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November 14, 2023

Sent via e-mail from jdehaas@theccf.ca to Kim.Fallis-Howell@edmonton.ca and michelle.plouffe@edmonton.ca and Carrie.Hotton-MacDonald@edmonton.ca

Dear City Solicitor Plouffe, Deputy City Solicitor Fallis-Howell and Manager Hotton-MacDonald,

I am Counsel with the Canadian Constitution Foundation (the “CCF”), a non-partisan legal charity dedicated to defending the fundamental rights and freedoms of Canadians through communications, public education and litigation. The CCF was established in 2002 and has appeared at all levels of courts including the Supreme Court of Canada to assist with the proper interpretation of rights and freedoms.

I am writing to urge you to consider rescinding your unconstitutional new policy requiring media to “notify the City of Edmonton prior to reporting, filming or conducting business on ETS property” including “transit centres, LRT stations, stops along the Valley Line Southeast and inside all buses and trains” and to “contact ETS Communications” to “gain access to ETS property.” Requiring notice and/or permission to engage in news reporting is an unjustifiable limitation on the right to freedom of expression and the right to freedom of the press protected by section 2(b) of the *Canadian Charter of Rights and Freedoms*.

This policy appears to be an attempt to chill journalists from reporting on important matters that ETS likely prefers media not cover such as rampant open drug use in LRT stations and potential problems with the much-delayed Valley Line Southeast. Even if ensuring “safe and effective service to riders” is the true purpose of this policy, the policy does not comply with the constitution and must be rescinded.

In *Montreal (City)*¹, the Supreme Court of Canada said that expressive activity is excluded from section 2(b) protection only if its method or location clearly undermines the values that underlie the guarantee.² The method restriction means expression cannot be violent.³ The location restriction means expression can be excluded from a place only if it is not a public place where one would expect constitutional protection for free expression on the basis that expression in that place is compatible with the values underlying free expression, namely the pursuit of democratic discourse, truth finding or self-fulfillment. To determine whether the values underlying free expression would be undermined in a particular location, one must consider the historical or actual function of the place and whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.⁴

There is nothing about news reporting without notice or permission that is incompatible with the historical or actual function of transit centres, LRT stations, LRT stops or inside buses and trains. No other

¹ *Montreal (City) v 2952-1366 Québec Inc*, 2005 SCC 62 [*Montreal (City)*].

² *Ibid*, para 71.

³ *Ibid*, para 75.

⁴ *Ibid*.

aspect of those places suggests that news reporting would undermine the values underlying the guarantee of freedom of expression. Quite the contrary. News reporting in these locations supports rather than hinders free expression, particularly democratic discourse and truth-finding.

The historical function of transit centres, LRT stations and LRT stops is as “contemporary crossroads” or “modern thoroughfares,” like the public areas of bus stations and airports that Supreme Court Justice L'Heureux-Dubé said “should be accessible to those seeking to communicate with the passing crowds.”⁵ This includes not only the expression at issue in that case (handing out leaflets) but also news reporting which has historically taken place on transit properties without any prior notification or permission.

There is also nothing about the actual function of “transit centres, LRT stations and stops along the Valley Line Southeast” that would suggest news reporting from there without ETS being notified or approving the request would undermine the values underlying free expression. Governments can, for safety reasons, impose restrictions that impede expression in “security type zones” of airports to prevent risks like terrorism, and can for efficiency’s sake limit expression that unnecessarily obstructs ingress and egress.⁶ But the non-security zones in airport terminals are public arenas and “government cannot simply assert property rights, or claim that expression is unrelated to an airport’s function in order to justify the restriction.”⁷ Likewise while ETS can create a policy that prevents journalists from entering certain parts of its operations for safety reasons (such as areas where security cameras are monitored) and can require that reporters not physically impede ingress and egress of travellers, it is clear that ETS cannot ban reporting without notification or permission from transit centres, LRT stations and LRT stops.

It is also the CCF’s position that there is nothing about the historical or actual function of spaces inside buses and trains that would support a claim that reporting without permission or notice in any way undermines the values underlying free expression. In *GVTA*,⁸ the Supreme Court overturned a transit authority policy that banned political advertisements on buses. The majority noted that buses are “by nature a public, not a private, space” and “like a city street, a city bus is a public space where individuals can openly interact with each other and their surroundings.”⁹

ETS can therefore only limit expression in the public areas of its properties using section 1 of the Charter, which requires showing the limit is demonstrably justified in a free and democratic society. This policy is not a demonstrably justified limit. There is no rational connection between a policy that requires permission and authorization by ETS Communications and the need to maintain safety and efficiency on ETS property. The policy is also not be minimally impairing of the right to freedom of expression because the goals of safety and efficiency can be achieved through a substantially less rights-infringing policy such as one that requires journalists to stay out of secure areas unless they have permission, and which allows them to report without notice so long as they do not impede ingress or egress of passengers and staff.

⁵ *Committee for the Commonwealth of Canada v Canada*, per L'Heureux-Dubé, [1991] 1 SCR 139 at 204-205.

⁶ *Ibid* at 223.

⁷ *Ibid* at 201.

⁸ *Greater Vancouver Transportation Authority v Canadian Federation of Students*, 2009 SCC 31 [GVTA].

⁹ *Ibid*, para 43.

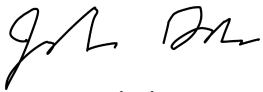
This position on the law is supported by multiple decisions. In *Sun Media*,¹⁰ the Quebec Court of Appeal took it as a “given” that expression was protected on transit property (in that case, those parts of transit stations between subway station entrances and turnstiles).¹¹ The Court of Appeal upheld the lower court’s decision that found the Montreal transportation authority’s policy of contracting to distribute a single free daily newspaper in its subway to the exclusion of all others infringed the 2(b) right to freedom of expression. This was upheld as a reasonable limit because allowing more newspapers would lead to a demonstrably increased safety risk from the fires caused by free newspapers building up and ending up on the tracks, which was found to be a pressing objective.¹² There is no such safety risk posed by allowing reporters to continue to report from ETS property without notice or permission so the *Sun Media* decision supports the view that the policy requiring notice and permission cannot be justified.

In *Churchill*,¹³ the British Columbia Supreme Court found¹⁴ that a campaign manager’s free expression rights had been violated when transit police told him to leave a transit station because he was attempting to engage commuters about a political candidate by handing out pamphlets.¹⁴ The court upheld a policy that banned electioneering from fare-paid zones including buses, trains and ferries as a demonstrable limit on freedom of expression. However, the court required that the policy be read down to allow expressive activity in ticket vending areas and bus interchanges where that expression did not interfere with the movement of passengers and vehicles or hinder access to the ticket machines.¹⁵ The BCSC’s decision made clear that the policy could not require those engaged in election expression in places like the ticket vending areas and bus interchanges to seek authorization from transit employees.¹⁶

It is always the CCF’s preference not to litigate because we are a donor-funded organization -and it would be the taxpayers of the City of Edmonton who would to bear the cost the city’s decision to defend an unconstitutional law. These expenses can be avoided and our concerns addressed by rescinding the policy and replacing it with one that clarifies that journalists can report freely in transit centres, LRT stations, at LRT stops, and inside buses and trains without notifying the city or seeking permission so long as they do not interfere with the safety or effectiveness of the system or enter secure zones. If ETS declines to bring the policy into compliance with the *Charter*, we may be compelled to act—as we have on many previous occasions across Canada—to defend the rights to freedom of expression by seeking a judicial review.

We look forward to your response.

Josh Dehaas



Counsel, the CCF

¹⁰ *Corp Sun Media v Société de transport de Montréal*, 2004 CanLII 39109 [*Sun Media*].

¹¹ *Ibid*, para 53.

¹² *Ibid*, para 84.

¹³ *Churchill v GVTA*, 2001 BCSC 572 [*Churchill*].

¹⁴ *Ibid*, para 56.

¹⁵ *Ibid*, para 55.

¹⁶ *Ibid*, para 55.