Freedom of Expression in Canada

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I. INTRODUCTION

Although the Supreme Court of Canada has often insisted that there is no priority amongst the *Canadian Charter of Rights and Freedoms*'[1] rights and freedoms,[2] the guarantee of freedom of expression is quite literally a "fundamental freedom". The ability to speak about matters that concern us — subjects that inspire and move us into action through expression — is central to contemporary ideas about liberty and democracy. For these reasons, McLachlin C.J.C. in *Sharpe* endorsed the idea of free expression as "the matrix, the indispensable condition of nearly every other freedom".[3]

Not only is the guarantee of central concern to free and democratic societies, it potentially is broad enough to cover all variety of activities. If the guarantee traditionally has been linked to political freedom, freedom of expression has expanded well beyond its roots in democracy to encompass nearly all non-violent forms of expression including the advertising of commercial products. As a result of the freedom's indeterminacy, much intellectual capital has been spent either contracting or expanding its definitional scope.

Both characteristics of freedom of expression — its indispensability and its indeterminacy — help to explain why freedom of expression has been a frequently litigated right under the Charter. The Court has weighed in on the indeterminacy question by construing freedom of

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

2 *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, [1994] 3 S.C.R. 835, at 877 (S.C.C.) [hereinafter "*Dagenais*"].

3 Justice Cardozo in *Palko v. Connecticut*, 302 U.S. 319, at 327 (1937), quoted approvingly in *R. v. Sharpe*, [2001] S.C.J. No. 3, [2001] 1 S.C.R. 45, at para. 23 (S.C.C.), *per* McLachlin C.J.C. [hereinafter "*Sharpe*"].

expression as broadly as possible. The value of the expression at issue, however, is still weighed by the Court as part of the justification process under section 1 of the Charter. Thus any analysis of freedom of expression in Canada must be concerned not only with the scope of constitutionally protected expression, but also with the process used to determine whether the government has justified reasonable limits on that right. It is mostly in the context of the section 1 justification process, though not exclusively, where courts seek to reconcile freedom of expression with competing Charter rights, such as an accused's right to a fair trial or the equality rights of vulnerable minorities to be free from racial invective. The choice of remedy also reflects the value a court places on the expression at issue. There are significant implications for freedom of expression rights, beyond the parties to the dispute, in choosing between striking down and reading down overbroad legislation. We refer here to the problem of self-censorship or "chilling effects". Actors, it is presumed, will want to steer wide of the sphere of prohibited expression in order to avoid facing civil damages or penal consequences for expressive activities. The worry is that legitimate and important, even truthful, expression which democratic societies would be loath to prohibit will be chilled into silence by overbroad laws. The extent to which Canadian courts are attentive to this cost in devising remedies for potentially overbroad laws reveals much about the value the courts place on free expression.

We begin this chapter by describing, in general terms, Canada's system of freedom of expression. Having outlined the origins and method of freedom of expression analysis in Canadian courts, we turn to the various contexts in which the doctrine has developed. Important freedom of expression claims arise in the context of criminal prohibitions on pornography or hate speech. Also in the criminal context are cases reconciling the related values of open courts and a free press with competing Charter rights, such as the accused's right to a fair trial and privacy rights. Outside of the criminal justice context, restrictions on commercial expression and choice of language claims have been critical to the development of the doctrine. In the common law context, freedom of expression is implicated in the law of defamation and restrictions on access to public and private property. National security concerns have precipitated new restrictions on freedom of expression and have blurred over into the aggressive policing of protests. These developments provide new challenges to freedom of expression. It is far from clear that

Charter litigation, even combined with Charter-inspired legislative reform, will be sufficient to produce a constitutional and political culture that fully respects the right of all to engage in free expression. We conclude with an examination of how choice of remedies interacts with the purposes and values of freedom of expression.

II. THE CANADIAN SYSTEM OF FREEDOM OF EXPRESSION

The Canadian tradition of freedom of expression is usually traced back to the English common law. Yet the common law has not been particularly sympathetic to free speech claimants. Dicey admitted in his treatise on constitutional law that it is not "specially favourable to free speech or to free writing in the rules which it maintains in theory and often forces in fact as to the kind of statements which a man has a legal right to make".[4] Rather, for Dicey, the solicitude owed to freedom of discussion in English law principally was due to the "supremacy" or "rule" of law — the idea that restraints on liberty require legislative prohibition and then prosecution before judges and juries. This practically had resulted in liberty of discussion.[5]

The *Constitution Act, 1867*[6] brought to Canada a constitution "similar in principle to that of the United Kingdom", though it was silent about liberties accruing to individuals. Nevertheless, the preamble suggested to courts that similar degrees of freedom practically would be available in Canada. The Supreme Court of Canada, on occasion, has been prepared to vindicate freedom of expression rights by denying jurisdiction to provinces to enact laws in regard to speech. In the *Alberta Press Case*, Duff C.J.C. characterized "free public discussion of public affairs, notwithstanding its incidental mischiefs, [as] the breath of life for parliamentary institutions".[7] Alberta's legislation would have permitted substantial governmental interference with the operation of newspapers in the province. This was beyond provincial competence, according to the Court, for it curtailed the right of public discussion and trenched on the federal criminal law power. In *Switzman v. Ebling*, one of the pivotal "implied bill of rights" cases, Rand

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[4] A.V. Dicey, *Introduction to the Study of the Law of the Constitution of England*, 7th ed. (London: Macmillan, 1885), at 236.

[5] *Id.*, at 243.

[6] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[7] *Reference re Alberta Legislation*, [1938] S.C.J. No. 2, [1938] S.C.R. 100, at 132-35 (S.C.C.).

and Abbott JJ. went further and suggested that jurisdiction to limit free speech rights may even be denied to Parliament.[8] These cases are exceptional, however, as provinces continued to have authority to regulate expressive activity in so far as it related to matters falling within section 92: laws concerning the regulation of streets, parks and zoning by-laws were all within provincial competence though they may have impacted negatively on expressive freedoms.[9] Even shortly before the coming into force of the Charter, in *Dupond*, concerning a Montreal municipal by-law temporarily prohibiting public gatherings and assemblies on the streets of the City, Beetz J. for the majority of the Court wrote that "the right to hold public meetings on a highway or in a park is unknown to English law".[10]

Nor did the experience under the *Canadian Bill of Rights*[11] enhance Canada's free speech tradition. The *Bill of Rights*' fundamental freedoms (section 1) were interpreted to reflect rights and freedoms in no "abstract sense" but "as they existed in Canada immediately before the statute was enacted",[12] in which case, the *Bill of Rights* "froze" the practice of rights as of 1960. We should add to this historical mix the panoply of federal restrictions on freedom of expression, whether they be the overly restrictive *Official Secrets Act* (now the *Security of Information Act*),[13] the criminalization of sedition, false news and scandalizing the courts, the powers of surveillance over Canadian citizens and permanent residents, or the regrettable denials of freedom of speech under the *War Measures Act*.[14] The Canadian law of freedom of expression, then, does not appear to have very deep roots.

With freedom of expression poorly anchored in Canadian constitutional law, section 2(b) might be viewed as having profoundly altered the

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[8] *Switzman v. Elbing*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 358-59, 371 (S.C.C.).

[9] Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d revised ed. (Toronto: McLelland & Stewart, 1975), at 40.

[10] *Dupond v. Montreal (City)*, [1978] S.C.J. No. 33, [1978] 2 S.C.R. 770 (S.C.C.) [hereinafter "*Dupond*"].

[11] S.C. 1960, c. 44.

[12] *R. v. Burnshine*, [1974] S.C.J. No. 73, [1975] 1 S.C.R. 693, at 705 (S.C.C.). For example, Dickson J.A., while on the Manitoba Court of Appeal, summarily dismissed a freedom of expression challenge under the *Canadian Bill of Rights* on the basis that the statutory bill of rights "does not serve as a shield behind which obscene material may be disseminated without concern for criminal consequences". See *R. v. Prairie Schooner News Ltd.*, [1970] M.J. No. 32, 75 W.W.R. 585, at 604 (Man. C.A.).

[13] R.S.C. 1985, c. O-5.

[14] (U.K.) Geo. 5, c. 2. See generally A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1986) [hereinafter "Borovoy"].

Canadian constitutional scene. As our detailed discussion of the cases below suggest, the overall judicial orientation toward freedom of expression claims certainly has shifted, but perhaps not all that significantly. Before proceeding with an exposition of that judicial record, we set out here the structure of analysis in Canadian freedom of expression claims. The fact that many of the early and important Charter cases concerned freedom of expression has had an impact on the scope and breadth of the guarantee. It may be fair to say that section 2(b) has colonized claims that might otherwise have been made under other fundamental freedoms, such as freedom of association or assembly (see *e.g.*, *Dolphin Delivery*,[15] *BCGEU*[16]). The Supreme Court's purposive approach and "large and liberal" orientation to Charter guarantees (*Big M*,[17] *Ford*[18]) ensured that all manner of expressive activities qualified for constitutional protection. In *Irwin Toy*, the Court affirmed that any activity that conveys or attempts to convey meaning is constitutionally protected expressive activity: "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" are deserving of Charter protection.[19] Even the physical act of illegally parking a car, so long as it was meant to convey meaning (such as protesting the manner in which parking spots are allocated), would qualify for section 2(b) protection. Only violent forms of expression would be disqualified. In *Keegstra*,[20] the Court apparently added threats of violence to the list of constitutionally protected expressive activities. As a consequence of this constitutional breadth, racist incitement (*Keegstra*),[21] holocaust denial (*Zundel*),[22] obscene materials (*Butler*)[23] and child pornography (*Sharpe*),[24] would be dignified with constitutional protection. The Court subsequently narrowed the scope of section 2(b) by excluding threats of

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[15] *RWDSU v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.) [hereinafter "*Dolphin Delivery*"].

[16] *BCGEU v. British Columbia (Attorney General)*, [1988] S.C.J. No. 76, [1988] 2 S.C.R. 214 (S.C.C.) [hereinafter "*BCGEU*"].

[17] *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

[18] *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at 767 (S.C.C.) [hereinafter "*Ford*"].

[19] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927, at 968-69 (S.C.C.) [hereinafter "*Irwin Toy*"].

[20] *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 733 (S.C.C.) [hereinafter "*Keegstra*"].

[21] *Id*.

[22] *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.) [hereinafter "*Zundel*"].

[23] *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.) [hereinafter "*Butler*"].

[24] *Sharpe*, *supra*, note 3.

violence. Preferring her dissenting reasons in *Keegstra* on this point,[25] McLachlin C.J.C. in *Khawaja*, declared that the "violence exception" is not confined to "actual physical violence" but extends as well to threats.[26]

A number of strategies were available to the Court that would have narrowed the scope of constitutional breadth, each of which was rejected.[27] The speech/conduct distinction, for instance, had been used by Canadian courts to weed out certain claims to expressive freedom. In *Dupond*, Beetz J. characterized public demonstrations as a form of "collective action" rather than a form of speech: They are "of the nature of a display of force rather than that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse".[28] The Supreme Court of Canada eschewed this distinction in *Dolphin Delivery*,[29] a case concerning secondary picketing in the context of a labour dispute. The old view, according to McIntyre J., was that picketing operated as a Pavlovian signal rather than as an element of dialogue or discourse. The Court is in favour of the admission that "in any form of picketing there is an element of expression". Similarly, in *Butler* the Court rejected the proposition that pornography was not a protected form of expression but purely physical activity.[30] Even if a purely physical act, it could still be caught by section 2(b) so long as the activity conveyed or intended to convey meaning.[31]

A second related strategy to confine the freedom of expression guarantee is the form/content distinction. According to this view, the guarantee protects the content of messages but not the form which those messages take. This distinction was adopted by Dugas J. of the Quebec Superior Court in *Devine*[32] and was advanced by the Attorney General of Quebec in the *Ford* case.[33] Invoking the language of Marshall McLuhan,

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[25] *Keegstra*, *supra*, note 20, at 831.

[26] *R. v. Khawaja*, [2012] S.C.J. No. 69, 290 C.C.C. (3d) 361, at para. 70 (S.C.C.) [hereinafter "*Khawaja*"], in the course of holding that the definition of terrorist activities in the *Criminal Code*, R.S.C. 1985, c. C-46 did not violate freedom of expression.

[27] On the strategy of creating categories of protected expression by "defining in" types of speech, see Frederick Schauer, "Categories and the First Amendment: A Play in Three Acts" (1981) 34 Vanderbilt L. Rev. 265, at 279-80.

[28] *Dupond*, *supra*, note 10.

[29] *Dolphin Delivery*, *supra*, note 15, at 587-88.

[30] *Butler*, *supra*, note 23.

[31] *Irwin Toy*, *supra*, note 19.

[32] *Devine c. Québec (Procureur général)*, [1982] C.S. 355 (Que. S.C.).

[33] *Ford*, *supra*, note 18, at 750.

the Attorney General maintained that the Charter right protected not the medium but the message; there was a constitutional right to convey a message but not the language, or form, in which that message was conveyed. Chief Justice Dickson for the Court rejected this distinction, maintaining that language is "intimately related to the form and content of expression". "Language", wrote Dickson C.J.C., "is not merely a means or medium of expression; it colours the content and meaning of expression".[34]

A third strategy is to distinguish between high- and low-value expression. This strategy aims to distinguish between those expressive activities closely connected to the underlying rationales for freedom of expression and those that lie farther from the core rationales. Political speech often is cited as lying at or near the core, while pornography and hate speech are argued to be so far removed from that core as to be disqualified from constitutional protection. The Court in *Ford* also rejected this distinction. Political speech is only one among many forms of expression worthy of constitutional protection. Moreover, linking protection to these "philosophical" rationales fuses two distinct processes that need to be kept separate: whether, on the one hand, expression is "within the ambit of the interests protected by the value of freedom of expression" and whether, on the other hand, an act of expression "deserves protection from interference under the structure of the Canadian *Charter*".[35] This reflects well the structure of analysis the Court has adopted in free expression cases. In the course of so doing, the Court also has embraced the high/low value distinction, not in the determination of whether the activity is protected expression, but in the determination of whether a governmental interference is justified. At this stage, the Court has taken to characterizing the expression as being of high or low value, a characterization which helps to determine whether a strict or attenuated section 1 justification analysis is required. In *Keegstra*,[36] for instance, Dickson C.J.C. applied the contextual approach to Charter interpretation, warning that not all expression was equally deserving of consideration under section 1. There are some forms that are "destructive of free expression values", like the promotion of racial hatred, that are not "closely linked" to the rationales

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34 *Id.*, at 748.

35 *Id.*, at 765-66.

36 *Keegstra*, *supra*, note 20, at 762.

underlying section 2(b). On these occasions, though the expressive activity will be constitutionally protected, the Court maintains that it is entitled to relax the standard of justification.

What are those underlying philosophical rationales the Court refers to? They first were explored by Dickson C.J.C. in the *Ford* case,[37] where he drew on the academic work of Emerson[38] and Sharpe,[39] and the rationales subsequently were incorporated into the structure of freedom of expression analysis by the Court in the *Irwin Toy* case. Justice McLachlin reiterated and expanded upon the purposes of the guarantee in her dissent in *Keegstra*.[40] She observed that no one of these rationales definitively justifies the constitutional guarantee but each "is capable of providing guidance" as to its scope and content.[41] Salient among these rationales is the argument from self-government, that free expression is "instrumental in promoting the free flow of ideas essential to democracy and democratic institutions". A second rationale, the promotion of truth, suggests that truth will win out in any free competition in the marketplace of ideas. Justice McLachlin notes that it would be naïve to rely solely on this rationale, as history has shown that falsehood oftentimes wins out over truth.

A third rationale, the argument from self-realization and individual autonomy remains central to the protection of both political and non-political expression. It arguably, however, is overbroad and collapses into an argument about liberty more generally. Justice McLachlin adds to this prominent list a politico-sociological rationale drawn from the work of Fred Schauer, what he calls the argument from "governmental incompetence". Schauer suggests that experience shows governments have a "peculiar inability" to engage in acts of censorship. In addition to a history of governmental blundering, governments often act as censors in advance of their own cause. All of this suggests that governmental attempts at censorship ought "*prima facie* [to] be viewed with suspicion".[42] Canadian constitutional scholar Richard Moon has suggested yet another rationale

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[37] *Ford*, *supra*, note 18, at 765.

[38] Thomas I. Emerson, *The System of Freedom of Expression* (New York: Vintage Books, 1970).

[39] Robert J. Sharpe, "Commercial Expression under the Charter" (1987) 37 U.T.L.J. 229.

[40] *Keegstra*, *supra*, note 20, at 802-806.

[41] On the value of multiple justifications, see Daniel A. Farber & Philip P. Frickey, "Practical Reason and the First Amendment" (1987) 34 U.C.L.A. L. Rev. 1615, at 1642.

[42] Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press, 1982), at 80*ff*.

for the Charter's freedom of expression guarantee, and this concerns its social value. Admitting that there are overlapping justifications for the right, the value of freedom of expression for Moon "rests on the social nature of individuals and the constitutive character of public discourse". This is a relational approach to Charter rights which emphasizes the contribution of freedom of expression "to engagement in community life and to ... participation in a shared culture and collective governance".[43]

Though Dickson C.J.C. described these rationales as mere "philosophical" devices, they have been incorporated into the very structure of analysis in freedom of expression cases where the law, in its effects, impinges on expressive activities. In *Irwin Toy*,[44] the Court (Dickson C.J.C. and Lamer and Wilson JJ.) outlined two different inquiries in freedom of expression cases, depending on the nature of the imposition on freedom of expression. Where the purpose of a governmental measure is to "restrict content" by any number of means — by singling out particular content (like children's advertising in *Irwin Toy*), restricting a "form of expression in order to control access by others to the meaning being conveyed" (for instance, French-only language laws in *Ford*) or controlling the ability to convey meaning (such as the ban on postering in *Ramsden*) — then the measure "necessarily limits" the guarantee of freedom of expression. If, however, the measure is content neutral and limits only the "physical consequences of certain human activity", then its purpose is not to control expression. Its effects, however, still might infringe the Charter guarantee. The Court here draws on the U.S. First Amendment distinction between regulation directed at content and regulation of the "time, place and manner" of expressive of conduct that is content neutral, such as a rule against littering or a noise by-law, both of which might have the effect of controlling the physical consequences of expressive activity.[45]

In the case of content-neutral laws that might, in their effects, restrict free expression rights, the Court outlines a second type of inquiry. Here, the person claiming an infringement must demonstrate that the expressive activity promotes or reflects at least one of the

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[43] Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto, 2000), at 8-9.

[44] *Irwin Toy*, *supra*, note 19, at 971-77.

[45] *Heffron v. International Society for Krishna Consciousness*, 425 U.S. 640 (1981).

principles underlying the guarantee. In the case of a noise by-law, it is insufficient to show that this merely restricts loud shouting. Rather, a plaintiff must demonstrate that "her aim was to convey a meaning reflective of the principles underlying freedom of expression", namely, one of the three rationales of self-government, truth, and individual fulfilment. Though this second inquiry shifts the burden of proof to Charter claimants, it might not be thought of as burdensome in many cases. Just as "all expressions of the heart and mind, however unpopular or distasteful", even purely physical conduct that conveys meaning, will qualify for protection under section 2(b), it often should not be too difficult to show that the activity promotes one of the underlying values. The underlying value of individual self-fulfilment, for instance, has been criticized as being overbroad and qualifying too much speech for constitutional protection. On the other hand, there are indications that certain types of expression, such as hate propaganda, if caught by a content neutral limitation, might not qualify under the effects-based test. In *Keegstra*, Dickson C.J.C. finds that the promotion of hatred "propagate[s] ideas anathemic to democratic values", does not advance the pursuit of truth, and denies self-fulfilment to the targeted minority.[46] In cases of effects-based restrictions on racial incitement or obscene speech, would these fail to satisfy the burden of proof? Moreover, as Gibson suggests, perhaps these underlying rationales do not exhaust the range of possibilities: "what about sheer entertainment or pleasure" such as a "Tom and Jerry film cartoon or a bawdy limerick", Gibson asks.[47] While it may be that even these activities promote individual self-fulfilment, such an approach would only play into criticisms of the self-fulfilment rationale as overbroad and difficult to distinguish from all forms of liberty. It is problematic, nevertheless, that the Court both adopts a "large and liberal" approach to freedom of expression and insists on a test that weeds out freedom of expression claims in the case of content-neutral restrictions on freedom of expression.

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[46] *Keegstra*, *supra*, note 20, at 765.

[47] Dale Gibson, "Constitutional Law — Freedom of Commercial Expression Under the Charter — Legislative Jurisdiction Over Advertising — A Representative Ruling: *Attorney General of Quebec v. Irwin Toy Limited*" (1990) 68 Can. Bar Rev. 339, at 344.

III. THE CONTEXTS OF FREEDOM OF EXPRESSION

1. Choice of Language

It is well known that the Supreme Court has interpreted freedom of expression in a very broad fashion.[48] This is in part, as examined above, because the Court can and does make contextual distinctions between different forms of expression under section 1 of the Charter. Another reason for the Court's broad interpretation is its view that the values and purposes of freedom of expression go beyond traditional pre-Charter concerns about preserving a robust democracy to include concerns about individual self-fulfilment by the expression of any form of non-violent meaning. In practice this means that restrictions on the form, as opposed to the content, of the expression can also be held to be restrictions on freedom of expression. Concerns about restrictions on the form of expression have been especially important in Canada in the context of language choice.

In *Ford v. Quebec*, the Supreme Court held that freedom of expression was restricted by Quebec language laws that required certain commercial signs to be only in French, even though the law did not regulate the content of that expression.[49] The Court concluded that:

> language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which may express their cultural identity.[50]

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[48] At the same time, certain licensing restrictions in the commercial context will not violate freedom of expression. Without giving reasons, the Court has concluded that a law prohibiting a person from practising as an accountant if he or she was not a member of a particular association of public accountants did not violate freedom of expression (*Walker v. Prince Edward Island*, [1995] S.C.J. No. 45, [1995] 2 S.C.R. 407 (S.C.C.)). A requirement that a person pay fees to an union also has been held not to violate s. 2(b) of the Charter on the basis that it is not an attempt to convey meaning and it does not prohibit the employee from expressing his or her views (*Lavigne v. Ontario Public Service Employees Union*, [1991] S.C.J. No. 52, [1991] 2 S.C.R. 211 (S.C.C.)).

[49] For discussion of content regulation of commercial speech, see *Irwin Toy*, *supra*, note 19 discussed above.

[50] *Ford*, *supra*, note 18, at 748.

In the less well-known companion case of *Devine v. Quebec*, the Court expanded its holding that prohibiting languages other than French violated section 2(b) of the Charter. The Court concluded that requiring the use of French, in addition to other languages, in commercial documents also violated freedom of expression.[51] In both cases, the Court applied the freedom of expression guarantee in both the Canadian Charter and the Quebec *Charter of Human Rights and Freedoms*[52] — the Canadian Charter's notwithstanding clause had been invoked to shield part of Quebec's *Official Language Act* from Charter scrutiny[53] — which the Court considered analogous to the Canadian Charter guarantee. Thus, both prohibitions on the use of a language and requiring the use of a specific language have been held to violate freedom of expression.

The distinction between prohibiting a language other than French and requiring the use of French in addition to other languages, however, made a crucial difference in whether the violation of freedom of expression can be justified under section 1. In *Devine v. Quebec*, the Court held that the requirement for bilingual commercial documents was a proportionate and reasonable means to protect the French language. In *Ford v. Quebec*, however, the Court held that a total ban on the use of languages other than French in commercial signs was not a proportionate restriction on freedom of expression. Although the law was a rational means to promote the important objective of protecting the French language in North America, it was not a proportionate means to advance this objective when compared with less restrictive alternatives such as allowing the use of other languages while requiring that French be predominant.

This decision turned out to be one of the most controversial decisions ever rendered by the Supreme Court. Quebec responded to the decision by quickly re-enacting the requirement that commercial signs only be in the French language and shielding the legislation from review under both the Quebec and Canadian Charters by invoking their notwithstanding mechanisms. Anglophone ministers resigned from the Quebec Liberal government in protest and the unpopularity of this action in the rest of Canada played an important role in the subse-

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51 *Devine v. Quebec (Attorney General)*, [1988] S.C.J. No. 89, [1988] 2 S.C.R. 790 (S.C.C.).

52 R.S.Q., c. C-12.

53 *An Act to Amend the Charter of the French Language*, S.Q. 1983, c. 56, s. 52.

quent defeat of the Meech Lake Accord that would have constitutionally recognized Quebec as a distinct society.[54] A human rights complaint subsequently was brought to the United Nations Human Rights Commission which found that it was "not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English".[55] When the override expired in 1993, the Quebec National Assembly did not renew it. At present, language laws in Quebec now generally allow the use of languages other than French, so long as the French language is predominant.[56] The choice-of-language cases ushered in an important moment in Canadian history. The use of the Charter's notwithstanding clause was so contentious that it prompted then Prime Minister Brian Mulroney to characterize the Canadian Charter as "not worth the paper it was printed on". The future legitimacy of the notwithstanding clause — a unique Canadian compromise around rights — was now placed in doubt. The continued doctrinal significance of these cases relates to the breadth of the court's interpretation of freedom of expression and the difficulty in justifying any complete ban on expression as a reasonable and proportionate restriction on freedom of expression.

2. Commercial Expression

The framers of the Charter deliberately omitted from the text of the Charter what have been called "pure" economic rights[57] — such things as property rights or contractual freedoms.[58] Even if economic liberalism is not expressly promoted by Charter rights and freedoms, it remains difficult to avoid the protection of economic interests, even if

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[54] See Errol Mendes, "Two Solitudes, Freedom of Expression, and Collective Linguistic Rights in Canada: A Case Study of the *Ford* Decision" (1991) 1 N.J.C.L. 283; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at 189-93 [hereinafter "Roach, 2001"]; Robert J. Sharpe & Kent Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 423-38.

[55] *Ballantyne, Davidson and McIntyre v. Canada*, Communications 359 and 385/1989, Human Rights Committee established under Article 28 of the *International Covenant on Civil and Political Rights*, March 31, 1993.

[56] *An act to amend the Charter of the French Language*, S.Q. 1993, c. 40, s. 18.

[57] *Wilson v. British Columbia (Medical Services Commission)*, [1988] B.C.J. No. 1566, 53 D.L.R. (4th) 171 (B.C.C.A.).

[58] Sujit Choudhry, "The Lochner Era and Comparative Constitutionalism" (2004) 2 I.C.O.N. 1.

indirectly. Nowhere has this resistance to economic liberalism proven to be more difficult than in the realm of commercial expression. The case of *Ford v. Quebec*[59] (discussed in "Choice of Language") established that not only did the Charter guarantee to individuals the freedom to choose the language in which they communicate — language being intimately related to the form and content of expression — it extended to protection of "commercial" expression as well. In so far as Quebec's language laws prohibited the use of any language other than the French language on commercial signs, it infringed the Quebec and Canadian Charter guarantees of freedom of expression. The Supreme Court of Canada in *Ford* exhibited little hesitation in extending constitutional protection to speech purely directed at making a profit. By contrast, the United States Supreme Court initially denied constitutional protection to advertising.[60] It was only some 34 years later that the Court acknowledged that commercial speech deserved qualified first amendment protection.[61]

According to the Canadian Supreme Court in *Ford*, there was no "sound basis" for excluding commercial expression from the scope of section 2(b). "Over and above its intrinsic value as expression", wrote a unanimous Court, "commercial expression which ... protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy".[62] The primary rationale offered for extending constitutional protection to commercial speech, as in the United States, was to protect and promote the interests of consumers. An emphasis on consumer welfare rather than on economic liberalism helped to conceal the advantage the Court's ruling would have for business enterprises in Canada.

In *Irwin Toy Ltd v. Quebec*,[63] Dickson C.J.C. and Lamer and Wilson JJ., writing for the majority, expanded on this rationale. The Court held the Quebec *Consumer Protection Act*'s prohibition on advertising directed at children under 13 years of age — the kind of children's advertising accompanying Saturday morning television programming — unjustifi-

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59 *Supra*, note 18.

60 *Valentine v. Chrestenson*, 316 U.S. 52 (1942).

61 *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976).

62 *Ford*, *supra*, note 18, at 767.

63 *Supra*, note 19.

ably infringed freedom of expression rights. Any activity that conveys or attempts to convey meaning, wrote the Court, is constitutionally protected expressive activity: "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream" are deserving of Charter protection.[64] Even the physical act of illegally parking a car, so long as it was directed at conveying meaning, would qualify. Only violent forms of expression receive no constitutional protection. Though children's advertising qualified for constitutional protection, the degree of protection was attenuated by the commercial nature of the speech together with the fact that its targeted audience was young children. As the law concerned the protection of a "vulnerable group" from "media manipulation", the Court would not too strictly scrutinize the limitation under section 1. The Court signalled that where legislators are protecting vulnerable groups, mediating between the "competing claims of conflicting groups" or "weighing conflicting scientific evidence and allocating scarce resources on this basis", the legislature need only be expected to exercise "reasonable judgment" on a balance of probabilities that the limitation is a reasonable one. This is in contrast to those situations where the "government is best characterized as the singular antagonist of the individual", as in the administration of criminal justice. When the criminal process is engaged, courts are better situated to more closely scrutinize limitations on rights, in contrast to rights claims where competing social science evidence is at issue, as in this instance.[65] *Irwin Toy*, along with another case decided the same year,[66] demonstrated the Court's increased willingness to take a "contextual" approach to Charter adjudication. What this often meant in the freedom of expression context was a re-evaluation of the value of the expression and its relation to the rationales of freedom of expression in determining whether limits on the particular form of expression are justified under section 1. As will be seen below, however, the distinction drawn in *Irwin Toy* between the social policy and criminal context has been unstable, especially in cases where the criminal law has been used in an attempt to protect children and other vulnerable groups.

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64 *Id.*, at 968-69.

65 *Id.*, at 987-91.

66 *Edmonton Journal v. Alberta (Attorney General)*, [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter "*Edmonton Journal*"].

The available evidence in *Irwin Toy* suggested there was some dispute about when children develop the cognitive skills to evaluate advertising (arguably after age seven). In which case, the government was entitled to choose among reasonable alternative means in order to achieve its stated goal of protecting children from harm and mediating between the claims of advertisers, on the one hand, and the claims of children and parents, on the other hand. Though other less intrusive means were available that would have achieved more modest objectives, "[t]his Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups".[67] Nevertheless, there must be a "sound evidentiary basis for the government's conclusions".[68] Justice McIntyre in dissent, with Beetz J. concurring, would not permit the government to justify a total ban on children's advertising on such a flimsy basis (essentially, to protect parents from their nagging children). Freedom of expression was "too important to be lightly cast aside or limited", wrote McIntyre J. "Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community."[69] This formulation of the freedom of expression guarantee, reminiscent of Justice Oliver Wendell Holmes' "clear and present danger" test (*Schenck* and *Abrams*)[70] never would take hold in the Supreme Court of Canada.

Commercial speech, the Court has stated on more than one occasion, lies some distance from the core rationales underlying the freedom of expression guarantee, namely the promotion of truth, self-government, and individual self-realization. Such a conclusion should make it easier for governments to justify limitations on commercial expression. This precisely was the case in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*,[71] concerning prohibitions on public communications for the purpose of soliciting the sexual services of a prostitute. Though the case concerned a criminal prohibition, where the state usually is held to a strict

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[67] *Irwin Toy*, *supra*, note 19, at 999.

[68] *Id.*

[69] *Id.*, at 1008-1009.

[70] *Schenck v. United States*, 249 U.S. 47, at 51 (1919); *Abrams v. United States*, 250 U.S. 616, at 629 (1919).

[71] [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.).

standard of justification, Dickson C.J.C. for the majority stressed that it could not be said that "communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression".[72] In light of this context and the law's important objective of eradicating a social nuisance, the scheme at issue need not be "perfect" only "appropriately and carefully tailored".[73] In his concurring opinion, Lamer J. also emphasized the value of the criminal sanction in responding to the degradation of women and children as prostitutes.[74] This foreshadowed some of the concerns that would later influence the Court in the pornography cases. Justices Wilson and L'Heureux-Dubé dissented in the case, finding that the prohibition was not connected to any public nuisance and that the prohibition was broad enough to include the "proverbial nod or wink, or hailing a taxi".[75] They also noted the inequities of criminalizing public solicitation for prostitution but not the actual act of prostitution. The majority's ready acceptance of the idea that criminal prohibition of expression would curb the nuisances of street prostitution in these cases reflects a rather uncritical approach to the use of the criminal sanction and also may overestimate what is actually achieved by the criminalization of expression. It also demonstrates the instability of the distinction in *Irwin Toy* between the social policy and criminal law contexts and reveals that the judicial deference associated with the former can migrate to the latter.[76]

Justice McLachlin reiterated in *Rocket v. Royal College of Dental Surgeons*[77] that the profit motive should make restrictions on commercial expression "easier to justify than other infringements on s. 2(b)".[78] Nevertheless, it would be an error to conclude that in all cases the courts will defer to the regulation of advertising. In *Rocket*, the founders of a chain of suburban dental clinics were disciplined by their professional association for participating in the promotional campaign of a national hotel chain. It was professional misconduct, ruled the College of Dental Surgeons, to have engaged in this form of advertising and self-promotion. Nevertheless, for

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[72] *Id.*, at 1136.

[73] *Id.*, at 1138.

[74] *Id.*, at 1194.

[75] *Id.*, at 1214.

[76] See Jamie Cameron, "The Past, Present and Future of Expressive Freedom under the Charter" (1997) 35 Osgoode Hall L.J. 1.

[77] [1990] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.) [hereinafter "*Rocket*"].

[78] *Id.*, at para. 29

the Supreme Court of Canada there was an important public interest served by commercial expression: it plays a role in "fostering informed economic choices ... by enhancing the ability of patients to make informed choices".[79] Though the expression was primarily economic and the Dental College had an interest in maintaining standards of professionalism, there was a "significant" consumer interest in receiving prohibited information, including hours of operation and languages spoken.[80] The limitation on dental freedom of expression could not be justified under section 1 — there was no vulnerable group requiring protection or competing claims requiring mediation by the state. According to the logic of the Court's reasoning, consumer advertising was a benign form of expression as it did not harm vulnerable groups nor require mediation between competing groups.

Limitations on cigarette advertising and promotion would seem to pose even less of a problem under Canadian commercial expression doctrine. Though the expression qualifies as section 2(b) speech, limitations easily should be justifiable — so thought lawyers for the Government of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*.[81] The *Tobacco Products Control Act* prohibited advertising of tobacco products, restricted the promotional activities of tobacco companies and mandated the use of unattributed health warnings on all cigarette packages sold in Canada. At the level of the Supreme Court, the Government of Canada conceded that all restrictions, but the unattributed health warnings, limited the tobacco companies' section 2(b) rights. The majority, in an opinion by McLachlin J., concluded that all of the restrictions unjustifiably limited commercial expression rights. Restricting promotional activities through trademark usage, for instance, bore no rational connection to the objective of reducing tobacco consumption.[82] Nor were mandatory unattributed health warnings or restrictions on advertising the least restrictive means of achieving governmental objectives.[83] The health warnings, for instance, could be attributed directly to Health Canada without having to associate tobacco companies with the message that smoking was dangerous to one's health. The ban on advertising (which exempted advertising in foreign periodicals) similarly was unnecessarily overbroad. Included in the ban were "[p]urely informational advertising, simple reminders of package

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79 *Id.*, at para. 14.
80 *Id.*, at para. 40.
81 [1994] S.C.J. No. 17, [1994] 1 S.C.R. 311 (S.C.C.).
82 *Id.*, at para. 159.
83 *Id.*, at para. 174.

appearance, advertising for new brands and advertising showing relative tar content of different brands". "Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health," wrote McLachlin J.[84] This precisely fit the logic of the tobacco manufacturer's claim that advertising was directed at existing smokers rather than directed at enticing new smokers to take up the habit. The government, moreover, had not tendered any evidence to show that the means chosen impaired rights the least. Critical for the Court was the fact that the government had chosen to suppress, by invoking cabinet confidentiality, a study addressing the question of less restrictive alternatives. The government had tendered no evidence on this question — all that the Court was left with was what McLachlin J. called the "bland statement" in the Attorney General's factum, echoing *Irwin Toy*, that a complete ban was justified because the government had to balance "competing interests".[85] The notion of "deference" could not be carried so far, the majority maintained, particularly where there was a complete, rather than a partial, ban concerning a lawful activity which deprives smokers of "information relating to price, quality and even health risks associated with different brands".[86] Other less intrusive alternatives were apparent to the majority, including a ban on "lifestyle" advertising or advertising aimed only at children. Justice McLachlin went so far in this case as to even question the attenuated burden of proof under section 1 in commercial speech cases. The profit motivation should be considered "irrelevant", just as it is in the case of booksellers and newspaper owners. In addition, she reflected on the instability of the *Irwin Toy* dichotomy between matters of social policy and criminal law by suggesting it will not always be clear when a law balances competing interests or when it concerns the state as singular antagonist.[87] In *RJR*, for instance, the criminal law was being used in order to advance social values. Commercial expression, in other words, should not be so undervalued.

Justice La Forest issued a passionate dissent (L'Heureux-Dubé, Gonthier and Cory JJ. concurring), disagreeing with the majority's findings. The unattributed health warnings did not pose any section 2(b)

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[84] *Id.*, at para. 162.
[85] *Id.*, at para. 167.
[86] *Id.*, at para. 170.
[87] *Id.*, at para. 135.

problem.[88] The ban on advertising and restriction on promotional activities were both rationally connected to the objective of reducing tobacco consumption and were proportional responses to "one of the leading causes of illness and death in our society".[89] Logical inferences between promotional activities and the uptake of new smokers could be drawn from the fact that Canadian tobacco manufacturers spend $75 million each year on advertising while internal documents revealed a marketing strategy designed to entice new smokers.[90] As for the ban on advertising, the failure of government to disclose evidence of less restrictive alternatives was not fatal as the Act was the well-thought out result of a lengthy 20-year public policy process.[91] The experience in other countries indicated that tobacco companies cleverly would evade less restrictive alternatives. In addition, over 20 other democratic countries already had adopted similar complete prohibitions.[92]

RJR-Macdonald is one of the Court's most criticized decisions.[93] It also resulted in reply legislation, at the Court's invitation, in the form of a ban on so-called lifestyle advertising.[94] Although some commentators see this reply as evidence of a "dialogue" between the Court and Parliament,[95] others criticize the Court's role in distorting Parliament's preferred policy on tobacco advertising and for accepting that tobacco advertising is a protected form of expression.[96] In any event, the Court upheld the reply legislation under section 1 of the Charter. The reply legislation prohibited tobacco advertising "likely to create an erroneous impression about the characteristics, health effects or health hazard of the tobacco product or its emissions" as well as advertising likely to appeal to young persons and sponsorship of sporting and cultural events. It also

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[88] *Id.*, at para. 115.

[89] *Id.*, at para. 65.

[90] *Id.*, at para. 88.

[91] *Id.*, at para. 98.

[92] *Id.*, at para. 99.

[93] See Richard Moon, "RJR-MacDonald and the Freedom to Advertise" (1995) 7 Constit. Forum 1; Roger Shiner, "The Silent Majority Speaks: *RJR-MacDonald* v. *Canada*" (1995) 7 Constit. Forum 8.

[94] *Tobacco Act*, S.C. 1997, c. 13; David Schneiderman, "Consumer Interests and Commercial Speech: A Comment on *RJR MacDonald* v. *Canada (AG)*" (1996) 30 U.B.C. L. Rev. 165.

[95] Peter Hogg & Allison Bushell "The Charter Dialogue Between Courts and Legislatures" (1997) 35 Osgoode Hall L.J. 75; Roach, 2001, *supra*, note 54.

[96] Janet Hiebert, *Charter Conflicts* (Montreal: McGill Queens Press, 2002). On the concept of Court decisions causing policy distortion in the formulation of legislative replies, see Mark Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illustrations of the Countermajoritarian Difficulty" (1995) 94 Mich. L. Rev. 245.

required health warnings to take up 50 per cent of packaging. In all cases, the Court found the restrictions on freedom of expression to be proportionate and stressed the low value of the expression at issue.[97] It also read down provisions to allow the publication of scientific studies sponsored by tobacco companies. It stressed not automatic deference to the reply legislation but that "the *Tobacco Act* must be assessed in light of the knowledge, social conditions and regulatory environment revealed by the evidence presented in this case".[98]

In order to vindicate the consumer interest in receiving commercial advertising, the Court even has entered the realm of labour relations — a realm which it initially was reluctant to enter on freedom of association grounds.[99] In *Dolphin Delivery*,[100] the Court acknowledged for the first time that secondary picketing in the context of a labour dispute was a constitutionally protected form of expression. Though picketing is ordinarily intended to do economic harm to targeted businesses, there will always be some expressive element in picketing. "The Union is making a statement to the general public that it is involved in a dispute, that it is seeking to impose its will on the object of picketing, and that it solicits the assistance of the public in honouring the picket line," wrote McIntyre J. for the majority.[101] In the *BCGEU* case,[102] the Court affirmed an injunction issued on an *ex parte* motion by the Chief Justice of the British Columbia Supreme Court barring peaceful picketing in front of the Vancouver courthouse. "Of what value are the rights and freedoms guaranteed by the *Charter* if a person is denied or delayed access to a court of competent jurisdiction in order to vindicate them?" asked Dickson C.J.C. The Court would not tolerate even peaceful picketing accommodating access by lawyers and litigants to the courthouse premises. In *RWDSU, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,[103] the Court clarified the holding in *Dolphin Delivery*, concluding that secondary picketing was not illegal *per se* and that Courts only should intervene to protect third parties where picketing

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97 *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.) [hereinafter "*JTI-Macdonald*"].

98 *Id.*, at para. 11.

99 It has since decided to enter the field of labour relations. See *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, [2007] 2 S.C.R. 391 (S.C.C.).

100 *Dolphin Delivery*, *supra*, note 15 .

101 *Id.*, at 588.

102 *BCGEU*, *supra*, note 16.

103 [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.) [hereinafter "*RWDSU v. Pepsi-Cola*"].

"crosses the line and becomes tortious or criminal in nature".[104] The consumer interest was brought strongly into relief, however, in *UFCW, Local 1518 v. KMart Canada Ltd.*[105] The case concerned consumer pamphletting by a labour union at non-unionized KMart retail stores. The pamphlets called on customers to boycott KMart in support of employees locked out of unionized KMart stores for over six months. The B.C. Labour Relations Board enjoined the pamphletting, characterizing it as an unlawful form of secondary picketing under the provincial labour relations scheme. The Supreme Court of Canada ruled that the injunction unjustifiably violated the freedom of expression rights of the union. Unlike a picket line, which operates as a coercive "signal" to customers and workers not to cross the line (as the Court characterized picketing in *Dolphin* and *BCGEU*),[106] consumer pamphletting, Cory J. wrote for the Court, seeks to persuade "through informed and rational discourse". This was the "very essence of freedom of expression".[107]

In *Guignard*,[108] the Court acknowledged that consumers also have the right to engage in counter-speech. The case concerned a Saint-Hyacinthe municipal by-law prohibiting advertising outside of designated industrial areas. Mr. Guignard erected a sign on one of his commercial properties, outside of a designated industrial area, complaining of the delay he was experiencing in receiving indemnification from his insurance company. Guignard's billboard proclaimed that: "When a claim is made one finds out about poor quality insurance."[109] Justice LeBel, for the majority, struck down the municipal by-law as consumers also have constitutional rights to freedom of expression and this occasionally will take the form of "counter-advertising". "Given the tremendous importance of economic activity in our society," wrote LeBel J., "a consumer's 'counter-advertising' assists in circulating information and protecting the interests of society just as much as does advertising of certain forms of expression".[110] Not only was the consumer interest in receiving and responding to commercial speech highlighted in LeBel J.'s decision, so was the economic interest of producers. Justice LeBel

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[104] *Id.*, at para. 73.

[105] [1999] S.C.J. No. 44, [1999] 2 S.C.R. 1083 (S.C.C.) [hereinafter "*UFCW v. Kmart*"].

[106] *Id.*, at para. 38. See *Dolphin Delivery*, *supra*, note 15 and *BCGEU*, *supra*, note 16.

[107] *Id.*, at para. 43.

[108] *R. v. Guignard*, [2002] S.C.J. No. 16, [2002] 1 S.C.R. 472 (S.C.C.) [hereinafter "*Guignard*"].

[109] *Id.*, at para. 3

[110] *Id.*, at para. 23.

acknowledged the great value that had been placed on commercial speech by the Court in earlier cases (as in *Rocket* and *RJR- Macdonald*) and that:

> The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on business and consumers having access to abundant and diverse information ...
>
> …
>
> The decisions of this Court accordingly recognize that commercial enterprises have a constitutional right to engage in activities to inform and promote, by advertising.[111]

This conclusion was embraced by the Ontario Court of Appeal in *Vann Niagara Ltd. v. Oakville (Town)*.[112] The case concerned a by-law of the municipality of Oakville which prohibited commercial billboard signs along highways and in certain designated areas. According to Borins J., for the majority, commercial expression is "a key component to our economic system and therefore merits Charter protection".[113] The Court of Appeal found the by-law constituted an unreasonable limitation on commercial speech rights. The Supreme Court of Canada reversed the finding under section 1, holding that Oakville could outlaw commercial billboard signs, but agreed with the Court below that the billboard restriction infringed section 2(b).[114] A similar approach was taken in a case holding that a Montreal by-law against the use of loudspeakers infringed section 2(b) but was justified under section 1. In a strong dissent, Binnie J. stressed that the by-law as written was overbroad because it applied to all use of loudspeakers and not only those that produced a nuisance.[115]

If in previous decisions the relationship between consumers and producers has been obscured, the Court now appears ready to equate the constitutional rights of producers with those of consumers. The interests of the producers of goods to promote their wares in the marketplace equally now are paramount to those of consumers. In this context, the

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111 *Id.*, at paras. 21, 23.

112 [2002] O.J. No. 2323, 60 O.R. (3d) 1 (Ont. C.A.).

113 *Id.*, at para. 17.

114 *Oakville (Town) v. Vann Niagara Ltd.*, [2003] S.C.J. No. 71, [2003] 3 S.C.R. 158 (S.C.C.). But see *UL Canada Inc v. Quebec (Attorney General)*, [2005] S.C.J. No. 11, [2005] 1 S.C.R. 143 (S.C.C.) for a one paragraph decision holding that the regulation of the colour of margarine did not infringe a corporation's freedom of expression.

115 *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) [hereinafter "*2952-1366 Québec*"]. This case is discussed at greater length *infra* at note 244.

Court is unwilling or unable to distinguish speech by the powerless and the powerful. Thus Guignard's billboard protest against the insurance companies translates into the right of powerful insurance companies and tobacco companies to advertise their products.

The political power of the powerless is made stark by recent enactments intended to do away with begging on the streets of Canadian municipalities. The Ontario *Safe Streets Act*[116] prohibits certain forms of "aggressive soliciting", such as using abusive language or soliciting while intoxicated, and "solicitation" in certain locations, such as panhandling outside of banks or near bus stops. There seems little doubt that these provincial and municipal laws target expressive activities by reason of their content, in which case, they fall within the constitutionally protected sphere of section 2(b). Whether such a law could satisfy the section 1 justification standard was addressed at trial in *R. v. Banks*.[117] Justice Babe characterized begging as "peripheral to the core values protected by s. 2(b)" as there is no evidence they are "intending to make a political point".[118] Yet, as Richard Moon has noted, though begging may not amount to a political critique of the socio-economic order, it is not "simply a request for money" but a "request for help".[119] That this appeal for assistance is not considered at least as constitutionally meritorious as cigarette advertising signals a disquieting bias in freedom of expression jurisprudence. To be sure, guaranteeing a constitutional right to beg is no means of satisfying the basic needs of poor people. The judicial orientation toward such claims, however, reveals the extent to which middle-class consumer values predominate under the Charter.[120]

3. Obscene Speech

The criminal regulation of obscene speech long has posed a problem for the judiciary. As U.S. free speech theorist Harry Kalven, Jr. put it, having courts weigh whether materials are obscene "seems like an

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116 S.O. 1999, c. 8.

117 [2001] O.J. No. 3219, 55 O.R. (3d) 374 (Ont. C.J.).

118 *Id.*, at 409.

119 Richard Moon, "Keeping the Streets Safe From Expression" in Joe Hermer & Janet Mosher, eds., *Disorderly People: Law and the Politics of Exclusion in Ontario* (Halifax: Fernwood Publishing, 2002) 65, at 72.

120 On judicial partiality in commercial expression cases, see David Schneiderman, "Constitutionalizing the Culture-Ideology of Consumerism" (1998) 7 Soc. & Leg. Stud. 213.

invention of the devil designed to embarrass and unhinge the legal system".[121] In Canada, the statutory offence of obscene speech first appeared in the 1892 *Criminal Code*. The meaning of obscenity applied by courts, however, was adopted from the common law *Hicklin*[122] test: whether the materials in question had a "tendency to deprave and corrupt those whose minds are open to immoral influences, and into whose hands a publication of this sort may fall". This test was the product of Victorian values premised upon a mix of both religious morals and class prejudice. Moreover, the artistic, literary, scientific or educational merit of the material prohibited was of little consequence.[123]

Criminal Code amendments in 1959 were introduced to replace reliance on the *Hicklin* test with a new definition of obscenity that concerned the "undue exploitation of sex or of sex and other characteristics".[124] The language of "undueness" suggested that materials with artistic or literary merit could be excused from the criminal prohibition. In *Brodie*,[125] which concerned a prosecution for the publication and distribution of D.H. Lawrence's *Lady Chatterley's Lover*, the Supreme Court of Canada endorsed the use of "community standards of tolerance" criteria in order to determine if material was sufficiently "undue" as to be obscene. In *Towne Cinema*,[126] Dickson C.J.C. explained that the standard concerned not what Canadians would "think is right for themselves to see" but "what Canadians would not abide other Canadians seeing because it would be beyond the contemporary Canadian standard of tolerance to allow them to see it".[127] Assessing community standards remained difficult for judges and became the easy target of academic criticism. The standard was indeterminate in its use of "community" (was it national or local, urban or rural?), it had serious compliance problems (how could one know in advance?) and, more

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[121] Harry Kalven, Jr., *A Worthy Tradition: Freedom of Speech in America*, ed. Jamie Kalven (New York: Harper & Row, 1988), at 34.

[122] *R. v. Hicklin* (1868), L.R. 3 Q.B. 360.

[123] See John P.S. McLaren, "'Now You See It, Now You Don't': The Historical Record and Elusive Task of Defining the Obscene" in David Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Thomson, 1991), 105.

[124] *Criminal Code*, S.C. 1953-54, c. 51, s. 150(8) (now *Criminal Code*, R.S.C. 1985, c. C-46) [hereinafter "*Criminal Code*"].

[125] *R. v. Brodie*, [1962] S.C.J. No. 55, [1962] S.C.R. 681 (S.C.C.).

[126] *R. v. Towne Cinema Theatres Ltd.*, [1985] S.C.J. No. 24, [1985] 1 S.C.R. 494 (S.C.C.).

[127] *Id.*, at 509.

significantly, covered up the harms experienced by women and children in both the production and the use of pornography.[128]

This latter, feminist critique of pornography, brought to prominence by the writings of law professor Catherine A. MacKinnon, emphasized the harms caused by pornography rather than merely its offensive or prurient nature. Pornography, for MacKinnon, institutionalized women's inequality; it reinforced the sexual image of women as desirous of their sexual, political and social subordination to men. Pornography, in this way, defined women for men.[129] In support of this approach, laboratory studies suggesting a correlation between exposure to pornography and aggression and violence against women were cited, as was the idea that the spread of pornography not only reinforced sexual stereotypes, but also "chilled" women's own free speech into silence and submission.[130] Clamping down on increasingly available pornography could better be justified employing this discourse of harm and inequality rather than Victorian-based morals. The problem was that the *Criminal Code* definition of obscenity had not been changed substantially since 1959. (An aborted attempt to revise the *Criminal Code* standard by the Mulroney-led Progressive Conservative government stalled in Parliament.[131]) Could the law withstand scrutiny under the Charter without actual reform of the *Criminal Code*?[132]

The Supreme Court of Canada answered the question in the *Butler* case,[133] salvaging the *Criminal Code* provisions from Charter invalidity by tying undueness to harm with a particular emphasis on harm to women and children. Butler faced 250 related obscenity charges; he was acquitted of many of them at trial. For a majority of the Manitoba Court of Appeal, however, this kind of material did not raise any freedom of

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[128] Kathleen Mahoney, "Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law" in David Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Thomson, 1991) 145, at 149-56.

[129] Catherine A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987), at 148.

[130] Catherine A. MacKinnon, "Sexuality, Pornography and Method: 'Pleasure under Patriarchy'" (1989) 99 Ethics 314, at 333-34; Catherine A. MacKinnon, *Only Words* (Cambridge: Harvard University Press, 1993) [hereinafter "MacKinnon, *Only Words*"].

[131] See Dany Lacombe, *Blue Politics: Pornography and the Law in the Age of Feminism* (Toronto: University of Toronto Press, 1994).

[132] This history and context helpfully is set out in Brenda Cossman & Shannon Bell, "Introduction" in Brenda Cossman *et al.*, *Bad Attitude/s on Trial: Pornography, Feminism, and the Butler Decision* (Toronto: University of Toronto Press, 1997), at 3.

[133] *Butler*, *supra*, note 23.

expression problem: "what we see and hear are the expression of loins and glands rather than hearts and minds".[134] On appeal to the Supreme Court of Canada, Sopinka J., writing for the majority, first reconstructed the *Criminal Code* provisions. Degrading and dehumanizing material fails under community standards, wrote Sopinka J., not because it offends against public morals, but because it places "women (and sometimes men) in positions of subordination, servile submission or humiliation". Not only does this run against the "principles of equality and dignity of all human beings", there also is a "substantial body of opinion" which holds that the portrayal of persons in such situations "results in harm, particularly to women and therefore to society as a whole".[135] The greater the degree of harm flowing from exposure to obscene materials, Sopinka J. concluded, the greater the likelihood the material does not satisfy the community standards test.[136] Even if offending community standards, the material will not be obscene if it satisfies the "internal necessities" or artistic defence test. This requires assessing the material to determine whether the exploitation of sex is internally necessary to a plot or theme, considering the work as a whole, and does not merely represent "dirt for dirt's sake". Because artistic freedom lies "at the heart of freedom of expression values", any doubt about the artistic value of the work "must be resolved in favour of freedom of expression".[137]

Turning to the sorts of material caught by the *Criminal Code*, Sopinka J. identified three broad categories of pornography: (1) explicit sex with violence; (2) explicit sex with violence that is degrading or dehumanizing; and (3) explicit sex without violence that is not degrading and dehumanizing.[138] The *Criminal Code* will almost always include the first, includes the second if the risk of harm is "substantial", and generally will not include the third unless children are involved in the production of the material in question.[139] Justice Sopinka then turned to the Charter's guarantee of freedom of expression. Clearly, this material fell within the scope of section 2(b) though it portrayed physical activities. Was the limitation, however, so vague and unintelligible as to fail to be "prescribed by law"? Though the standard of undue exploitation of

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134 *R. v. Butler*, [1990] M.J. No. 519, 73 Man. R. (2d) 197 (Man. C.A.).
135 *Butler*, *supra*, note 23, at 479.
136 *Id.*, at 485.
137 *Id.*, at 486.
138 *Id.*, at 484.
139 *Id.*, at 486.

sex was a standard which escapes "precise technical definition", the *Criminal Code* was replete with such standards and was sufficiently intelligible to allow the judiciary to do its work.[140] Looking to the *Oakes*[141] criteria, avoidance of general societal harm was a pressing and substantial objective that justifiably could limit Charter rights and freedoms. This was not a case of "shifting purposes", which the Court cautioned against in its *Big M Drug Mart* decision. The law was not merely one about morals but about harm, though societal "understanding of the harms caused by these materials has developed considerably" since 1959. Harm and morality, in any event, often are "inextricably linked", which was to say that Parliament legitimately could enact legislation based on some "fundamental conception of morality".[142]

The Court in *Butler* found a rational connection between the prohibition and the prevention of harm, despite inconclusive social science evidence. The Court's deference to criminal prohibitions of speech that attempt to protect vulnerable groups may overestimate the actual benefits of such sanctions in promoting equality. As will be seen, it also encourages governments to offer new criminal laws as a response to the legitimate concerns of vulnerable groups rather than taking less punitive and perhaps more expensive actions to promote equality and combat discrimination.[143]

The Court completed the section 1 analysis in *Butler* by stressing that deference was required because obscene speech does not lie close to the core values underlying the freedom of expression. Though a scheme less intrusive of freedom of expression rights could be envisaged, the Court would not insist on a "perfect" scheme. All that is required, at the minimal impairment stage of the analysis, is that the law be "appropriately tailored".[144] Erotic materials that cause no harm remain freely available, while material having artistic, scientific or literary merit remain exempt from the Code. It also was appropriate for the Court to take into account failed recent attempts by Parliament to define what is "pornographic" —

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[140] *Id.*, at 491.

[141] *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

[142] *Butler*, *supra*, note 23, at 493-96.

[143] See generally Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) on the tendency of governments to govern through punitive crime control strategy and the role that equality concerns and optimistic predictions about the ability of the criminal sanction to promote equality now play in legitimating the criminal sanction.

[144] *Butler*, *supra*, note 23, at 505.

the "impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote".[145] Justices Gonthier and L'Heureux-Dubé issued concurring reasons which would have included the third category of pornography (sexual, non-violent and non-degrading material) by virtue of its content (including children, for instance) or its manner of representation (as on a public billboard).[146]

The Court has been accused of "judicial activism" in the performance of its judicial review function under the Charter, most often in cases where the Court issues declarations of constitutional invalidity. Escaping this charge are cases where the Court goes out of its way to salvage laws vulnerable to attack under the Charter.[147] In *Butler*, the Court re-interpreted obscenity law so as to include more modern concerns about harms to women and children and so as to enable the law to survive Charter review even though Parliament's attempt to achieve similar reforms had failed. In *Sharpe*[148] we find the Court engaging in a similar kind of salvaging operation. New child pornography provisions, rushed into passage in the wake of *Butler* and on the eve of the 1993 federal election, prohibited the production, sale, distribution and possession of visual representations of persons depicted as being under 18 years of age and who are engaged in "explicit sexual activity". Depictions of the sexual organs or anal regions of persons under 18, the "dominant characteristic" of which is for a "sexual purpose", were also prohibited. Lastly, it was an offence to have any written material or visual representation that "advocates or counsels sexual activity" with a person under 18 that is otherwise a criminal offence (section 163.1) (namely, sex with a person under the age of 14 [now 16] or, where a person is in a position of trust or authority, with a young person under their care who is under 18 years of age (sections 150.1, 153). No one could be found guilty of the offence of child pornography if the written material or visual representation had "artistic merit or an educational, scientific or medical purpose" (section 163.1) or was in the service of the "public good" (section 163(3)).[149]

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[145] *Id.*, at 566.

[146] *Id.*, at 516-19.

[147] But see Arbour J.'s argument in dissent that the Court had usurped the legislative function in salvaging s. 43 of the *Criminal Code* by placing restrictions on it. *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

[148] *Sharpe*, *supra*, note 3.

[149] On events leading to the enactment of the law, see Stan Persky & John Dixon, *On Kiddie Porn: Sexual Representation, Free Speech and the Robin Sharpe Case* (Vancouver: New Star Books, 2001).

Chief Justice McLachlin, writing for the majority, read down as a matter of statutory interpretation such terms as "explicit sexual activity" to include only "extreme" or "non-trivial" depictions of sex by those under age 18. It was not intended, wrote McLachlin C.J.C., that the law should catch within its scope less extreme forms of sexual conduct, such as kissing, hugging or fondling.[150] Nor would family photos of children in the bath be caught by the law as they would not have a sexual purpose as their dominant characteristic. The words "advocates or counsels" applying to written materials required "active" encouragement and not mere description[151] — Nabokov's *Lolita* would escape criminal liability. The artistic defence, the Court added, was broad enough to include all expression "reasonably viewed as art"[152] — nor need the material be internally necessary to the literary or artistic purpose, as in the judge-made law of obscenity.[153] Having dampened fears about the laws' overbreadth, McLachlin C.J.C. then read in, as a matter of constitutional remedy, two exceptions to the *Criminal Code* prohibition. These concerned "self-created expressive materials", such as written diaries, stories and drawings, and another exception for "private recordings of lawful sexual activity" such as video recordings of sexual activity between two teenagers of consenting age that are kept private.[154] Three Justices (Gonthier, L'Heureux-Dubé and Bastarache JJ.) questioned whether child pornography deserved Charter protection and that, if it did, Parliament was justified in prohibiting the possession of all visual and written material reasonably falling within the definition of child pornography. This would include the possession of adolescent self-created visual material and self-authored privately held material, the two areas carved out of the *Criminal Code* by the majority's innovative reading-down remedy.[155]

Sharpe was subsequently convicted of charges related to the possession of prohibited photographs but was acquitted on charges relating to his own writings, in part, by successfully invoking the defence of the artistic merit.[156] The federal government responded quickly by tabling

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[150] *Sharpe*, *supra*, note 3, at paras. 46-49.

[151] *Id.*, at para. 56.

[152] *Id.*, at para. 63.

[153] *Id.*, at paras. 65, 67.

[154] *Id.*, at paras. 115-116.

[155] *Id.*, at para. 231.

[156] The complete saga of the *Sharpe* case is discussed in Florian Sauvageau, David Schneiderman & David Taras, *The Last Word: Media Coverage of the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2006), at c. 5.

amendments to the child pornography provisions of the *Criminal Code*.[157] In addition to a new offence targeting written material which has as its dominant characteristic "the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years of age that would be an offence under this Act", the federal proposals would have shrunk the defences to child porn charges to include only acts that "serve the public good". Although it is possible that the courts would define this defence in a manner that incorporates the defences of artistic, educational, scientific or medical merit, which were all proposed for abolition, there is no certainty that this would occur. This could well have a chilling effect on artistic expression. Such amendments if enacted would also unsettle the precedential value of *Sharpe* and put the constitutionality of the toughened child pornography in doubt.

The Court's reasoning in *Sharpe* displays extreme confidence in the ability of police, prosecutors and lower courts judges to administer the law as reformulated by the Court. This is a recurring theme in the case of overbroad laws negatively impacting on freedom of expression that are intended to protect vulnerable groups from harm. This confidence is strikingly exhibited in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*.[158] There was, in *Little Sisters*, a voluminous 12-year record of harassment of gay and lesbian booksellers in Vancouver and Toronto by Customs Canada. At issue was the enforcement of the *Customs Tariff*, prohibiting the importation of material deemed obscene, hateful, treasonous or seditious under the *Criminal Code*. Customs officials consistently targeted gay and lesbian bookstores, like Little Sisters in Vancouver, for importing criminally obscene material. Whereas identical books would escape customs censorship if destined for mainstream bookstores, those imported by Little Sisters would be seized and held at the border for months at a time, resulting in significant financial hardship to the booksellers. As the Supreme Court of Canada in *Butler* was silent on the question of whether gay and lesbian pornography deserved any special consideration in the administration of the *Criminal Code*, customs officials treated as obscene those materials dealing with gay or lesbian sexuality.[159]

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[157] Bill C-20, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act*, 37th Parl., 2nd Sess.

[158] [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) [hereinafter "*Little Sisters*"].

[159] See Brenda Cossman & Bruce Ryder, "Customs Censorship and the *Charter*: The *Little Sisters* Case" (1996) 7 Constit. Forum 103.

Little Sisters argued that gay and lesbian sexual speech promoted a positive self-image of their sexuality.[160] Nor did this material engage the harm-based justification for obscenity law outlined in *Butler*.[161] For these reasons, the expressive activity at issue should not be undervalued and *Butler* distinguished. There would be no special exemption from the *Butler* standard, wrote Binnie J. for the Court: "The potential of harm and a same-sex depiction are not necessarily mutually exclusive."[162] The attack on the customs scheme was not much more successful. Though the record at trial revealed "high error rates" — Little Sisters reasonably felt like they were being treated as "sexual outcasts"[163] — there was nothing "on the face of the Customs legislation, or in its necessary effects" that gave rise to any Charter problems.[164] Rather, it was "human, erroneous determinations"[165] at the "administrative level"[166] that gave rise to these errors. Justice Binnie was of the view that any Charter violation easily could be repaired: "Customs legislation is quite capable of being applied in a manner consistent with respect for *Charter* rights."[167] Only in one respect was the customs scheme faulty, and that was in shifting the burden of proof to importers to disprove obscenity — this the state could not do. The majority saw no need to issue any further meaningful remedy, despite the "evidence of actual abuse".[168] The majority's ruling amounted to little more than a plea of confidence in customs officials, who time and again have shown themselves ill-suited to perform the role of arbiter of sexual tastes.

The minority opinion of Iacobucci J., with Arbour and LeBel JJ. concurring, was far more receptive to the booksellers' arguments. They rejected the majority's holding that it was only the administration of the scheme that posed a problem and not the legislation itself. Where legislation "lends itself to repeated violations of *Charter* rights, as does the legislative scheme here, the legislation itself is partially responsible and must be remedied".[169] The minority spoke about the problems of

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160 *Little Sisters*, *supra*, note 158, at para. 53.
161 *Id.*, at para. 64.
162 *Id.*, at para. 60.
163 *Id.*, at para. 36.
164 *Id*., at para. 125.
165 *Id.*, at para. 77.
166 *Id.*, at para. 125.
167 *Id.*, at para. 133.
168 *Id.*, at para. 137.
169 *Id.*, at para. 205.

vagueness and overbreadth, and also about the problem of a regime of prior restraint. It long has been accepted, as far back as Blackstone, that prior restraint as a system of censorship is anathema to the values of freedom of expression. The minority even suggested that Parliament consider abandoning front-line censorship on Canadian borders and rely on *Criminal Code* enforcement once materials have entered the country. This may be the best strategy for the state, they recommended, particularly in light of the fact that it is so easy to evade customs officials through the use of the Internet.[170] Such a regime would transfer front-line enforcement from the hands of customs officials to the police. In all events, courts should be sensitive that it is not independent judges or juries who will in the first instance interpret and apply vague and potentially overbroad laws, but rather bureaucrats such as custom officials and the police.

It may be that Binnie J., who wrote the opinion for the Court in *Little Sisters*, has come around to this sort of view. Having experienced continuing harassment at the hands of Canada Customs, the besieged bookstore sought an order of advance costs in order to defray the burden of litigating yet another Charter challenge to the agency's practices. A majority of the Court declined to award the extraordinary remedy of advance costs to Little Sisters.[171] Justice Binnie in dissent, however, observed that the application was before the Court "precisely because the appellant says that the Minister's assurances proved empty in practice, that the systemic abuses established in earlier litigation have continued and that (in its view) Canada Customs has shown itself to be unwilling to administer the Customs legislation fairly and without discrimination".[172] The chambers judge, indeed, found that Little Sisters had *prima facie* established that Canada Customs failed to live up to commitments made in the earlier litigation. This was a fight regarding "unfinished *Charter* business", wrote Binnie J. in apparent exasperation, and it was appropriate that the Court aid the bookstore to "make good the victory it thought it had won" the first time around.[173]

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[170] *Id.*, at para. 280.

[171] *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, [2007] S.C.J. No. 2, [2007] 1 S.C.R. 38 (S.C.C.).

[172] *Id.*, at para. 120.

[173] *Id.*, at para. 129.

4. Hate Speech

There is perhaps no form of expression that is harder to ignore and more difficult to defend than the promotion of race hate. The free expression rights of racial supremacists and holocaust deniers test the outer boundaries of any democratic society's tolerance for speech it has every right to loathe. The Cohen Committee of 1966 — chaired by McGill Law professor Maxwell Cohen — was charged with the task of inquiring into the state of hate propaganda in Canada. Though the numbers of actors were "small", the Committee concluded that they could constitute a "clear and present danger" (U.S. Justice Oliver Wendell Holmes's words) to Canadian society.[174] Parliament moved on the Committee's recommendations by criminalizing the wilful promotion, other than in a private conversation, of racial hatred against certain identifiable groups. In order to preserve latitude for freedom of expression, a number of defences are available including truth, reasonable belief in the truth of a matter of public interest the discussion of which is for the public benefit, commentary in good faith opinion upon a religious subject, and good faith identification of matters tending to produce feelings of hatred. In addition, charges could not be laid without the consent of the provincial Attorney General.[175]

Canada's race hate laws were tested against the guarantee of freedom of expression in the Supreme Court of Canada decision of *R. v. Keegstra*.[176] James Keegstra, a high school teacher in the small Alberta town of Eckville, was charged under the *Criminal Code* with wilfully promoting hatred against an identifiable group by teaching his high school students that Jews had "created the Holocaust to gain sympathy" and that — as his student's notes reveal — they were "treacherous", "subversive", "sadistic", "money-loving" "child killers" who sought to destroy Christianity and were responsible for depressions, anarchy, chaos, wars and revolution. Before his dismissal as a teacher in 1982, he required his students to reproduce these anti-Semitic teachings in their test answers and essays.[177]

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[174] Canada, *Report of the Special Committee on Hate Propaganda in Canada* (Chair: Maxwell Cohen) (Ottawa: Queens Printer, 1966), at 24.

[175] See discussion in Law Reform Commission of Canada, *Hate Propaganda, Working Paper 50* (Ottawa: Law Reform Commission of Canada, 1986).

[176] *Keegstra*, *supra*, note 20.

[177] Fuller accounts of Keegstra's teachings are found in Steve Mertl & John Ward, *Keegstra: The Issues, The Trial and the Consequences* (Saskatoon: Western Producer Prairie Books, 1985) and David Bercuson & Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday Canada, 1985).

The Supreme Court unanimously held that Keegstra's teachings were a form of expression protected under section 2(b) of the Charter. Chief Justice Dickson concluded that the fact that the wilful promotion of hatred against an identifiable group "is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning …"[178]. He added that the content of the speech was not relevant under section 2(b), "the result of a high value being put on freedom of speech in the abstract".[179]

The Court in *Keegstra* split 4-3 about whether the restriction on freedom of expression had been justified, with Dickson C.J.C. holding for a majority of Wilson, Gonthier and L'Heureux-Dubé JJ. that the restriction was a reasonable one. The majority concluded that the requirement for a pressing and substantial objective to justify the restriction of freedom of expression "was easily satisfied" because Parliament has recognized the substantial harm that can flow from hate propaganda:

> The nature of Parliament's objective is supported not only by the work of numerous study groups, but also by our collective historical knowledge of the potentially catastrophic effects of the promotion of hatred … Additionally, the international commitment to eradicate hate propaganda and the stress placed upon equality and multiculturalism in the Charter strongly buttress the importance of this objective. [180]

The majority went on to conclude that the criminal prohibition against hate speech was a proportionate and justifiable restriction on freedom of expression. Chief Justice Dickson took a contextual approach to hate speech, stressing that such speech lies far from the core of the freedom's underlying values: it "contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged".[181] He then concluded that the use of the criminal law was rationally connected to the objectives of denouncing

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[178] *Keegstra*, *supra*, note 20, at 730. The Court indicated that hate speech was not analogous to violence and even if hate speech amounted to threats of violence, it would be protected under s. 2(b) of the Charter (at 732-33). The Court also indicated that competing Charter rights should be considered under s. 1 (at 734).

[179] *Id.*, at 760.

[180] *Id.*, at 758.

[181] *Id.*, at 766.

hate speech and that the impugned law violated freedom of expression as little as possible because it contained numerous safeguards, such as the requirement that the Attorney General approve the commencement of any prosecution under the law, and various defences, including truth. As regards worries about overbreadth and vagueness, Dickson C.J.C. insisted that the promotion of hatred provisions were intended to catch only the most "intense and extreme" forms of hatred, "Hatred is predicated on destruction", he wrote, and in this sense "is the most extreme emotion that belies reason." Despite some worrying instances where the law had been used by authorities to restrict valuable expression, this was a consequence of unlawful state action and "police harassment", matters which have "minimal bearing" on the Court's proportionality analysis.

In her dissent, McLachlin J. accepted the legitimate objectives of the law but held that the law was not rationally connected to such objectives. She stressed that rather than inhibiting hate speech, the law often gives hate mongers increased publicity and provided no assurances that hate against vulnerable minorities would not flourish.[182] This was a particularly pragmatic and consequentialist argument against constitutionalizing hate speech.[183] Justice McLachlin also expressed concerns about the breadth of the law, its chilling effect on legitimate expression, and concerns about criminalizing the content of speech. Although these concerns were expressed in dissent, as will be seen, they soon resurfaced in a majority decision of the Court.

The Supreme Court's 1990 decision in *Keegstra* can usefully be compared to a 1992 decision of the United States Supreme Court that struck down a city ordinance making it illegal to display a symbol that one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender". The law had been applied with respect to the burning of a cross on the lawn of an African American family. The United States Supreme Court struck down the ordinance as an impermissible attempt to prohibit speech on the basis of its content. Justice Scalia reasoned for the Court that the "only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases thus singled out.

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[182] Public opinion polling evidence after the Zundel trial indicates that there was no greater antipathy towards Jews generated by the trial. See Gabriel Weimann & Conrad Winn, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada* (Oakville: Mosaic Press, 1986), at 59*ff.*

[183] See also Borovoy, *supra*, note 14, at c. 2.

That is precisely what the First Amendment forbids."[184] Chief Justice Dickson in *Keegstra* rejected such a content-neutral approach by noting that:

> Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States. Far from requiring a less solicitous protection of *Charter* rights and freedoms, such independence of vision protects these rights and freedoms in a different way. … [I]n my view the international commitment to eradicate hate propaganda and, most importantly, the special role given equality and multiculturalism in the Canadian Constitution necessitate a departure from the view, reasonably prevalent in America at present, that the suppression of hate propaganda is incompatible with the guarantee of free expression.[185]

The Court's approach in *Keegstra* may represent a greater acceptance of the positive role of the state and reflect the exceptional nature of American First Amendment jurisprudence.[186] At the same time, too much should probably not be made of how *Keegstra* relates to a distinctive Canadian jurisprudence on freedom of expression. The Court was closely divided 4-3 and, two years later, many of the concerns expressed by McLachlin J. on behalf of the minority in *Keegstra* about overbreadth and the chill of free expression resurfaced in her decision for a majority of the Court in *R. v. Zundel*.[187] In addition, the American First Amendment case law has continued to evolve. The United States Supreme Court re-visited the emotive issue of cross burning and has opened the door to some regulation of such acts. In the case of a Virginia prohibition on cross-burning with intent to intimidate, O'Connor J. for the Court distinguished between cross-burning which communicates a serious expression of intent to commit unlawful violence against an individual or group and cross burning as a statement of ideology, "as a symbol of

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184 *RAV v. City of St. Paul*, 505 U.S. 377 (1992).

185 *Keegstra*, *supra*, note 20, at 743.

186 Lorraine Weinrib, "Hate Promotion in a Free and Democratic Society" (1991) 36 McGill L.J. 1416; Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (1992) 55 L.C.P. 77; Mayo Moran, "Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech" [1994] Wisc. L. Rev. 1425. On the many virtues and pathologies of First Amendment doctrine, see Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Boulder: Westview Press, 1996).

187 *Zundel*, *supra*, note 22.

group solidarity".[188] The Court was prepared to permit proscription of the former but not the latter, which qualifies as constitutionally protected political speech.

Ernst Zundel is one of the world's most prominent Holocaust deniers. Zundel was charged with wilfully publishing false news that he knew was false and was likely to cause injury or mischief to a public interest.[189] He was charged under this old and obscure provision of the *Criminal Code* rather than with wilful promotion of hatred because the Attorney General of Ontario refused to consent to a prosecution as required by the *Criminal Code*'s promotion of hatred provisions.

The Supreme Court of Canada in *Zundel* unanimously agreed that the deliberate publication of statements that the speaker knows to be false nevertheless is a protected form of expression under section 2(b). The Court underscored its very broad approach to protected expression that includes all attempts to convey meaning "unless the physical form by which the communication is made (for example, by a violent act) excludes protection".[190] Justice McLachlin for the majority quoted Holmes J. with approval that

> the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free for those who agree with us but freedom for the thought that we hate".[191]

The Court refused to examine closely whether deliberate lies advanced the values of freedom of expression, namely the search for truth, individual self-fulfilment or political or social participation in a democracy. It cited the difficulty of determining whether the statements were in fact false and the dangers of excluding statements from constitutional protection that had even a marginal relation to the values protected by freedom of expression.

The Court split 4-3 over whether the false news provision was a justified and reasonable limit on freedom of expression. Justice McLachlin held for the majority that the old false news provision, originally enacted as part of the 1892 *Criminal Code*, had not been enacted for a purpose

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188 *Virginia v. Black*, 538 U.S. 343, at 14, 20 (Lexis) (2003).

189 *Criminal Code*, *supra*, note 124, s. 181.

190 *Zundel*, *supra*, note 22, at 753.

191 *Id.*, at 752-53, quoting *United States v. Schwimmer*, 279 U.S. 644, at 654-55 (1929).

that was important enough to limit a Charter right or freedom. She stressed that other countries did not have similar laws and that, at best, the law was originally enacted "to protect the mighty and the powerful from discord or slander".[192] Even assuming that the law was limited to promoting racial and social tolerance, as the three dissenting judges maintained, McLachlin J. concluded that it was disproportionate and overbroad for that purpose. The offence applied to all forms of false expression and could apply whenever false statements injured any public interest. The overbreadth of the section could chill a broad range of legitimate expression related to questionable claims of facts. She emphasized the dangers of using the most coercive instrument of the criminal sanction to target controversial speech and cited the hate propaganda provisions upheld in *Keegstra* as an example of a more restrictive and proportionate restriction on freedom of expression. The minority stressed, as did the majority in *Keegstra*, the importance of prohibiting speech that ran counter to the constitutional values of equality and multiculturalism, the tenuous connection between hate speech and the purposes of freedom of expression, and the safeguards provided by a criminal prosecution in which the state must establish the accused's guilt beyond a reasonable doubt.

The Court's two leading cases on the criminal prohibition of hate speech should be read together and they demonstrate some degree of ambivalence about using the criminal sanction to prohibit hate speech. Although the Court has upheld the hate propaganda provisions of the *Criminal Code*, it has stressed the importance of safeguards, such as the requirement of proof of the wilful promotion of hatred and the Attorney General's consent to prosecution, that many advocates of hate speech prohibitions argue deter the use of criminal prosecutions and undermine their effectiveness as an instrument to denounce hate speech. The Court's decision in *Zundel* demonstrates many of the concerns about overbreadth and chill that are found in the minority judgment in *Keegstra*.

Judicial ambivalence toward the *Criminal Code* prohibitions on hate speech was made evident in lower court proceedings against David Ahenakew, an elder and former President of the Federation of Saskatchewan Indians Nations. In his keynote address to a 2002 conference on changes to Aboriginal federal health policy, Ahenakew declared that the "second World War was created by the Jews" and, in a follow-up inter-

[192] *Zundel*, *supra*, note 22, at 765.

view with a journalist, proceeded to vilify Jews for "owning the goddamn world" and behaving like a "disease". "To hell with the Jews", he declared, "I can't stand them." Ahenakew's conviction in 2005[193] for wilfully promoting hatred against an identifiable group was set aside and a new trial ordered by the Saskatchewan Queen's Bench in 2006 for fear that he had not acted "willfully".[194] Upon retrial, Tucker J. concluded that, although expressing "revolting, disgusting, and untrue" opinions, Ahenakew did not have the requisite intention to promote hatred.[195] The trial judge accepted that Ahenakew had not intended to promote hatred against Jews but was prompted to respond in anger by what he considered aggressive and rude questioning put to him by a reporter. Judicial reluctance to legally condemn the vilification of vulnerable minorities also surfaces in the *Malhab* decision concerning a class action civil lawsuit for defamation against Quebec City radio host André Arthur.[196] We discuss the case in more detail below and wish only to point out here that the Supreme Court's reluctance to take seriously the harms caused by Arthur's racist remarks, while demeaning to the community concerned, generates more space for free expression, even of the offensive kind.

The cases examined so far relate to criminal prohibitions that have been used against hate speech. The treatment of hate speech also arises under human rights codes that are designed to prevent discrimination against vulnerable minorities rather than punish harmful conduct. In a companion case to *Keegstra*, the Court similarly split 4-3 with respect to a provision that made it a discriminatory practice under the *Canadian Human Rights Act*[197] to communicate messages by telephone that expose identifiable groups to hatred or contempt.[198] As in *Keegstra*, the Court in *Taylor* was unanimous that hate speech was protected under section 2(b), but divided about whether its prohibition as a discriminatory practice could be justified under section 1 of the Charter. Chief Justice Dickson, for the majority, cited, in addition to the constitutional and international law concerns in *Keegstra*, the importance of promoting equality of opportunity free of discrimination. He also held

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193 *R. v. Ahenakew*, [2005] S.J. No. 439, 267 Sask. R. 124 (Sask. Prov. Ct.).

194 *R. v. Ahenakew*, [2006] S.J. No. 354, 281 Sask. R. 47 (Sask. Q.B.).

195 *R. v. Ahenakew*, [2009] S.J. No. 105, 329 Sask. R. 140, at para. 43 (Sask. Prov. Ct.).

196 *Bou Malhab v. Diffusion Métromédia CMR inc*, [2011] S.C.J. No. 9, [2011] 1 S.C.R. 214 (S.C.C.) [hereinafter "*Malhab*"].

197 R.S.C. 1985, c. H-6 [hereinafter "*Canadian Human Rights Act*"].

198 *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) [hereinafter "*Taylor*"].

that the restriction on expression was reasonable even though there was no intent requirement or defences such as truth as required under the *Criminal Code* hate propaganda provisions upheld in *Keegstra*. The emphasis under the human rights code was legitimately, in his view, placed on the discriminatory effects of hate speech on minorities. He also noted that an intention to disobey a court order must be proven before a person could ever be imprisoned under the human rights scheme. In her dissent, McLachlin J. stressed the vagueness of the words "hatred" and "contempt" and their overbreadth in prohibiting conduct that did not actually result in discrimination and in not providing any defences such as those based on lack of intent to discriminate or truthfulness of the statements.

The Supreme Court considered the treatment of hate speech under provincial human rights codes in the *Ross* case. A human rights tribunal ordered that a teacher, Malcolm Ross, be given an unpaid 18-month leave of absence and only be re-hired in a non-teaching position because of anti-Semitic speeches and writings he had made in his off-work hours. The tribunal also required that Ross be fired if he continued to make anti-Semitic speeches and produce or sell such writings in his time away from work, should he be re-hired in a non-teaching position. The Court held that the tribunal's order violated both Ross's freedom of expression and freedom of religion. Justice La Forest stressed that:

> [a]part from those rare cases where expression is communicated in a physically violent manner, this Court has held that so long as an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee of freedom of expression…freedom of expression serves to protect the right of the minority to express its view, however unpopular such views may be ...[199]

This fits into the well-established pattern of interpreting freedom of expression in a broad fashion and leaving a contextual evaluation of the speech to the section 1 analysis.

The Court held that the tribunal's order, with the exception of the permanent ban on Ross's anti-Semitic speeches and writings, was a justified limit on freedom of expression under section 1. It stressed the educational context as a reason for removing Ross from his teaching position and held that it was reasonable to anticipate that Ross's well

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[199] *Ross v. New Brunswick School District No. 15*, [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825, at para. 60 (S.C.C.).

publicized out of class conduct could poison the teaching environment if he was allowed to teach children. The Court found, however, that the permanent ban on Ross's expression could not be justified as necessary to create an environment free from discrimination once Ross had been removed from the classroom. Accordingly, it struck down that part of the tribunal's order as an unjustified restriction on freedom of expression.[200] This case affirms the difficulty of justifying total bans on expression as reasonable and proportionate.

Having survived their initial tests of constitutional validity, statutory bans on racist invective are currently under threat. Following high-profile investigations of a *Maclean's* magazine author and the editor of the *Western Standard*, various jurisdictions are under pressure to repeal statutory bans on hate speech.[201] The Canadian Human Rights Tribunal even concluded that section 13 of *Canadian Human Rights Act* unreasonably limited the freedom of expression in section 2(b), despite the Supreme Court's ruling in *Taylor*.[202] The House of Commons voted to repeal section 13 in June 2012,[203] a course of action previously recommended by Professor Moon in a report to the Canadian Human Rights Commission on the ground that *Criminal Code* prosecution should be the preferred course of action and in only the most serious of cases.[204]

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[200] *Id.*, at para. 106.

[201] See discussion in Richard Moon, "The Attack on Human Rights Commissions and the Corruption of Public Discourse" (2010) 72 Sask. L. Rev. 93. Moon describes some of these attacks as "misleading and just plain false" (at 96).

[202] *Warman v. Lemire*, [2009] C.H.R.D. No. 26, 68 C.H.R.R. D/205 (Can. H.R.T.). The tribunal was able to distinguish *Taylor* on this basis at para. 290:

> In my view, it is clear that *Taylor*'s confidence that the human rights process under the *Act* merely serves to prevent discrimination and compensate victims hinged on the absence of any penal provision akin to the one now found at s. 54(1)(*c*), as well as on the belief that the process itself was not only structured, but actually functioned in as conciliatory a manner as possible. The evidence before me demonstrates that the situation is not as the Court contemplated in both respects.

The tribunal ruling was subsequently reversed in part by the Federal Court of Canada. See *Warman v. Lemire*, [2012] F.C.J. No. 1233, 266 C.R.R. (2d) 111 (F.C.). Justice Mosley agreed with the tribunal, however, that the addition of penalty provisions in 1998 distinguished the present case from the *Taylor* decision (at para. 107).

[203] Bill C-304, *An Act Respecting the Canadian Human Rights Act (Protecting Freedom)*, 41st Parl. 1st Sess. At the time of writing, the Bill was stalled in the Senate awaiting second reading.

[204] Richard Moon, "Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet" (October 2008), at 31, online: Canadian Human Rights Commission <http://ezralevant.com/Moon_Report_en.pdf> [hereinafter "Moon"].

Even though the subject of intense debate in the political sphere, the Supreme Court of Canada reiterated support for provincial human rights code prohibitions on hate speech in its unanimous ruling in *Whatcott*.[205] The *Saskatchewan Human Rights Code* prohibits the publication or display of material "that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons" on the basis of specified prohibited grounds.[206] William Whatcott was found to have run afoul of the Code by distributing flyers on behalf of Christian Truth Activists that both condemned the introduction of same-sex education in Saskatoon public schools and vilified gay men. Four flyers — two of them provocatively entitled "Keep Homosexuality out of Saskatoon Public Schools" and "Sodomites in our Public Schools" — were found by a human rights tribunal to have exposed individuals to hatred and ridicule on the basis of their sexual orientation. The flyers were peppered with biblical references and accusations that gay men promoted rampant pedophilia and child abuse. On appeal, the Saskatchewan Court of Appeal found that the Code's hate speech provisions were Charter compliant but that the four flyers did not rise to the level of hate speech.[207]

Some predicted that the Court would follow the approach taken by McLachlin J. in her *Taylor* dissent and advocated by Professor Moon in his report for the Canadian Human Rights Commission.[208] Instead, Rothstein J., writing for a unanimous Court, reaffirmed each of the principal holdings of Dickson C.J.C.'s majority opinion in *Taylor* and reinstated the tribunal's findings regarding the likelihood of two of the four flyers spreading hatred. As the Code prohibitions were confined only to the most objectively vile and intense feelings of detestation, Rothstein J. severed the words "ridicules, belittles or otherwise affronts the dignity of" from the Code because such expression was not rationally connected to the objective of reducing systemic discrimination.[209] The Court otherwise expressed little concern with overbreadth or chilling effects of those who could fall within the Code's prohibition, finding the Code provisions were well-tailored to

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[205] *Saskatchewan Human Rights Commission v. Whatcott*, [2013] S.C.J. No. 11, 355 D.L.R. (4th) 383 (S.C.C.) [hereinafter "*Whatcott*"].

[206] *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 14.

[207] *Whatcott v. Saskatchewan (Human Rights Commission)*, [2010] S.J. No. 108, 317 D.L.R. (4th) 69 (S.C.C.).

[208] *Taylor*, *supra*, note 198; Moon, *supra*, note 204.

[209] *Whatcott*, *supra*, note 205, at para. 99.

distinguish between "healthy and heated debate on controversial topics … and impassioned rhetoric which seeks to incite hatred as a means to effect reform".[210] This approach continues the trend seen in the offensive speech cases (*Keegstra*, *Butler* and *Sharpe*) of using "reading down" to save overbroad laws that infringe freedom of expression. Such approaches may discount how even a reformulated but still overbroad law may chill freedom of expression.

The same week that the Court released its decision also saw public controversy over comments made by Professor Tom Flanagan that questioned the criminalization of child pornography.[211] This resulted in his firing as a political commentator for the CBC, announcement of his impending retirement from the University of Calgary, and distancing by the provincial Wildrose and federal Conservative parties from their former senior advisor.[212] Especially in light of some of the media coverage that generally interpreted the *Whatcott* case as an unambigious loss for freedom of expression,[213] the Flanagan episode raises the spectre of potentially overbroad laws creating "no go" zones in public discourse.

The chilling effect of principal concern to the Court, instead, was that on victims of racist invective who would have no "ability to respond", "cut[ting] off any path of reply by the group under attack".[214] In an argument that parallels one made by Catherine Mackinnon regarding the silencing effects of obscene speech,[215] Rothstein J. maintained that hate speech "shuts down dialogue by making it difficult or impossible for members of the vulnerable group to respond, thereby stifling discourse".[216] It would be surprising to find, in the context of heated debates over matters of public controversy, that the rules of civil discourse applied

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[210] *Id.*, at para. 111.

[211] In an academic talk at the University of Lethbridge, Flanagan declared that child pornography is an "issue of personal liberty" and that its use does "not harm another person".

[212] Heritage Minister James Moore criticized Professor Flanagan, a former top Conservative advisor, by stating: "The demand for child pornography fuels the supply for child pornography. Any defence is unacceptable and disgusting … The CBC did the right thing by firing Tom Flanagan. I think the University of Calgary should take similar steps." See Jeff Green, "Former Conservative advisor says viewing child pornography shouldn't be a crime" *The Toronto Star* (February 28, 2013); Josh Wingrove, "Amid child-porn comment controversy, U of C announces Flanagan's retirement" *The Globe and Mail* (February 28, 2013).

[213] For example, Tonda MacCharles, "Anti-Gay Pamphlets Broke Law, Supreme Court of Canada Says" *The Toronto Star* (February 28, 2013).

[214] *Whatcott*, *supra*, note 205, at para. 75.

[215] See Mackinnon, *Only Words*, *supra*, note 130.

[216] *Whatcott*, *supra*, note 205, at para. 117.

with an opportunity to respond. Whatever the empirical evidence suggests about a community's ability to respond to racist invective (and the Court cited none), *audi alteram partem* should not be a prerequisite to the conduct of constitutionally expressive activity.

More problematic is the way in which the Court applied the Code provisions to the flyers in question. As mentioned, they contained both biblical references and invective against gay men. Whatcott complained that his religious freedom under section 2(a) was infringed, limits which the Court held were reasonable once offending words from the Code were excised.[217] Moreover, it was appropriate for the human rights tribunal, wrote Rothstein J., to have isolated excerpts in the flyers that demeaned gays from the flyers' religious rhetoric. While acknowledging that the expression must be "considered as a whole", it was not unreasonable for the tribunal to "isolate the phrases it considered to be an issue". If, he wrote, "despite the context of the entire publication, even one phrase or sentence is found to bring the publication, as a whole, in contravention of the *Code*, this precludes publication of the flyer in its current form".[218] In addition to being uninterested in requiring proof of subjective intent to promote hatred or in the absence of a defence of truth in the *Human Rights Code*, safeguards available under the *Criminal Code* prohibition, the Supreme Court was also uninterested in developing an "internal necessities" or artistic defence test, as it has in the realm of obscenity law (see discussion of *R. v. Butler*, above), for literature, satire and even religious exegesis. All the Court would concede is that it is highly unlikely that religious expression would be construed as hate speech: "While use of the Bible as a credible authority for a hateful proposition has been considered a hallmark of hatred, it would only be unusual circumstances and context that could transform a simple reading or publication of a religion's holy text into what could objectively be viewed as hate speech."[219] In which case, accusations about gay men spreading filth, disease and criminal conduct in two flyers could easily be distinguished from biblical exhortations that a "millstone" be tied around their necks and their being "cast into the sea" in another two flyers.[220]

An important consequence of the *Whatcott* decision is the more constitutionally stable role it portends for provincial human rights legislation

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217 *Id.*, at para. 164.
218 *Id.*, at para. 175.
219 *Id.*, at para. 199.
220 *Id*.

in proscribing racist speech. Federal diversity in this realm potentially could result in 13 different legislative hate speech regimes. The House of Commons' response to criticism of the federal *Human Rights Act* suggests that repeal also remains an option. It may be just as likely that those provincial jurisdictions desirous of addressing hate speech through human rights law will follow the Court's lead and use *Whatcott* as a template for modest reform in the area.

5. Political Speech

Consistent with the trends seen above with respect to a willingness to restrict obscenity and hate speech to protect minority groups, freedom of expression has been interpreted in a more egalitarian than a libertarian manner in relation to the regulation of political speech connected with elections. In 1997, the Court struck down spending limits imposed on the Quebec referenda but only on the basis that all spending by third parties not affiliated with the official yes or no campaigns was prohibited.[221] In *Harper v. Canada (Attorney General)*,[222] the Court rejected a Charter challenge by Stephen Harper, then leader of the National Citizens Coalition, to third party spending limits of $3,000 per riding and $150,000 nationally. The majority stressed the importance of ensuring fair elections by promoting equality in political speech. The dissenters accepted the legitimacy of this objective but concluded that the third party spending limits were so low that they effectively amounted to an almost total ban on political expression. The entire Court accepted a total ban on third party spending on Election Day given the difficulty of responding to misleading advertising on that day. The Court's approach differed dramatically from a more libertarian approach to third party spending taken by the Alberta Court of Appeal, in an earlier case, and by the United States Supreme Court.[223] The Court's egalitarian approach, however, did not uniformly result in deference to legislators, as seen by its 2003 judgment in *Figueroa*.[224] In that case, the Court reversed a denial of state subsidy to the Communist Party because they ran less than 50

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[221] *Libman v. Quebec (Attorney General)*, [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.).

[222] [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.).

[223] *Canada (Attorney General) v. Somerville*, [1996] A.J. No. 515, 136 D.L.R. (4th) 205 (Alta. C.A.); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (striking down on First Amendment grounds a ban on corporations and unions engaging in electioneering communication within 60 days of an election or 30 days of a primary).

[224] *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37, [2003] 1 S.C.R. 912 (S.C.C.).

candidates in a federal election. The Court was concerned that such a denial of benefits would not allow marginal parties and candidates to engage in freedom of expression.

The Court's approach to other parts of election law have been mixed. In one 1998 case, it invalidated a ban on the publication of opinion polls three days prior to a federal election, stressing that the law did not minimally impair political speech. Four judges, however, dissented and stressed the dangers that democracy might be harmed by the publication of inaccurate polls so close to an election.[225] In a 2007 decision, the Court upheld a restriction on disseminating election results while polls were still open in part of the country. This case was also closely divided, with four judges in dissent arguing that the harms of influencing election rights were speculative and stressing the importance of allowing political speech.[226] These two cases also raise issues about how emerging technologies will affect the regulation of speech. The law struck down in 1998 as a reasonable limit on freedom of expression targeted the traditional print and broadcast media who would commission public opinion polls, while the 2007 decision involved a person who posted results on his own website while the polls were still open in western Canada. Justice Abella, in her dissent in the 2007 case, argued that the benefits of the ban on publishing election results are "diminished by the reality" that such bans had been "'rendered obsolete' by broadcasting and telecommunications technology".[227] Nevertheless, it remains illegal in Canada to publish election results while the polls are still open. In addition, as discussed below, the Court has been unwilling to interpret freedom of expression as imposing a positive obligation on the state to facilitate voting in a referendum[228] or being able to run as a candidate.[229] The political speech cases confirm that even expression lying at the core of the guarantee is far from absolutely protected in Canada. Such forms of expression can be limited for a variety of reasons, including the desire to ensure equality in

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[225] *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.).

[226] *R. v. Bryan*, [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.).

[227] *Id.*, at para. 123.

[228] *Haig v. Canada (Chief Electoral Officer)*, [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.); *Siemens v. Manitoba (Attorney General)*, [2002] S.C.J. No. 69, [2003] 1 S.C.R. 6 (S.C.C.) [hereinafter "*Siemens*"]. In both cases, however, an egalitarian approach might still be vindicated if the vote was denied on discriminatory grounds.

[229] *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.) [hereinafter "*Baier*"], upholding a law that prevented school board employees from running as school trustees.

political speech as well as a reluctance to enforce expression claims that have a positive dimension.

6. Public Forum

In a flourishing democratic society, expressive activities can be expected to take place anywhere and at any time. Streets and parks are the types of preferred places for public displays of expression and are particularly important for the less powerful who cannot afford to rent private halls or purchase advertising space. What about publicly owned property not ordinarily viewed as forums for expression, such as inside courthouses, government offices and public parks? In these instances, it would have been expected that Canadian courts would look to the "public forum" doctrine in the U.S. In the United States, the rule permits the use of government-owned property for speech purposes so long as they are traditionally used or designated as public forums. In all other cases, the outer boundaries of the first amendment will have been reached.

In the *Committee for the Commonwealth of Canada* case,[230] the Supreme Court of Canada rejected the U.S. version of the public forum doctrine, but did not settle on any preferred test or set of criteria. Senior officials associated with the Committee for the Republic of Canada attempted to distribute pamphlets in Montreal's Dorval Airport. RCMP and airport management concluded that this activity was contrary to federal government airport regulations. The Supreme Court of Canada unanimously agreed that a complete ban on pamphletting in the public areas of the airport unreasonably infringed the Committee's freedom of expression rights. The Court was badly split, however, over what precisely to do in public forum cases. The judgments of three different justices detailed a public forum doctrine for the future. According to Lamer C.J.C., freedom of expression "is intrinsically limited by the function" of the public place.[231] In circumstances where a form of expression is incompatible with the purpose or function of the public property at issue, that expression will fall outside of section 2(b).[232] No one, for instance, could claim that the freedom of expression guarantee entitled one to shout political

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[230] *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.) [hereinafter "*Committee for the Commonwealth of Canada*"].

[231] *Id.*, at 157.

[232] *Id.*, at 156.

messages in the quiet of the Library of Parliament, wrote the Chief Justice. Forms of expression, instead, had to correspond to the use to which the place was put. If expression was compatible with function, then the Court could proceed to the section 1 stage of analysis. Then, a court could consider whether other governmental interests, such as the maintenance of law and order, could justify the infringement on expression.

Justice McLachlin rejected Lamer C.J.C.'s formulation. It inappropriately balanced governmental objectives with individual freedoms, an exercise best undertaken in the section 1 justification process. Instead, McLachlin J. offered a test closely linked to the considerations mentioned in *Irwin Toy*. All state regulation of expression that is tied to content — such as a ban on anti-war messages on Ottawa's Parliament Hill — falls within section 2(b). Regulations that are content neutral and directed only at the physical consequences of expression may infringe section 2(b) where a claimant can establish that he or she is promoting one of the underlying rationales of the guarantee previously mentioned in *Irwin Toy* (the "pursuit of truth, participation in the community", or "individual fulfillment and human flourishing").[233] On these grounds, freedom of expression would have no place, she claimed, in the Prime Minister's office, an airport control tower, or a prison cell. Justice McLachlin simply could not imagine freedom of expression's purposes being served in these locales. In our view, freedom of expression does have a place in prisoner cells, especially considering McLachlin C.J.C.'s subsequent affirmation of prisoners' right to vote.[234] Restrictions on freedom of expression in the private offices of prime ministers and in air traffic control towers, admittedly, could more easily be justified under section 1.

Justice L'Heureux-Dubé preferred not to define out of section 2(b) expressive activity in public forums. Whether the purpose of the governmental measure was content-based or directed only at the physical consequences of the activity, all would have safe haven under section 2(b). The Court then could turn, under section 1, to such consideration as the traditional use of the property for expressive activity, whether the public ordinarily is admitted to the property as of right, the symbolic significance of the property, and the availability of other avenues for

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[233] *Id.*, at 240.

[234] *Sauvé v. Canada (Chief Electoral Officer)*, [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.).

expression.[235] Applying these criteria, it would be apparent that "government offices, air traffic control towers, prison cells and judge's chambers" would not be appropriate venues for freedom of expression.[236] Justice L'Heureux-Dubé would apply more relaxed section 1 criteria in the case of time, place and manner restrictions, for if all "restrictions relating to noise, litter, orderliness, and access to property, which may obliquely impinge upon the freedom of expression, had to be predicated upon momentous governmental objectives under the *Oakes* test, government would hardly ever be able to legislate effectively with respect to these matters". In which case, if "the purposes are legitimate, and the measures taken are reasonable having regard to all the circumstances, the standard of absolute minimal impairment need not be applied".[237]

Though the Court failed to identify any single set of standards, the justices were in agreement that unqualified restrictions on pamphletting in airports could not survive Charter scrutiny. In *Ramsden v. Peterborough (City)*,[238] the Court drew on this consensus, in addition to the specific tests of the various justices, to find that the City of Peterborough's ban on affixing posters on any public property unjustifiably infringed section 2(b). Mr. Ramsden was a musician who sought to promote an upcoming performance of his band by placing posters on hydro poles in the municipality. Justice Iacobucci, writing for a unanimous Court, acknowledged that postering "has historically been an effective and relatively inexpensive means of communication".[239] Moreover, as the *Committee for the Commonwealth* precedent had established, "postering on *some* public property is protected by s. 2(b)".[240] Finding, moreover, that postering on utility poles satisfied Lamer J.'s "compatibility with function" test and McLachlin J.'s "linkage to underlying purposes" test, the Court turned to section 1 considerations.[241] Here, whatever objectives legitimately were being served — whether they be worker safety, the prevention of traffic hazards or aesthetic blight — they equally could be served by more narrowly tailored prohibitions.[242] The value of "inexpensive means of communication" such

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235 *Committee for the Commonwealth of Canada*, *supra*, note 230, at 203.
236 *Id.*, at 198.
237 *Id.*, at 222.
238 [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.).
239 *Id.*, at 1096.
240 *Id.*, at 1100.
241 *Id.*, at 1103.
242 *Id.*, at 1107.

as postering was reiterated by the Court in *Guignard*. Justice LeBel underscored the constitutional value of signs as a "public, accessible and effective form of expressive activity for anyone who cannot undertake media campaigns".[243]

The Court revisited its public forum doctrine in a dispute concerning a city of Montreal noise by-law.[244] A St. Catherine Street strip club broadcast music and commentary going on inside the club with a loudspeaker projecting onto city sidewalks. The club's operator was charged with producing outside noise using sound equipment contrary to the noise by-law. The Court held that the emission of noise onto public streets was a protected constitutional activity under section 2(b) under any of the tests proposed in the *Committee for the Commonwealth of Canada* case.[245] With the objective of simplifying analyses going forward, McLachlin C.J.C. and Deschamps J. proposed that the basic question to be asked is "whether the place is a public place where one would expect" constitutionally expressive activity to take place and that the activity does not "conflict with one the purposes s. 2(b) is intended to serve". The majority proposed the following factors be taken into account in answering this question: "(a) the historical or actual function of the place; and (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression".[246] Though falling within the scope of constitutionally protected speech, the City's noise by-law turned out to be a reasonable and proportionate response to limiting noise on otherwise "peaceful" city streets. We assume, going forward, that the Court will focus on its two-pronged factor analysis, with an emphasis on historical and actual functions, rather than return to the Court's fractured decision in *Committee for the Commonwealth of Canada*.

This is precisely what occurred in a case brought by the B.C. branch of the Canadian Federation of Students and the B.C. Teachers Federation after being denied an ability to purchase advertising space on Vancouver city buses.[247] The teachers and students sought to place political advertisements on buses that would encourage student voter turnout in an

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243 *Guignard*, *supra*, note 108, at para. 25.

244 *2952-1366 Québec*, *supra*, note 115.

245 *Id.*, at para. 66.

246 *Id.*, at para. 74.

247 *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.).

upcoming federal election. The two transit authorities responded that they were unable to entertain political advertisements on city buses, only those "concerning goods, services, public service announcements and public events". Justice Deschamps for the majority applied *Montreal (City)* criteria finding, as in the case of airports and utility poles, there was not only some history but "actual use" of buses as advertising vehicles which did not impede their primary function.[248] Advertising was not only consistent with patterns of actual use but also furthered the purposes underlying the constitutional guarantee. Rather than "undermining the purposes of s. 2(*b*)", wrote Deschamps J., "expression on the sides of buses could enhance them by furthering democratic discourse, and perhaps even truth finding and self-fulfillment".[249] Having found the expressive activity to fall within section 2(b) and having been denied by the advertising policy, the majority found the policy lacked a rational connection to the prevention of a "safety risk or an unwelcoming environment for transit users" and did not minimally impair the right in so far as the policy amounted to a "blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse".[250]

Streets and parks seem to be paradigmatic of the sorts of public places available for the conduct of expressive activity.[251] The Occupy movement tested the outer boundaries of this tradition in autumn 2011. Replicating a strategy inaugurated by the Occupy Wall Street movement,[252] Canadian protestors took to occupying parks and public spaces, setting up tent cities with various amenities including community food kitchens and libraries. Public authorities tolerated most occupations for about 30 days after which municipalities sought to evict the occupiers. This precipitated a series of lower court rulings in Canadian courts in various provinces. For instance, trespass notices were distributed to the Occupy Toronto movement ordering removal of tents, persons, and other structures from St. James Park in downtown Toronto. They were entitled to use the park, the City claimed, but not for the purpose of erecting

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[248] *Id.*, at para. 42.

[249] *Id.*, at para. 43.

[250] *Id.*, at paras. 76, 77.

[251] *Hague v. CIO*, 307 U.S. 496, at 515-16 (1939), *per* Roberts J. for the minority, cited with approval in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, at 152 (1969).

[252] See "Communiqué 1", *Tidal: Occupy Theory, Occupy Strategy* 1 (December 2011), 3, online: Tidal <http://tidalmag.org/pdf/tidal1_the-beginning-is-near.pdf>.

structures and not between the hours of 12:01 a.m. and 5:30 a.m. Characterizing the occupiers as lawbreakers and engaging in civil disobedience, Brown J. of the Superior Court of Justice for Ontario admitted that section 2(b) freedoms were at stake.[253] Likening the case to the noise by-law at issue in *Montreal (City)*, Brown J. granted a measure of latitude to the city under section 1.[254] As a consequence, the interests of other city goers who wished to use the park for dog walking, frisbee throwing, or reading a book, were entitled to as much solicitude as those engaging in constitutionally protected activity. As the municipal by-law did not result in a complete ban, the measures were considered proportionate to the objective of sharing public parks with everyone.[255] The protestor's attempt to monopolize park space for constitutional purposes would have to yield to the multiple pleasures that parks bring to all citizens. "Peace, order, and good government" would prevail, declared Brown J.[256] Similar results obtained in applications to enjoin the occupiers in Victoria and Vancouver without any consideration of Charter questions.[257] In an application for injunctive relief against Occupy Calgary, Wittman C.J.Q.B. of the Alberta Court of Queen's Bench weighed freedom of expression rights into the equation but in a less than adequate manner.[258] Beginning with the measure of deference we find in cases involving public protest, Wittman C.J.Q.B. found the City's permit application process was reasonable and proportionate. Moreover, Occupy Calgary "had not proposed any alternative to these limits that would meet the City's objectives", losing sight of the burden of proof at this stage of the justification analysis. It should be noted that courts in other countries (such as those in the U.S. and U.K.) did not perform much better.[259]

At a time when the places and spaces for expressive activities increasingly fall under the control of private property owners, the question arises of whether the Charter guarantees access only to public property.

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[253] *Batty v. Toronto (City)*, [2011] O.J. No. 5158, 108 O.R. (3d) 571 (Ont. S.C.J.) [hereinafter "*Batty*"].

[254] *Id.*, at para. 101.

[255] *Id.*, at para. 111.

[256] *Id.*, at para. 110.

[257] *Victoria (City) v. Thompson*, [2011] B.C.J. No. 2582, 94 M.P.L.R. (4th) 260 (B.C.S.C.); *Vancouver (City) v. O'Flynn-Magee*, [2011] B.C.J. No. 2305, 26 B.C.L.R. (5th) 155 (B.C.S.C.).

[258] *Calgary v. Bullock (Occupy Calgary)*, [2011] A.J. No. 1561, 59 Alta. L.R. (5th) 347 (Alta. Q.B.).

[259] For example, *Waller v. New York*, 933 N.Y.S. 2d 541 (N.Y.S.C. 2011); *London v. Samede*, [2012] EWHC 34 (Eng. Q.B.).

What about access to private property? In the pre-Charter case of *Harrison v. Carswell*, Dickson J. for the Court maintained that "Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or any interest therein, save by due process of law".[260] Consequently, the employee of a tenant in a shopping mall could not lawfully picket on the sidewalk of the shopping centre. Chief Justice Laskin, in dissent, would have distinguished between residential private property and the "parking areas, roads and sidewalks" of a shopping centre. These were "closer in character to public roads and sidewalks than to a private dwelling", wrote Laskin C.J.C.[261] If private property rights could trump expressive freedoms, has the Charter shifted the balance of power? The Court admittedly has modified the common law of secondary picketing on private property in ways that are more speech protective, as the common law rule must conform to the Charter "value" of freedom of expression.[262] In the *Committee for the Commonwealth*, however, McLachlin J. insists that the Charter does not extend to private action and that it is "therefore clear that s. 2(b) confers no right to use private property as a forum for expression".[263] This was a subject L'Heureux-Dubé J. and others preferred to leave for another day.[264]

7. Freedom of Expression in Relation to Fair Trial Rights

Courts in Canada traditionally have not hesitated to use publication bans as a means of protecting the accused's right to a fair trial. Indeed, the traditional position of Canadian courts with respect to publication bans could be said to reflect both a lack of sensitivity to the values of free expression and an automatic preference for the accused's right of a fair trial over the public's right to freedom of expression.

The leading case on reconciling fair trial and free expression rights is *Dagenais v. Canadian Broadcasting Co*.[265] That 1994 case involved a publication ban that prohibited the broadcast of the television program *Boys of St. Vincent*, a fictional account of the abuse of boys in a Catholic

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260 [1975] S.C.J. No. 73, [1976] 2 S.C.R. 200, at 219 (S.C.C.).
261 *Id.*, at 207-208.
262 *RWDSU v. Pepsi-Cola*, *supra*, note 103.
263 *Committee for the Commonwealth of Canada*, *supra*, note 230, at 228.
264 *Id.*, at 197.
265 *Dagenais*, *supra*, note 2.

school in Newfoundland. The publication ban in question was sweeping. It applied anywhere in Canada and until the completion of four trials against members of a Catholic religious order on charges that they had abused boys in a Catholic training school in Ontario. As originally formulated, the publication ban also applied to the fact that it had been made. In its decision, the Supreme Court overturned the ban as too sweeping and rejected the idea that concerns about protecting the accused's right to a fair trial should always trump the equally important constitutional right of freedom of expression.

The Court rejected a hierarchical approach to competing rights and devised a test patterned after the section 1 test for reconciling freedom of expression with other Charter rights. As under section 1, it was the proponent of the restriction on freedom of expression that had the burden of justifying the measure. The *Dagenais* test would only allow freedom of expression to be infringed "to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk". As under section 1, the focus would be on whether other means were available to protect the objective, in this case protecting the accused's right to a fair trial that would not limit freedom of expression. The alternative measures that could protect an accused's right to a fair trial while not infringing freedom of expression included such things as more extensive questioning of prospective jurors about the influence of pre-trial publicity and even the sequestering of juries once they were empanelled. Even if alternative measures were not available, the Court had to determine that "the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban".[266] In this case, the Court reformulated the section 1 test by urging judges not to compare the benefits of the objective and freedom of expression in the abstract, but to determine just how well the restriction of freedom of expression would actually protect the objective, in this case protecting the right to a fair trial. For example, the Court warned that judges should be aware that "in this global electronic age, meaningfully restricting the flow of information is becoming increasingly difficult. Therefore, the actual effect of bans on jury impartiality is substantially diminishing."[267] This part of the case not only recognized that new technologies may practically make it more difficult to limit

[266] *Id.*, at 878.
[267] *Id.*, at 886.

freedom of expression, but also concluded that the risk that publication bans may be difficult to enforce on the Internet should enter into the process of comparing the benefits of the publication ban in relation to its harms.

In *Dagenais*, the Court concluded that while the ban was directed at a real and substantial risk to the right to a fair trial, it failed the second part of the test because there were reasonable alternatives to protect the accused's right to a fair trial that imposed less of a burden on freedom of expression. The Court stressed that a ban would only be a proportionate restriction on freedom of expression if it "was as narrowly circumscribed as possible (while still serving the objectives); and … there were no other effective means available to achieve the objectives".[268] The ban was overbroad in that it applied throughout Canada and applied to the existence of the ban itself. In addition, the judge who ordered the ban gave insufficient weight to the ability to protect the accused's right to a fair trial by alternative means. These alternatives included questioning prospective jurors about their exposure to prejudicial pre-trial publicity and the ability of jurors to decide the case solely on the basis of evidence heard at the trial. Other alternatives included adjourning trials, changing their location, sequestering jurors, and warning them not to rely on pre-trial publicity when deliberating about their verdict. The publication ban in *Dagenais* was overturned without resort to the final part of the new test which, as discussed above, requires that the beneficial effects of the ban outweigh its harmful effects.

8. Freedom of Expression in Relation to Other Competing Interests and Rights

The Supreme Court revisited the *Dagenais* test for reconciling freedom of expression with other rights and interests in *R. v. Mentuck*.[269] The publication ban in question applied to the identity of undercover police officers and police operational methods in a murder investigation. The Court made clear that the *Dagenais* test applied not just to the reconciliation of competing Charter rights, but also to the reconciliation of freedom of expression with social interests that do not constitute Charter rights. This meant that a serious threat to the proper administration of justice,

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[268] *Id.*, at 881.

[269] [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442 (S.C.C.).

not only the accused's Charter right to a fair trial, could justify a publication ban that restricted freedom of expression. As in *Dagenais*, however, the ban would only be justified if there were no reasonable and less restrictive alternatives to protect the objective and if the benefits of the publication ban in protecting the objective outweighed the harms that it caused to freedom of expression. In *Mentuck*, the Court took an even more contextual approach and indicated that the harms that might be caused to other rights and interests, namely the accused's right to a fair trial and the efficacy of the administration of justice, should also be considered. As the test for justifying limitations on freedom of expression becomes more contextual, it also becomes more difficult to predict what the courts will decide in any particular case.

Applying *Dagenais*, the Court in *Mentuck* held that a publication ban should only be ordered where:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[270]

In the result, the Court held that no publication ban was justified with respect to the operational methods used by the police. The Crown had failed to establish even the threshold matter, namely that a ban was necessary in order to prevent a serious risk to the proper administration of justice. A publication ban as to operational methods would also harm the public's rights to know about police conduct and the accused's right to public trial in a manner that was disproportionate to any benefits achieved by the ban. A publication ban with respect to the identity of the undercover officer was, however, upheld. There would be a serious risk to ongoing undercover operations if names were published. It was an important factor in the Court's calculus that the ban was limited to one year's duration. This decision should not be interpreted as an approval of all such bans in the future. The Court indicated that in future cases a reasonable alternative to a publication ban could be requiring the

[270] *Id.*, at para. 32.

undercover police officers to use pseudonyms, thus rendering unnecessary a publication ban with respect to their real names. *Mentuck* represented an important extension of the *Dagenais* test beyond the context of reconciling free expression and fair trial to the broader context of reconciling free expression with a broad range of other important and competing social interests.

What emerges from the reconciliation tests of *Dagenais* and *Mentuck* is a test for justifying limits on freedom of expression that mirrors the main doctrinal parameters of the section 1 test. In both cases, those who wish to restrict freedom of expression must justify the measure as related to important objectives. In addition, they must demonstrate that alternative means of pursuing that objective are not available or will not be effective. Even if these hurdles are crossed, the proponent must also demonstrate that the benefits of the proposed restriction on freedom of expression outweigh the costs to freedom of expression and other rights and values.

Two further cases underline the similarities between the section 1 test and the balancing of interests under the *Dagenais/Mentuck* test. Specifically, they illustrate that the burden of justifying limits on freedom of expression will be the same under section 1 and under the *Dagenais/Mentuck* test. Both cases also demonstrate a trend to a contextual and restrictive approach to freedom of expression. In one case, the Court upheld rules of courts under section 1 that prohibited filming or interviewing people anywhere in a courthouse or broadcasting audio proceedings of judicial proceedings. The Court stressed that the rules were designed in part to prevent vulnerable participants in court proceedings from being recorded or interviewed while in the courthouse.[271] In the other case, the Court upheld under the *Dagenais/Mentuck* test a judicial order that allowed reporters to view but not broadcast a judicial exhibit,[272] namely a statement by the accused to the police about the suicide of his uncle. The Court noted that the accused had been acquitted of assisting his uncle to commit suicide and that the restriction on the broadcast of his interview with the police was designed in part to protect him as a vulnerable person involved in the justice system.[273]

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[271] *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19, at para. 56 (S.C.C.) [hereinafter "*CBC v. Canada*"].

[272] *Canadian Broadcasting Corp. v. The Queen*, [2011] S.C.J. No. 3, [2011] 1 S.C.R. 65 (S.C.C.).

[273] *Id*.

These cases suggest that the vulnerability of justice system participants have considerable weight in the balance between freedom of expression and other competing values that is struck under section 1 of the Charter and the *Dagenais/Mentuck* test. The Court has expanded the category of the vulnerable who can be harmed by speech beyond the categories of identifiable minorities who are the targets of hate speech or women and others who are the target of violent and degrading pornography.

Freedom of expression must also be reconciled with other rights. It can, for example, be relevant in determining the reasonableness of a search under section 8 of the Charter. In two 1991 cases, the media challenged the process for granting search warrants under the *Criminal Code*.[274] The Supreme Court held that in determining the reasonableness of the search, judges should consider the effects of the proposed search on the ability of the media to disseminate information. In particular, the judge should examine whether the information could be obtained by the state without searching the media. The media's interest in being protected from search and seizure will be less when the information sought by the state had already been broadcast. Although freedom of expression is relevant in determining the reasonableness of the search, the Court rejected the media's argument that the regular search warrant provisions in the *Criminal Code*[275] did not apply to searches of media outlets. The media does not have immunity from searches, but the state will have to exhaust other possible sources for the information before a search of the media is authorized.

The Supreme Court has recognized that privacy rights have to be reconciled with the public's interest in freedom of expression. In a case decided under Quebec's *Civil Code*, it indicated that "[t]he balancing of the rights in question depends both on the nature of the information and on the situation of those concerned. This is a question that depends on the context". In that case, the Court recognized that "the private life of a person who is engaged in a public activity or has acquired a certain notoriety can become matters of public interest. This is true, in particular, of artists and politicians, but also, more generally, of all those whose professional success depends on public opinion."[276] At the same

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[274] *Canadian Broadcasting Corp. v. Lessard*, [1991] S.C.J. No. 87, [1991] 3 S.C.R. 421 (S.C.C.); *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] S.C.J. No. 88, [1991] 3 S.C.R. 459 (S.C.C.).

[275] *Criminal Code*, *supra*, note 124, s. 487.

[276] *Aubry v. Éditions Vice-Versa*, [1998] S.C.J. No. 30, [1998] 1 S.C.R. 591, at para. 58 (S.C.C.).

time, it held that a photograph taken of a teenager sitting on the steps of a building and without her consent was an unjustified invasion of privacy rights. Although it did not consider the Charter right to freedom of expression, the Supreme Court held in another case that the privacy rights of an accused justified not releasing a taped confession to the media. The confession had been excluded at trial because it was improperly obtained by the police. Two judges dissented on the basis that the public interest in knowing about the confession and the open court principle, supported by the Charter right of freedom of expression, outweighed the accused's privacy rights.[277] The value of this case as a Charter precedent, however, is undermined by the fact that the majority did not specifically consider the Charter interest in freedom of expression or attempt to reconcile this interest with the accused's interest in privacy by considering a less drastic alternative. Finally, it should be noted that there was a strong dissent in favour of releasing the court exhibits to further public debate about the court process. As will be seen in the next section, the principle of open courts, while not absolute, is solidly embedded in the jurisprudence.

9. Access to the Courts and Legislatures

It might be expected that even a minimal understanding of freedom of expression as related to the functioning of a robust democracy would support an unfettered right of access to courts and legislatures as a concomitant of the guarantee of freedom of expression. The story, however, is more complex and the courts have tolerated some restrictions on access to the courts and legislatures, particularly when those restrictions themselves may be seen as promoting other constitutional values. Although the courts have generally been inclined to strike down mandatory bans on access to the courts, they also have been more deferential to bans that give judges discretion to restrict access to the courts and freedom of expression.

In *Canadian Newspapers Co. v. Canada (Attorney General)*,[278] the Supreme Court upheld a *Criminal Code* provision banning the publication of the complainant's name in all sexual offence cases. The Court

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[277] *Vickery v. Nova Scotia Superior Court (Prothonotary)*, [1991] S.C.J. No. 23, [1991] 1 S.C.R. 671 (S.C.C.).

[278] [1988] S.C.J. No. 67, [1988] 2 S.C.R. 122 (S.C.C.).

noted that fear of publication was a contributing factor to the underreporting of sexual offences and that a discretionary ban "would be counterproductive, since it would deprive the victim of that certainty".[279] The Court upheld the restriction as a reasonable limit on freedom of expression, noting that it:

> … applies only to sexual offence cases, it restricts publication of facts disclosing the complainant's identity and it does not provide for a general ban but is limited to instances where the complainant or prosecutor requests the order or the court considers it necessary. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.[280]

Although the Court upheld a mandatory publication ban in this case, it did so by holding that a mandatory ban could be justified only in the particular context of sexual offences and only if it applied to the name of the complainant.

In *Toronto Star Newspapers Ltd v. Canada*,[281] the Court held that another mandatory publication ban, namely one under section 517 of the *Criminal Code*, was nevertheless a reasonable limit on freedom of expression. The case involved two high profile prosecutions. One was an Alberta case where a man charged with murdering his wife had, to much public outrage, been granted bail. The other case involved terrorism charges against various persons living in the Greater Toronto area with allegations that they had planned to use car bombs in downtown Toronto and attack Parliament Hill in Ottawa. The impugned section required a mandatory publication ban on bail hearings whenever the accused requested such a ban, as was done in these high profile proceedings.[282] In upholding the restriction on freedom of expression under section 1 of the Charter, the Court somewhat surprisingly stressed not so much the harm that release of information about the bail hearing might cause to the accused's fair trial rights, but that requiring hearings to justify a discretionary publication ban under the *Dagenais/Mentuck* test would slow down a prompt bail process designed to allow the accused to focus

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279 *Id.*, at 132.

280 *Id.*, at 133.

281 [2010] S.C.J. No. 21, [2010] 1 S.C.R. 721 (S.C.C.).

282 Some of the accused in the Toronto terrorism prosecution did not, however, request such a ban.

on being released pending trial. The Court also reasoned that the mandatory publication ban was justified under section 1 because the press could report on the outcome of the bail hearing after the criminal proceedings were terminated. This approach, however, discounts the fact that the bail hearing may itself, as it did in the Alberta case, become a matter of intense public controversy. In addition, delay between the bail hearing and the eventual disposition of a high profile prosecution may, as was in the case in the Toronto terrorism prosecution, be many years. The Court's decision also presents a romanticized view of the bail process as one that is prompt and primarily concerned with the accused's liberty, something belied by the fact that almost half of those imprisoned in provincial institutions have been denied bail. Justice Abella issued a strong dissent and would have severed the words that made the publication ban mandatory, thus requiring the *Dagenais/Mentuck* balancing test to be applied in all cases.

Outside the context of sexual offences and bail hearings, the courts have been much less tolerant of mandatory publication bans. In *Edmonton Journal v. Alberta*,[283] the Supreme Court struck down a law restricting publication of the details of matrimonial cases as an unjustified restriction on freedom of expression. Justice Cory articulated the general principle that:

> There can be no doubt that the courts play an important role in any democratic society. They are the forum not only for the resolution of disputes between citizens, but for the resolution of disputes between the citizens and the state in all its manifestations. The more complex society becomes, the more important becomes the function of the courts. As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.[284]

He also stressed that the restrictions on access to courts affected the rights of "listeners" and "readers" to receive information from the press about what happens in courts. "Practically speaking, this information can only be obtained from the newspapers or other media."[285] The Court concluded in a 4-3 decision that the restrictions were disproportionate to the goals of protecting the privacy of the individuals or ensuring that they

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283 *Edmonton Journal*, *supra*, note 66.
284 *Id.*, at 1337.
285 *Id.*, at 1339.

could have a fair trial. The Court stressed that judges could make more tailored and discretionary orders to pursue these important objectives.

In *Sierra Club v. Canada*,[286] the Supreme Court recognized that discretionary publication restrictions or confidentiality bans in civil litigation infringed both freedom of expression and the principle of open courts. Borrowing from *Dagenais*, the Court articulated a general test of when such publication bans would be justified. The first requirement is that the order is necessary to prevent a serious risk to an important interest. The important interest can include commercial interests and contractual agreements about privacy. Nevertheless, it should also be a real and substantial risk and one that is capable of being seen as a public as opposed to a private interest in confidentiality. Indeed, it would be unfortunate if the private parties could turn a public institution such as a court into their own private forum simply by means of contract. The second requirement is that the benefits of the confidentiality order must outweigh its harms to freedom of expression and the public interest in open courts. As under *Dagenais*, judges should consider whether there are reasonable alternatives to publication bans and whether the ban restricts freedom of expression as little as possible. In *Sierra Club*, the Court upheld a confidentiality order so as to allow a Crown corporation to satisfy an environmental assessment requirement and its contractual obligations of confidentiality. This was permitted even though there was a public interest in knowing about the technical information that would be disclosed in court only to the parties and not to the applicant public interest group. It is hoped that courts in the future will insist on full compliance with *Dagenais* standards and alternatives before approving of confidentiality bans in the context of civil litigation. Private parties should not be allowed to convert the public forum of courts into their own private and confidential instruments of dispute resolution, especially given the fact that they can achieve the same result through resort to private arbitrators, often retired judges.

In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,[287] the Supreme Court upheld a broad but discretionary power of judges under the *Criminal Code* to close courtrooms when, in their opinion, it was in the interest of public morals, the maintenance of order, or

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[286] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.).

[287] [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.).

the proper administration of justice to do so. The Court stressed that the discretion given to each judge, coupled with the right to seek judicial review of any overbroad order, would ensure that all restrictions on freedom of expression would be proportionate. In exercising the statutory discretion to order a publication ban, judges should follow the outlines of the *Dagenais* test discussed above. In particular, this required the judge to consider whether there were reasonable and effective alternatives to a ban, whether the ban was as limited as possible and finally whether the positive and negative effects of the ban were proportionate.[288] The Court has applied similar reasoning to all discretionary court orders including those that will give the press access to material used to obtain search warrants. It has stressed that judges can edit the material in order to reconcile freedom of expression with other competing interests such as the protection of the identity of informers.[289]

Although the Court has been deferential to discretionary orders to close courtrooms, it generally takes a harder look at mandatory bans. In *Ruby v. Canada (Solicitor General)*,[290] the Supreme Court held that a provision requiring *in camera* hearings was a disproportionate violation of freedom of expression. The Court held that objectives relating to national security and protecting foreign intelligence options could be more proportionately achieved by limiting the mandatory *in camera* provision to a few cases in which the government made *in camera* submissions. In all other cases, the judge should have discretion whether to restrict access to the court. Unlike cases such as *Edmonton Journal*, the Court did not strike down the impugned mandatory ban but, rather, read it down to allow judicial discretion to determine whether it was necessary to restrict access to the court. As discussed below (Remedies), this case indicates how the courts are now more inclined than they used to be to save potentially overbroad laws by reading them down in an attempt to ensure that they will only authorize reasonable and proportionate restrictions on freedom of expression.

An important issue concerning access to the courts that has now been resolved is whether prohibitions on cameras and tape recordings in the courtroom can be justified as a reasonable limit on freedom of expression. In 2011, the Supreme Court upheld rules of court that prohibited

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288 *Id.*, at para. 69.

289 *Toronto Star Newspapers Ltd. v. Ontario*, [2005] S.C.J. No. 41, [2005] 2 S.C.R. 188 (S.C.C.).

290 [2002] S.C.J. No. 73, [2002] 4 S.C.R. 3 (S.C.C.) [hereinafter "*Ruby*"].

filming or interviewing people anywhere in a courthouse or broadcasting audio recordings of judicial proceedings violated freedom of expression but was justified under section 1. The Court stressed the importance of maintaining the serenity of proceedings and the vulnerability of witnesses and parties in the courthouse. The Court admitted that audio broadcasting of court proceedings would make such broadcasts more accurate and interesting, but nevertheless held that these benefits to freedom of expression were outweighed by possible but ill-defined harms to the administration of justice. The Court unconvincingly asserted that audio records are "a means of conserving evidence. To broadcast them in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle is supposed to guarantee."[291] The Court's concern about cameras in and around the courtroom and especially about the audio broadcasting of court proceedings seems overblown. In today's television age, there is a strong case that the public's right to know what happens in courtrooms requires cameras or at least audio feeds from the court. Audio recording already occurs in most courtrooms. The Court's suggestions that the broadcast of such recordings would harm courtroom decorum or the testimony of witnesses are speculative at best. In addition, any mischief of allowing the press greater freedom in courtrooms could be more proportionately addressed by relying on the judge's ample powers to control the courtroom and to issue tailored publication restrictions. The case for cameras in the courtrooms is also strengthened by the Supreme Court of Canada's own extensive experience in allowing its appeal hearings to be televised.

The Supreme Court has held that the Charter does not apply to the decision by the New Brunswick legislative assembly not to allow the taping of parliamentary proceedings.[292] It held that the privilege of a legislative assembly itself enjoyed constitutional status. This blunt approach is unfortunate given the ability to give full weight to the importance of Parliamentary privilege under the contextual approach to limits on expression that the courts have taken under section 1 of the Charter. It should not be extended to the access to court context given the many cases in which courts have already assessed the case for restricting access to the courts under section 1. If anything, the case of televising

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[291] *CBC v. Canada*, *supra*, note 271, at para. 93.

[292] *New Brunswick Broadcasting Corp. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] S.C.J. No. 2, [1993] 1 S.C.R. 319 (S.C.C.).

parliamentary proceedings strengthens the case for cameras in the courtrooms. The New Brunswick legislature subsequently followed the practice of most Canadian legislatures by providing a controlled form of electronic Hansard. A media challenge based on its own independent right to tape parliamentary or court proceedings would not likely succeed given the interest in allowing either the legislative assembly or the court to control broadcasts of their own proceedings. Indeed Cory J., in a persuasive dissent in the New Brunswick case, suggested that the new system used in the New Brunswick legislature was "eminently fair and suitable and would be justifiable under s. 1 of the *Charter*".[293]

The concern about ensuring access to the courts cuts both way. In other words, ensuring access to the court is a value located both in the right to freedom of expression and an important objective that can itself justify restrictions on expression. It was the latter concern that motivated a unanimous Supreme Court to uphold an injunction issued by a judge on his own motion prohibiting the picketing of a Vancouver courthouse as part of a lawful strike, even though the union was prepared to allow people to enter the courthouse with respect to urgent matters. Chief Justice Dickson readily conceded that peaceful picketing was a protected form of expression, but then concluded that the injunction was a proportionate restriction necessary to ensure access to the courts. He argued that the objective of ensuring access to courts was in part "to protect *Charter* rights. The *Charter* surely does not self-destruct in a dynamic of conflicting rights".[294] He also noted that the "injunction left the Union and its members free to express themselves in other places and in other ways so long as they did not interfere with the right of access to the courts". [295]

Although ensuring access to courts can require restrictions on some forms of expression, rights claimed on behalf of crime victims cannot. In *French Estate v. Ontario*,[296] the Ontario Court of Appeal refused to recognize the rights of the families of murder victims to require a trial judge to prohibit all public access to videotapes of the rape of their daughter. In that case, the trial judge had imposed a partial publication ban that prohibited those in the courtroom from seeing the videotapes when they

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293 *Id.*, at 413-14.

294 *BCGEU*, *supra*, note 16, at para. 71.

295 *Id.*, at para. 70.

296 [1998] O.J. No. 752, 38 O.R. (3d) 347 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 139, 61 C.R.R. (2d) 376 (S.C.C.).

were entered as court exhibits, but allowed those in the court to hear the audio portion of the tapes.

10. Freedom of Expression in Relation to Criminal Justice and National Security

As seen above, the courts are prepared to recognize a broad range of interests that compete with freedom of expression, including the rights of the accused to a fair trial and concerns about the vulnerability of minorities, criminal justice participants and others who may be harmed by expression. The state's interests in both criminal investigations and national security are particularly weighty public interests. As will be seen, the courts have been reluctant to hold that freedom of expression should prevail over such state interests.

In *R. v. National Post*,[297] the Court preferred criminal justice interests to freedom of the press when it upheld a search warrant to obtain information that a secret media source had provided a reporter with possibly fraudulent documents relating to the Prime Minister's real estate transactions. The Court rejected the idea that freedom of expression required protection for all secret sources of the traditional media. In particular, it rejected media arguments that the media should enjoy a categorical or class privilege for secret sources. Class privileges, such as attorney-client privilege, provide the greatest certainty for those protected by them, but the justice system is very reluctant to grant them especially compared to the less drastic alternative of recognizing privileges that shield information from disclosure on a case-by-case basis. The case-by-case approach preferred by the Court also resembles the nuanced approach contemplated by the *Dagenais/Mentuck* test discussed above. The Court noted that legislatures could, as has been done in a number of American and Australian states, create broader class privileges to protect media sources, but there seems to be little appetite for such reforms in Canada.

In the *National Post* case, the Court rejected an absolute or class privilege for media sources but left the door open to establishing a privilege on a case-by-case basis. Media sources would have had to have been promised confidentiality and the court would have to decide on the facts that the confidential relationship was worth maintaining. Although not necessary to decide the case, the Court hinted that the traditional media

[297] [2010] S.C.J. No. 16, [2010] 1 S.C.R. 477 (S.C.C.).

might be better protected under this approach with Binnie J. stating that "[t]he relationship between the source and a blogger might be weighed differently than in the case of a professional journalist ... who is subject to much greater institutional accountability within his or her own news organization".[298] The Court also indicated that even if it was prepared to protect confidential relationships between the media and their sources, the media must establish that this relationship was more important than "any countervailing public interest such as the investigation of a particular crime (or national security, or public safety or some other public good)".[299] In other words, the Court was concerned with "the need to achieve proportionality in striking a balance among the competing interests".[300] In this case, the Court determined that the media had "not established that the public interest in the protection of their secret source(s) outweighs the public interest in the production of the physical evidence of the alleged crimes".[301] At the same time, the Court hinted that in some cases, freedom of expression and media interests might prevail. It cited an RCMP investigation into journalist Juliet O'Neill's possession of leaks about Maher Arar as a possible example where the state's interests in a criminal investigation or national security were so tenuous that they should not prevail over the media's interests.[302] Nevertheless, the Court recognized that "[t]he bottom line is that no journalist can give a source a total assurance of confidentiality. All such arrangements necessarily carry an element of risk that the source's identity will eventually be revealed." [303]

Concerns about incursions on freedom of expression played a role in debate about the *Anti-terrorism Act*,[304] introduced in Parliament in October 2001 in the wake of the terrorist attacks on the United States of September 11, 2001. As originally introduced, a terrorist activity was defined to include serious disruptions of essential public or private

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298 *Id.*, at para. 57.

299 *Id.*, at para. 58.

300 *Id.*, at para. 59.

301 *Id.*, at para. 91.

302 Justice Binnie explained that in the Juliet O'Neill case, the RCMP "sought the warrant with the intent to intimidate the reporter into giving up her sources" (*id.*, at para. 62). In a case involving leaks by government sources about Maher Arar, a Canadian citizen who had been rendered to Syria, in part, on the basis of inaccurate information linking him with terrorism, Binnie J. observed that "in such a case, the demand to deliver up even physical evidence that would disclose the identity of the secret source might well be refused. That is not this case" (*id.*, at para. 62).

303 *Id.*, at para. 69.

304 S.C. 2001, c. 41.

services or systems "other than as a result of *lawful* advocacy, protest, dissent or stoppage of work" that was not intended to cause death or serious bodily harm, endanger a person's life or health and safety. This led to concerns that unlawful protests, of the kind conducted by some in the environmental, anti-poverty, union, and anti-globalization movements could be treated as terrorist activities.[305] Indeed, many of these groups mobilized against this and other parts of the Act prompting the government to delete the word "lawful" from the above definition and adding a clause providing that "for greater certainty, the expression of a political, religious or ideological thought, belief or opinion" was not a terrorist activity "unless it constitutes an act or omission"[306] that otherwise satisfies the definition of a terrorist activity.[307] Parts of this definition still arguably implicate freedom of expression interests. For example, protests that are intended to endanger life or public safety are still included in the definition as are "threats" to commit such actions. The Supreme Court of Canada, however, unanimously dismissed a Charter challenge, with McLachlin C.J.C. reasoning that the definition of terrorist activities was not protected under section 2(b) of the Charter, as the constitutional right excludes violence and threats of violence. She rejected the proposition "that the violence exception to s. 2(*b*) is confined to actual physical violence, without however deciding the precise ambit of the exception. Threats of violence fall outside the s. 2(*b*) guarantee of free expression."[308] The Chief Justice elaborated:

> "terrorist activity" is defined as an act or an omission that "intentionally" "causes death or serious bodily harm", "endangers a person's life", "causes a serious risk to the health or safety of the public", or "causes substantial property damage ... likely to result" in these bodily harms ... These acts, and threats to commit them, constitute serious violence or threats of serious violence, and hence are not protected by s. 2(*b*) ... The particular nature of the enumerated conduct justifies treating counselling, conspiracy or being an accessory

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[305] David Schneiderman & Brenda Cossman, "Political Association and the Anti-Terrorism Bill" in Ronald Daniels, Parick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

[306] *Criminal Code*, *supra*, note 124, s. 83.01(1.1).

[307] On the global trend of terrorism laws to restrict freedom of expression, see Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (Cambridge: Cambridge University Press, 2011).

[308] *Khawaja*, *supra*, note 26, at para. 70. One of the authors (Roach) represented the British Columbia Civil Liberties Association in its intervention in this case, where it argued that threats of violence should be restricted to threats of physical violence against persons.

> after the fact to that conduct as being intimately connected to violence — and to the danger to Canadian society that such violence represents.[309]

The Court acknowledged that, though it was not convinced on the submissions before them that an additional provision prohibiting disruptions of essential services that endanger health, safety, or life violated freedom of expression, it would not rule out that this provision "might in some future case be found to capture protected activity. In such a case, the issue would be whether the incursion on free expression is justified under section 1 of the *Charter*."[310]

The Court also rejected arguments that the requirement in the law for proof of political and religious motive chilled freedom of expression. The Court reasoned that the chill in expression of extremist political and religious thought that had led the trial judge to strike down and sever the religious and political motive requirement from the rest of the definition of terrorist activities was caused by "the post-'9/11' climate of suspicion" and not the impugned law.[311] The Court found that a chill could not be based on a "patently incorrect understanding"[312] of the law. It stressed the exculpatory provision in the law, which provided that the non-violent expression of political or religious thought would not constitute a terrorist activity. Finally, the Court noted that any discriminatory profiling of a person based on their political or religious expression could not be attributed to the law.[313] This last conclusion is consistent with the majority's decision in the first *Little Sisters* case that similarly found that even proven profiling or targeting of a gay and lesbian bookstore by customs officials could not be attributed to the underlying law that will be enforced. Having concluded that the definition of terrorist activity constituted either violence or threats of violence not protected under freedom of expression, the Court did not have to consider the proportionality of singling out the political or religious motivation of the activity as a means to distinguish terrorism from other activity.

Other parts of the *Anti-terrorism Act* have also been upheld from Charter challenge. Investigative hearings that allow for a judicial order and hearing to require a person to answer questions about their knowledge of

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309 *Id.*, at para. 71.
310 *Id.*, at para. 74.
311 *Id.*, at para. 81.
312 *Id.*, at para. 82.
313 *Id.*, at para. 83.

terrorist activities have been upheld under the Charter. The majority of the Court did, however, indicate that the open court presumption would apply to such hearings. It also ruled that the presiding judge had favoured secrecy too much by preventing publication of the existence of the order for the investigative hearing and conducting the constitutional challenge to the provisions *in camera*.[314] The Court recognized that demands for openness was assisted by the fact that the investigative hearing in question was being considered by the courts for the first time and in relation to the prosecution of two men charged with the 1985 bombing of Air India Flight 182. At the same time, the open court presumption was rebuttable and the majority contemplated that information, even with regards to the constitutional challenge to the provisions, could be subject to a total or partial publication ban if an open hearing would jeopardize the investigation. Nevertheless, two judges in dissent argued that it was inappropriate to apply the open court presumption to what was in essence a continuation of a police investigation. The dissent, however, discounted the flexibility of the *Dagenais/Mentuck* test in allowing the state to justify robust limits on freedom of expression. In any event, the majority of the Court held that a sweeping publication ban was not justified in the context of the questioning of a potential witness in the ongoing Air India terrorism trial and a Charter challenge to the novel investigative hearing provisions.[315] Investigative hearings were allowed by Parliament to expire in 2007, but Parliament re-authorized investigative hearings under new anti-terrorism legislation in 2013.[316]

The use of Canada's *Anti-terrorism Act* has been sparing since its enactment. Many activities aimed at combatting international terrorism have instead been redirected through Canada's immigration system. In *Suresh v. Canada*,[317] the Supreme Court held that undefined reference to terrorism in immigration law was not unconstitutionally vague. It read in a definition of terrorism taken from international law that is considerably narrower than the broader definition of terrorist activities added in 2001 to the *Criminal Code* and subsequently upheld by the Court in *Khawaja* under the Charter. It rejected Suresh's argument that the law was overbroad because it could catch persons who are members of terrorist organizations or associate with

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314 *Re Vancouver Sun*, [2004] S.C.J. No. 41, [2004] 2 S.C.R. 332 (S.C.C.).

315 *Id.*, at paras. 52-56.

316 *Combating Terrorism Act*, S.C. 2013, c. 9.

317 *Suresh v. Canada (Minister of Citizenhship and Immigration)*, [2002] S.C.J. No. 3, [2002] 1 S.C.R. 3 (S.C.C.).

such organizations for political and charitable purposes, while being ignorant of the terrorism committed by the organization. The Court held that the Minister's discretion to deport current or former members of terrorist organizations did not violate section 2(b) of the Charter, so long as the Minister, by following the definition of terrorism the Court had read into the Act, only applied it to "persons who are or have been associated with things directed at violence, if not violence itself".[318] This holding arguably narrows the broad definition of expression protected under section 2(b) to exclude not only those who commit violence but those who are "associated with things directed at violence", a trend also seen in the Court's subsequent *Khawaja* decision. The Court's holding in *Suresh* demonstrates its increased tendency to salvage potentially overbroad restrictions on freedom of expression by reading in restrictions that are not present on the face of the statute. As discussed above, such a salvage operation assumes that officials will not be guided by the broad language of the statute but by the Court's more restrictive interpretation, and it does not adequately address the potential chill on expression caused by allowing an overbroad law to remain on the statute books. If the officials do not understand the law as read down by the courts, both *Little Sisters* and *Khawaja* suggest that the only remedy available will be remedies under section 24(1) of the Charter that target unconstitutional acts, as opposed to broader section 52(1) declarations of invalidity for unconstitutional laws.[319]

The Court's decision in *Suresh* also raises concerns about the interaction between free expression and the equality rights of non-citizens. In the United States, concerns have been expressed that post-September 11 amendments to immigration laws have reintroduced the idea of ideological exclusion of immigrants who are not only members of terrorist groups but who are members of "political, social or other similar groups

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[318] *Id.*, at para. 108. The Court seemed to extend the reading down process into a discretionary process of the Minister not to deport members of a terrorist organization when it stated, at para. 110:

> We believe that it was not the intention of Parliament to include in the s.19 case of suspect persons those who innocently contribute or become members of terrorist organizations….Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class of persons eligible for deportation on national security grounds.

[319] This distinction is explored further in Kent Roach, "The Enforcement of the Charter" in this volume.

whose public endorsement of acts undermines United States efforts to reduce or eliminate terrorist activities".[320] Courts in both countries should take care to avoid double standards that allow citizens more freedom of expression than non-citizens, given that the guarantee of freedom of expression applies to everyone.[321]

The *Anti-terrorism Act*, enacted at the end of 2001, and uses of immigration law have attracted the most attention, but the *Security of Information Act*, formerly the *Official Secrets Act*, also limits freedom of expression. As will be seen, Charter challenges to this law have been more successful than those to other national security laws. A police search of the home and offices of newspaper reporter Juliet O'Neill in early January 2004 was conducted as part of an investigation into possible violations of section 4 of the *Security of Information Act*[322] in relation to leaks about Maher Arar, a Canadian citizen who the United States rendered to Syria in 2002 on the basis of inaccurate intelligence provided by the RCMP linking Mr. Arar to al Qaeda. The O'Neill search was conducted as part of an investigation into damaging leaks by Canadian officials about Mr. Arar after he returned home to Canada after having been tortured and detained in Syria for almost a year.[323] As will be seen, the RCMP investigation again misfired but this time because of the unconstitutionality of the formal law.

The search of reporter O O'Neill's office and house was conducted on the basis that she was suspected of breaching section 4 of the *Security of Information Act*, a very broadly and awkwardly drafted section designed to criminalize both those who leak and those who subsequently possess leaked information. Section 4 was not changed when the Act was amended and re-named in late 2001, though various law reform

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[320] *Patriot Act*, Pub. L. No. 107-56, § 411(a), 115 Stat. 272, at 346 (2001) (codified as amended in scattered ss. of 8, 12, 15, 18, 20, 31, 42, 50 U.S.C.).

[321] The Court has, however, been resistant to equality challenges to immigration laws. For example, it rejected an equality based challenge to the use of secret evidence against non-citizens detained under security certificates on the basis that non-citizens do not have the same rights as Canadian citizens to remain in Canada. *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, [2007] 1 S.C.R. 350 (S.C.C.). This approach, however, begs the question because limits on the s. 6 right to remain in Canada should not excuse unequal treatment under s. 15, especially as it affects the exercise of other Charter rights such as freedom of expression that are guaranteed to "everyone" and not just Canadian citizens.

[322] R.S.C. 1985 c. O-5, s. 4.

[323] For strong criticisms of these leaks as a wrongful attempt to smear Mr. Arar's reputation and to defend the Canadian actions, see Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Analysis and Recommendations* (Ottawa: Public Works, 2006).

commissions and law reform bodies had criticized it as an overbroad restriction on freedom of expression.[324] The Act makes it an offence not only to release or leak secret documents but also to receive or possess such information. Section 4(3) is particularly broad, as it makes it an offence to receive such secrets "knowing, or having reasonable ground to believe, at the time he receives it, that" they are "communicated to him in contravention of this Act … unless he proves that the communication to him" of the information "was contrary to his desire". A trial judge in the *O'Neill* case found that these provisions were an unjustified violation of both sections 2 and 7 of the Charter. Justice Ratushny of the Ontario Superior Court concluded that the offences were vague, overbroad and criminalized:

> … a wide variety of conduct that should not be caught, for example, the communication, receipt or possession and retention of information that invokes no harm element to the national interest. They also have the very real potential to "chill" the pursuit and enjoyment of the right of freedom of expression by the public and by the press.[325]

She found that the government could not justify the violation of section 2(b) under section 1, given that the offence was much broader than necessary to protect legitimate secrets that could damage national security. The judge also refused the government's request for a suspended declaration of invalidity, noting that even with the invalidation of the provisions the government had ample resources to keep its secrets. The validity of this conclusion is supported by the fact that no reply legislation has yet to be enacted in response to this ruling. The invalidation of these provisions represents the only significant Charter victory in recent freedom of expression challenges to national security legislation and one that is notable because of its concerns that broad national security laws may chill the actions of the press and freedom of expression more generally.

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[324] Ontario Law Reform Commission, *Political Activity, Public Comment and Disclosure by Crown Employees* (Toronto: Ministry of the Attorney General, 1986); Home Office, United Kingdom, *Reform of Section 2 of the Official Secrets Act 1911* (London: Her Majesty's Stationer's Office, 1988), at 13; Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police, *First Report: Security and Information* (Ottawa: Supply and Services, 1979), at 24-25 (Recommendation 12).

[325] *O'Neill v. Canada (Attorney General)*, [2006] O.J. No. 4189, 82 O.R. (3d) 241, at para. 102 (Ont. S.C.J.) [hereinafter "*O'Neill*"].

11. Public Protests: APEC, G20 and Idle No More

Public protests are a site where the state's interests are sometimes characterized as matters of national security,[326] but might be better characterized as ordinary law enforcement given the non-violence employed by most protesters. In any event, various public protests and the state's response to them have sharpened the conflict between free expression and competing governmental interests, whether based on national security or law enforcement.

Protest actions by the anti-globalization movement in Vancouver, Quebec City and at the G20 meeting in Toronto raise these concerns in stark relief. These protests attracted the massive attention of both police and security intelligence officials. In November 1997, Canada played host to a meeting of the Asia-Pacific Economic Cooperation countries ("APEC"). Among the leaders attending the meeting, held on the site of the University of British Columbia campus, was the Indonesian dictator, President Suharto. His attendance, together with other "Asian dictators", precipitated a series of student demonstrations and a round of RCMP counter-measures, including the use of "pepper spray" against peaceful demonstrators and the maintenance of a security perimeter that kept protestors at some distance from the site of the meeting.[327] In the subsequent public hearing into RCMP misconduct, Commissioner Ted Hughes recommended that, so as to avoid breach of the Charter right of free expression, in future "generous opportunity will be afforded for peaceful protestors to see and be seen in their protest activities by guests to the event".[328] Police, in other words, are required to provide protestors with reasonably ample opportunity to make known their views to the targets of their expressive activities. Though there was no student violence at UBC, subsequent meetings of international leaders had become, in the words of Blanchet J., "incendiary".[329] It was reasonable, according to the

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[326] M.L. Friedland, *National Security: The Legal Dimensions* (Ottawa: Supply and Services, 1980); Reginald Whitaker & Gary Marcuse, *Cold War Canada: The Making of a National Insecurity State, 1945-1957* (Toronto: University of Toronto Press, 1994).

[327] See W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000).

[328] Canada, Commission for Public Complaints Against the RCMP, *Commission Interim Report* (Ottawa: Commission for Public Complaints Against the RCMP, 2001) (Commissioner: Ted Hughes), at 446.

[329] *Tremblay c. Québec (Procureur général)*, [2001] J.Q. no 1504, [2001] R.J.Q. 1293, at para. 77 (Que. S.C.).

judge, for the organizers of the spring 2001 Summit of the Americas meeting held in Quebec City to have cordoned off all of the old City of Quebec, the site of the meeting, from protestors. Other avenues for protest were available, including facilities for an anti-APEC "Peoples Summit", in which case fencing preventing protestors from getting anywhere near the 34 heads of state was an appropriate and proportionate response under the Charter.

The G20 summit meeting held in Toronto in June 2010 was greeted with a massive state presence, including an estimated 20,000 police, intelligence and military officials at an estimated cost of a billion dollars.[330] Before the meetings and protests, the Canadian Labour Congress and Canadian Civil Liberties Association attempted to obtain an interlocutory injunction against the planned use of sound cannons by the police to communicate with and control crowds of expected demonstrators. One of their arguments was that the use of such equipment would chill freedom of expression. Justice Brown of the Ontario Superior Court (who, as noted above, subsequently issued an injunction against the Occupy movement in Toronto) prefaced his decision by commenting that:

> Canada enjoys an enviable reputation amongst the world's nations for its public culture of political expression. Although public speech still sometimes stumbles against pockets of process and content-based restrictions in public institutions, by and large Canadian public streets and places remain open and available for the expression of a wide variety of political and social messages. For example, last year judges of this court were front-row witnesses to the closure of University Avenue in front of the courthouse for an entire week as members of the Toronto Tamil community protested political events in Sri Lanka. That protest was permitted to continue even though it interfered with some operations of this court. Toronto now anticipates large public demonstrations and protests over the next few days as the G20 Summit unfolds.[331]

These comments suggest a confidence verging on complacency about the respect for the freedom to protest in Canada. It is questionable whether such a confidence was warranted at the time given the response to protests at the APEC and Quebec City demonstrations. In

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[330] "Billion-dollar G20 security costs not a blank cheque: security czar" *The Globe and Mail* (May 28, 2010).

[331] *Canadian Civil Liberties Assn. v. Toronto Police Service*, [2010] O.J. No. 2715, 224 C.R.R. (2d) 244, at para. 105 (Ont. S.C.J.).

any event, the confidence can hardly be sustained after what happened at the G20 protests.

Justice Brown went on to hold that the applicants had failed to raise a serious issue that the use of the sound cannons would chill freedom of expression on the basis that the applicants' evidence "was highly speculative, anecdotal hearsay, and lacking in substance". Concerns expressed by the applicants about a lack of turnout at the demonstration could in his view be attributed to "the overall security measures taken for the G20 Summit, as well as the well-publicized risk of unlawful conduct by others".[332] Again this suggests an acceptance of the massive show of state force planned and executed at the protest and a willingness to curtail the expression of the vast majority of peaceful protesters because of the unlawful actions of a small minority of protesters. In the end, Brown J. ordered an injunction to prevent the use of the highest alert setting on the sound cannons because of concerns that such high levels of noise might cause hearing loss among protesters. He stressed that the Vancouver police and the RCMP had not used such high settings at other protests.[333]

As is well known, the protests resulted in over 1,100 arrests and the detention of protesters in grossly inadequate conditions. The police also used "kettling" techniques to confine demonstrators on several occasions. The Ontario Cabinet enacted a regulation under the *Public Works Protection Act*[334] to designate the Toronto Convention Centre a public work and to require people to identify themselves and submit to searches before entering it. The law had first been enacted in 1939 as an emergency measure against wartime sabotage but remained on the books. It had been challenged under the Charter as applied to searches before entering courtrooms but had been upheld.[335] The enactment of the regulation was not well-publicized and was poorly understood by protesters and police alike. Reports by both the Ontario Ombudsperson and retired Ontario Chief Justice Roy McMurtry were critical of the use of the regulation and recommended repeal of the *Public Works Protection Act*.[336] A bill to

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[332] *Id.*, at para. 113.

[333] This injunction was dissolved when the Toronto Police Service agreed to abide by its terms. *Canadian Civil Liberties Association v. Toronto Police Service*, [2010] O.J. No. 2716, 2010 ONSC 3698 (Ont. S.C.J.).

[334] O. Reg. 233/2010, enacted under the *Public Works Protection Act*, R.S.O. 1990, c. P.55.

[335] *R. v. Campanella*, [2005] O.J. No. 1345, 75 O.R. (3d) 342 (Ont. C.A.).

[336] Ontario Ombudsman, *Caught in the Act*: *Investigation into the Ministry of Community Safety and Correctional Services' Conduct In Relation to Ontario Regulation 233/10 under the Public Works Protection Act* (Toronto: Ombudsman, 2010); Ontario, Hon. Roy McMurtry, *Report of*

achieve such a result was subsequently introduced in the Ontario legislature, but it also provided similar legislative powers, albeit limited to the protection of courtrooms and nuclear facilities.[337] Although the bill can be defended as a more proportionate and modern response to security concerns than the 1939 Act it would replace, it is not without its flaws, including a provision that allows a person to be denied entry to a courthouse if "there is reason to believe that the person poses a security risk",[338] without attempting to define what is a security risk. In any event, the replacement of the *Public Works Protection Act* will not guarantee future responses to public protests that are more respectful of the right to protest, in part, because the law applies only within Ontario and summits involving internationally protected persons are ordinarily subject to federal control and legislation.[339] There is a danger that the focus on the *Public Works Protection Act* after the G20 summit was misplaced and lent to the illusion that limited legislative reform will actually restrain state responses to public protests that are arguably disproportionate and driven by intelligence about remote risks of serious crimes.[340] The G20 episode belies the confidence expressed by Brown J. and others about Canada's "enviable reputation" for a "public culture of political expression". We do agree with Brown J., however, that responses to public protests reflect a constitutional culture and traditions that are deeper and more difficult to change than the formal law or judicial decisions.

Questions about the limits of the right to protest and the strength of Canada's constitutional commitment to free expression also arose with respect to a series of injunctions issued against blockades of rail passages by Aboriginal protesters in the grassroots "Idle No More" movement. Justice Brown of the Ontario Superior Court, again, was the judge in these cases involving separate blockades in Sarnia and Kingston. In both cases, he issued injunctions.

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the Review of the Public Works Protection Act (Toronto: Ontario Ministry of Community Safety and Correctional Services, 2011).

[337] Bill 51, *Security for Courts, Electric Generating Facilities and Nuclear Facilities Act*, 2nd Sess., 40th Parl., Ontario, 2013 (debated at second reading on April 24, 2013).

[338] *Id.*, at Sch. 2.

[339] For instance, the RCMP has authority to do what is necessary to protect foreign dignitaries under the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41. For arguments about the need for reform, see Wesley Pue & Robert Diab, "The Gap in Canadian Police Powers: Canada Needs 'Public Order Policing' Legislation" (2010) 28 Windsor Y.B. Access Just. 87.

[340] For arguments that the focus on the reform of the *Public Works Protection Act*, which was only used in two of the over 1,100 arrests at the G20 summit, was misplaced, see Kent Roach, "Post 9/11 Policing of Protests: Symbolic but Illusory Law Reform and Real Accountability Gaps" in Margaret Beare, *The State on Trial* (Vancouver: University of British Columbia Press, forthcoming).

In the Sarnia case, an emergency and temporary injunction was granted at the request of Canadian National Railways ("CN") and without hearing representations from those subject to the injunction. Justice Brown recognized that: "The protestors obviously are engaged in a form of expressive activity" and that "persons are free to engage in political protest of that public nature." Nevertheless, he went on to hold that:

> … the law does not permit them to do so by engaging in civil disobedience through trespassing on the private property of others, such as CN. Given the alternative locations for expressive conduct open to the protestors, and the economic disruption their expressive activity most probably will have on other industries, the political nature of the message expressed by the protestors carries little weight in the balance of convenience analysis in the particular circumstances of this case.[341]

Similar to his decision with respect to the Occupy movement, discussed above, this decision recognized that expressive issues were at stake in the protest but held that other interests, namely protecting private property through trespass law, should prevail.

Six days after the injunction was issued, Brown J. issued another judgment continuing the temporary injunction.[342] He attempted to distinguish two Ontario Court of Appeal decisions,[343] which stressed the need to consider the Crown's duties to consult and other obligations towards Aboriginal peoples when granting and enforcing injunctions, on the basis that the Idle No More blockade at Sarnia was part of a general protest towards the policies of the federal government and did not apparently involve an assertion of Aboriginal title as had the situations at issue in the Ontario Court of Appeal decisions. It is questionable whether the Ontario Court of Appeal judgments can be so easily distinguished, especially because the protesters were not represented in the proceedings and the nature of their protest appeared to have been gleaned by Brown J. from the media. The protests were multi-faceted and involved concerns about treaty, land and constitutional rights that also were the focus of the Ontario Court of Appeal's earlier decisions.

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[341] *CNR v. Chief Chris Plain*, [2012] O.J. No. 6272, 2012 ONSC 7348, at para. 23 (Ont. S.C.J.) [hereinafter "*CNR I*"].

[342] *CNR v. Chief Chris Plain*, [2012] O.J. No. 6184, 114 O.R. (3d) 27 (Ont. S.C.J.) [hereinafter "*CNR II*"].

[343] *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council*, [2006] O.J. No. 4790, 82 O.R. (3d) 721 (Ont. C.A.) [hereinafter "*Henco*"]; *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, [2008] O.J. No. 2651, 91 O.R. (3d) 1 (Ont. C.A.).

Justice Brown displayed considerable frustration that the Sarnia police had not enforced the injunction and ended the blockade in the six days since the injunction was issued. He stated "it is not the purpose of a court order simply to initiate talks or consultations between the police and those whom the court has found to have breached the law".[344] He warned about the dangers of the police deciding "that the writ of the courts do not run against particular groups or particular political messages".[345] In our view, Brown J.'s approach runs a serious risk of undermining the legitimate role of police and prosecutorial discretion in enforcing injunctions and attempting to reconcile the competing constitutional values at issue, including those of freedom of expression. Moreover, it avoids clear warnings by the Ontario Court of Appeal about the importance of police and prosecutorial discretion in enforcing injunctions against Aboriginal protests.[346] These warnings should not be limited to cases where claims of Aboriginal title were made, but are relevant to a wider range of contexts including those involving all forms of non-violent protest protected by section 2(b) of the Charter.

In early 2013, Brown J. issued another emergency injunction requested by CN against a blockade of its main rail line at Kingston.[347] The constitutional analysis in this decision was perfunctory. Justice Brown dismissed the relevance of freedom of expression in the following manner:

> While expressive conduct by lawful means enjoys strong protection in our system of governance and law, expressive conduct by unlawful means does not. No one can seriously suggest that a person can block

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[344] *CNR II*, *supra*, note 342, at para. 38.

[345] *Id.*, at para. 40.

[346] In a 2006 case arising from a long term Aboriginal protest in Caledonia, Laskin J.A. observed for the Court of Appeal:

> In this kind of case, the police and the Crown, not the court, are in the best position to assess whether a serious breach of the injunction has occurred, and if so, by whom. And even if the injunction has been breached, the police and the Crown must invariably balance many competing rights and obligations and must take account of many considerations beyond the knowledge and expertise of the judge.
>
> In the present case, for example, many considerations are at play beyond the obligation to enforce the law. These considerations include Aboriginal and treaty rights, constitutional rights, the right to lawful enjoyment of property, the right to lawful protest, concerns about public safety, and importantly, the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation.

Henco, *supra*, note 343, at paras. 116-117.

[347] *Canadian National Railway Co. v. John Doe*, [2013] O.J. No. 26, 114 O.R. (3d) 126 (Ont. S.C.J.) [hereinafter "*John Doe*"].

> freight and passenger traffic on one of the main arteries of our economy and then cloak himself with protection by asserting freedom of expression. The *Canadian Charter of Rights and Freedoms* does not offer such protection, as I examined at length in *Batty v. City of Toronto*.[348]

The idea that "expressive conduct by unlawful means" is not protected under section 2(b) is clearly erroneous, given the Supreme Court's broad interpretation of freedom of expression as only excluding violence and threats of violence. The suggestion that unlawful conduct can never be protected as freedom of expression ignores the fundamental distinction in a democracy between peaceful civil disobedience and violent protest. It is also inconsistent with Brown J.'s own recognition in the *Batty* case involving the Occupy movement, discussed above, that freedom of expression was in play in the construction of shelters to convey a political message.[349]

As in the Sarnia case, Brown J.'s Kingston injunction decision demonstrated considerable impatience with the lack of an immediate and forceful police response to the protest. The Kingston injunction did not include a clause recognizing the role of police discretion in its enforcement that had been included in the original Sarnia injunction.[350] The judge stated:

> I do not understand why the Main Line between Toronto and Montreal had to remain shut for several hours while a rail operator rushed off to court while the police simply stood by, inactive, and I do not understand why a judge of this Court cannot predict with certainty whether a police agency will assist in enforcing his or her court order. A simpler solution under the law exists.[351]

The so-called "simpler solution" of immediate arrest may not adequately respect all of the competing rights in play, including those of freedom of expression. The Ipperwash Inquiry, in its report on the death of Aborigi-

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[348] *Id.*, at para. 11.

[349] In the Occupy case, he stated: "I ... hold that the structures erected by the applicants and other Protesters in the Park form part of the manner of expressing their political message and therefore engage section 2(b) of the *Charter*." See Batty, *supra*, note 253, at para. 72.

[350] The original Sarnia order authorized the arrest and removal of those who breached the injunction but contained a clause that "for greater certainty, such a police service or peace officer retains his or her discretion to decide whether to arrest or remove any person pursuant to this Order". See *CNR II*, *supra*, note 342, at para. 35. This clause was omitted from both the continued injunction and the Kingston injunction (*id.*, at para. 44; *John Doe*, *supra*, note 347).

[351] *John Doe*, *id.*, at para. 26.

nal protester Dudley George, warned of the danger of viewing the policing of protests simply through a law enforcement perspective. It endorsed the approach of the Ontario Court of Appeal which stressed, in a case arising from an Aboriginal protest at Caledonia, the need to consider not simply the need to enforce the law, but also "Aboriginal and treaty rights, constitutional rights, the right to lawful enjoyment of property, the right to lawful protest, concerns about public safety, and importantly, the government's obligation to bring about the reconciliation of Aboriginal and non-Aboriginal peoples through negotiation".[352] Justice Brown's approach seems to view injunctions against Aboriginal protests simply as a matter of law enforcement and not one involving competing rights, including freedom of expression.

12. Defamation

The common law jealously guards individual reputation. Under the common law of defamation, defamatory statements are presumed to be false and malicious. No further proof of harm is required to be shown; general damages are presumed to have been suffered. The common law rule then shifts the onus on the publisher of the defamatory utterance to prove its truthfulness or otherwise show that the statement falls within a limited range of privileged statements. Public officials and personages have repeatedly had resort to the law of defamation as a means of punishing or thwarting speech tending to impair their reputations. Then Minister of Human Resources in British Columbia, Bill Van Der Zalm, for instance, sued the editorial cartoonist of the *Vancouver Sun* for having depicted the Minister tearing the wings off of flies.[353] Former Quebec Premier Jacques Parizeau and Bloc Québécois Lucien Bouchard successfully sued a financial analyst who, in his financial bulletin, likened

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[352] *Henco*, *supra*, note 343, at paras. 116-117. This approach was endorsed by the Ipperwash Inquiry in its final report on the killing of Aboriginal protester Dudley George at a protest in Ipperwash Provincial Park: Ontario, The Ipperwash Inquiry, *Final Report, Volume 2: Policy Analysis* (Toronto: Queens Park, 2007), at 217-18. The Inquiry concluded that the Court of Appeal's approach "was consistent with the thrust of this report. Aboriginal occupations and protests raise more complex and competing interests and should not be approached as a simple matter of enforcing the law. Even with respect to law enforcement, there should be due deference to the discretion of the police."

[353] *Van der Zalm v. Times Publishers*, [1979] B.C.J. No. 2073, 96 D.L.R. (3d) 172 (B.C.S.C.), revd [1980] B.C.J. No. 2073, 109 D.L.R. (3d) 531 (B.C.C.A.).

Parizeau and Bouchard to Adolf Hitler.[354] In the United States, the common law of defamation was modified in *New York Times v. Sullivan*.[355] "[E]rroneous statement is inevitable in free debate," wrote Brennan J., and even these demand protection if freedom of expression is to have its requisite "breathing space".[356] The U.S. Court modified the common law rule, prohibiting public officials from suing for defamatory falsehoods relating to their official conduct, unless a statement is proven by the plaintiff to have been made with "actual malice", that is, with knowledge of its falsity or with "reckless disregard as to whether it was false or not". With the advent of the Charter's guarantee of freedom of expression, it might have been thought that the common law rule would be modified in Canada as well. In their first opportunity to consider reform of the highly protective rule, the Supreme Court of Canada declined to do so. It would take another 13 years for the Court to revisit the question and to begin to modestly reform the law in respect of press freedom.

Hill v. Church of Scientology of Toronto[357] concerned what was then the largest jury award for defamation in Canadian history. Casey Hill, an Ontario Crown prosecutor, was awarded $1.10 million in general and special damages for defamatory statements made by the Church of Scientology and their legal counsel Morris Manning. Acting on behalf of his client, Manning held a press conference on the steps of the Osgoode Hall courthouse in Toronto, alleging that Hill "had misled a judge of the Supreme Court of Ontario and had breached orders sealing certain documents belonging to Scientology".[358] In subsequent contempt proceedings, these allegations were proven to be false and so Hill sued for defamation.

The question before the Supreme Court of Canada was whether the common law of defamation was consistent with the Charter's value of freedom of expression. Though the Charter did not apply directly to the common law, following *Dolphin Delivery*, common law rules were to be interpreted in a manner consistent with Charter values.

Defamatory statements were "tenuously related to the core values" underlying section 2(b), wrote Cory J. for the majority. By contrast, the

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354 *Lafferty, Harwood & Partners v. Parizeau*, [2003] J.Q. no 14458, [2003] R.J.Q. 27585 (Que. C.A.).

355 376 U.S. 254 (1964).

356 *Id*., at 271-72.

357 [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.). One of the authors (Roach) was co-counsel to the Canadian Civil Liberties Association in this case.

358 *Id.*, at paras. 1-2.

value of protecting a person's reputation, particularly important to a practising lawyer, was significant. Though the common law rule was admittedly restrictive, "[s]urely it is not requiring too much of individuals that they ascertain the truth of the allegations they publish".[359] The Court resisted adopting the "actual malice" rule from the United States, noting concerns that the rule can have the effect of distorting public debate while sacrificing reputations.[360] The Court also rejected an intermediate standard that had been adopted in Australia in the case of *Theophanous v. Herald & Weekly Times*.[361] The High Court of Australia there endorsed a rule which allowed defendants to escape liability for defamatory statements concerning political matters if "circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false".[362] This would permit the publication of defamatory statements concerning pressing political issues where circumstances did not permit further investigation or fact-checking. Rejecting any serious modification of the common law rule, the Supreme Court of Canada collectively (L'Heureux-Dubé J. dissenting in part) refused to re-evaluate defamation law in light of the Charter value of protecting freedom of expression. It would appear that the deplorable conduct of the Church of Scientology did not warrant any reconsideration of outdated common law rules.

It is revealing the degree to which the Court in *Hill*, in addition to many of the other cases we have discussed, was unconcerned with the chilling effect overbroad and vague protections could have on the exercise of freedom of expression in a democratic society. The Court finally appeared to take an interest in such matters in *WIC Radio*, where Binnie J. declared that "chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements."[363] The Court allowed Vancouver radio personality Rafe Mair's defence of fair comment to prevail over a claim that he defamed an anti-gay activist whom he likened to, among others, Adolf Hitler. Sub-

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359 *Id.*, at para. 137.

360 Rodney Smolla, "Taking Libel Reform Seriously" (1987) 38 Mercer L. Rev. 793.

361 [1994] H.C.A. 46, 182 C.L.R. 104 (H.C.A.).

362 *Id.*, at para. 44.

363 *WIC Radio Ltd. v. Simpson*, [2008] S.C.J. No. 41, [2008] 2 S.C.R. 420, at para. 15 (S.C.C.) (emphasis in original).

sequently, in *Grant v. Torstar*,[364] the Court formulated a new defence to the tort of defamation, applying its "Charter values" approach to common law development, of responsible communication on matters of public interest. Chief Justice McLachlin began her ruling by acknowledging that the strict liability tort "has a chilling effect that unjustifiably limits reporting facts and strikes a balance too heavily weighted in favour of protection of reputation".[365] It should not be available, she declared, as "a weapon by which the wealthy and privileged stifle the information and debate essential to a free society".[366] Comparative developments elsewhere (namely, the United Kingdom, Australia, New Zealand and South Africa) also pointed in the direction of judicial reform of the common law. It was time to "take a fresh look at the common law and re-evaluate its consistency with evolving societal expectations through the lens of Charter values".[367]

Taking up a formulation proposed by Sharpe J.A. in the companion case of *Quan* in the court below,[368] the defence of responsible communication would be available to defendants in cases where, first, publication is "on a matter of public interest" and, second, the defendant was "responsible, in that he or she was diligent in trying to verify the allegation(s), having regard to all relevant circumstances".[369] Matters of public interest included all variety of subjects in which the public would have "a genuine stake" and which would encourage "wide-ranging public debate".[370] Though this suggests a low threshold of inquiry, this is a question of law that only a judge could decide. By contrast, determining whether the communication was a responsible one was a question of fact for a jury, having regard to a number of factors: (i) the seriousness of the allegation; (ii) the public importance of the matter; (iii) the urgency of the matter; (iv) the status and reliability of the source; (v) whether the plaintiff's side of the story was sought and accurately reported; (vi) whether the inclusion of the defamatory statement was justifiable (which avoids liability when responsibly repeating a libellous statement); and (vii) other considerations

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[364] *Grant v. Torstar Corp.*, [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter "*Torstar*"].

[365] *Id.*, at paras. 28, 39.

[366] *Id*., at para. 39.

[367] *Id.*, at paras. 40, 46.

[368] *Cusson v. Quan*, [2007] O.J. No. 4349, 286 D.L.R. (4th) 196 (Ont. C.A.) [hereinafter "*Cusson v. Quan*"].

[369] *Torstar*, *supra*, note 364, at para. 98.

[370] *Id.*, at para. 106.

(*i.e.*, style or tone will not be determinative of liability).[371] Justice Abella dissented on the division of labour between judge and jury: whether the communication was a responsible one should be a question of law for the judge to decide. Whether the communication at issue in *Grant* was a responsible one in the public interest, concerning allegations about influence peddling by a private golf course developer, was a matter for retrial.

In the companion case of *Quan v. Cusson*, the Court applied the first limb of analysis in the curious case of Ontario Provincial Police Constable Cusson who, with his pet dog Ranger, rushed to Manhattan's "Ground Zero" to help out in 9/11 rescue operations.[372] *The Ottawa Citizen* later reported that Cusson had "misled New York State police into thinking he was a fully trained K-9 handler with the RCMP".[373] He was awarded $100,000 in damages at trial and an appeal to the Ontario Court of Appeal was dismissed. On appeal, Sharpe J.A. took the opportunity to articulate a new defence of responsible journalism on matters of public interest. He chose, however, not to order a new trial.[374] The Supreme Court thought otherwise and ordered a new trial so that the defendants (including *The Ottawa Citizen*) could avail themselves of this new defence. The first part of the inquiry, whether the public interest test was satisfied, was however pre-empted by the Court in finding that the public interest test had been met. While it was not a "purely private matter" nor "political in the narrow sense, the articles touched on matters close to the core of the public's legitimate concern with the integrity of its public service".[375] The question was sent back to trial for a jury to determine whether the communication met *Grant*'s standard of responsibility.

One could read the *Malhab* decision as reflective of recent judicial trends resulting in reform of the law of defamation. In a class action suit against "shock jock" radio host André Arthur, Mr. Malhab sought damages on behalf of all Arabic and Creole speaking Montreal taxi drivers for on-air defamatory comments.[376] Though Arthur's comments were "scornful and racist", Deschamps J. observed for the majority, they were unlikely to

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[371] *Id.*, at paras. 110-125. Chief Justice McLachlin here drew on factors previously identified by the House of Lords in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609, at 626 (H.L.).

[372] [2009] S.C.J. No. 62, [2009] 3 S.C.R. 712 (S.C.C.) [hereinafter "*Quan v. Cusson*"].

[373] *Id.*, at para. 10.

[374] *Cusson v. Quan*, *supra*, note 368.

[375] *Quan v. Cusson*, *supra*, note 372, at para. 31.

[376] Arthur alleged that Arabic and Creole speaking taxi drivers were "incompetent", "rude" and corrupt. *Malhab*, *supra*, note 196, at paras. 3, 82.

reflect on each individual cab driver.[377] The group, moreover, was too heterogeneous and Arthur's comments too "general and vague" to give rise to liability under Quebec's *Civil Code*.[378] Mr. Arthur was well known for his "distasteful and provocative language" and for a "satirical" and sensational style, in which case, no ordinary person would grant any "plausibility" to his allegations.[379] Justice Abella, in her lone dissent, found that Mr. Arthur's remarks resulted in very specific injury giving rise to harmful economic consequences. His comments were directed at a "precisely defined and easily identified group" and were not merely satirical, but made "seriously".[380] Justice Abella was surely correct to chastise the majority for downgrading the harms suffered by Mr. Arthur's remarks. Indeed, we would surmise that Mr. Malhab and his cohort suffered further indignity when the majority of the Court characterized their claim as unmeritorious.

The Supreme Court appears not to be as solicitous to the speech claims of lawyers, however. Early on in the life of the Charter, the Ontario Court of Appeal significantly narrowed the common law of contempt by scandalizing the courts. It quashed a contempt of court conviction of lawyer Harry Kopyto who complained that a judge's decision "stinks to high hell … The courts and the RCMP are sticking so close together that you'd think they were put together with Krazy Glue."[381] The Supreme Court in *Doré*, by contrast, accepted without hesitation "the importance of professional discipline to prevent incivility in the legal profession", namely insults directed at a judge in a private letter.[382] In an instance where criminal defence lawyer Gilles Doré and Boilard J. of the Superior Court of Quebec exchanged invectives — Boilard J. in open court and Mr. Doré in his letter[383] — the Court unanimously affirmed the appropriateness of disciplining Mr. Doré for exceeding the "public's reasonable expectation" of legal professionalism. In an application for judicial review of administrative action, a full-blown *Oakes* analysis was

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377 *Id.*, at para. 82.

378 *Id.*, at paras. 86, 88.

379 *Id.*, at para. 89.

380 *Id.*, at paras. 116, 120.

381 *R. v. Kopyto*, [1987] O.J. No. 1052, 62 O.R. (2d) 449 (Ont. C.A.).

382 *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, [2012] 1 S.C.R. 395, at para. 66 (S.C.C.) [hereinafter "*Doré*"].

383 Judge Boilard accused Doré of being "insolent", "bombastic" and "totally ridiculous", remarks the Canadian Judicial Council found were "unjustified derogatory remarks" (*id.*, at para. 14). Doré, for his part, accused the judge of being a "coward", "loathsome" and possessing the "most appalling of all defects for a man in your position: You are fundamentally unjust" (*id.*, at para. 10).

inappropriate. Instead, a more flexible approach was appropriate which would be more deferential to administrative decision makers. The standard would be one of proportionate balancing, weighing Charter values against statutory objectives by applying a standard of reasonableness.[384] Here, the Charter value of freedom of expression was to be weighed in the balance against the need to police professional conduct. "In light of the excessive degree of vituperation in the letter's content and tone", the disciplinary body's finding, concluded Abella J., "cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives".[385] While it is appropriate for the Court to be sensitive to the expertise offered by administrative decision makers, it should behove the Court to be more protective of freedom of expression interests, even those which, the Court below determined, had "little expressive value".[386]

13. Positive Right

There are very few expressly positive rights and freedoms in the Charter. For these reasons, it has been characterized as a bill of negative rights. Oftentimes, this view naïvely asserts that constitutional rights are not dependent upon any government action. Yet governments are expected to provide the infrastructure — whether they be parks, roads, police, or voting facilities — necessary for the exercise of civil liberties like freedom of expression. Does the Charter's guarantee go further, however, and require government action, such as funding, so as to allow for meaningful opportunities to exercise expressive freedoms?

In *Haig v. Canada*,[387] L'Heureux-Dubé J., writing for the majority, emphasized at first the traditional view of the freedom of expression guarantee: it "prohibits gags, but does not compel the distribution of megaphones".[388] The Court admitted, however, that there may be situations where governmental action is required "in order to make a fundamental freedom more meaningful". This could take the form of legislative action to "prevent certain kinds of conditions which muzzle expression, or ensuring access to certain kinds of information". In this

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384 *Id.*, at para. 56.
385 *Id.*, at para. 71.
386 *Id.*, at para. 16.
387 [1993] S.C.J. No. 84, [1993] 2 S.C.R. 995 (S.C.C.) [hereinafter "*Haig*"].
388 *Id.*, at 1035.

case, Mr. Haig was denied the right to vote in the 1992 Charlottetown Accord referendum, a consultative referendum regarding a large package of constitutional reform. The federal government administered the referendum across Canada, except for in the Province of Quebec, where the provincial government conducted the referendum according to provincial law. Having moved recently to Quebec from Ontario, Haig could not satisfy the residency requirements for participating in the Quebec referendum, nor could he vote in the rest-of-Canada referendum as he had not been ordinarily resident in Ontario. The majority of the Court was unconvinced that his section 2(b) rights had been infringed. There was no constitutional right to vote in a referendum, nor was there an obligation on the part of government to consult citizens on questions of constitutional reform, in which case no freedom of expression rights were impaired.[389] When the government chooses to consult its citizens via referendum, however, the government must not do so in a discriminatory fashion. The majority turned to section 15, concluding that discrimination on the grounds of residency did not violate equality rights.[390] Justice Iacobucci, with Lamer C.J.C., issued dissenting reasons which found that Haig had been denied the ability to participate in an important expressive activity.[391] With an absence of section 1 evidence, the limitation on freedom of expression could not be justified.

A further gloss on the positive right to freedom of expression is found in *Native Women's Assn. of Canada v. Canada*,[392] another case flowing out of the 1992 Charlottetown Accord process. Funding had been granted by the Government of Canada to four national Aboriginal organizations in order to facilitate their participation in national constitutional conferences, funding which was denied to the Native Women's Association of Canada ("NWAC"). Though some of these funds were earmarked for women's issues, and though NWAC did receive a share of funds from these groups, these were male-dominated organizations, NWAC claimed, who could not credibly represent the views of Aboriginal women at these conferences. What particularly distinguished NWAC's views from these other organizations was that NWAC believed that Charter rights and freedoms should apply with full vigour to Aboriginal self-government arrangements then

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389 *Id.*, at 1033. See to the same effect *Siemens*, *supra*, note 228.

390 *Haig*, *supra*, note 387, at 1045.

391 *Id.*, at 1065.

392 [1994] S.C.J. No. [1994] 3 S.C.R. 627 (S.C.C.) [hereinafter "*Native Women's Assn.*"].

under negotiation. Justice Sopinka, writing for the majority, could not find that freedom of expression rights were infringed. Referring to U.S. Supreme Court doctrine on the subject, Sopinka J. held that governments were entitled to consult with certain groups and not with others.[393] Speaking the language of equality of opportunity, Sopinka J. insisted that it will be "rare indeed that the provision of a platform or funding to one or several organizations will have the effect of suppressing another's freedom of speech".[394] Moreover, *Haig* had established that "generally the government is under no obligation to fund or provide a specific platform of expression to an individual or group".[395] This was a characterization of *Haig* resisted by L'Heureux-Dubé J. in her concurring reasons. *Haig*, instead, stood for the proposition that government "in that particular case" was under no constitutional obligation to provide an opportunity to vote in a referendum. Every case, she maintained, will turn on its particular facts.[396] On the facts of this case, NWAC had not demonstrated that it had been prevented from expressing its views. This trend to reject the positive dimensions of freedom of expression was continued in *Baier v. Alberta*,[397] where the Court held that section 2(b) was not violated by legislation that prohibited school board employees from running and being elected as school trustees. The Court characterized running for election as a positive right and stressed that employees denied the opportunity to run for election could still express their views on school board matters in other ways. The results in these cases suggest that Sopinka J.'s characterization is not entirely wrong: equality of expressive opportunity will be presumed and no denial of freedom of expression found unless government acts in a way which amounts to the suppression of speakers or their viewpoints.

14. Access to Information

Most Canadian jurisdictions have enacted access to information legislation and such legislation serves as an important source for journalists, researchers and the interested public to obtain information about government and to engage in political forms of expression. The Court has, however, been

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393 *Id.*, at 655. The comments of O'Connor J. in *Minnesota State Board for Community Colleges*, 465 U.S. 271 (1984) were cited with approval in *id*., at 656.

394 *Native Women's Assn.*, *supra*, note 392, at 657.

395 *Id.*, at 655.

396 *Id.*, at 666-67.

397 *Baier*, *supra*, note 229.

cautious in interpreting freedom of expression to require access to information possessed by the government. It has held that freedom of expression "does not guarantee access to all documents in government hands. Access to documents in government hands is constitutionally protected only where it is shown to be a necessary precondition of meaningful expression, does not encroach on protected privileges, and is compatible with the function of the institution concerned."[398] Under this approach, it was not necessary for exemptions for solicitor-client and law enforcement privilege from access to information legislation to be subject to a review to determine whether it was nevertheless in the public interest that such material be disclosed. The Court elaborated that, under the *Irwin Toy* approach, in order to "show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise of free expression on matters of public or political interest".[399] The Court concluded that meaningful public discussion of alleged police improprieties in the investigation of an alleged mobster's murder was still possible without access to a 300-page police investigation and legal advice provided by the Crown.[400] This underlines how the *Irwin Toy* approach can place significant definitional limits on freedom of expression. Even if meaningful public discussion was not possible without access to the requested documents, the state could still claim the benefit of solicitor-client[401] and law enforcement privileges. In addition, freedom of expression would not be engaged if the government could demonstrate that access was incompatible with the functioning of government. Examples given by the Court include access to Cabinet documents or access to prejudgment memos and research by courts.[402] This demonstrates a willingness to impose internal limitations on freedom of expression that do not have to be justified under section 1. In the result, it appears as if legislatures could repeal or curtail much access to information legislation without violating the guarantees of freedom of expression under the Charter.

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[398] *Ontario (Public Safety and Security) v. Criminal Lawyers' Assn.*, [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815, at para. 5 (S.C.C.) [hereinafter "*Criminal Lawyers' Assn.*"].

[399] *Id.*, at para. 36.

[400] *Id.*, at para. 59.

[401] For another case applying the solicitor client privilege broadly to prevent access to information, see *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] S.C.J. No. 31, [2006] 2 S.C.R. 32 (S.C.C.).

[402] *Criminal Lawyers' Assn.*, *supra*, note 398, at para. 40.

15. Remedies for Violations of Freedom of Expression

The Supreme Court has repeatedly stressed that remedies for violations of Charter rights should vindicate the purpose of the right violated and provide full and effective remedies.[403] In the freedom of expression context, it could be argued that the preference should be for remedies that do not preserve vague or potentially overbroad laws that may result in unjustified violations of freedom of expression. The purposive concern would be that such laws could chill expression and authorize unjustified or unnecessary violations of freedom of expression. In the United States, for example, there is some preference for striking down overbroad laws to protect against further chills on expression.[404]

At first, the Supreme Court gravitated towards striking down laws that violated freedom of expression, but more recently there has been a trend to saving laws that could impose unjustified restrictions on freedom of expression by reading them down in an attempt to ensure that they will only impose justified violations.

In *Rocket v. Royal College of Dental Surgeons of Ontario*,[405] the Court struck down a total restriction on advertising, with McLachlin J. stating that the "danger of leaving legislation in force which is too broad is that it may prevent people from engaging in lawful activities by reason of the fact that the prohibition is still 'on the books'". A year later, in *Osborne v. Canada*, the Court again struck down a law restricting political activities by civil servants, even though it indicated that some of the activities that were restricted by the law could be justified as reasonable limits on freedom of expression. Justice Sopinka stressed that it was better for Parliament to revise the law in its entirety because it was impracticable for the courts to determine "the constitutionality of the section on a case by cases basis". In addition, he concluded that a declaration of invalidity was the remedy that best vindicated "the values expressed in the *Charter*" and provided "the form of remedy to those whose rights have been violated that best achieves that objective".[406]

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[403] *R. v. Gamble*, [1988] S.C.J. No. 87, [1988] 2 S.C.R. 595 (S.C.C.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] S.C.J. No. 63, [2003] 3 S.C.R. 3 (S.C.C.).

[404] Carol Rogerson, "The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreadth and Vagueness" in R.J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987).

[405] *Rocket*, *supra*, note 77, at 82.

[406] *Osborne v. Canada (Treasury Board)*, [1991] S.C.J. No. 45, [1991] 2 S.C.R. 69, at para. 70 (S.C.C.).

Finally, in *R. v. Zundel*,[407] a majority of the Court refused to save the criminal prohibition against knowingly spreading false news that was likely to cause injury to a public interest by restricting it to false news, such as the denial of the Holocaust, which amounted to hate speech contrary to equality values. Justice McLachlin, for the majority, suggested that the reading down proposed by the minority was not consistent with the intent of the false news provision. Moreover, she expressed concerns that such a remedy would leave in place a criminal prohibition that could chill legitimate expression. She stressed that an overbroad criminal sanction authorizing police, prosecutors, and juries could chill expression no matter how it was interpreted by appellate courts.

Zundel represents the high-water mark of the Court's willingness to strike down overbroad criminal prohibitions because of the danger that they would chill expression. The Court took a different approach in *R. v. Butler*,[408] a case decided in the same year as *Zundel*. Although the issue in *Butler* was not explicitly conceived as one of choice of remedies, it had important implications for the development of remedies in the freedom of expression context. In *Butler*, as we examined above, the Court re-categorized and reinterpreted the type of pornography that would fall under the *Criminal Code*'s prohibition of obscene material with an eye on what forms of expression could be restricted justifiably under section 1 of the Charter. Although the Court did not label its reinterpretation of the obscenity law as a reading down remedy, it had that effect. It also left a potentially overbroad law on the books, resulting in concerns about how the new *Butler* standard of obscenity is being administered by the police and especially custom officials.[409]

In a 1999 case dealing with expression and strikes, the Court acknowledged that when "one interpretation [of a statute] would run afoul of a *Charter* right or freedom, the alternative interpretation is to be preferred"[410] and read down a law that prohibited all attempts to persuade others not to do business with a secondary employer during a strike. The Court expressed confidence that the read down statute would reconcile

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[407] *Zundel*, *supra*, note 22.

[408] *Butler*, *supra*, note 23. There may also have been a degree of reading down or reinterpretation done by the majority in *Keegstra*, *supra*, note 20, in relation to the interpretation of "hate".

[409] *Little Sisters*, *supra*, note 158.

[410] *Allsco Building Products Ltd. v. UFCW Local 1288*, [1999] S.C.J. No. 45, [1999] 2 S.C.R. 1136, at para. 26 (S.C.C.).

both freedom of expression and legitimate state interests in prohibiting coercive or intimidating expression.[411]

In *R. v. Sharpe*, the Court employed reading down to save a *Criminal Code* prohibition that prohibited the possession of child pornography. As in *Butler*, the Court employed reading down as an interpretative technique, recognizing that "if a legislative provision can be read in a way that is constitutional and in a way that is not, the former reading should be adopted".[412] It employed this technique to interpret the prohibition so that it would not apply to innocent depictions of children in the bath and such. The Court found that even after the criminal prohibition was interpreted in this manner, some overbreadth remained in the form of prohibiting expression in a manner that could not be justified under section 1 of the Charter. Rather than striking down the prohibition in its entirety, the Court employed a strong form of reading down and formulated two specific exemptions for material that would otherwise be prohibited under the law. The content of these exemptions has been discussed above,[413] but *Sharpe* demonstrates that the Court is now prepared to make full use of reading down to save laws that may, in some applications, unreasonably and unjustifiably restrict freedom of expression.[414]

One concern about the increased reliance on reading down is that it will leave potentially overbroad law on the books.[415] In the first instance, such laws will be interpreted and applied by police and other front line officials. In *Little Sisters v. Canada*,[416] a majority of the Supreme Court refused to strike down the legal powers of customs officials to seize obscene material at the border, despite finding that custom officials had, in the past, violated freedom of expression and equality rights by targeting material ordered by the Charter applicant, a prominent gay and lesbian book store in Vancouver. The Court expressed confidence that obscenity

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411 *Id.*, at para. 28.

412 *Sharpe*, *supra*, note 3, at para. 33.

413 *Id.*, at para. 122.

414 See also *Ruby*, *supra*, note 290, at para. 60 for use of reading down with respect to a mandatory provision for *in camera* hearings and *JTI-Macdonald*, *supra*, note 97, at para. 56.

415 The same can be said of the use of delayed declarations of invalidity, such as was employed in *UFCW v. Kmart*, *supra*, note 105, and *Guignard*, *supra*, note 108. For an argument that the courts have too frequently delayed declarations of invalidity see Bruce Ryder, "Suspending the Charter" (2003) 21 S.C.L.R. (2d) 267. As noted above, the court in *O'Neill*, *supra*, note 325, at paras. 166-167 (Ont. S.C.J.) rejected the state's request for a suspended declaration of invalidity with regards to overbroad "leakage" provisions of the *Security of Information Act* on the basis that the state had an adequate ability without overbroad offences to protect secrets.

416 *Little Sisters*, *supra*, note 158.

as interpreted in *Butler* could be prohibited without violating either freedom of expression or equality rights. By implication, the Court seemed confident that custom officials could and would properly interpret the obscenity standard in light of the Court's declaration that they had misinterpreted the standard in the past and, in doing so, had violated freedom of expression and equality rights. The minority in the case would have struck the authorizing legislation down both in order to minimize the risk of custom officials continuing to violate the Charter and to give Parliament an opportunity to re-think the manner to deal with the importation of obscene materials. In *Khawaja*,[417] the Court similarly held that any discriminatory profiling by state officials could not be attributed to the political and religious motive requirement in the *Criminal Code*'s definition of terrorist activities, even though it requires police to investigate the religious and political motives of suspected terrorists and the prosecutor to establish that they acted with such motives.

Cases such as *Butler*, *Sharpe*, *Little Sisters* and *Khawaja* are united by a perhaps overly optimistic faith that leaving potentially overbroad laws on the books will not chill freedom of expression and that police and other officials will properly interpret the law as it has been interpreted by the courts. It also means that, as in *Little Sisters*, any improper application of the law will only result in a section 24(1) remedy designed to cure specific unconstitutional acts as opposed to the broader legislative framework. As in *Little Sisters*, it is unclear that such remedies will effectively change governmental behaviour. To this end, it is also significant that the many protesters who were unlawfully searched and detained at the Toronto G20 demonstrations have also sought subsection 24(1) remedies, both in criminal cases and in ongoing class proceedings.[418] Again it is unclear that section 24(1) remedies for unconstitutional government acts in individual cases will effectively change government behaviour to prevent future disproportionate incursions on freedom of expression.

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417 *Khawaja*, *supra*, note 26.

418 See *R. v. Puddy*, [2011] O.J. No. 3690, 277 C.C.C. (3d) 60 (Ont. C.J.) for an example of the exclusion of evidence unconstitutionally obtained at the G20 demonstration. One class proceedings is seeking general damages of $35 million for violations of various Charter rights, as well as an additional $40 million in aggravated and punitive damages. See *Good v. Toronto Police Service Board*, Court File No. CV-10-408131 OOCP, Statement of Claim (October 12, 2011), online: G20 Class Action <http://www.g20classaction.ca/wp-content/uploads/2011/03/2nd-Fresh-as-Amended-Statement-of-Claim-filed-Oct-12-2011.pdf>.

IV. CONCLUSION

A number of themes emerge from this survey of freedom of expression. The first is that the effects of Canada's rather modest free expression tradition can still be felt in many areas of the law. Prime examples are the lack of a clear public forum doctrine, the ready acceptance of mandatory public bans for bail hearings, discretionary publication bans and closed courts, the use of parliamentary privilege to preclude freedom of expression claims, rejection of secret source privilege for the media and the considerable judicial caution in recognizing positive dimensions of the right to freedom of expression, including access to information held by the government.

The second theme, seemingly somewhat at odds with the first, is the broad and generous approach to freedom of expression in other contexts which has allowed commercial advertising, language requirements, deliberate lies, pornography and hate speech all to be accepted as constitutionally protected forms of expression under section 2(b). In the context of commercial expression, the Supreme Court has, with the objective of promoting consumer interests, endowed producers with significant constitutional resources to combat state regulation. In so doing, however, the Court has neglected to distinguish between consumer speech, as an instrument of the relatively powerless, and commercial speech as an instrument of powerful economic interests.

A third theme, in tension with the second, is that the traditional deference to state authority we have seen before the Charter's proclamation has at times been refashioned under the Charter as requiring deference to the state's attempt to protect vulnerable groups by criminalizing speech, such as pornography and hate speech. The idea that speech can harm the vulnerable has also been used to justify prohibitions on interviewing people in courthouses, broadcasting court testimony or exhibits, and restrictions on third party spending in elections. Attempts to impose a dichotomy between regulations in the name of social policy, which call for judicial caution, and demands for the rigorous justification of criminal prohibitions on expression have been unstable from the start. Indeed, they now have broken down to a thoroughly contextual and somewhat unpredictable test for justification and reconciliation of competing risks.

The protection of freedom of expression is affected by broader trends in judicial review. In revising this chapter for a new edition, we have

been struck by the fact that the Supreme Court's most vigorous defence of freedom of expression in the last seven years has been in reforming the law of defamation to take into account a new defence of responsible journalism. In contrast, the Court has deferred to Parliament with respect to mandatory publication bans regarding bail hearings and broad definitions of terrorism. It has also upheld the restrictions in access to information and third party spending from Charter challenges. The Court's deference to the state is also seen in its rulings deferring to rules of court and court orders limiting freedom of expression and to disciplinary proceedings of bar associations as they affect the expression of lawyers. In other words, a court that may be becoming more deferential to the state has nevertheless reformed the private law of defamation in a manner that provides more protection for freedom of expression. Although these latter reforms are welcome and long overdue, freedom of expression needs more thoroughgoing protection. All judicial protections of human rights are to an extent cyclical and subject to judicial changes, but a failure of the Canadian courts to support freedom of expression may have particular troubling effects, given the relative absence of a freedom of expression tradition in Canada's broader constitutional culture. Events such as the massive and disproportionate state response to the Toronto G20 protest and the recent injunctions against Aboriginal protests and the view among some judges that they should be quickly enforced solely as a matter of law enforcement, undermines confidence in the Canadian approach to free speech.

Canada's unstable freedom of expression tradition, as well as perhaps an unwarranted deference to the state and its officials and an overly optimistic view about the benefits achieved by restricting speech, can also be seen in the willingness of courts to salvage vague and overbroad laws by reading them down. Such remedies give front-line officials considerable discretion and may result in a chill on legitimate, albeit unpopular and unconventional, forms of expression. Despite its claim to being a "fundamental" freedom which has eclipsed other Charter rights, much more work remains to be done in securing the central place that freedom of expression should occupy in the evolving Canadian constitutional landscape.