The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R. v. *Grant*, 2009 SCC 32

http://scc.lexum.org/en/2009/2009scc32/2009scc32.html

In this case, the Supreme Court of Canada (SCC) created a new test for determining whether evidence obtained by a Charter breach should be excluded under s. 24(2) of the Charter, replacing the test from R. v. Collins. The R. v. Grant case was released concurrently with R. v. Harrison, 2009 SCC 34.

Date Released: July 17, 2009

The Facts

Three police officers were on patrol for the purposes of monitoring an area near schools with a history of student assaults, robberies and drug offences. Two of the officers were dressed in plainclothes and driving an unmarked car, while the third was in uniform driving a marked police car. Mr. Grant, a young black man, was walking down the street when he came to the attention of the two plainclothes officers. As they drove past, Mr. Grant stared at them and started to fidget with his coat and pants, prompting the officers to request that the uniformed officer stop and speak with Mr. Grant to determine if there was any cause for concern. The uniformed officer approached Mr. Grant on the sidewalk and requested that he provide identification. Mr. Grant was behaving nervously and was about to adjust his jacket when the officer asked Mr. Grant to keep his hands in front of him. After observing the exchange from their car, the two plainclothes police officers approached the pair on the sidewalk and identified themselves as police officers. The three police officers blocked Mr. Grant's path on the sidewalk and asked him if he was in possession of anything that he shouldn't be. Mr. Grant told the police that he was in possession of "a small bag of weed" and a firearm. At this point the officers arrested and searched Mr. Grant, seizing a bag of marijuana and a loaded gun. They advised him of his right to counsel and took him to the police station.

At trial, Mr. Grant alleged that his rights under ss. 8, 9 and 10(b) of the *Canadian Charter of Rights and Freedoms* had been violated.

> ***Canadian Charter of Rights and Freedoms***
> 8. Everyone has the right to be secure against unreasonable search and seizure.
>
> 9. Everyone has the right not to be arbitrarily detained or imprisoned.
>
> 10. Everyone has the right on arrest or detention
> (b) To retain and instruct counsel without delay and to be informed of that right

The trial judge found that Mr. Grant was not detained before his arrest and that ss. 9 and 10(b) of the *Charter* were not infringed. The gun was admitted into evidence and Mr. Grant was convicted of firearm offences. The conviction was appealed.

The Court of Appeal for Ontario held that s. 9 of the *Charter* was infringed because the officers had no reasonable grounds to detain Mr. Grant. However, the court held that the firearm should be admitted under s. 24(2) and Mr Grant's conviction was upheld. Mr. Grant appealed the decision to the SCC.

> ***Canadian Charter of Rights and Freedoms***
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Decision

Whether Mr. Grant was Detained

The Majority of the SCC defined "detention" as the suspension of an individual's liberty by a significant physical or psychological restraint. A psychological detention occurs where an individual has a legal obligation to comply, or where a reasonable person would conclude that, based on the police conduct, he had no choice but to comply. The court identified several factors to consider when determining whether there was a psychological detention. Such factors include:

(1) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focused investigation.

(2) The nature of police conduct, including the language used, the use of physical contact, the place where the interaction occurred, the presence of others and the duration of the encounter.

(3) The particular characteristics or circumstances of the individual where relevant, including age, physical stature, minority status and level of sophistication.

The Court held that Mr. Grant was psychologically detained when he was told to keep his hands in front of him and when the police officers stopped him from walking away. As a result, Mr. Grant was arbitrarily detained in violation of s. 9 of the *Charter.* The right to counsel arises immediately upon detention and the police failed to notify Mr. Grant of his right to speak to a lawyer before they

began the questioning that led to discovery of the firearm. Therefore, the majority of the SCC concluded that Mr. Grant was also denied his right to counsel in violation of s. 10(b) of the *Charter.*

Whether Evidence Should be Excluded under s. 24(2)

After determining that Mr. Grant's *Charter* rights were violated, the court addressed the application of s. 24(2) of the *Charter.* Section 24(2) deals with the exclusion of evidence in a trial. When evidence is obtained through the violation of a *Charter* right, claimants may apply under s. 24(2) of the *Charter* to have the evidence excluded from the trial.

The majority of the SCC replaced the *Collins* test (the previous test for determining the exclusion of evidence) and created a new three-part test to determine whether admitting evidence obtained by a *Charter* breach would damage the reputation of the justice system. The Court outlined the following factors for deciding whether or not to exclude evidence in the event of a *Charter* breach:

(1) Seriousness of the *Charter*-infringing state conduct
- This inquiry focuses on the severity of the state conduct leading to the *Charter* breach, and includes an analysis of whether the breach was deliberate, and whether the officers were acting in good faith.

(2) Impact on the *Charter*-protected interests of the accused
- This inquiry focuses on how the accused person was affected by the state conduct. Depending on the *Charter* right engaged, this could include an analysis of the intrusiveness into the person's privacy, the direct impact on the right not to be forced to incriminate oneself, and the effect on the person's human dignity.

(3) Society's interest in an adjudication on the merits
- This inquiry focuses on how reliable the evidence is in light of the nature of the *Charter* breach, importance of the evidence to the Crown's case, and seriousness of the offence.

The SCC held that despite the *Charter* breaches, the gun should not be excluded as evidence against Mr. Grant and, consequently, the conviction was upheld.

The Dissent

Justice Deschamps, in a concurring decision, agreed with the majority's conclusion that the gun should not be excluded, but disagreed with the majority's proposed test. She proposed a simpler two-part test for s. 24(2) of the *Charter* that balances two aspects:

(1) The public interest in protecting *Charter* rights.
- Considerations include police conduct, nature of the evidence, nature of the violated right, urgency of the situation, and clarity of the law. The judge should consider the long-term impact of admission on every individual whose rights might be violated in a similar way, rather than only focusing on the rights of the accused being tried.

(2) The public interest in an adjudication on the merits.

- With respect to the benefits of getting to the truth of what happened, the judge should consider reliability of the evidence, how important it is to the prosecution's case, and the seriousness of the offence being tried.

In Justice Deschamps' opinion, the court should be focused not on the individual accused, nor on the conduct of the police in the case, but on the public interest.

Discussion Issues

1. It is a balancing process to determine whether or not to exclude evidence that was obtained in breach of an individual's *Charter* rights. The court must assess the effect of admitting evidence on society's confidence in the justice system. Review the wording of s. 24(2) of the *Charter.* What does it mean to bring the administration of justice into disrepute? Discuss how the admission or exclusion of the gun as evidence could bring the administration of justice into disrepute?

2. Try applying the *Grant* test to the facts of the case. What type of analysis would you give for each step and why? Do you agree or disagree with the result reached by the SCC?

3. In applying step two of the three-part *Grant* test, the SCC ruled that "the impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale." Discuss this statement. Why was the police conduct not considered to be at the most serious end of the scale? In your opinion, what would constitute conduct at the most serious end of the scale? Do you think the SCC has adequately balanced the rights of accused with the power of police?

4. What do you think will be the implications of this case in the future? Do you think this will result in police conducting their investigations differently? Why or why not?

The Top Five 2009

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R. v. *Harrison*, 2009 SCC 34

http://scc.lexum.org/en/2009/2009scc34/2009scc34.html

In a decision rendered concurrently with R. v. Grant, 2009 SCC 32, the Supreme Court of Canada (SCC) applied the new analysis for excluding evidence under s. 24(2) of the Charter to determine if evidence of cocaine trafficking should be excluded.

Date Released: July 17, 2009

The Facts

The accused and his friend rented a vehicle and were driving from Vancouver to Toronto when a police officer noticed that the vehicle did not have a front license plate, which constitutes an offence in Ontario. After following and signalling the car to pull over, the officer realized that the car was registered in Alberta and therefore did not require a front license plate. The officer was informed by radio dispatch that the vehicle was rented at the Vancouver airport and, although he no longer had grounds to believe an offence was committed, pulled the vehicle over. The officer testified that he decided to pull over the vehicle anyway to preserve the integrity of the police in the eyes of observers.

The officer was suspicious because the vehicle appeared to be weathered and he was aware that rental cars were often used by drug couriers. He also knew that it was rare for drivers to drive that stretch of the road at exactly the speed limit, and was wary of contradictory stories given by the accused and his friend. The accused did not have his driver's license and the officer discovered that the license was under suspension, at which point he arrested him for driving with a suspended license.

The officer asked the accused and his friend if there were any drugs in the car to which they both answered no. The officer proceeded to search the vehicle anyway and testified that the search was incidental to the arrest in order to find the driver's license. The search uncovered two boxes containing 35 kg of cocaine, estimated to be worth approximately $4 million.

At trial, the judge held that the initial detention was based on mere suspicion, and that the officer did not have reasonable grounds for detaining the accused. The arrest was therefore contrary to s. 9 of the *Charter*. The trial judge also held that the search of the vehicle was not related to the charge of driving with a suspended license and was therefore a breach of s. 8 of the *Charter*.

Canadian Charter of Rights and Freedoms
8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

The issue in this case was whether the cocaine should be excluded from evidence under s. 24(2) of the *Charter.* Section 24(2) provides that once a court concludes that evidence was obtained in violation of an individual's *Charter* rights, the evidence must be excluded if its inclusion would harm the reputation of the administration of justice.

Canadian Charter of Rights and Freedoms
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The trial judge applied the test in *R. v. Collins* for determining whether evidence should be excluded under s. 24(2) of the *Charter*. On the seriousness of the breach, the trial judge was critical of the officer's conduct and concluded that the officer's actions "can only be described as brazen and flagrant." Further, the judge held that the officer was not credible when he testified. However, despite the seriousness of the breach, the trial judge found that the officer's actions were "pale in comparison" to excluding 35 kg of cocaine as evidence in the case. Therefore, the evidence was admitted and the accused was convicted.

The decision was appealed to the Court of the Appeal for Ontario. On appeal, the majority stated that it was a "close call" and upheld the trial judge's decision to admit the evidence. The accused appealed the decision to the SCC.

The Decision

Writing for the majority, Chief Justice McLachlin applied the new test for excluding evidence under s. 24(2), which had been established in *R. v. Grant,* replacing the *R. v. Collins* test. The SCC set out three factors a court must consider when determining if the admission of evidence obtained by a *Charter* breach would bring the administration of justice into disrepute:

(1) Seriousness of the *Charter*-infringing state conduct
- This inquiry focuses on the severity of the state conduct leading to the *Charter* breach, and includes an analysis of whether the breach was deliberate, and whether the officers were acting in good faith.

On the seriousness of the *Charter*-infringing state conduct, the majority found that the officer acted recklessly and displayed a blatant disregard for *Charter* rights.

(2) Impact on the *Charter*-protected interests of the accused

- This inquiry focuses on how the accused person was affected by the state conduct. Depending on the *Charter* right engaged, this could include an analysis of the intrusiveness into the person's privacy, the direct impact on the right not to be forced to incriminate oneself, and the effect on the person's human dignity.

On the impact of the *Charter*-protected interests of the accused, the majority found that the detention affected the privacy and liberty rights of the accused, and that individuals driving on the highway have an expectation that they will not be stopped, unless for valid highway traffic infractions. In this case, the Court ruled that the impact was "significant".

(3) Society's interest in an adjudication on the merits

- This inquiry focuses on how reliable the evidence is in light of the nature of the *Charter* breach, importance of the evidence to the Crown's case, and seriousness of the offence.

Here, the majority found that the cocaine was reliable evidence of a serious drug trafficking charge, which favoured admission of the evidence.

The majority went on to balance the factors and held that the seriousness of the breach outweighed the reliability of the evidence. The Court held that the conduct of the police that led to the *Charter* breaches represented a blatant disregard for *Charter* rights and was further aggravated by the officer's misleading testimony at trial. Therefore, the cocaine was excluded as evidence and the accused was acquitted.

The Dissent

Justice Deschamps, writing in dissent, stated that the majority attached excessive weight to the officer's conduct, which did not fall in the most severe category. Following her decision in *R. v. Grant,* she proposed a simpler two-part test for s. 24(2) which balances the public interest in protecting constitutional rights and the public interest in getting to the truth of what happened. Applying this test, she concluded that the evidence should have been admitted.

Discussion Issues

1. Both cases, *R. v. Grant* and *R. v. Harrison,* involved the application of s. 24(2) of the *Charter*, which requires courts to exclude evidence obtained in violation of *Charter* rights. Did the justices of the SCC apply the same standard in both cases? Why or why not? What factors led to different outcomes?

2. The majority held that "the price paid by society for an acquittal in these circumstances is outweighed by the importance of maintaining *Charter* standards. That being the case, the admission of the cocaine into evidence would bring the administration of justice into disrepute." Do you agree with the majority? Why should "tainted evidence" sometimes be excluded?

3. In *R. v. Grant*, the Court ruled that evidence that has been modestly tainted by police misconduct can be used to convict the accused, unless the violation of *Charter* rights was blatant and would shake public trust in the justice system. Discuss greater implications of this ruling on trial fairness, *Charter* rights and police investigations.

4. Do you agree with the trial judge's characterization that the police officer's conduct was "very serious" considering the accused was stopped for a short period of time, there was no use of force or violence, and the search was not of the person? Why or why not?

5. Chief Justice McLachlin stated: "the public expects police to adhere to higher standards than alleged criminals." Does this decision put more pressure on police to ensure investigations are carried out appropriately, given the consequences of excluding such a large quantity of drugs as evidence?

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Alberta v. *Hutterian Brethren of Wilson Colony*, 2009 SCC 37

http://scc.lexum.org/en/2009/2009scc37/2009scc37.html

This case addressed whether the new licensing requirements in the province of Alberta, requiring every driver's license to contain a photograph of the licensee, violates freedom of religion under s. 2(a) of the Charter.

Date released: July 24, 2009

The Facts

The province of Alberta requires everyone who drives a motor vehicle to hold a driver's license. Since 1974, every license has had a photograph of the license holder, with exemptions made for individuals who objected to having their photographs taken for religious reasons. Those exempted would be granted a license without a photograph. In 2003, the province adopted a new regulation under s.14(1)(b) of Alberta's *Operator Licensing and Vehicle Control Regulation*, which made the photo a requirement, without exception, for every driver's license. Photographs taken at the time of issuance of the license would be placed in the province's facial recognition data bank and scanned using facial recognition software. There were about 450 non-photo licenses in Alberta, 56 percent of which were held by members of Hutterian Brethren colonies.

The Wilson Colony of Hutterian Brethren maintains a rural, communal lifestyle, carrying on a variety of commercial activities. They sincerely believe that the Second Biblical Commandment—you shall not make yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth—prohibits them from having their photograph willingly taken. Under the new law, Colony members holding licenses without photographs must have images taken when renewing their licenses.

The province proposed two measures to accommodate the Hutterian's objections; however, the Colony rejected both revisions as they still required the taking of a photo. The members of the Colony challenged the constitutionality of the regulation, alleging an unjustifiable breach of their religious freedom. This case proceeded on the basis that the universal photo requirement violated s. 2(a) of the *Canadian Charter of Rights and Freedoms*.

> *Canadian Charter of Rights and Freedoms*
> 2. Everyone has the following fundamental freedoms:
> (a) Freedom of conscience and religion

At trial, the Colony claimants asserted that if members of their colony could not carry out their responsibilities because of not being able to renew/obtain a license, it would negatively affect the viability of their communal lifestyle. The Province argued that the new system was connected to provincial efforts aimed at minimizing identity theft associated with driver's licenses, and that the new facial recognition data bank was aimed at reducing the risk of this type of fraud. Both the trial judge and the majority of the Alberta Court of Appeal held that the new law violated the Colony's freedom of religion, and that the infringement was not justified under s. 1 of the *Charter*. The Province appealed to the Supreme Court of Canada (SCC).

> ***Canadian Charter of Rights and Freedoms***
> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Decision

All seven judges of the SCC agreed that the regulation infringed s. 2(a), but they were split 4 to 3 on whether the limit could be justified under s.1. The majority of the SCC held that the new photo requirement was a justified limitation on the s. 2(a) right to freedom of religion.

In determining whether the infringement of s. 2(a) was justified under s. 1 of the *Charter*, the Court applied the *R. v. Oakes* test, which is used to weigh whether a particular limitation on an individual's rights and freedoms should be allowed in a free and democratic society. It seeks to balance the benefits of the purpose of the law with the harmful effects of the infringement. The *Oakes* test requires the government to convince the court that the law is justified:

(1) There is a "pressing and substantial" objective that justifies infringement of the right;

(2) The way it has chosen to obtain the objective is reasonable, which involves a three-step "proportionality test":
   a. The measure used must be carefully designed, or "rationally connected", to achieve the objective;
   b. The measure used should impair the right as minimally as possible; and
   c. The negative effects of the measure must be balanced by the actual benefits of that result from it.

Chief Justice McLachlin, writing for the majority of the court (Binnie, Deschamps and Rothstein JJ. concurring), held that the objective of a universal photo requirement is to have a complete digital bank of facial photos to prevent wrongdoers from using driver's licenses for identity theft, and ensuring that no individual has more than one license. The majority held that this objective was of pressing and substantial importance.

The majority held that the universal photo requirement is rationally connected to the government's goal of protecting the integrity of the driver's licensing system, and reducing the likelihood of identity theft. The Court ruled that the non-photo identification card proposed by the Colony did

not meet the government's objective of preventing identity fraud because it lacked a photo to be entered in the data bank. This type of license would not prevent a person from assuming someone's identity using the license in conjunction with other fraudulent documents. The majority held that the photo requirement ensures that no person holds more than one license, enhancing the security of the licensing system and therefore being rationally connected to the objective of the provision.

The majority also found that the new regulation minimally impaired the Colony member's s. 2(a) rights as there were viable alternatives available to the Colony. The majority was of the view that it is possible to hire other individuals with driver's licenses or to arrange third party transport for necessary services.

In determining whether the effects of the new regulation were proportionate with the government's objectives, the court identified three major benefits associated with the universal photo requirement:

(1) Enhancing the security of the driver's licensing scheme;
(2) Assisting in roadside safety and identification; and
(3) Eventually harmonizing Alberta's licensing scheme with those in other jurisdictions.

The harmful effects identified by the majority were primarily financial. The impact of the regulation would be to impose an additional cost on the community, as they would likely have to hire drivers to help them gather supplies and conduct business outside of their community. While the majority acknowledged that these costs would not be minor, they held that the costs did not deprive the Hutterites of the ability to pursue their religion. Therefore, the limit on religious practice associated with the universal photo requirement for obtaining a driver's license is proportionate to the government's objectives.

The Dissent

Justice Abella (Lebel and Fish JJ. Concurring) dissented on the issues of minimal impairment and proportional effects. They concluded that the inability to drive severely compromised the independence of the Hutterites' religious community, and that this regulation failed to minimally impair the Hutterites' freedom of religion. The dissent held that a license is of critical importance, especially in rural Alberta, and there are other approaches separate from the universal photo requirement which would establish a better balance between the societal and constitutional interests at stake.

With regard to proportionality, the dissent held that the benefits to the province were greatly disproportionate to the harm the Hutterites would suffer as a result of the regulation. They concluded that the benefit of requiring the Hutterites to be photographed for the purpose of reducing identity theft is trivial, based on the fact that hundreds of thousands of Albertans do not have a driver's licence and would therefore not be part of the proposed facial recognition database. The 250 Hutterites' photos in the database would not significantly enhance the government's objective, compared to the *Charter* intrusion.

The dissent disagreed with the majority that third party arrangements could be made for transport, as this view fails to appreciate the significance of the self-sufficiency of the Hutterites' religious community. The photo requirement forced the Hutterites to choose between compliance with their religious beliefs and the self-sufficiency of their community, a community that has preserved its religious autonomy through its communal independence.

Discussion Issues

1. Do you feel that the problem of identity theft is an important problem for the government to solve? Why or why not?

2. Before trial, the government of Alberta proposed two alternative measures for the Hutterites. The first was that the license display a photo, but that it be carried in a sealed envelope indicating it as provincial property, and the digital photo placed in the facial recognition bank. The second was that the digital photo be placed in the bank, but the license issued without a photo. These suggestions aimed to lessen the impact on the Hutterian Brethren by removing the need for colony members to have any direct contact with the photographs. The Colony proposed that no photograph be taken and that licenses be issued to them marked "Not to be used for identification purposes".

   What do you think of the alternatives proposed by government and the Hutterites? Do you think that the two alternatives proposed by the province of Alberta passed the minimal impairment test in s. 1 of the *Charter*? Can you think of any ways in which the government could have altered the law in order to achieve their stated goal without violating the Hutterites' religious beliefs?

3. The SCC held that the financial cost of hiring driving services would not deprive the Hutterite community of the choice to practice their religion. Do you agree with this? Why or why not?

4. Do you agree with Justice Abella's assertion that forcing the Hutterites to abide by s.14(1)(b) would not reduce identity theft because many Albertans do not have driver's licenses and are therefore absent from the photo imaging system? Why or why not?

5. Chief Justice McLachlin acknowledged in the majority decision that because of the diversity of religions and practices in the world today, that it is "inevitable that some… will come into conflict with laws… of general application." Do you think that the Courts adequately balanced the need for public safety with freedom of religion under the *Charter*? Why or why not? If you were a judge on the SCC, how would you have decided this case?

The Top Five 2009

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

http://scc.lexum.org/en/2009/2009scc31/2009scc31.html

This case dealt with whether a regulation banning "political" advertisements on buses violated freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms.

Date Released: July 10, 2009

The Facts

The public transportation authorities in British Columbia permit and generate revenue from commercial advertisements placed on the inside and outside of buses that operate in the province. The policies prohibit advertising that presents politically-oriented viewpoints, meetings, or organizations.

Transit Authorities' Advertising Policies

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.

In the summer and fall of 2004 the Canadian Federation of Students, British Columbia Component (CFS) and the British Columbia Teachers' Federation (BCTF) attempted to purchase advertising space on the sides of buses operated by the transit authorities. The CFS wanted to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting ads about the election on buses. In accordance with their advertising policies, the transit authorities refused to post the advertisements of the CFS and BCTF, which promoted an upcoming provincial election. The CFS and BCTF challenged the advertising policies on the grounds that articles 2, 7 and 9 violated their freedom of expression as protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

> *Canadian Charter of Rights and Freedoms*
> 2. Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The trial judge dismissed the action, finding that the respondents' right to freedom of expression had not been infringed. The majority of the Court of Appeal for British Columbia reversed the judgment and declared the relevant sections of the advertising policies to be of no force or effect. The decision was appealed to the Supreme Court of Canada (SCC).

The Decision

Whether the Charter Applies to the Transit Authorities

The first issue addressed by the SCC was whether the transit authorities should be considered "government" within the context of the *Charter.* In order to make a claim under the *Charter*, the infringing body or organization must be considered part of the government.

> *Canadian Charter of Rights and Freedoms*
> 32. (1) This Charter applies
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Court held that the *Charter* applies to government in all of its activities, as well as the activities of all agencies that are controlled by government. Additionally, the *Charter* applies to organizations that are controlled by government if their activities are "governmental in nature." Here, the transit authorities were considered "government" because the day-to-day operations were controlled by government; thus, the transit authorities had to act in accordance with the *Charter*.

Whether Freedom of Expression is Infringed

The Court then assessed whether the expression on the sides of buses should be protected by s. 2(b) of the *Charter.* Canadian courts have held that not all methods or locations of expression enjoy protection under s. 2(b); however, the courts have also recognized that s. 2(b) protects an individual's right to express him or herself in certain public places.

The Court held that buses are used for commercial expression and that the advertisements do not impede the primary function of the bus as a vehicle for public transportation. The Court held that the bus is a public place and passengers are exposed to the messages on the sides of a bus in the same way as a message on a utility pole or in any public space in the city. Therefore, advertisements on public buses are expressions protected by s. 2(b) of the *Charter* and the transit authority policies limited freedom of expression, contrary to s. 2(b).

Whether Transit Policies Reasonably Limit Freedom of Expression

The Court also assessed whether the limit on freedom of expression was justified under s. 1 of the *Charter*, as an infringement that is reasonable in a free and democratic society.

Canadian Charter of Rights and Freedoms

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In determining whether the infringement of s. 2(b) was justified under s. 1 of the *Charter*, the court applied the *R. v. Oakes* test, which is used to weigh whether a particular limitation on an individual's rights and freedoms should be allowed in a free and democratic society. It seeks to balance the benefits of the purpose of the law with the harmful effects of the infringement. The *Oakes* test requires the government to convince the court that the law is justified:

(1) There is a "pressing and substantial" objective that justifies infringement of the right;

(2) The way it has chosen to obtain the objective is reasonable, which involves a three-step "proportionality test":
   a. The measure used must be carefully designed, or "rationally connected", to achieve the objective;
   b. The measure used should impair the right as minimally as possible; and
   c. The negative effects of the measure must be balanced by the actual benefits of that result from it.

In applying the *Oakes* test, the Court ruled that while the stated purpose of providing "a safe, welcoming public transit system" is a sufficiently important public purpose to allow for limits on freedom of expression, the limits imposed by the regulations are not rationally connected to that purpose. The Court found that the transit authorities' policies set out a blanket exclusion of political advertising, and held that this exclusion was so wide that it did not minimally impair the right to freedom of expression. In other words, the court found that the infringement on freedom of expression was not justified under s. 1 of the *Charter*.

Therefore, the advertisement policies were not a justifiable limit and, as a result of the violation of s. 2(b), the policies were struck down as invalid. This meant that the political advertisements qualified as a constitutionally protected form of expression and were therefore allowed on the buses.

Discussion Issues

1. Writing for the majority, Justice Deschamps noted that the ban on political advertising was not rationally connected to the aim of providing a "safe, welcoming public transport system":

   "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 advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the object of providing a safe and welcoming transit system will be undermined."

   Do you agree or disagree with her statements? Why or why not? Can you think of examples where the government could reasonably limit bus advertisements?

2. The courts have progressively recognized more public places as having protection under s. 2(b) of the *Charter*, including utility poles, town squares and the sides of buses. What implications do you think this ruling will have for expression in other public places? Can you think of examples of public places where freedom of expression might come into play?

3. In examining freedom of expression under the *Charter*, the location where the expressive activity takes place matters. Does the audience matter? Does it make a difference that bus riders are a captive audience and may have difficulty avoiding the advertising? Consider the demographic of bus passengers and the ability to choose whether to take public transportation or not.

4. Discuss whether a commercial aspect to freedom of expression exists? In this case, removing the political ban will likely increase the advertising revenues for the public transit authorities.

5. Why is freedom of expression so sacred in contemporary society?

The Top Five 2009

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

A.C. v. *Manitoba (Director of Child and Family Services)*, 2009 SCC 30

http://scc.lexum.org/en/2009/2009scc30/2009scc30.html

This case examined the ability of the courts to order medical treatment for children under 16 years of age.

Date Released: June 26, 2009

The Facts

A child in Manitoba, A.C., was admitted to hospital two months before her 15th birthday, suffering from gastrointestinal bleeding caused by Crohn's disease. The child, a devout Jehovah's Witness, had previously completed a medical directive containing written instructions not to be given blood transfusions under any circumstance, including potential medical emergencies. The child's doctor believed that the internal bleeding created an imminent and serious risk to her health and potentially her life. The child, however, refused to consent to receiving blood despite the professional medical opinion of her doctor, because of her religious beliefs. The majority of Jehovah's Witnesses believe that the Bible prohibits the ingestion of blood, including blood transfusions in medical emergencies.

The Director of Child and Family Services apprehended her as "a child in need of protection". As provided for under ss. 25(8) and (9) of the Manitoba *Child and Family Services Act (CFSA)*, the Director sought a treatment order from the court to authorize the medical treatment of the child. The *CFSA* gives the court this power when the court considers the treatment to be in the "best interests" of the child, and the child is still under the age of 16. The court ordered the child to receive the blood transfusions prescribed by her doctor; she survived and made a full recovery.

> ***Manitoba Child and Family Services Act***
>
> 25(8) Subject to subsection (9), upon completion of a hearing, the court may authorize a medical examination or any medical or dental treatment that the court considers to be in the best interests of the child.
>
> 25(9) The court shall not make an order under subsection (8) with respect to a child who is 16 years of age or older without the child's consent unless the court is satisfied that the child is unable.
>
> (a) To understand the information that is relevant to making a decision to consent or not consent to the medical examination or the medical or dental treatment; or
>
> (b) To appreciate the reasonably foreseeable consequences of making a decision to consent or not consent to the medical examination or the medical or dental treatment

The *CFSA* presumes that the "best interests" of a child over 16 years of age will be most effectively promoted by allowing their views to be determinative, unless the child does not understand or appreciate the consequences. Because the child is under 16, the court can authorize medical treatment through an interpretation of what is in the child's "best interest," with the child's views not being considered as the final decision.

The child and her parents appealed the court order for treatment arguing that it was unconstitutional because it unjustifiably infringed the child's rights under s. 2(a), 7, and 15(1) of the *Charter.* Unsuccessful at the provincial level, the case was brought before the Supreme Court of Canada (SCC).

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:
   (a) Freedom of conscience and religion;

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Decision

The SCC dismissed the appeal by a majority of 6 to 1, and declared ss. 25(8) and (9) of the *CFSA* constitutional. The majority held that when the "best interests" standard is properly interpreted, the legislative scheme does not infringe on s. 7, 15 or 2(a) of the *Charter* because it is neither arbitrary, discriminatory, nor infringes on religious freedom. When a child's "best interests" are interpreted in a way that sufficiently respects their capacity for mature and independent judgment in a medical decision-making context, the legislation remains constitutional.

Under s. 7 of the *Charter*, the majority held that, while it may be arbitrary to assume that children under the age of 16 do not have the ability to make responsible medical treatment decisions, the assumption is not arbitrary because children are given the chance to establish a maturity level that facilitates making such important decisions. A young person is entitled to lead evidence of sufficient maturity to have her wishes respected. Chief Justice McLachlin added that such legislation successfully balances society's interest in ensuring that children receive necessary medical care on the protection of their autonomy.

Accordingly, although s. 25(9) identifies 16 years of age as the threshold for ensuring self-determination, it does not constitute age discrimination under s. 15 of the *Charter* because the ability to make treatment decisions is "ultimately adjusted in accordance with maturity, not age." Additionally, the law is aimed at protecting the interests of minors as a vulnerable group by utilizing a rational standard that affords the child a degree of input, which is not discriminatory by the very definition of s. 15 of the *Charter*.

Finally, if the child is entitled to prove sufficient maturity, the Manitoba legislation cannot be seen to be violating their religious convictions under s. 2(a). Consideration of a child's "religious heritage" is one of the statutory factors to be considered in determining their "best interests" and therefore is not being unconstitutionally disregarded. Even if the child's religious beliefs are considered to be infringed upon, s. 1 of the *Charter* justifies the infringement "when the objective of ensuring the health and safety and of preserving the lives of vulnerable young people is pressing and substantial, and the means chosen – giving discretion to the court to order treatment after a consideration of the relevant circumstances – is a proportionate limit on the right."

The Dissent

Justice Binnie wrote that the *Charter* is not just about protecting "the freedom to make the wise and correct choice," but rather to protect the individual autonomy and religious freedom to refuse medical treatment regardless of what the judge thinks is in their best interest. He expressed the opinion that the government has not shown that the limitations on the rights of mature minors are proportionate to the alleged positive effects. Justice Binnie concluded that the best interests of the child should be determined the child if she has the capacity to make the decision and understand the consequences.

Contrary to the majority's opinion, Justice Binnie found that the provisions violated ss. 2(a) and 7 of the *Charter*. The presumption that a child under the age of 16 lacks capacity arbitrarily denies mature minors the same rights as children over the age of 16. It limits their religious freedoms and infringes on their life, liberty and security of the person in an arbitrary manner that is not proportionate to the positive effects the laws have on immature minors, which he argues are none. The benefits of ensuring judicial control over medical treatment for "immature" minor is not advanced by overriding the *Charter* rights of "mature" minors under 16 years old who are not in need of judicial control.

Discussion Issues

1. Do you think the threshold age of 16 is an appropriate age at which to give individuals the autonomy to make decisions about their medical health? Should the age be lower or higher? Explain why.

2. Why do you think the courts are concerned with the child making a decision independent of parental influence? What potential consequences do you foresee?

3. Do you agree with the decision of the majority or Justice Binnie? Do you think the government should decide what is in the "best interests" of a child? If not, who should? Should the government be able to override parental decisions regarding the health of their child? Does your answer change depending on the age of the patient?

4. Is it more important to have the ability to make one's own health choices, regardless of age, or to ensure that human life is protected? Explain.