bc civil liberties association
L'Association des libertés civiles de la Colombie-Britannique

April 5, 2011

Commissioner Stan T. Lowe
Office of the Police Complaint Commissioner
British Columbia

VIA FAX: 250.356.6503

Dear Commissioner Lowe:

I am writing on behalf of the BC Civil Liberties Association to initiate a policy complaint under the *Police Act* regarding the South Coast British Columbia Transportation Authority Police Service (Transit Police).

Our complaint arises from an incident where a Transit Police officer demanded that Jean Wharf remove a button with the words "Fuck Yoga" because this allegedly violated Translink rules prohibiting rude or abusive language. Ms. Wharf's own complaint is currently under review by the OPCC after a decision to dismiss her complaint.

The U.S. Supreme Court addressed the question in 1968 in *Cohen v. California* whether a law banning offensive language was constitutional in a case where a young man wore a jacket that said "Fuck the Draft". The court ruled that the law was unconstitutional and the conviction under it ought to be set aside. Harlan, J., commented thus:

> *Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.*

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In a day and age where judges in our own courts have referred to the word in question as a meaningless vulgarity commonly used by many, it is difficult to see how Translink could seek to police its use – whether in written or oral form – throughout its system. One wonders as well whether advertisements from the FCUK brand would be refused on similar grounds.

The *Greater Vancouver Transit Conduct Safety Regulation* provides Translink with the authority to post rules, and this Regulation provides transit employees with the authority to enforce transit rules. S. 6 of the *South Coast British Columbia Transportation Authority Act* provides Translink with similar authority to that of a municipal authority, but the context of this authority is centered on land use and the management of transit infrastructure. This section, by any reading, does not provide Translink with authority to regulate lawful and *Charter*-protected feelings towards yoga or any other physical or political activity.

Translink can make rules to manage its infrastructure and provide transit services; however, their ability to do so has already been restricted by the Courts in the case *Greater Vancouver Transportation Authority v. Canadian Federation of Students*. In that case, the Court was unambiguous with respect to paid advertising in the transit system:

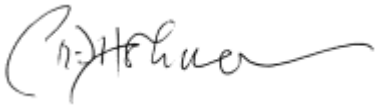
> *I accept that the policies were adopted for the purpose of providing "a safe, welcoming public transit system" and that this is a sufficiently important objective to warrant placing a limit on freedom of expression. However, like the trial judge, I am not convinced that the limits on political content imposed by articles 2, 7 and 9 are rationally connected to the objective. I have some difficulty seeing how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. 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.*

These values would only be heightened in the context of personal expression in the form of a button, as compared to paid advertising on the side of a bus.

Even more important than Canada's highest court affirming the protected nature of political and artistic speech in our transit system is the underlying principle that the Transit Police are not Translink employees. The Transit Police serve the public interest, and it is very well established in law and in the *Canadian Charter of Rights and Freedoms* that political expression and artistic expression are particularly protected from regulation by police. The idea that police could, with threat of force, require citizens to remove or cover expressive content from their clothing or to leave the public transportation system is offensive in the extreme to Canadians who value free speech.

In January, 2010, the Transit Police agreed to revise wording of a public bulletin that told members of the public to be cautious and report to police if citizens were preparing to stage or were engaged in political demonstrations or "shouting slogans" in a demonstration, given the transit police's recognition of the need to facilitate – not just refrain from repressing – free expression. At the time, the BCCLA was satisfied with the transit police response and did not press for policy reform. This latest incident, however, indicates to the BCCLA that formal training and clear policy on free expression is required.

Yours truly,



Robert Holmes
President

cc. South Coast British Columbia Transportation Authority Police