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

Elaine Craig
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By

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Abstract

The Court’s recent decision in Vancouver Transportation is problematic for two reasons. First, the majority adopts an analytical framework for determining whether a claim triggers the positive rights/Baier analysis that essentially means that policies that restrict expressive rights based on groups rather than content will be very unlikely 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 only apply the positive rights Baier/Dunmore criteria where the claim is for the government’s ear or the government’s purse. Second, the Court’s section 1 analysis leaves 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.

Introduction

Are public transit authorities allowed to censor from their public buses an advertisement denying the existence of god? What about a pro-life advertisement depicting an aborted fetus or advertising that quotes Leviticus 20:13? These are the types of issues with which transit authorities’ have begun, and will undoubtedly continue, to

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face in light of the Supreme Court of Canada’s recently released decision\(^1\) upholding expressive rights to private advertising on publicly owned property.\(^2\)

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. The Court’s determination that section 2(b) of the *Charter* prohibits transit authorities from excluding controversial content from the advertising spaces that they sell, confirms that the sale of advertising by government entities has opened a can of worms that in hindsight many of those government entities might have preferred left unopened. 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. The forecasted problems to come, such as those suggested in the opening paragraph, will stem from the difficulty in determining a


\(^2\) This controversy has already come to the fore across Canada as 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 [http://www.cbc.ca/canada/british-columbia/story/2009/02/03/bc-good-without-god-ads.html](http://www.cbc.ca/canada/british-columbia/story/2009/02/03/bc-good-without-god-ads.html) accessed September 1, 2009). In Halifax the ad was rejected because 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 BC transit authorities in Victoria. The Halifax transit authorities reversed their position after the *Vancouver Transit Authorities* decision by the Court 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](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] SJ 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 Authorities*, supra note 1, could open the door for those interested in posting such advertisements on the sides of public buses.
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 focuses primarily on political advertising (as that was what was at issue in Vancouver Transportation) they draw conclusions and make suggestions (such as the suggestion that courts might rely on community standards of tolerance to define offensiveness) which, when considered in the context of advocacy advertising, are problematic.

There is an additional analytical difficulty with the majority’s decision in Vancouver Transportation Authority. This difficulty stems from the analytical framework that they adopt to address the transit authorities’ assertions that the claim made by the respondents would place a positive obligation on the government. The respondents, the Canadian Federation of Students and the British Columbia Teacher’s Federation, had both tried to purchase bus advertising space encouraging citizens to vote in the upcoming provincial election. The transit authorities’ policies permitted commercial but not political or controversial advertising on buses and they refused to post the advertisements on this basis. The respondents challenged the policies as a violation of their section 2(b) expressive rights. In response, the transit authorities argued that what the respondents were claiming was a positive right to a government created means of expression. As discussed below, the Court has in prior cases determined that claims for an expressive right that can be characterized as a claim 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, a lot can turn on whether a claim is
one which 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 relies on a puzzling and potentially problematic analytical distinction between excluding speakers (restrictions targeted at groups) and excluding speeches (restrictions targeted at content).

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. 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) v. 2952-1366 Quebec Inc.*[^3] 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.

As noted above, the transit authorities in this case argued that the respondents’ claim to purchase bus advertisements should be characterized as a positive right to inclusion in a particular government created means, or platform for, expression. 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.[^4] “Thus where the government creates such a means, it is generally entitled to determine which speakers are allowed to

[^3]: [2005] 3 SCR 141 [hereinafter *City of Montreal*] at para. 74. In *City of Montreal*, the Court determined 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. As an aside, this test is somewhat confusing. It almost suggests dueling 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-Dube’s approach in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 SCR 139. But see Richard Moon’s critique of Justice Lamer’s strictly functional approach in Richard Moon, *The Constitutional Protection of Freedom of Expression*, (University of Toronto Press: Toronto, 2000).

[^4]: *Supra* note 2 at para. 29.
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 under inclusive means of, or platform for, expression to an individual 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. The Dunmore criteria extend the scope of section 2(d) protection to claims of under inclusivity only where the claim is grounded in a fundamental Charter freedom rather than access to a particular statutory regime, the exclusion results in a substantial interference with the protected activity (or that is the exclusion’s purpose) and where 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* would not satisfy the criteria established in *Dunmore* and adopted in *Baier*. There was nothing to suggest that

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6 [2007] 2 SCR 673.
9 *Supra* note 1 at para. 105. For example, the criteria are 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.*
the respondents in this case 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.

i) 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 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. The Court denied the claim on the basis that what the claimants sought was inclusion in an under inclusive statutory scheme, that this was the hallmark of a positive rights claim and that this was not a positive rights claim that met 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 under inclusiveness 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.

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10 Supra note 6. One might question, as did Justice Lebel in his concurring opinion in Baier, whether the claim in this case even engages 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).

11 Supra note 1 at para. 32. “Suffice it to say that to succeed in its claim of under inclusiveness B.C. transit had to at least demonstrate that the respondents themselves were excluded from the particular means of expression.”
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 are entitled to use – without undue state interference with the content of their expression.

ii) Problem With Relying on 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 opinion, stems from the analytical significance they attribute 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 will apply – where the exclusion is based on the content of the expression Baier will not apply.\(^\text{12}\) 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.”\(^\text{13}\)

\(^{12}\) *Supra* note 1 at para. 32.

\(^{13}\) *Ibid.* at para. 109
Even setting aside the implausible notion of disaggregating the speaker from the speech, under the majority’s analytical approach any policy of this nature that targets groups rather than content would be subject to the more stringent *Baier/Dunmore* criteria. But for those groups that might find shelter under the equality guarantees of section 15, this could lead to absurd results for many groups or classes of people seeking access to government created means of expression.\(^{14}\) For example, if the transit policies had prohibited groups whose mandate included political advocacy or democratic awareness, the more restrictive *Baier* analysis would apply under the majority’s approach and the outcome of this appeal would have been different. Perhaps even more notably, had the policies prohibited advertisements by unions, for example, then under their approach, *Baier* would have applied and the claimants in this case would have been unsuccessful in regards to the very same expression that in this case was found to be protected. The outcome would have been different simply because the policy targeted not political content but potentially politicized groups.

There is a second problem related to the analytical significance that the majority attributes to the distinction between restricting groups or individuals and restricting content. The majority’s reasoning 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,

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\(^{14}\) 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 regardless. 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* only be applied in expression cases involving groups!
does not apply. In other words, the 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. In Native Women’s Association, 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, that “generally the government was under no obligation to fund or provide a specific platform of expression to an individual or group”. The outcome of Native Women’s Association of Canada v. Canada would likely have been the same under the majority’s Vancouver Transportation 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 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 hypothetical may be moot in terms of outcome because the government in this particular factual circumstance would perhaps (although not necessarily) be entitled to deny the opportunity under the time, place and manner restrictions to section 2(b) dictated by the City of Montreal

\[15\] 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.

\[16\] [1994] 3 SCR 627.


\[18\] Supra note 16 at 655.
Regardless, it is not irrelevant in terms of illuminating 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. 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

iii) 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 on an examination of the claim itself – what exactly is the expressive right sought?
In this case it is the right to access a government created space for private advertising.

In his concurring opinion Justice Fish, who dissented from the majority in Baier,
adopted an analysis that does exactly 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 transit authorities assertion that a positive rights
(Baier/Dunmore) analysis ought to be applied. Justice Fish suggested that courts ought to

19 Supra note 3.
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 argument’ advanced below is similar to the one adopted by Justice Fish – although it would potentially result in a more restrictive standard as to when Baier/Dunmore applies than would Justice Fish’s approach. The approach suggested in the paragraphs to follow is that i) the issue should be characterized based on the nature of the claim not the nature of the restriction (unlike what the majority did) and ii) that the Baier/Dunmore 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 Baier/Dunmore 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 Baier/Dunmore criteria

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20 Supra note 1 at para. 103
21 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 3. Instead he resorts back to Justice Lamer’s approach in the pre-City of Montreal case of Committee for the Commonwealth of Canada v. Canada, supra note 3. 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 Richard Moon, The Constitutional Protection of Freedom of Expression, supra note 2. 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/Baier issue, is a complete departure from current case law on expressive rights on public property.
without resorting to the problematic reasoning adopted by the majority in *Vancouver Transportation*.

The cases in which a section 2(b) argument has been denied on the basis that the claimant seeks a positive right not obligated by the government have typically been one of two types. 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, a claim that section 2(b) requires that where the government has created a means or forum for the government to access or receive opinion or information than 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 v. Canada* and it involved a claimed right to vote in a referendum. 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

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22 *Supra* note 17.
– by whatever method it chooses. Section 2(b) does not circumscribe the government’s ability to choose its sources of expertise, advice and opinion.\(^{23}\)

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.\(^{24}\) In *Allman v. Northwest Territories (Commissioner)* the court of appeal upheld a three-year residency requirement to vote in a plebiscite on whether the North West Territories should be divided. The court followed the ruling in *Haig* that, in seeking public opinion on an issue, the government is not constitutionally obligated to seek everyone’s opinion.\(^{25}\) 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.\(^{26}\)

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 for access to a narrowly defined audience created by the government to carry out government related functions.

\(^{23}\) As compared, for example, to section 15 or section 35 which do impact the government’s ability in this respect.


\(^{26}\) *Supra* note 16.
The first of these two cases is *O.P.E.I.U., Local 378 v. British Columbia Hydro and Power Authority*. 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 proposed outsourcing agreement violated section 2(b) was refused. It 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. The Court denied the claim on the basis that what the claimants sought was inclusion in an under inclusive statutory scheme, that this was the hallmark of a positive rights claim and that this was not a positive rights claim that met 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 claim in *Baier* is actually even more narrow than this given that the claimants not only sought an

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29 Supra note 6. One might question, as did Justice Lebel in his concurring opinion in *Baier*, whether the claim in this case even engages 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*. 
audience with the school board of trustees but also an ability to, if elected, have decision making powers as a school board trustee.

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 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.\(^{30}\) In *Hogan* the 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 that government funding and campaigning for the ‘Yes’ side meant the government was required to provide funding to the ‘No’ 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 only place collect calls.\(^{31}\) 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 *Baier/Dunmore* 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, it also leaves the government relatively free to consult with whomever it sees fit\(^{32}\) and unrestrained in its discretion (in this context) to allocate funds as it deems appropriate. Application of the *Braier/Dumore* 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.

In *Vancouver Transportation* the majority rightly clarifies that “if government support or enablement were all that was required to trigger a ‘positive rights analysis’, it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis…”\(^{33}\) But 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

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\(^{32}\) 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.

\(^{33}\) *Supra* note 1 at para. 34.
particular means of expression.”34 Surely a claim for enablement to access a particular
government created means of expression is not enough to trigger a positive rights
analysis? 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. Wouldn’t a request for a permit to hold a demonstration on the public
stage in a government owned park be considered a claim that the government enable one
to express oneself through a particular government created means? The majority would
agree that such a claim ought not to trigger Baier/Dunmore.

They go on to draw the questionable conclusion 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.” 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 requesting 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 was established, creates the difficult (to the
point of arbitrary) task of trying to parse out the difference between positive versus
negative action, enablement versus enablement tied to a particular means of expression,
granting versus taking away, excluding versus not including, statutorily created

34 Ibid. at para. 35.
government platforms versus non-statutorily created government platforms and of course speakers versus speeches.

So then what ought the Court to have done? There is a qualitative difference between a claim such as the one made in *Vancouver Transportation* 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* 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 gardens than like a right to be consulted by the government during their 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’ ‘suggestion that the *Baier* analysis ought to apply to the facts of *Vancouver Transportation* should have been dismissed on the basis that the claim sought was unrelated to the very narrow circumstances in which a positive rights type *Baier/Dunmore* 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 enablement tied to government created means versus general enablement.

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35 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.
There are a number of factors that a court ought to consider in an assessment as to whether a claim requires the *Baier/Dunmore* 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 (for the government’s ear or the government’s purse) in which the principle regarding access to government platforms was established, then the *Baier/Dunmore* 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 *Baier/Dunmore* analysis, regardless of the nature of the restriction, should not be applied.

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

**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 determined whether this violation could be justified. They determined that although the transit authorities’ policies were proscribed 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 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.36

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

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.37

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.

The Court 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 that was likely to
cause offence to any person or group of persons or create controversy, as determined by
the prevailing community standards of tolerance. The Court 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

36 Supra note 1 at para. 4.
37 Ibid. at para. 76.
“controversy” is unnecessarily broad.”\textsuperscript{38} 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{39}

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 are offensive advertisements on government owned property and what are merely controversial advertisements on government owned property. Unfortunately as discussed below, it is a challenge to which the Court’s reasons gave only partial and notably problematic guidance. The decision focuses primarily on political advertising as that was what was at issue in \textit{Vancouver Transportation}; however, the Court draws conclusions and makes suggestions which, when considered in the context of advocacy advertising, are problematic.

As the majority notes, 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 do not outright adopt the community standards of tolerance test they suggest \textit{twice} that this may be the appropriate standard. Moreover, it is the only possible standard that they discuss.

\textsuperscript{38} \textit{Supra} note 1 at para. 77.
\textsuperscript{39} \textit{Ibid.}
It is first suggested in their discussion regarding the over breadth 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 suggest 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 behavior”. Advertising Standards Canada’s *Canadian Code of Advertising Standards*, in addition to rejecting advertising that contains discriminatory content or condones violence or unlawful behavior also rejects advertising that “displays obvious indifference to, or encourages, 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 juxtaposes 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 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 very soon will arise and cause controversy for public transit officials.

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40 *Supra* note 1 at para. 77.
across Canada.\textsuperscript{43} Are these advertisements controversial or 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.\textsuperscript{44} Not only do 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-\textit{Butler} harm based version. That is to say, 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, purported 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, an examination of adjudications of complaints by Advertising Standards Canada’s Consumer Response Councils indicates

\textsuperscript{43} \textit{Supra} note 2.

\textsuperscript{44} \textit{Supra} note 1 at para 78 where they cite \textit{R. v. Labaye}, [2005] 3 SCR 728. In \textit{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 behavior.
that the standard is not based on harm but rather based on notions of propriety and decency.\textsuperscript{45}

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

\textsuperscript{45} See for example a 2009 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 prohibiting unacceptable portrayals and depictions on the basis that they would disregard prevailing standards of decency among a significant segment of the population. Had the advertisement not been shown during family programming the complaint would not have been upheld (http://www.adstandards.com/en/standards/adComplaintsReportsSearch.asp, accessed August 27, 2009). 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.
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.47

Even assuming that it were possible for a judge to accurately and objectively assess the community’s sense of decency, it is questionable whether this should be the constitutional marker used to determine as 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 Re Vancouver Sun and Gay Alliance.48 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

(1) homosexuality is offensive to public decency and that the advertisement would offend some of its subscribers;
(2) that the Code of Advertising Standards, a Code of Advertising Ethics subscribed to by most of the daily newspapers in Canada includes the following section: "Public decency--no advertisement shall be prepared, or be knowingly accepted which is vulgar, suggestive or in any way offensive to public decency” and that the advertisement in question did not conform to the standards therein set out; and;
(3) that the Appellant newspaper had a duty to protect the morals of the community.49

47 Labaye, supra note 44.
49 Ibid.
The Gay Alliance made a complaint under section 3 of the *British Columbia Human Rights Code* which at the time stipulated that the newspaper could not deny a service that it offers to any particular member of the public unless reasonable cause exists for so doing. Sexual orientation was not, at that time, a prohibited ground of discrimination under the *British Columbia Human Rights Code*.50 The unreasonable denial of a publicly available service to anyone was, however, prohibited. While the Gay Alliance was successful before the Board of Inquiry, the British Columbia Court of Appeal, whose decision was affirmed on appeal,51 determined that the Vancouver Sun had not violated the Code; 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. The court noted that:

> [t]he subject-matter of homosexuals or homosexuality is so notorious that some degree of judicial notice may be taken of the subject-matter. Many people in our society may well entertain a bias or some predisposition against homosexuals or homosexuality on moral and/or religious grounds. It cannot therefore be justly said that a bias so held has no reasonable foundation.52

It is likely that in 1977 a significant segment of the public did consider homosexuality indecent. It is even more likely that regardless, it would be reasonable for the newspaper to assume this and correspondingly decide to refuse the advertisement. A newspaper,

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50 I am indebted to Dianne Pothier for pointing out to me that at that time grounds of discrimination were not an essential element of a human rights complaint in British Columbia.

51 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”, 13 Windsor Y.B. Access to Just. 3 at 37.

provided it does not violate human rights codes, 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 “displays obvious indifference to, or encourages, gratuitously and without merit, conduct or attitudes that offend the standards of public decency prevailing among a significant segment of the population”?

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 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 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?

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53 Canadian Advertising Standards, *supra* note 45.
ii) 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 assessments as to majoritarian perspectives on what is offensive. 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 communities standards of tolerance for the degree of harm posed by the sexual activity at issue.\textsuperscript{54} Chief Justice McLachlin, writing for the majority in \textit{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.

\textsuperscript{54} \textit{Labaye, supra} note 44.
from which all other normative positions are judged.\textsuperscript{55} She argues that the Constitution articulates both. She suggests that the \textit{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 she identifies being autonomy, human dignity and respect for the parallel rights of others.

In \textit{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.\textsuperscript{56} Under her approach in \textit{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.\textsuperscript{57} However, the current test remains reliant on the higher order values underpinning the protection. Under the current test, established in \textit{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

\textsuperscript{56} [1991] 1 SCR 139.
\textsuperscript{57} 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 \textit{supra} note 2 for a discussion on this point.
conflict with the purposes which s.2(b) is intended to serve, namely (1) democratic discourse (2) truth finding and (3) self-fulfillment.58

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 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?

iii) 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 standards of tolerance or sense of what is decent with respect to any of these three examples. Does it depend on the community where the bus operates? Should 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? Is it the business community?

Instead of attempting to determine the distinction between offensive and controversial content based on a community standards test, let’s consider the issue with reference to the liberty two-step? 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

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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 would 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\textsuperscript{59} will 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 will be the same.

As the majority noted in \textit{Vancouver Transportation}, location matters, as does audience.\textsuperscript{60} 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 advertisements placed on the outsides of buses and 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 protestors 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 citizens would have the ability to avert their eyes without much difficulty.

\textsuperscript{59} While \textit{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 \textit{Charter} challenge to the criminal regulation of sexual activity.

\textsuperscript{60} See also \textit{Canada (Attorney General) v. JTI-MacDonald Corp.}, [2007] 2 SCR 610.
Transit users will also be exposed only briefly – although perhaps repeatedly - to advertisements on the sides 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’.\(^{61}\)

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.\(^{62}\)

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.)

\(^{61}\) The Court in *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] SCC 37 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.

\(^{62}\) *Supra* note 44.
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 ad 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 or that 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 ad 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 the court 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 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.