

British Columbia Court Of Appeal Orders Vancouver Transit Authority To Reconsider Selling Ad Space To Anti-Abortion Group

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In [Canadian Centre for Bio-Ethical Reform v South Coast British Columbia Transportation Authority](#), (**CCBR v TransLink**), the British Columbia Court of Appeal unanimously allowed an appeal brought by the Canadian Centre for Bio-Ethical Reform (**CCBR**), and ordered the South Coast British Columbia Transportation Authority (**TransLink**) to reconsider its 2015 decision to disallow the pro-life / anti-abortion group to purchase advertising space on public buses. The Court also quashed TransLink's cross appeal of an evidentiary ruling made by the chambers judge, which precluded TransLink from tendering an expert report as evidence in response to the CCBR's judicial review application.

CCBR v TransLink marks a significant development in Canadian jurisprudence concerning the right to freedom of expression guaranteed by section 2(b) of [the Canadian Charter of Rights and Freedoms](#) (**the Charter**), and will likely have broad implications on future interactions between individuals or groups, such as the CCBR, and organizations or service providers, like TransLink, which are deemed to be "government" within the meaning of section 32 of the Charter.

This case serves as a pointed reminder to government decision-makers to provide reasons for their decisions and clearly articulate that consideration was given to **balancing the moving party's Charter rights with the decision-maker's statutory mandate**, as Canadian courts cannot substitute their own justifications for a decision or speculate **what findings may have been made in the absence of articulated reasons** by the decision-maker.

Procedural Background and Facts

In early 2015, the CCBR sought to purchase advertisement space on Metro Vancouver buses with TransLink's advertising agent, Lamar Transit Advertising Canada Ltd. (**Lamar**). The CCBR's proposed advertisement contained colour images of human fetuses at varying stages of development, and text proclaiming, among other things, "7-Weeks GROWING", "16-Weeks GROWING", and "GONE", followed by the words "ABORTION KILLS CHILDREN" and a URL for the CCBR's website.

Representatives for Lamar refused the CCBR's proposed advertisement on the basis that the images of the fetuses were "graphic" and contravened TransLink's advertising policy, which prohibits advertisements that are "of questionable taste or in any way offensive in style, content or method of presentation."

The CCBR and their counsel challenged this decision with various Lamar and TransLink representatives, including TransLink's director of customer engagement and marketing, and the individual responsible for administering TransLink's advertising policy (the Director). On February 12, 2015 the Director informed the CCBR's counsel via email that TransLink supported Lamar's refusal to place the CCBR's advertisement as it was against TransLink's advertising policy (the February Email). He also directed the CCBR to review TransLink's advertising policy should they wish to challenge this decision further.

In July 2015, the CCBR filed a petition for judicial review of TransLink's refusal to run the advertisement. In November 2016, the parties came before a chambers judge, who directed both the CCBR and TransLink to exchange expert evidence summaries and reports. In April 2017 the parties again appeared before the chambers judge. At this time he disallowed TransLink from tendering its expert report, but upheld TransLink's decision to refuse the CCBR's proposed advertisement on the basis that it could cause psychological harm to children and women. According to the chambers judge, although the Director had made a discretionary administrative decision on behalf of TransLink, which infringed on the CCBR's section 2(b) Charter rights, the decision was reasonable and reflected a proportionate balancing of TransLink's statutory mandate with the CCBR's Charter rights. The chambers judge went on to state that he had accessed the CCBR's website and reviewed some of the group's more graphic content. Due to the fact that the proposed advertisement referenced the CCBR's website, the judge held that this further supported TransLink's decision to deny the CCBR's request.

The CCBR appealed the [chambers judge's ruling](#) on the basis that the judge erred in finding justification for the Director's decision outside of the February Email, and by accessing the CCBR's website. TransLink cross appealed a portion of the chambers judge's decision and the resulting order, which precluded TransLink from tendering expert medical evidence that had not been before the Director.

Court of Appeal Analysis and Decision

The Court of Appeal considered several issues as part of this decision:

1. did the chambers judge err in dismissing the CCBR's application for judicial review of TransLink's decision;
2. did the chambers judge err by looking beyond the record and accessing the CCBR's website; and
3. did the chambers judge err in refusing to admit TransLink's expert affidavit evidence (evidence that was not before the decision-maker)?

1. Dismissal of CCBR 's Application for Judicial Review

Although the Court of Appeal agreed with the chambers judge that the appropriate standard of review was reasonableness, it unanimously held that he erred in finding the

Director's decision reasonable and should not have dismissed the CCBR's application for judicial review.

According to the Court, the Director's February Email provided no basis for his decision to find the CCBR's proposed advertisement to be a contravention of TransLink's advertising policy, even in light of the record. The February Email also failed to acknowledge the CCBR's right to freedom of expression and did not explain how TransLink's denial represented a proportionate balancing of the CCBR's Charter rights with TransLink's objectives to provide a safe and welcoming transit system. Lastly, the Court found that the record was unclear with respect to the nature of the information that the Director had before him at the time he made his decision.

The Court of Appeal did not accept TransLink's argument that it was open to the chambers judge to find the Director's refusal reasonable on the basis of factors he did not consider or failed to articulate to the CCBR, simply because one or more of those factors (such as psychological harm) could have justified his decision. While the Court acknowledged that in some instances where reasons are non-existent or insufficient it may be appropriate for a reviewing court to "connect the dots on the page..." for a decision-maker, the sheer dearth of any meaningful reasoning on the part of the Director in this case rendered that inappropriate.

2. Accessing the CCBR Website

The Court of Appeal noted that the Director had not accessed the CCBR's website in coming to his decision, and TransLink had not sought to tender the website as evidence. It was, in fact, the chambers judge who revealed that he took it upon himself to peruse the CCBR's website and consider its contents in reaching his final decision.

According to the Court, although it is not improper for a judge to consider authorities not cited by the parties, it is improper for a judge to go beyond the material that was before the decision-maker and to take that information into consideration - particularly without notice to the parties. In light of the foregoing, the Court held that although the impugned advertisement referred to the CCBR's website, the chambers judge's review of the CCBR's website fell beyond the scope of the record, and therefore should not have formed part of the judge's reasonableness analysis.

Importantly for TransLink (and other section 32 "government" entities), and notwithstanding the above, the Court of Appeal refused the CCBR's submission that an order in the nature of mandamus be issued, which would have required TransLink to accept the proposed advertisement. Instead, the Court of Appeal remitted the matter to TransLink for reconsideration, and stated that "this is not a case in which it can be said that any decision refusing the advertisement would be unreasonable." [Emphasis added]

3. Refusing to Admit TransLink 's Expert Evidence

Lastly, the Court held that it had no jurisdiction to entertain TransLink's cross appeal of the chambers judge's refusal to admit specific expert evidence as enumerated in the judge's formal order. The Court reminded readers that it is "well-established that the operative terms in an order are limited to the court's ultimate disposition of the matter

before it," and concluded that TransLink's cross appeal amounted to an attempt to appeal an evidentiary 'ruling' that should never have been referred to in the order at all.

Implications

This case should serve as a cautionary tale for section 32 "government" entities and inform how they interact with groups seeking to express themselves - particularly where those ideas are contentious or provocative. In situations where a government decision-maker has decided to deny or place limits on a party's attempt to express a particular belief or viewpoint, the Court of Appeal in *CCBR v TransLink* is clear that the decision-maker must provide reasons for that decision and demonstrate that the party's Charter right to freedom of expression was considered and balanced with the decision-maker's statutory mandate. Failure to provide insight into the decision-maker's reasoning process may result in a reversal of the decision-maker's decision, or a remittal of that decision to the decision-maker for reconsideration, as there are limitations on reviewing courts with respect to drawing conclusions on behalf of a decision-maker and considering authorities not cited by the parties.

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