimited interpretation of rights and freedoms guaranteed under the Charter, the majority began its section 2(b) analysis by noting that the government is not typically under an obligation to provide individuals with a particular means of expression. 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 section 2(b) right to participate unless she or he meets the criteria set out in Baier.

Baier v. Alberta established the very limited circumstances in which section 2(b) creates a positive right requiring the government to extend an underinclusive means of, or platform for, expression to an individual

6. Supra note 4.
7. Supra note 1 at para. 29.
8. Ibid.
or group. In order to determine what those very limited circumstances will be, the Court in *Baier* relied on the section 2(d) analysis adopted in *Dunmore v. Ontario (Attorney General)*. *Dunmore* identified those exceptional circumstances in which the government is under a positive obligation to facilitate a group’s freedom to associate. *Dunmore* extended the scope of section 2(d) protection to claims of underinclusiveness only where the following criteria are met: i) the claim is grounded in a fundamental *Charter* freedom rather than access to a particular statutory regime; ii) the exclusion results in a substantial interference with the protected activity (or that is the exclusion’s purpose) and; iii) the government inaction substantially orchestrates, encourages or sustains the violation of fundamental freedoms. The criteria in *Dunmore* create a very narrow exception to the principle that the government is under no obligation to enable the exercise of one’s section 2 guarantees. As Justice Fish noted in his concurrence in *Vancouver Transportation Authority*, the exception created in *Dunmore* was really only intended for situations where a fundamental right cannot otherwise be exercised. The respondents’ claim in *Vancouver Transportation Authority* would not satisfy the criteria established in *Dunmore* and adopted in *Baier*. There was nothing to suggest that the respondents in *Vancouver Transportation Authority* would be unable to express themselves in other forums. Had the *Baier* analysis applied, the respondents’ claim would almost certainly have been denied. In other words, had the Court determined that requiring the government to allow access to the advertising space on public buses constituted a claim to a positive right, the appeal would have been allowed and the transit policies held to be constitutionally sound.

1. **The majority’s treatment of *Baier***

The majority concluded that the *Baier* analytical framework was not the appropriate analysis for this claim. In *Baier* the claimants argued that it

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12. *Supra* note 1 at para. 105. For example, the criteria were met where removing vulnerable agricultural workers from the protections of a labour relations legislative framework would reinforce their vulnerability and make them essentially incapable of exercising their freedom to associate. This was the factual circumstance in *Dunmore*, *ibid.*
was a violation of section 2(b) to prohibit all teachers in Alberta from standing for election to the office of school trustee and serving as a school trustee without taking a leave of absence from, and if successful in their candidacy resigning from, their teaching position. The Court in Baier denied the claim on the basis that what the claimants sought was inclusion in an underinclusive statutory scheme, that this was the hallmark of a positive rights claim and that this was not a positive rights claim fulfilling the Dunmore criteria.

The majority in Vancouver Transportation Authority determined that the Baier analytical framework was not the appropriate analysis for this claim on two bases. First, they determined that the transit authorities’ characterization of the claim as one of underinclusiveness could not succeed because the appellants had not demonstrated that the respondents themselves were excluded from the particular means of expression. The transit policies, they determined, did not prevent the respondents from using the advertising service; the policy only restricted the content of their advertisements. Second, they rejected the transit authorities’ argument that the exercise of expression in this context was a positive right because it required support and enablement in order to convey the message. They determined that the need for government “support or enablement” in order to express oneself was not enough to construe a claim as an assertion of a positive right. They held that the respondents were not requesting that the government support or enable their expressive activity by providing them with a particular means of expression from which they were excluded. Instead, they determined that what the respondents sought was to express themselves—by means of an existing platform they were entitled to use—without undue state interference with the content of their expression.

2. Problem with relying on the distinction between the speaker and the speech

The majority’s analytical framework for determining that Baier and the positive rights analysis did not apply is problematic. The first difficulty with their approach, which was acknowledged in Justice Fish’s concurring

13. Baier, supra note 9. One might question, as did Justice Lebel in his concurring opinion in Baier, whether the claim in this case truly engaged the protection of freedom of expression under section 2(b). In his view the right to run for office as a school trustee, and if elected take part in the management of the school board, does not constitute a communicative act as required to qualify as expression under section 2(b). He would have denied the claim in Baier not because it was a positive claim to expressive rights but rather because it was a claim to a right to stand for office in a context not covered by section 3 of the Charter.

14. Supra note 1 at para. 32: “[S]uffice it to say that to succeed in its ... claim ... of underinclusiveness, BC transit had to at least demonstrate that the respondents themselves were excluded from the particular means of expression.”
opinion, stems from the analytical significance they attributed to the distinction between speakers and speech. Under the majority's analytical framework, where the exclusion from the government means of expression is based on the speaker, the Baier analysis, assuming the claim is for a government means or platform as understood by the majority, will apply. Where the exclusion is based on the content of the expression Baier will not apply.\footnote{Supra note 1 at para. 32.} As noted by Justice Fish, "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....To still the messenger is to suppress the message."\footnote{Ibid. at para. 109}

Under the majority's analytical approach a claim against a government policy that denied access to groups to a particular government-created platform for expression would be subject to the more stringent Dunmore/Baier criteria whereas a denial based on content would not. Exempting those groups that might find shelter under the equality guarantees of section 15, this could lead to absurd results for groups or classes of people seeking access to government-created means of expression.\footnote{There is a question as to whether it was even appropriate in Baier to apply the Dunmore analysis (established in the context of section 2(d) rights to associate) to claims under section 2(b). There is a qualitative distinction between the nature of group-oriented claims of association and claims of freedom to expression that suggests the same analysis ought not to apply to both. However, if the majority meant to address this issue they ought to have done so by overruling Baier and determining that Dunmore be limited to association rights, not by suggesting that Dunmore/Baier only be applied in expression cases involving groups.} Think for example of a policy that restricts access to a government-provided means of expression for messages in support of labour rights. Now consider a policy that excludes unions of any kind from accessing a government-created platform of expression. The determination as to whether a positive rights analysis should apply should not be different simply because the policy targeted not political content but potentially politicized groups. This is particularly true given that, as a result of how limited the positive right recognized under section 2(b) is, a determination as to whether a government policy or law violates section 2(b) will often turn on whether the claim is for a positive right.

The majority's reasoning also implies that where the policy (or law or government act) restricts the content of what can be expressed in a government platform, the narrowed scope of the protected freedom, as determined by the Baier/Dunmore criteria, will never apply.\footnote{She states at para. 32 "[o]nly the content of their advertisements is restricted. Thus, their claim cannot be characterized as one against underinclusion." Supra note 1.}
words, their decision suggests that an expressive right that is restricted based on content never falls under a positive rights type analysis regardless as to the government means or platform claimed. This is also problematic. Think of a factual circumstance similar in nature to the one at issue in Native Women's Association of Canada v. Canada.19 There, the Native Women's Association of Canada (NWAC) unsuccessfully argued that the government had denied their freedom of expression by not providing them with funding or inviting them to consult or participate in constitutional discussions leading up to the Charlottetown Accord. The Court held, as they had in other cases,20 that "generally the government is under no obligation to fund or provide a specific platform of expression to an individual or group."21 The outcome of Native Women's Association of Canada v. Canada would likely have been the same under the majority's Vancouver Transportation Authority reasoning. Under their analysis, because it was NWAC themselves who were excluded, the Baier test would have applied and the claim would be denied. However, what would be the analysis under the majority's approach in Vancouver Transportation Authority were a similar claim for funding and an opportunity to consult denied on the basis that the government was not interested in hearing the viewpoint sought to be expressed? The illogic of determining whether a positive rights based analysis is to be engaged based on whether the restriction is as to speaker or speech is revealed by this counterfactual. Certainly a request to be included in government consultation is a claim for a positive right (a claim of underinclusion)—it does not become a negative right simply because it is denied on the basis that the government does not want to hear what you have to say rather than denied on the basis that the government does not want to hear what you have to say. Under the majority's approach the Baier analysis would apply in NWAC were the case brought today, but would not apply in the hypothetical just proposed. It makes little sense to have the nature of the exclusion rather than the nature of the claim dictate the analytical test to be applied.

Having drawn the distinction between exclusions based on speakers and those based on content, and identified the claim in this case as a content-based exclusion, the Court went on to consider the appellant's argument that the claim was for a positive right because the respondents required their support and enablement to convey the messages in question. The majority rightly clarifies that "if government support or enablement

21. Supra note 19 at 655.
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..."22 However, they then go on to confuse the issue by stating that “[w]hen 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.”23 It seems right to suggest that a claim for government enablement should not trigger the restrictive Dunmore/Baier analysis. But what does it mean to say that if this enablement is tied to a particular government-created means of expression then a positive rights analysis is triggered? The problem is that without something more this “test” for triggering Baier does not avoid the very point the majority had just made regarding claims to demonstrate in a public park. How can a request for a permit to hold a demonstration on a public stage in a government-owned park not be considered a claim that the government enable one to express oneself through a particular government-created means of expression? But the majority would agree that such a claim ought not to trigger Dunmore/ Baier. However, they would do so based on the questionable conclusion that such a claim was not a request that the government enable expressive activity by providing them with a particular means from which they would otherwise be excluded.

In Vancouver Transportation Authority, the majority determined that 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.”24 Really? Are they not? This conclusion on the part of the majority turns wholly on the distinction they draw between speakers and speech. Once one acknowledges that this is more of a distinction without a difference, the assertion that claimants who are asking that the government sell them advertising space on public buses are not requesting that the government enable their expressive activity by providing them with a particular means of expression from which they have been excluded, becomes hollow.

Attempting to characterize a claim based on the restriction or the alleged under inclusivity at issue (rather than identifying whether what is being sought is of the same ilk as the type of claim in which this principle regarding positive rights under section 2(b) was established) creates the difficult task of trying to parse out the difference between positive versus

22. Supra note 1 at para. 34.
23. Ibid. at para. 35.
24. Ibid.
negative 'government action, enablement versus enablement tied to a particular means of expression, granting versus taking away, excluding versus not including, statutorily created government platforms versus non-statutorily created government platforms and of course speakers versus speeches.

3. What Justice Deschamps could have done
There may be another way to approach this type of dispute that does not require this problematic and false distinction between the speaker and the speech. Instead of characterizing the claim based on the type of restriction imposed or the basis for the underinclusion alleged (as the majority does), a better approach would be to characterize based only on an examination of the claim itself: what exactly is the expressive right being sought and is it of the same ilk as the type of claim in which this principle regarding positive rights under section 2(b) was established? In this case it is the right to access a government-created space for private advertising.

In his concurring opinion in Vancouver Transportation Authority Justice Fish, who dissented from the majority in Baier, adopted an analysis that does almost this. His approach is based on an examination of the claim itself rather than on the nature of the restriction. He adopted a more direct approach to rejecting the assertion of the transit authority that a positive rights (Dunmore/Baier) analysis ought to be applied. Justice Fish suggested that courts ought to consider whether the freedom of expression claimed would impose 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.”

The approach to section 2(b) and the “positive rights versus negative rights” issue advanced below is similar to the one adopted by Justice Fish—although it would potentially result in a more explicitly restrictive standard as to when Dunmore/Baier applies than would Justice Fish’s

25. Supra note 1 at para. 103
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...approach. The approach suggested in the paragraphs to follow is that i) the issue should be characterized based solely on the nature of the claim not the nature of the restriction and ii) that the Dunmore/Baier analysis should only apply where the claim fits within one of the two types of claims for which this principle regarding positive rights under section 2(b) was established and is typically found.

If the claim is of the sort in which this notion about "positive rights" under section 2(b) was developed, the Dunmore/Baier criteria should apply. If it is not one of these two types of claims (discussed below), then the regular City of Montreal approach to expressive rights on public property should be adopted. This will ensure a limited application of the very restricted guarantee provided for under the Dunmore/Baier criteria, without resorting to the problematic reasoning adopted by the majority in Vancouver Transportation Authority.

There have typically been two types of cases in which a section 2(b) argument has been denied on the basis that the claimant seeks a positive right that the government is not obligated to provide. The first category of cases in which expressive rights have been denied on the basis that the claim places a positive obligation on the government not required by the Constitution are cases involving claims for a right to be consulted by the government—a right to have the ear of law or policy makers if others have been given that ear. In other words, these cases involved a claim that section 2(b) requires that where the government has created a means or forum for itself to access or receive opinion or information, then the government is required to hear about every opinion or viewpoint, or from every group or individual seeking to be consulted. The audience in these types of cases is small—it is either the government or some narrowly defined audience created by the government. In fact, it was a case of this nature in which the Court first determined that section 2(b) does not generally guarantee a right to government-created platforms of expression. The case was Haig.

26. There is a separate issue with respect to Justice Fish's decision. It is not consistent with the Court's line of jurisprudence regarding the use of public property for expressive purposes. After disposing of the positive rights issue, he does not then apply the test established in City of Montreal, supra note 4. Instead he reverts back to Justice Lamer's approach in the pre-City of Montreal case of Committee for the Commonwealth of Canada v. Canada, supra note 4. The problem with a test that relies exclusively on compatibility with government function is, as Professor Moon notes in discussing Lamer's approach, that it requires a judicial determination as to the function of a location but does not offer any stable criteria by which to ascertain what constitutes manifest incompatibility. See Moon, supra note 4. This was the very issue the Court attempted to avoid in City of Montreal by adopting the unified approach that is currently the binding precedent on how to determine the scope of protection under 2(b) for expression on public property. Justice Fish's decision, even setting aside his resolution of the positive rights Dunmore/Baier issue, is a complete departure from current case law on expressive rights on public property.
v. Canada and it involved a claimed right to vote in a referendum.\textsuperscript{27} While the right to vote in federal and provincial elections is constitutionally protected under section 3 of the Charter, the right to vote in referendums, public opinion polls, or plebiscites is not. The Court was clear in Haig that, provided it is not done discriminatorily, the government can seek public opinion—consult with the public or a segment of the public—by whatever method it chooses. Section 2(b) does not circumscribe the government’s ability to choose its sources of expertise, advice and opinion.\textsuperscript{28}

It is significant to note that a denied right to government consultation was the context in which the principle that there is no general obligation on the part of the government to provide access to government-created means of, or platforms for, expression, was established by the Court. Indeed, many of the cases in which a right to expression through a government-created platform have been denied are of this consultation genre. In Siemens v. Manitoba, for example, the Court found that there was no section 2(b) right to be included in a referendum on prohibiting video lottery terminals.\textsuperscript{29} In Re Allman and Northwest Territories (Commissioner) the N.W.T. Court of Appeal upheld a three-year residency requirement to vote in a plebiscite on whether the Northwest Territories should be divided.\textsuperscript{30} The court in Allman followed the ruling in Haig that, in seeking public opinion on an issue, the government is not constitutionally obligated to seek everyone’s opinion. In NWAC, discussed above, the Court held that section 2(b) does not constrain the government in its choice of advisors or require the government to hear every viewpoint.\textsuperscript{31}

There have been two decisions that one could characterize as of this genre but with somewhat of a deviation from the typical government consultation category of cases. In these cases the government itself was not the audience for the platform. However, the claim in these cases was, in large measure, for access to a narrowly-defined audience created by the government to carry out government-related functions.

The first of these two cases is Office and Professional Employees’ International Union, Local 378 v. British Columbia (Hydro and Power Authority).\textsuperscript{32} In this case the Union’s claim that a rejection of their application to have the Utilities Commission conduct a hearing to review B.C. Hydro’s

\textsuperscript{27} Supra note 20.

\textsuperscript{28} As compared to, for example, section 15 or section 35, which do impact the government’s ability in this respect.


\textsuperscript{31} Supra note 19.

proposed outsourcing agreement violated section 2(b) was refused, on the basis that the claim was for a positive right that the government was not obligated to provide. The narrowly defined and statutorily constituted audience to which the claimants sought access was the British Columbia Utilities Commission. The British Columbia Utilities Commission is an independent regulatory agency of the provincial government that operates under, and administers, the Utilities Commission Act. It is a narrowly defined audience created to carry out a particular government function.

The second case is Baier itself. Recall that in Baier the claimants argued that it was a violation of section 2(b) to prohibit all teachers in Alberta from standing for election to the office of school trustee and serving as a school trustee. In order to be eligible for nomination, a teacher is required under Alberta’s legislation to obtain a leave of absence from their position. Under the impugned law, if elected a teacher is required to resign their teaching position. Recall that the majority denied the claim on the basis that what the claimants sought was inclusion in an underinclusive statutory scheme and that this was not a positive rights claim which fulfilled the Dunmore criteria. The narrowly defined and statutorily constituted audience to which the claimants sought access in Baier was the school board of trustees. The claimants not only sought an audience with the school board of trustees but also the ability to, if elected, have decision-making powers as school board trustees.

The second type of claim in which expressive rights have been denied on the basis that the claim places a positive obligation on the government not required by the Constitution, are cases involving claims for government-funded expression. NWAC would also fall into this category of cases. In addition to seeking the right to be consulted by the government, the organization also unsuccessfully argued that their freedom of expression

34. Baier, supra note 9.
35. They also sought the ability to speak to the public in the capacity of school board trustee nominee. As such, there is a critique of my reliance on Baier for the assertion that typically positive rights under section 2(b) are recognized only where the claim is for an audience with the government (or for government funding). The legislation at issue in Baier restricted teachers not only from serving as trustees but also from even running for election as trustees unless they took a leave of absence from teaching. One could argue that the running for election aspect of the claim involved a public audience and not a narrowly defined government audience. There is merit to this claim. However, the fact that teachers remain free under the legislative scheme to speak publicly about any of the education issues that they would express as a school board trustee candidate and the not unreasonable presumption that the central issue in Baier was the right of teachers to actually serve as school board trustees supports the suggestion that the more significant audience at issue in Baier was the school board and the provincial government that the board serves.
had been denied because the government had provided funding to other aboriginal organizations, but not to NWAC.

_Hogan v. Newfoundland_ also involved a claim of this nature.\(^{36}\) In _Hogan_ the Newfoundland Court of Appeal determined that section 2(b) did not require the Newfoundland government to impose spending limits on referendum campaigns so that each viewpoint would be equally expressed to the voters; nor, the Court determined, did section 2(b) require the government to provide funding to the “No” side simply because they had funded the “Yes” side.

Finally, in _Criminal Trial Lawyers Association v. Alberta (Solicitor-General)_ the Edmonton Remand Centre had instituted a new phone system that allowed inmates to place only collect calls.\(^ {37}\) As such, inmates were unable to call cell phones. The Criminal Trial Lawyers Association argued that this was a violation of the inmates’ section 2(b) rights. The Alberta Court of Queen’s Bench determined that there was no obligation on the government to pay for inmate calls.

It seems reasonable to very narrowly define the scope of protected expression in cases where claimants are demanding the government’s ear or asking the government to spend money so that one can express oneself. With respect to these types of claims a positive rights _Dunmore/Baier_ analysis may be appropriate. Such an approach leaves at least some space for recognition of those circumstances in which, without a government-sponsored megaphone or an audience with the government, a de facto gag is produced. However, this approach also leaves the government relatively free to consult with whomever it sees fit\(^ {38}\) and unrestrained in its discretion.

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38. There are of course instances where the government is under a duty to consult, such as the constitutionally-protected requirement that they consult with aboriginal groups whose potential treaty or aboriginal rights are at stake. As well, a government that acts discriminatorily in its decisions regarding consultation and funding for expression continues to be subject to the equality protections guaranteed under section 15 of the Charter.
Application of the Dunmore/Baier criteria and discussion about positive government obligations, positive rights, government-created platforms and degree of government action required should be confined to the types of claims in which the principle that the government is under no obligation to provide for a particular means of expression was introduced—claims of entitlement to the government’s ear or the government’s purse.

There is a qualitative difference between a claim such as the one made in Vancouver Transportation Authority and a claim for the right to be consulted by the government, to access a government commission or to receive government funding in order to express one’s message. In Vancouver Transportation Authority the intended audience was the public at large, not the government or a narrowly defined audience constituted by the government. The government-created platform at issue was one that was open to the public and aimed at a public audience. It was, in this sense, more like a telephone pole or “Speaker’s Corner” in a public park than a right to be consulted by the government during constitutional deliberations. The claimants did not seek government funding; indeed “enabling” their expressive abilities in this case would generate revenue for the government. The transit authorities’ argument that the Dunmore/Baier analysis ought to apply to the facts of Vancouver Transportation Authority should have been dismissed on the basis that the claim sought was unrelated to the very narrow circumstances in which a positive rights

39. The issue of to what extent the Charter guarantees positive right—places positive obligations on the government—is a difficult one and one which varies depending on the provision at issue. In terms of section 2(b), for practical and pragmatic reasons alone it is reasonable to assume that a government cannot, but for highly particularized reasons such as those identified in Dunmore, be required to consult with everyone and anyone interested in advising them on a particular matter. Similarly, the reality of finite public resources and the existence of a democratically elected body vested with the responsibility of distributing those resources suggests that a constitutionally entrenched right to expression should not ordinarily give rise to a judicial order to government to distribute those resources in a particular manner. That said, for the same reason that Quebec’s prohibition on private health insurance was determined to violate section 7 of the Charter in Chaoulli v Quebec (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791 and that Ontario’s exclusion of agricultural workers from labour law protection was said to violate section 2(d) in Dunmore, supra note 10, there will be cases where a confluence of factual circumstances, statutory or legal regimes, and/or government actions suggests that section 2(b) does provide a right to the government’s ear or government’s purse. Given both of these considerations, application of the Dunmore criteria for section 2(b) claims to a right to be consulted by the government or the right to receive funding from the government for expressive purposes seems reasonable. The problem focused on in this paper is not whether positive rights under section 2(b) should be circumscribed, nor whether Dunmore is the correct test once a claim has been properly characterized as a positive rights claim. The problem focused on here is how and when to properly characterize section 2(b) claims as positive rights claims.

40. The majority acknowledges this later in their decision under the section where they apply City of Montreal in order to determine whether the form or location of the expression limits protection. See supra note 1 at para. 43.
type analysis was intended to apply. The majority ought to have assessed
the nature of the claim and rejected a positive rights approach on that basis
rather than examining the nature of the restriction, making distinctions
between the speaker and the speech and then engaging in an analysis that
attempts to parse out in some principled manner the distinction between
government action and inaction, or government enablement tied to
government-created means versus general government enablement.

There are a number of factors that a court ought to consider in an
assessment as to whether a claim requires the Dunmore/Baier analysis. A
court ought to consider the intended audience, the cost to the government
and perhaps the government’s purpose in creating the particular means
at issue. Where an assessment of these factors indicates that a claim is
qualitatively similar to the types of claims in which the principle regarding
access to government platforms was established, then the Dunmore/
Baier analysis could be applied. Where the claim is not for a right to be
consulted by the government or for a right to government funding then on
that basis alone the Dunmore/Baier analysis, regardless of the nature of
the restriction, should not be applied.

The majority’s approach to Baier is not the only difficulty with the
decision in Vancouver Transportation Authority. As suggested above, the
majority’s discussion regarding justification for the section 2(b) violation
under section 1 also raises potential issues.41

II. The Court’s section 1 analysis
Having determined that the transit authorities’ policies violated section
2(b) of the Charter, the majority turned to section 1 to determine whether
this violation could be justified. They determined that although the transit
authorities’ policies were prescribed by law, the policies were not justified
in a free and democratic society. The specific language of the contested
policies was as follows:

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

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

9. No advertisement will be accepted which advocates or opposes
any ideology or political philosophy, point of view, policy or action, or

41. While Justice Fish took issue with the majority’s approach to the section 2(b) analysis, his
reasons did not articulate a departure with respect to the majority’s section 1 analysis.
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.\textsuperscript{42}

The majority held that while the policies were adopted for a sufficiently important objective—to provide a safe and welcoming public transit system—the limits created by the policies were not rationally connected to this objective. They stated that

[i]t 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.\textsuperscript{43}

According to their reasoning, the line to be drawn is between offensive and inoffensive advertisements—it is only a restriction on offensive content that will be rationally connected to the objective of providing a safe and welcoming public transit system.

They went on to determine that even had there been a rational connection between the objective and the limits imposed by articles 2, 7 and 9, they would have found them to be unreasonable and disproportionate. Recall, Article 2 excluded political advertisements and Article 9 prohibited all political advertising—making them overly broad according to the Court. Article 7 excluded any advertisement likely to cause offence to any person or group of persons or create controversy, as determined by the prevailing community standards of tolerance. The majority concluded that Article 7 was also unnecessarily broad. “While a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which ‘create controversy’ is unnecessarily broad.”\textsuperscript{44}

Again, it is only offensive advertising that will undermine the objective of a safe and welcoming transit system. Citizens, they concluded, are expected to put up with some controversy in a free and democratic society.\textsuperscript{45}

It seems right to suggest that citizens are expected to put up with some degree of controversy. The difficulty is in determining a principled and just distinction between what constitutes offensive advertisement on government-owned property and what are merely controversial advertisements on government-owned property. Unfortunately, as

\textsuperscript{42} Supra note 1 at para. 4.
\textsuperscript{43} Ibid at para. 76.
\textsuperscript{44} Ibid at para. 77.
\textsuperscript{45} Ibid.
discussed below, this is a challenge to which the reasons in *Vancouver Transportation Authority* gives only partial and notably problematic guidance. The decision focused primarily on political advertising as that was what was at issue in *Vancouver Transportation Authority*. However, the Court drew conclusions and made suggestions which, when considered in the context of advocacy advertising, are problematic.

As the majority noted, the fact that the policies in this case are overly broad and not rationally connected to their objective does not mean that the government cannot limit speech in public transit advertisements. The difficulty with their section 1 analysis is that the only guidance it provides for how the government might place those limits—that is, draw the line between offensive and merely controversial content—is the community standards of tolerance test.

While they did not outright adopt the community standards of tolerance test they suggested twice that this may be the appropriate standard. Moreover, it is the only possible standard that they discussed. It is first suggested in their discussion regarding the overbreadth of Article 7. They stated that “[w]hile a community standard of tolerance may constitute a reasonable limit on offensive advertisements, excluding advertisements which ‘create controversy’ is unnecessarily broad.” Second, they suggested that the *Canadian Code of Advertising Standards* “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.” Advertising Standards Canada’s *Canadian Code of Advertising Standards*, in addition to rejecting advertising that contains discriminatory content or condones violence or unlawful behaviour also rejects advertising that “display[s] obvious indifference to, or encourage[s], gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population.”

To illuminate the distinction between protected expression and offensive expression, the Court juxtaposed the political speech at issue in this case with content that is discriminatory or condones violence. There is however, a vast space on the freedom of expression spectrum between political speech at one end and discriminatory or violence-inciting speech towards the other end. Consider again the examples suggested in the opening paragraph: an advertisement denying the existence of God, an

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46. *Supra* note 1 at para. 77.
47. *Ibid.* at para. 79.
advertisement quoting Leviticus 20:13 or an advertisement depicting an aborted fetus and declaring that abortion is murder. These are the types of advertisements that already have caused controversy or are very likely to soon arise and cause controversy for public transit officials across Canada. Are these advertisements merely controversial or are they offensive and by what standard ought courts to make this assessment?

The only indication of how to approach this question revealed in the Court's decision is their implicit endorsement of the community standards of tolerance test—a standard that has finally been rejected in the very line of cases that they cite as authority for the principle that the government can constitutionally place criminal prohibitions on speech (or action) based on the location where the expression is to occur and the audience to which it will be directed. Not only did they suggest that an assessment of what a significant segment of the public would consider decent may be an appropriate measure as to what constitutes a justifiable limit on expression in this context, but it is presumably the community standards of tolerance test as it stood in the earlier obscenity and indecency cases rather than in its later post-Butler harm-based version. That is to say, it is a standard based on an assessment as to what the community would tolerate others viewing or hearing rather than an assessment as to what the community would tolerate in terms of harm arising from such expression. The latter harm-based community standard, asserted by courts in the obscenity context to be more objective, would be a more onerous standard for the government to meet under section 1; it was not referred to by the Court and is not referred to in the Canadian Code of Advertising Standards (to which, as noted above, they also referred). Certainly, the reported adjudications of complaints by Advertising Standards Canada's Consumer Response Council indicates that the standard is not based on harm but rather based on notions of propriety and decency.

49. Supra note 2.
50. Supra note 1 at para 78 where they cite R. v. Labaye, 2005 SCC 80, [2005] 3 S.C.R. 728. In R. v. Labaye, Chief Justice McLachlin determined that indecency should be defined based on constitutional values such as autonomy, liberty, equality and human dignity rather than an assessment as to the degree of harm that the community would tolerate arising from a particular sexual behaviour.
51. See for example a 2004 determination of the Council upholding a complaint that an advertisement which depicted two women kissing passionately was highly offensive and inappropriate for viewing during family programming and therefore violated clause 14 of the Code. Clause 14 prohibits unacceptable portrayals and depictions on the basis that they would disregard prevailing standards of decency among a significant segment of the population (<http://www.adstandards.com/en/Standards/adComplaintsReports.asp?periodquarter=1&periodyear=2004>). A review of the Council's other adjudications in 2008 and 2009 suggests that this case, far from being an anomaly, is indicative of the way in which their community standards of tolerance assessment seems to operate.
Allowing the government to rely on the “standards of public decency prevailing among a significant segment of the population” as a yardstick to justify content-based limits on access to government-created means of expression is problematic. For the purposes of circumscribing constitutional freedoms and protections, determining what is offensive should not be done based on majoritarian notions of decency. This risks both justifying government censorship based on majoritarian attitudes and perspectives as well as failing to protect an “insignificant segment of the population” from content that the majority of the population would not find offensive.

It is one thing for an independent self-regulatory agency founded by the advertising industry, or an individual broadcaster, newspaper, or billboard owner, to censor content based on their assessment of what a “significant segment of the population” considers decent. Provided this is done in a manner that does not contravene human rights code protections, private actors are entitled to censor advertising in whatever manner best suits their business or personal interests. It is quite another matter, however, to allow the government to justify content-based limits on the constitutionally guaranteed freedom of expression on the basis of an adjudicator’s subjective assessment as to what the majority of Canadians, or a significant segment of Canadians, consider decent.

In the context of criminally regulating obscenity and indecency, the courts ultimately determined that the community standards of tolerance test was too subjective—that it would not ensure against a judge substituting his or her own moral perspective or degree of tolerance for that of the community’s perspective or degree of tolerance. This is why the notion of harm was eventually incorporated into the doctrine and in part why the community standards test was eventually rejected.

Even assuming that it were possible for a judge to assess accurately and objectively the community’s sense of decency, it is questionable whether this should be the constitutional marker used to distinguish between what the government can justifiably censor on the basis that it is offensive and what must be permitted as merely controversial.

Take for example the facts in *Gay Alliance Toward Equality v. Vancouver Sun*. In this 1979 case, the *Vancouver Sun* refused to include in their classified section an advertisement promoting a magazine entitled “Gay Tide.” They refused on the grounds that homosexuality is offensive to public decency, that the advertisement would offend some

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of the paper’s subscribers and that the newspaper had a duty to protect the morals of the community.\textsuperscript{55} The British Columbia Court of Appeal, whose decision was affirmed on appeal,\textsuperscript{56} determined that the Vancouver Sun had not violated the B.C. Human Rights Code.\textsuperscript{57} They determined that homosexuality was controversial, that a significant segment of the public would consider homosexuality an offence against public decency and that the Vancouver Sun therefore had a reasonable cause for refusing the classified advertisement. A newspaper, provided it does not violate human rights codes,\textsuperscript{58} is entitled to cater to the sensibilities of its clientele. But should the government be similarly entitled?

Imagine if the Vancouver transit authorities had been selling advertising space in 1982 (after section 2 of the Charter was in effect but before sexual orientation was protected under section 15 and before public sensibilities about the decency of homosexuality had evolved). Had they refused an advertisement for subscriptions to a gay magazine, would it be acceptable to justify this violation of section 2(b) on the basis that a pro-homosexuality advertisement “display[s] obvious indifference to, or encourage[s], gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population”?\textsuperscript{59}

Consider the more contemporary examples suggested above. Should majoritarian perspectives on what is tolerable for others to view dictate whether the government can justifiably censor an advertisement denying the existence of god on the basis that it is offensive rather than merely controversial? What about a graphic pro-life advertisement, a homophobic advertisement or perhaps advertising that promotes the decriminalization of polygamy or labour rights for sex workers?

Assuming that the answer to these questions is in the negative—that majoritarian perspectives ought not to dictate what is constitutionally justifiable government censorship—then what should be the standard of justification? How should courts decide what can, in the context of

\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid. The Supreme Court of Canada found that the provision on unreasonably denying services to the public did not apply to classified advertising. Regardless, as Professor Bruce Ryder points out, Justice Martland “seemed to suggest that the Sun was free to take a position on ‘the controversial subject of homosexuality’ and reject the ad on the basis of its opposition to equal rights for gay men and lesbians.” See Bruce Ryder, “Family Status, Sexuality and ‘The Province of the Judiciary’: The Implications of Mossop v. A.G. Canada” (1993) 13 Windsor Y.B. Access to Just. at 37.
\textsuperscript{58} Sexual orientation was not, at that time, a prohibited ground of discrimination under the British Columbia Human Rights Code. The unreasonable denial of a publicly available service to anyone was, however, prohibited.
\textsuperscript{59} Canadian Advertising Standards, supra note 47.
advertising on government-owned property, be justifiably censored? Should the line be drawn between offensive and controversial content? If so should determinations as to what is offensive be based on assessments of majoritarian notions of decency?

1. *Chief Justice McLachlin’s “liberty two-step”*

In fact, there may be an analytical approach to making these sorts of determinations that does not rely on judicial assessments as to majoritarian perspectives on what would offend notions of decency. With respect to the definition of indecency (and presumably also obscenity) the Court has come to the conclusion that limits on sexual expression should be dictated by those fundamental principles underpinning Canadian society, such as the values reflected in the Constitution, rather than an assessment of the community’s standards of tolerance for the degree of harm posed by the sexual activity at issue.  

Chief Justice McLachlin, writing for the majority in *Labaye*, determined that principles such as equality, autonomy, liberty and dignity ought to dictate limits on sexual liberty. In other words, she relied on constitutional values in order to both define the scope of, and to protect, those same values. This analytical approach to the circumscription of constitutionally guaranteed freedoms—an approach that might be described as “the liberty two-step”—is also revealed in Chief Justice McLachlin’s approach to religious liberty and in her approach to the scope of section 2(b) protection on publicly owned property generally.

In “Freedom of Religion and the Rule of Law: A Canadian Perspective,” Chief Justice McLachlin attempts to reconcile the tension between freedom of religion and the rule of law (what she describes as a “dialectic of normative commitments”; i.e., two different, and at times competing, comprehensive systems of belief) by distinguishing between two orders of values: a first order of normative positions or goods that society has identified as valuable and in need of protection and a second order of core values from which all other normative positions are judged. She argues that the Constitution articulates both. She suggests that the *Charter* has entrenched freedom of religion as one of our society’s goods but that in addition, in defining the scope of that good, the law must rely on those values (hyper goods) that freedom of religion protects. The core values

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60. *Labaye*, supra note 50.
61. Ibid.
she identifies are autonomy, human dignity and respect for the parallel rights of others.

In Committee for the Commonwealth of Canada v. Canada, Justice McLachlin (as she then was) proposed that the scope of protected expression on government owned property ought to be determined based on whether the expression at issue was in pursuit of the purposes underpinning the guarantee of freedom of expression. Under her approach in Commonwealth of Canada a prohibition on expression on government-owned property will fall outside the scope of section 2(b) protection unless the person seeking access is pursuing one the following three purposes: seeking truth, participation in decision-making or individual self-fulfillment. Her approach was modified somewhat by the current test for section 2(b) protection on public property. However, the current test remains reliant on the higher order values underpinning the protection. Under the current test, established in City of Montreal, the scope of section 2(b) protection on public property will be based on 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.

If fundamental values such as self-fulfillment, autonomy, equality, liberty and human dignity can be applied to determine whether a particular sexual act in a particular location constitutes one of indecency for purposes of the criminal law, and can be applied to determine whether the scope of religious freedom extends to a particular religious activity, can these same principles be applied to determine whether a particular advertisement on a public transit system is offensive?

2. Location, location, location
Consider again the examples discussed above: an advertisement denying the existence of God, one quoting from Leviticus 20:13 and a pro-life advertisement depicting an aborted fetus. It seems very difficult to imagine how a judge would assess "the community's" tolerance for, or sense of what is decent with respect to, any of these three examples. Would the assessment depend on the community where the bus operates? Should

63. Committee, supra note 4.
64. The modifications to the test have made it more confusing—not because of her liberty two-step but because it now seems to rely on the notion of two competing spheres of protected expression. See supra note 2 for a discussion on this point.
65. City of Montreal, supra note 4 at para. 74.
a judge consider what the religious communities in a particular location would tolerate others viewing, or perhaps the queer community or the feminist community? Is it the community at large that is to be considered? Is it the business community?

Instead of attempting to determine the distinction between offensive and controversial content based on a community standards test, perhaps it would be helpful to consider the issue with reference to fundamental values such as those reflected in the Constitution. What would be the analysis if an assessment of “offensiveness” was done according to Chief Justice McLachlin’s liberty two-step?

In defining what constitutes an offensive advertisement on government-owned property such as public buses it is likely that the same sorts of fundamental values—such as liberty, autonomy, equality, and respect for human dignity—that she has identified in defining indecency for the purposes of the criminal law or in guiding the scope of protection for religious freedom in a multicultural society could be applicable. While the assessment of these values, and the factors relied upon to assess them, will be different when considering religious freedom, the reach of the criminal law, and advocacy advertising on government-owned property, the analytical framework could likely be the same. So, for example, the limits placed on what the government can criminally prohibit as indecent sexual activity would likely be greater than the limits on what they can justifiably censor from public bus advertisements. However the values (equality, dignity, autonomy and liberty) and the factors (such as location and potential audience) used to determine these limits would be the same.

As the majority noted in Vancouver Transportation Authority, location matters, as does audience. At issue in this context are two locations, and two types of audiences—both of which create circumstances of unwilling/involuntary exposure to members of the public. The audiences are the general public and transit users. The locations are: i) advertisements placed on the outsides of buses and ii) advertisements placed on the insides of buses. Citizens at large will be involuntarily exposed to advertisements on the outside of buses in a fashion similar to the way one is involuntarily exposed to protesters when one drives on a public road or the way one is involuntarily exposed to a parade as it passes by them. In each of these instances the exposure is limited and likely brief and in most cases

66. While Labaye was a case on statutory interpretation, not a constitutional challenge, it was certainly informed by, and considered in light of, those constitutional issues that would arise in a Charter challenge to the criminal regulation of sexual activity.
citizens have the ability to avert their eyes without much difficulty. Transit users will also be exposed only briefly—although perhaps repeatedly—to advertisements on the outsides of buses. However, transit users will also be forced to ride on buses knowing what is on the outside of them.

Advertisements on the insides of buses are somewhat different. While members of the public at large will not be exposed to them, transit users will be involuntarily exposed and likely for longer periods and with less ability to simply “not look at them.”

In Labaye Chief Justice McLachlin determined that activities which cause (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct, would be indecent on the basis that such harm threatens those fundamental values reflected in the Constitution.

As noted, the bar for activities that will be criminally prohibited on the basis that they are indecent will likely be higher than would be the standard for determining what content might be advertised on the sides of public buses. However some of the same factors should be relevant. Chief Justice McLachlin determined that only serious and deeply offensive moral assaults will fall under the first category of harm. Under the second category, she determined that conduct that undermines respect for and the dignity of targeted groups could violate formally recognized norms reflected in Canada’s constitution and other fundamental laws. (The third category of harm identified in Labaye in the context of indecency is not as relevant here.)

68. The Court in Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567, recently characterized driving as a privilege rather than a right, arguing that those unable for religious reasons to comply with provincial driver’s licence requirements could take the bus. Use of the taxpayer-funded public transit system should be thought of more as a right than a privilege. It is reasonable to suggest that individual transit users who “choose” to ride the bus have nonetheless been involuntarily exposed to whatever advertisements are posted on the inside of the bus. In Lehman v. City of Shaker Heights, supra note 4, both Justice Blackmun for the majority, and Justice Douglas in concurrence, noted that the captive nature of the transit user audience was significant in ascertaining the scope of 1st Amendment protection in a case with facts quite similar to Vancouver Transportation Authority. Justice Douglas, in particular, noted in paras. 24 and 25 that “in my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience.” He went on to emphasize that “[b]uses are not recreational vehicles used for Sunday chautauquas as a public park might be used on holidays for such a purpose; they are a practical necessity for millions in our urban centers.” In Lehman, unlike here, the issue of a captive audience was deemed relevant to the scope of the protection itself rather than as a factor to consider when attempting to justify a violation of the protection. Of course, in the American constitutional context, balancing must be done within the scope of the protection itself because there is no constitutional provision analogous to section 1 of the Charter.

69. Supra note 50.
Consider again the three examples suggested above. First, consider an advertisement denying the existence of God. Placed on the outside of a bus it is unlikely that such an advertisement would constitute a serious enough moral assault such that it could be said to have impacted the autonomy and liberty of those who were involuntarily but briefly exposed to it. It seems unlikely that people would avoid streets where public buses travel. The same might reasonably be concluded with respect to the pro-life advertisement. However, if placed on the inside of the bus the analysis would be different with respect to both of these advertisements. It seems quite plausible that many people would avoid riding on a bus in which they would be forced to sit across from the image of an aborted fetus. It also seems plausible to suggest that some people would refuse to send their children to school on a bus in which they would be inundated with the message that they could be good without God. Such circumstances would certainly circumscribe their liberty and autonomy.

Would either of these advertisements—placed on the outsides of buses—undermine respect for and the dignity of a targeted group such that fundamental societal values would be threatened? It is unlikely that the humanist advertisement could be said to perpetuate this type of harm. Whether the pro-life advertisement could be said to do this might depend on its content. Perhaps the controversial ad with the depiction of an aborted fetus would not cause this type of harm but it might be reasonable to suggest that a declaration that abortion is murder would undermine the dignity and respect of a targeted group—women.

Now consider the example of the advertisement quoting Leviticus 20:13: “If a man lies with a man as one lies with a woman, both of them have done what is detestable. They must be put to death; their blood will be on their own heads.” As is the case with respect to the other two examples, it seems unlikely that the placement of such an advertisement on the side of a bus would adversely affect citizens’ liberty or autonomy to the degree contemplated in Labaye. It may be however, that an advertisement on the side of a public bus suggesting death to all homosexuals could undermine respect for and the dignity of gay, lesbian and transgender Canadians. It is also plausible that gay and lesbian transit users would feel less at liberty to take public transit should such a message confront them as they ride to work or school.

The approach just suggested is not without difficulties. It still requires a subjective assessment on the part of courts as to what level of harm to autonomy, liberty, equality and dignity is required to justify this type of government censorship. Whether one finds it a preferable approach to the one suggested by the Court in Vancouver Transportation Authority
Section 2(b) Advertising Rights On Government Property:  
Greater Vancouver Transportation Authority...

turns simply on whether one would prefer that determinations as to what content the government can justifiably censor from public bus advertising be based on an adjudicator’s assessment of what will (or will not) offend majoritarian notions of decency or on an adjudicator’s assessment of the potential harm to the autonomy, liberty, equality and dignity of the public posed by the advertisement.

Conclusion
The majority in Vancouver Transportation Authority rightly determined that the respondent’s claim was not one that should be subject to a positive rights analysis. However, they based this finding on an implausible distinction between laws or policies that exclude speakers versus those that exclude the content of speech, and on an illusory distinction between government enablement in general and government enablement tied to a government-created means of expression. It is not logical to distinguish claims of underinclusivity from claims for freedom from government interference in expressive entitlements based on whether the government action is directed towards restricting particular groups or individuals rather than the particular content of expression. Instead of attempting to draw distinctions between exclusions based on speakers and exclusions based on the content of speech, a better approach for the Court to take would be to characterize section 2(b) claims based on the nature of the claim rather than the nature of the restriction and to only apply the positive rights Dunmore/Baier criteria where the claim is for the government’s ear or the government’s purse.

As discussed, there is a second difficulty with the Court’s reasoning in Vancouver Transportation Authority. Having determined that content-based restrictions to government-owned advertising space violate section 2(b) of the Charter, the Court then considered what types of content the government could justifiably censor under section 1 of the Charter. The Court determined that government actors can justifiably refuse to allow offensive content in the advertising space they sell. Unfortunately, the only direction the Court offered for how the distinction between offensive (and justifiably censored) material might be distinguished from controversial (and unjustifiably censored) material was the community standards of tolerance test. A section 1 analysis premised on community standards of tolerance leaves sparse and problematic guidance for determining what constitutes offensive and what constitutes controversial advertising. Instead, the Court should have resorted to the fundamental and core principles underpinning Canada’s constitutional consensus—principles
such as autonomy, equality, dignity and respect for the parallel rights of others.