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Commissioned Paper: Freedom of Expression

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Freedom of Expression

Background Paper for the Public Order Emergency Commission

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Summary

This paper examines the Canadian courts' approach to the justification, scope, and limits of freedom of expression. The paper also discusses a number of the freedom of expression issues raised by the convoy protests, such as the right to access government owned property in order to communicate with others, the regulation of hate speech, the restriction of insults and harassment in public spaces, the right to protest, the right to erect fixed structures as part of a protest, the protection of captive audiences from unwanted speech, and the spread of disinformation and conspiracy theories.

The justification for freedom of expression

There are a variety of arguments for protecting freedom of expression, but all seem to focus on one or a combination of three values: truth, democracy, and individual autonomy. It is said that freedom of expression must be protected because it contributes to the public's recognition of truth or to the growth of public knowledge; or because it is necessary to the operation of a democratic form of government; or because it is important to individual self-realization or personal autonomy.¹ Most accounts assume that a commitment to freedom of expression, which extends protection to political, artistic, scientific, and personal expression, rests on the contribution the freedom makes to all three values. This was the view of McLachlin J. in *Keegstra* 1990, 806: "The broad wording of s.2(b) of the Charter is arguably inconsistent with a justification based on a single facet of expression. This suggests that there is no need to adopt any one definitive justification for freedom of expression. Different justifications for freedom of expression may assume varying degrees of importance in

¹ When discussing the protection of freedom of expression under s.2(b) of the Charter, the Supreme Court of Canada has said that the freedom is "an essential feature of Canadian parliamentary democracy" (*Dolphin Delivery* 1986, 584); that it is "one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society" (*Dolphin Delivery* 1986, 583); that it is "the means by which the individual expresses his or her personal identity and sense of individuality" (Ford 1988, 749); that it is an important way of "seeking and attaining truth" (*Irwin Toy* 1989, 976); that it is "the matrix, the indispensable condition, of nearly every other form of freedom" (*Sharpe* 2001, 23, quoting the US Supreme Court in *Palko* 1937).

different fact situations”.

Freedom of expression does not simply protect individual liberty from state interference. Rather, it protects the individual's freedom to communicate with others – to speak to others, and to hear what others have to say. The right of the individual is to participate in an activity that is deeply social in character and that involves socially created languages and the use of collective resources such as the streets and the internet. Freedom of expression is valuable because human agency and identity emerge in discourse - in the joint activity of creating meaning. Human reflection and judgment are dependent on socially created languages, which give shape to idea and feeling. We become individuals capable of thought and judgment when we join in conversation with others and participate in collective life. The different accounts of the value of freedom of expression (democratic, truth, and self-realization-based accounts) highlight the many roles that expression plays in the life of the individual and the community -- that different relationships and different forms of communication contribute to the realization of human agency and the formation of individual identity.

Recognition that individual agency and identity emerge in communicative interaction is crucial to understanding not only the value of expression but also its potential for harm. Our dependence on expression means that words can sometimes be harmful. Expression can threaten, it can harass, and it can undermine self-esteem. Expression can also be deceptive or manipulative.

The premises of freedom of expression

A commitment to freedom of expression means that an individual must be free to speak to others, and to hear what others may say, without interference from the state. It is said that the answer to bad or erroneous speech is not censorship, but rather more and better speech. Importantly the listener, and not the speaker, is seen as responsible (as an independent agent) for her/his actions, including harmful actions, whether these actions occur because he/she agrees or disagrees with the speaker's message. In other words, respect for the autonomy of the individual, either as speaker or listener, means that speech is not ordinarily regarded as a *cause* of harmful action. A speaker does not cause harm simply because he/she persuades the audience of a particular view, and the audience acts on that view in a harmful way.

Underlying the commitment to freedom of expression (and the refusal to treat speech as a cause) is a belief that humans are substantially rational beings capable of evaluating factual and other claims and an assumption that public discourse is open to a wide range of competing views that may be assessed by the audience. The claim that 'bad' speech should not be censored, but instead answered by 'better' speech, depends on both of these assumptions -- the reasonableness of human judgment and the availability of competing perspectives. A third, but less obvious, assumption underpinning the protection of freedom of expression is that the state has the effective power to either

prevent or punish harmful action by the audience. Individuals will sometimes make poor judgments. The community's willingness to bear the risk of such errors in judgment may depend on the state's ability to prevent the harmful actions of audience members or at least to hold audience members to account for their actions.

The courts, though, recognize that the assumptions about the audience's agency or judgment, which underlie the protection of expression, may not always hold, and indeed never hold perfectly. Prohibitions on false, or misleading, product claims have been supported because advertisers have overwhelming power in the 'marketplace of ideas' and information (and others have limited opportunities, or lack incentives, to correct misleading ads) and because so much commercial advertising is non-rational or visceral in its appeal. Similarly, the restriction of defamatory speech rests on a recognition that false claims made about an individual are not easily corrected through 'more speech'. The harm of defamatory speech may persist because the audience is not always in a position to assess the false and damaging claims and because (people being as they are) the correcting speech may not spread as effectively as the original defamation.

Freedom of expression doctrine has always permitted the restriction of expression that occurs in a form and/or context that discourages independent judgment by the audience or that impedes the audience's ability to assess the claims made. When speech *incites* or *manipulates* the audience to take harmful action, the speaker may be seen as responsible for, and perhaps even as a participant in, any violence or harm that follows. For example, in *On Liberty* 1859, J. S. Mill thought that the authorities would be justified in punishing a fiery speech given in front of the home of a corn merchant to a crowd of farmers angry about crop prices. A heated speech delivered to such a group appeals to passion and prejudice and might lead to impulsive and harmful actions. Speech is described as incitement when the time and (reflective) space between the speech and the (called for) action is so limited that the speaker may be viewed as leading the audience into action rather than simply trying to persuade them to act.

In American free speech jurisprudence, the classic example of a failure in the conditions of ordinary discourse comes from a judgment of Justice Holmes, who said that: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic" (*Schenk* 1919). The theatre audience in such a case would not have time to stop and think before acting on the communicated message. The panic that would follow the yell of fire in these circumstances would almost certainly result in injury.

The examples given by Mill and Holmes involve circumstances that limit the audience's ability to assess, carefully or dispassionately, the communicated message. The assumption is that ordinarily, when an individual communicates with others, she/he appeals to their independent and reasoned judgment. In exceptional circumstances, however, an individual's words may appeal to passions and fears and may encourage unreflective action. In these circumstances the state may be justified in restricting or punishing the expression. Speech may be treated as a *cause* of audience action when the time and space for independent judgment are compressed or when emotions are

running so high that audience members are unable or unlikely to stop and reflect on the claims being made. While the line between rational appeal or conscious argument, on the one hand, and on the other, manipulation or incitement, may not be easy to draw (and indeed is a relative matter) it is at least possible to identify some of the circumstances in which reasoned or independent judgment is significantly constrained.

The scope of freedom of expression

The intention to convey a message

Section 2(b) of the Canadian Charter of Rights and Freedoms protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” – although the provision is often referred to as simply freedom of expression. Section 1 of the Charter provides that the rights protected may be subject to limits that are “prescribed by law” and are “reasonable” and “demonstrably justified in a free and democratic society”. The adjudication of rights claims under the Charter then involves two steps. The first step is concerned with whether a Charter right has been breached by a state act. In deciding this, the court must define the scope of the constitutionally protected activity or interest and then determine whether this activity has been interfered with by the state. At this stage, the burden of proof is said to lie with the party claiming a breach of the right. The second step in the adjudicative process is concerned with whether the interference with the right is justified. The limitation decision is described by the courts as a balancing of competing interests or values. At this stage, the burden of proof lies with the party seeking to uphold the limitation, usually the state.

In *Irwin Toy* 1989 the Supreme Court of Canada said that if “[a]n activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the [s. 2(b)] guarantee” (*Irwin Toy* 1989, 968).² Expression, said the court, can take “an infinite variety of forms”, including the written and spoken word, the arts, and physical gestures” (*Irwin Toy* 1989, 607). The court used the example of illegal or unauthorized parking to illustrate the potential breadth of the category of expression. In most cases people park illegally because they cannot find an available or convenient space or because they are unwilling to pay parking charges. But, said the court, if an individual parks his/her car illegally as a protest against the way in which parking spaces are allocated or against some other policy or practice, then the act of illegal parking will fall within the scope of s. 2 (b) because it is intended to convey a message.³

² The majority judgment in *Irwin Toy* 1989 was written by Dickson C.J. and Lamer and Wilson J.J. A dissent was written by McIntyre J., who did not take issue with the majority’s approach to s. 2(b).

³ The illegal parking example, though, is more complicated than the court acknowledges, because the parking law is not simply a limitation on the individual’s expression but is integral to his/her communicative act. The individual, in the example, has expressed his/herself by breaking the law and now argues that the law amounts to a restriction on his/her expression - and presumably should not be enforced against her/him. He/she is seeking to be exempted

An act of expression or communication is characterized by the actor's intention to articulate and convey to an audience an idea or feeling. When communicating, the speaker wants the audience to recognize that his/her act is meaningful - that the act is intended to convey a message to them and should be viewed as such. The communicative act will be successful if the audience recognizes the speaker's intention and is able to grasp the act's meaning. The meaning of an act, such as unlawful parking, may not always be obvious to others and so may not be successfully communicated to its intended audience. Nevertheless, an act will count as expression if the actor intends by his/her act to convey a message to others, and more particularly if she/he wants her/his audience to recognize his/her act as meaningful. Even if expression is an intentional act of the speaker, the meaning of this act will be shaped by the language of expression, and by the listener's assumptions and attitudes.

Expression may be confrontational, uncivil, and even insulting and still carry a message – still engage its audience. However, because expression operates at many levels, engaging its audience both cognitively and emotionally, there is no bright or simple line separating acts intended by the actor to convey a message and acts that appeal to / or affect the audience at a non-cognitive or visceral level. The Canadian courts have adopted a relaxed approach to the definition of the freedom's scope – recognizing that the distinction between expression (an act intended to convey a message) and other forms of human action is often difficult to draw. They have often been quick to find that the act restricted by the state is expression and have focused instead on the issue of reasonable limits under s.1, finding it easier to address questions about the communicative character of the act or the nature of the speaker's appeal to his/her audience, within the framework of interest balancing.

The Supreme Court of Canada has held that the category of expressive acts (acts intended to carry a message) protected under s. 2(b), includes commercial advertising (*Irwin Toy* 1989), labour picketing (*Dolphin Delivery* 1986), hate speech (*Keegstra* 1990), soliciting for the purposes of prostitution (*Ref. re s 193 CC*), and obscenity/pornography (*Butler* 1995). The freedom also gives protection to the donation and expenditure of money in support of expression (*Harper* 2004) and access to government-owned property for purposes of expression (*Montreal By-law* 2005). Even if the expenditure of money is not ordinarily an act of expression (is not intended to convey a message to an audience) it is often necessary to effective expression.

The court has said that protection is given to expression “irrespective of the particular meaning or message sought to be conveyed” (*Keegstra* 1990, 729), because “in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual” (*Irwin Toy* 1989, 968). The court has also said that it will not exclude an act of expression from the scope of the freedom simply because the act is thought to be without value (*Keegstra* 1990, 760). The underlying values of truth, democracy, and self-realization play an active or explicit role later in the court's analysis, only after it has defined the category of expression, and

from the law that gave his/her act meaning and significance.

most clearly at the s. 1 limitations stage.

The exclusion of violent expression

There are two exceptions to the Supreme Court of Canada's broad definition of the scope of freedom of expression under s. 2(b). First, the court has said that an act of expression will be denied s.2(b) protection if its method or location is incompatible with the values underlying the freedom – truth, democracy, and self-realization (*Montreal Bylaw* 2005). The court in *Irwin Toy* 1989 recognized that its broad definition of expression, at the first step of the test, meant that violent acts, including terrorist action, might fall within the protection of the right, and so decided to carve out an exception for such acts. According to the court, a violent act, even if intended to carry a message, does not fall within the scope of s. 2(b), because it does not advance the freedom's underlying values (*Irwin Toy* 1989, 970). Expression that *advocates* violence is protected under s. 2(b) but may be limited under s.1. However, if the expressive act has a violent *form* – is itself violent - then it will be denied protection under s.2 (b) and the state will not be required to justify its restriction under s.1. Initially the court held that threats of violence do not fall within this exception and are protected under s.2(b). In deciding not to include threats within the exception the court recognized that the line between unpleasant but constitutionally protected expression and unprotected abusive or threatening expression cannot be drawn without taking account of the social, political, economic, and historical context in which the expression occurs – which is the kind of analysis the court ordinarily leaves to the s. 1 stage. However, later in *Khawaja* 2012, the court revised its position and held that because threats of violence undermine “the very values and social conditions that are necessary for the continued existence of freedom of expression” they also fall outside the scope of s.2(b) protection (*Khawaja* 2012, 70). In that case, the court held that that the Criminal Code ban on “terrorist activity” did not breach s. 2(b) of the Charter because this activity involved “acts of violence or threats of violence” (*Khawaja* 2012, 71).

The court has also said that s. 2(b) protection does not extend to expression that takes place on a state-owned property that is not generally open to the public for expression (is not a public arena/forum). This exclusion is a Canadian adaptation of the US courts' public forum doctrine and will be discussed later in this paper.

The purpose/effect distinction

The court has also narrowed the scope of s. 2(b) by drawing a distinction between two types of state restriction on expressive activity: state acts that have as their purpose the restriction of expression and those that, although not designed to restrict expression, nevertheless have this effect. The court in *Irwin Toy* 1989, 974 distinguished between, on the hand, government action that is intended to restrict “the content of expression” either “by singling out particular meanings that are not to be conveyed” or restricting particular forms or means of expression that are tied to content, and, on the other hand,

government action that is intended “to control only the physical consequences of certain human activity, regardless of the meaning being conveyed.”

The significance of the purpose/effect distinction, which roughly parallels the distinction in American jurisprudence between content restrictions and time, place, and manner restrictions, is that a government act that is intended to limit expression, and in particular the expression of certain messages, will be found to violate s. 2 (b) automatically, while a government act that simply has the effect of limiting expression will be found to violate s. 2 (b) only if the person challenging the state act can show that the restricted expression advances the values that underlie freedom of expression. Specifically, he/she must show that the restricted expression contributes to the realization of truth, participation in social and political decision-making, and diversity in the forms of individual self-fulfillment and human flourishing (*Irwin Toy* 1989, 976). Yet it is unclear why an act that the court has already decided is expressive – conveys meaning – would not, at least in some minimal way, advance individual self-realization. In *Montreal Bylaw 2005*, a case in which a strip club challenged a noise by-law that prohibited the amplification of sound onto the street, the Supreme Court of Canada found that the club’s expression advanced the value of individual self-realization because it informed passersby about a leisure activity. If this speech advances free speech values, it is difficult to imagine what forms or instances of expression would not satisfy this requirement.

Because the court has defined *expression* broadly to include all acts intended to convey a message, any act is potentially an act of expression. This also means that any law is potentially a restriction on expression - on how a particular individual has chosen to express her/himself. Understandably, the courts are reluctant to require substantial justification for a law, such as a parking restriction, that would not ordinarily be seen as impeding expressive freedom. In these cases, the individual speaker will almost always have other ways to communicate her/his message that are no less effective. There may, however, be exceptional cases in which the means or location of expression is critical, for symbolic reasons, to the effectiveness of the message, or where there are no other ways or places to effectively communicate the message.

The only way to make sense of the *effect* rule, is to see it as establishing (albeit indirectly) a lower or variable standard of justification for time, place, and manner restrictions than the ordinary s.1 standard. These restrictions are treated differently, not because the restricted expression is, or might be, less valuable (less directly connected to the values underlying the freedom) but because the impact of such a restriction on freedom of expression interests will depend on the adequacy of the alternatives available for the message or the speaker. The question asked by the court then should not be whether the speech advances free expression values but instead whether the particular time, place, or manner of the expression (that is restricted) is important or necessary to the effective communication of the speaker’s message. If an individual can effectively communicate her/his message in other ways, or at other places or times, then the restriction may be viewed as minor. Some time, place, and manner restrictions, though, may have a significant impact on the individual’s ability to express her/himself

and so should be upheld only if they are judged to be necessary under s.1.

Limits on freedom of expression

Prescribed by law

If the court decides that the state has restricted expression under s. 2(b), it then considers whether the restriction is justified under s. 1 of the *Charter*. The first issue for the court, at the limitations stage, is whether the restriction is “prescribed by law”. To be prescribed by law, the restriction must have the form of law, such as a statute, regulation, or binding policy, and it must not be vague, although it is sufficient if the restrictive rule provides “an intelligible legal standard” for determining when conduct is caught by the ban (*NS Pharmaceuticals* 1992).

The Oakes Test

In *Oakes* 1986, which was decided shortly after the Charter’s enactment, the Supreme Court of Canada set out a general test for determining whether a restriction on a right is “reasonable” and “demonstrably justified” under s.1. The first part of the *Oakes* test asks whether the purpose of the restrictive law is substantial enough to justify the limitation of a fundamental right or freedom. The next two steps involve an assessment of the means chosen to advance that purpose. The rational connection test asks whether the means (the restriction) rationally or effectively advance the law’s substantial and pressing purpose. The minimal impairment test asks whether the measure restricts the protected activity (expression) no more than is necessary to advance the law’s purpose. The rational connection and minimal impairment tests are, of course, closely related. A law that does not rationally advance the pressing and substantial purpose, for which it was enacted, can be seen as unnecessarily restricting the right or freedom. Similarly, a law that restricts the right or freedom more than is necessary to advance its pressing and substantial purpose (that does not minimally impair the freedom) is to that extent ineffective or irrational. At the final stage of the *Oakes* test, the court asks whether the benefit of the restrictive measure is proportionate to its impairment of the freedom.

In those cases, in which the court finds that a restriction is not justified under s. 1, the decision is most often based on the minimal impairment test, and, occasionally, on the rational connection test. Undoubtedly these tests have come to play a central role in the court’s assessment of limits under s. 1, because they appear to involve nothing more than a judgment about the relationship of the law’s means to its ends. The court may strike down the law not because its purpose is objectionable or because the constitutional values it impedes outweigh the values it advances, but simply because the means chosen to advance that purpose are ineffective or will impair the protected freedom unnecessarily.

However, the rational connection and minimal impairment tests do not simply involve an instrumental judgment about the effectiveness of the law. If the rational connection test,

for example, was failed only when the law's means were entirely unrelated to its ends, or wholly ineffective in advancing those ends, then it would never, or at least very rarely, be failed. Indeed, it would be difficult to attribute to a law a purpose that seemed to be entirely unconnected to its provisions. Instead, the rational connection test must involve some sort of effectiveness threshold, with a court determining whether the law *reasonably* advances the pressing and substantial purpose for which it was enacted. Similarly, it will be very rare that an alternative measure that is less rights-restrictive will advance the law's substantial purpose as completely or effectively. The part of the law that is said to be irrational or overbroad (so that the law does not minimally impair the right) will seldom be entirely ineffective in advancing the law's purpose.

Because the court's application of the rational connection and minimal impairment tests involves a judgment about the relative effectiveness of the law's means (in whole or in part), other considerations easily enter the court's analysis. The application of these tests then often includes a judgment about the value of the restricted expression compared to the importance of the restrictive law's purpose. For example, a law may fail the minimal impairment test when the court considers that a small increase in the law's overall effectiveness in achieving its substantial and pressing purpose does not justify its broad interference with the protected right. The fact that judgments about rational connection and minimal impairment generally involve an assessment of the relative value/harm of the restricted expression may explain why the final *balancing* step of the *Oakes* test seldom plays anything more than a formal role in the court's s.1 analysis. The outcome of the final test is invariably the same as the outcome of the minimal impairment test because the court has already engaged in a form of proportionality analysis at that earlier step.

Context and deference

The Supreme Court of Canada has said that freedom of expression can only be overridden when its exercise would result in a substantial harm to social or individual interests. At the same time though, the court has adopted a contextual approach to the assessment of limits on the freedom (*Dagenais* 1994, 878). In deciding whether a limit is justified, the court will consider the necessity or importance of the restriction but also the extent to which freedom of expression interests are impaired by the restriction. As earlier noted, the court has defined the scope of s. 2(b) broadly so that it protects all non-violent forms of expression; however, when the court assesses limits on the freedom under s.1, it distinguishes between core and marginal forms of expression, describing the different forms of expression as more or less valuable. The court recognizes that a broad and inclusive definition of the scope of the right means that there may be a significant variation in the *value* of different instances of protected expression.⁴ Political expression, for example, is considered by the court to be core

⁴ Cory J. in *Lucas* 1998, 459: "Quite simply, the level of protection to which expression may be entitled will vary with the nature of the expression. The further that expression is from the core values of this right the greater will be the ability to justify the state's restrictive action".

expression that can be restricted only for the most substantial and compelling reasons. In contrast, obscenity, commercial advertising, and hate speech are regarded as marginal forms of expression, because they are less directly connected to the values underlying the freedom. As a consequence, they may be restricted for less substantial reasons.

In *Keegstra* 1990, for example, Dickson C.J., writing for the majority of the court, said that, while hate speech falls within the protection of s. 2(b) of the Charter, it “strays some distance from the spirit of s.2(b)” and so its restriction under s.1 can be more easily justified. Hate speech, said Dickson C.J., undermines the autonomy and democratic participation of the members of the group targeted by the speech, and works against the realization of truth or the growth of public knowledge because it advances false claims.

The courts have also been willing, in certain circumstances, to *defer* to legislature’s judgment about the need for a restriction on expression. In *Irwin Toy* 1989, which involved a legislative ban on advertising directed at children, the court signaled that it would show deference to the legislature’s judgment about the need for a particular restriction on a right such as freedom of expression, “[w]here the legislature mediates between the competing claims of different groups in the community” (*Irwin Toy* 1989, 990). The court should not simply “second-guess” the legislature’s judgment about where to draw the line between competing claims. The court also thought that when determining whether the restriction satisfied the minimal impairment requirement, the court should not “take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups” (*Irwin Toy* 1989, 993). Underlying the court’s call for deference is, first, a concern that the Charter “not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons” and second a belief that the court should be slow to displace the compromises struck by democratic institutions (*Irwin Toy* 1989, 993).⁵

There are two different ways in which the court may defer to the legislature’s judgment. The first involves deference to findings of fact by the legislature. The court may decide to lower the standard of proof that the legislature must meet when establishing the factual basis for the justification of a restriction. In *Irwin Toy* 1989 there was little dispute that protecting children from manipulation was an objective important enough to justify restricting free expression. The more difficult issue was whether or not the government had proved that the restriction on advertising advanced this important purpose effectively and without unnecessarily impairing freedom of expression. In seeking to justify the restriction on advertising directed at children, who were under the age of

⁵ In *Thomson* 1998, 90, Justice Bastarache describes some of the contextual factors that the court should take into account when accessing limits under s.1. In particular, he notes that “the vulnerability of the group which the legislator seeks to protect ... that group’s own subjective fears and apprehension of harm ... and the inability to measure scientifically a particular harm in question, or the efficaciousness of a remedy” are all relevant factors when the court is “assessing whether a limit has been demonstrably justified....”.

thirteen, the legislature relied on social science evidence that children were unable to critically assess advertisements. However, this evidence was not clear cut, particularly on the question of whether children over the age of six were subject to the manipulative influence of advertising. The court, though, decided that it ought not to second-guess the legislature's assessment of the social science evidence in this case. The principal reason for this deference seems to have been the Court's sense of its limited competence in such matters and the inappropriateness of substituting its own reading of the evidence for that of the elected legislature (*Irwin Toy* 1989, 990). The second form of judicial deference relates to the legislature's accommodation of competing values or interests. If the legislature has made an apparently reasonable judgment that concerns about the manipulation of children (or some other interest) justify the restriction of certain forms of expression, the court should not simply substitute its own judgment for that of the legislature. The reason for this form of deference may be the Court's lingering doubt about the legitimacy of second-guessing the value judgments of democratic institutions.

The regulation of hate speech

The law in Canada

In 1970 the Canadian government enacted criminal restrictions on the advocacy of genocide (s. 318), the incitement to hatred likely to lead to a breach of the peace against an identifiable group – a group identified on the basis of race, religion, and ethnicity (s. 319(1)), and the wilful promotion of hatred against an identifiable group, (s. 319(2)). These additions to the *Criminal Code* were made on the advice of the *Cohen Commission* 1966, which had reported to Parliament a few years earlier.

To be convicted of promoting hatred under s. 319(2) of the Criminal Code, an individual must be shown to have engaged in speech that either stirred up hatred in its audience or created a risk that such hatred would be stirred up, and to have done this intentionally or at least with knowledge that her/his speech was likely to have this effect (*Mugesera* 2005, 102). The *Code* includes several defences to the charge of hate speech, including that a person shall not be convicted under the section “if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject or on an opinion based on a belief in a religious text” (s. 319(3)(b)) or “if he can demonstrate that his claims are true” (s. 319(3)(a)) or “if the statements were relevant to any subject of public interest, the discussion of which was for the public benefit, and if on reasonable grounds he believed them to be true” (s. 319(3)(c)). A prosecution under the criminal hate speech ban can only be commenced with the consent of the provincial Attorney-General.

In 1977 the federal government amended the Canada Human Rights Act [CHRA] to include a ban on “telephonic” communication that is likely to expose the members of an identifiable group to hatred or contempt. The scope of the s. 13 ban was later extended to include hate speech on the internet. Section 13 of the CHRA was repealed by the

federal government in 2013, although the current government has promised to reintroduce s. 13 in a slightly modified form. The human rights codes of British Columbia, Alberta, Saskatchewan, and the Northwest Territories include a provision similar to s. 13 that is applicable to signs and publications.

The human rights code ban on hate speech is complaint driven. An individual or organization can make a complaint under the code, which is investigated by a human rights commission.⁶ The commission must decide whether the complaint has substance and should be referred to a tribunal for adjudication. The purpose of the human rights code ban on hate speech is not to condemn and punish the person who committed the discriminatory act, but rather to prevent or rectify discriminatory practices or to compensate the victims of discrimination for the harm they have suffered. In contrast to the criminal ban on hate speech, an individual may be found to have breached the human rights code ban even though she/he did not *intend* to expose others to hatred or realize that her/his communication might have this effect. The focus is on the effect of the act and not the intention with which it was performed. The ordinary remedy against an individual who is found to have breached the human rights code ban is an order that she/he cease her/his discriminatory practices.

The *Criminal Code* prohibits the wilful promotion of hatred against an “identifiable” group – a group identified by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability. The human rights code restrictions on hate speech protect an even wider range of groups.

Criminal restrictions on *incitement* to hatred apply only to speech that is closely tied (by time and place) to ensuing violence. For example, s. 319(1) of the Canadian *Criminal Code*, which prohibits the incitement of hatred against an identifiable group, is breached only when “the incitement is likely to lead to a breach of the peace.” The judgment that speech is likely to have such an effect (the recognition of a *causal* link between the speech and the action) rests in part on the character of the expression, but more significantly on the context in which it occurs, and in particular the absence of space for the audience to make a careful or independent judgment before acting. A speaker, who calls on a group (whose emotions are running high) to take immediate action, may be seen as leading the audience into that action – as causing, or contributing to, the harm that follows.

The Canadian courts, though, have upheld restrictions on hate speech, even when violence is not the certain and imminent consequence of the speech. The leading hate speech cases in Canada involve the restriction of racist claims that are meant to persuade members of the general community about the dangerous or undesirable character of the members of a particular group. The law rests on a belief that those who hear racist claims may come to view the target group differently and may be encouraged to act towards the group’s members in a discriminatory or even violent way. There are two challenges faced by any attempt to reconcile the regulation of hate

⁶ In BC complaints go directly to the tribunal. In Saskatchewan the commission refers complaints to the courts.

speech with the right to freedom of expression. The first concerns the claim that there is a causal link between the expression of hateful views and the spread of hatred (and acts of discrimination and violence) in the community. The second concerns the claim that it is possible to isolate for restriction a narrow category of extreme or hateful speech that reinforces, or contributes to, hatred in the community.

The constitutionality of the criminal ban on hate speech: *R. v. Keegstra*

In *Keegstra* 1990, the leading Canadian hate speech case, the Supreme Court of Canada held that the Criminal Code ban on the “wilful promotion of hatred” was a justified limit on the Charter’s freedom of expression right. Chief Justice Dickson, writing for the majority of the court, held that s. 319(2) restricted expression and so breached s. 2(b). However, he found that the restriction was justified under s. 1, the *Charter’s* limitation provision, because its purpose -- to prevent the spread of hatred in the community -- was “substantial and compelling” and because it limited only a narrow category of extreme speech that “strays some distance from the spirit of s.2(b)” (*Keegstra* 1990, 99). Justice McLachlin, in her dissenting judgment, agreed that preventing the spread of hateful ideas was an important public purpose but did not accept that the criminal prohibition advanced this purpose effectively and at minimal cost to freedom of expression.

At the outset of his s.1 analysis, Chief Justice Dickson identified two “very real harms” caused by hate speech (*Keegstra* 1990, 64). He noted first the emotional or psychological injury experienced by the members of the target group. According to Dickson CJ., the “derision, hostility and abuse encouraged by hate propaganda” negatively affect the members of the group because their “sense of human dignity and belonging to the community at large is closely linked to the concern and respect accorded to the groups” with which she/he identifies (*Keegstra* 1990, 65). Because an individual’s identity is partly constituted by her/his association and interaction with others, she/he experiences attacks on the group(s), to which she belongs, personally and sometimes very deeply. The second harm identified by Dickson CJ. is the injury that hate speech causes to “society at large” (*Keegstra* 1990, 66). If members of the larger community are persuaded by the message of hate speech, they may engage in acts of violence and discrimination, causing “serious discord” in the community (*Keegstra* 1990, 66).

Chief Justice Dickson was prepared to say that hate speech causes or contributes to the spread of hatred in the community, because he was sceptical about the role of reason in the communicative process, at least in certain circumstances.⁷ He repeated

⁷ McLachlin J. in *Keegstra* 1990, 853, suggested a more immediate problem with the majority's scepticism about audience reason: “The argument that criminal prosecution for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, these listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it.”

the Cohen Commission's observation that "individuals can be persuaded to believe almost anything if the information or ideas are communicated using the right technique and in the proper circumstances" (*Keegstra* 1990, 66).

The Chief Justice also found that the restriction was narrow in its scope and therefore limited in its impact on freedom of expression. He noted that the restriction applies only when an individual wilfully *promotes* hatred. To promote hatred, the *actus reus* of the offence, involves more than the simple encouragement of hateful views. It involves, instead, the active support or instigation of such views. Dickson CJ recognized that the causal link between a particular act of expression and the generation of hatred in the community might be difficult to establish and that to require "direct proof" of a link "between a specific statement and hatred of an identifiable group" could severely limit the effectiveness of the ban. In his view, the *actus reus* of the offence would be established if the speech creates a "risk of harm". In determining this, the court will consider whether the speech is of the kind that might lead to the spread of hatred (*Keegstra* 1990, 119).

As well, the speaker must *wilfully* promote hatred. According to Dickson CJ., the speaker must "subjectively desire the promotion of hatred" or they must recognize that the promotion of hatred is the likely consequence of their expression – that it is "certain or substantially certain" that hatred will be stirred up by the speech (*Keegstra* 1990, 111).⁸ As the court noted in the later judgment of *Mugesera* 2005, 104, "[a]lthough the causal connection need not be proven, the speaker must desire that the message stir up hatred". In *Keegstra* 1990, Dickson CJ. accepted that, when deciding if the accused intended to promote hatred, "the trier will usually make an inference as to the necessary *mens rea* based upon the statements made" (*Keegstra* 1990, 117). In other words, the court will generally look to the content and tone of the speech, as well as its intended audience, when determining whether the speaker intended to stir up hatred.⁹

Finally Chief Justice Dickson thought that the hate speech ban did not interfere with freedom of expression in a significant way, because the provision restricts only a narrow category of extreme expression (that causes or is likely to cause hatred) and does not catch expression that is merely unpopular or unconventional (*Keegstra* 1990, 105). According to Dickson CJ., the term "hatred" connotes "emotion of an intense and extreme nature that is clearly associated with vilification and detestation" and so "[o]nly

⁸ In *Ahenakew* 2009, a Saskatchewan court held that even though Mr. Ahenakew had made a number of "revolting" anti-Semitic statements to a reporter he had not intended to promote hatred but had instead been provoked to respond in anger to the reporter's questions.

⁹ The Supreme Court of Canada in *Mugesera* 2005, 103 when describing the elements of the s. 319(2) offence of wilfully promoting hatred, noted that it is necessary for the court to look at the speech in "its social and historical context". But if, as Chief Justice Dickson acknowledged (when discussing the *actus reus* of the offence), it is difficult to establish a link between speech and the promotion of hatred (the inculcation or reinforcement of racist attitudes among the audience) what inferences about intention or foreseeability can the court draw from the speaker's words?

the most intense forms of dislike fall within the ambit of this offence” (*Keegstra* 1990, 116). Hatred “belies reason” and when directed against the members an identifiable group, it signals that they are to be “despised, scorned, denied respect, and made subject to ill-treatment” because of their group membership (*Keegstra* 1990, 116).

The constitutionality of human rights code regulation – *CHRC v. Taylor* and *Whatcott v. Sask. HRC*

The Supreme Court of Canada in *Taylor* 1990 upheld s.13 of the CHRA, as a justified limit on freedom of expression, adopting a line of reasoning similar to that taken in the *Keegstra* 1990 decision. Chief Justice Dickson, writing for the majority of the court, noted the “substantial psychological distress” caused by hate speech and “the damaging consequences” that this speech would have for the target group members, including “loss of self-esteem, feelings of anger and outrage and strong pressure to renounce cultural differences that mark them as distinct” (*Taylor* 1990, 40). He further noted that hate speech may “convince listeners, even if subtly, that members of certain racial or religious groups are inferior”, resulting in acts of discrimination and even violence (*Taylor* 1990, 40). As in *Keegstra* 1990, he interpreted the scope of the s.13 ban narrowly so that it was limited to extreme speech that stirred up hatred. He reiterated that hatred involves “unusually strong and deep-felt emotions of detestation, calumny and vilification” and that it “allows for no ‘redeeming qualities’ in the person” (*Taylor* 1990, 46). At the same time, he acknowledged that “the nature of human rights legislation militates against an unduly narrow reading of s. 13(1)” (*Taylor* 1990, 59).

There was, however, an important difference between the criminal and human rights bans on hate speech. Section 13, in contrast to the *Criminal Code* ban, did not require proof of an intention to spread hatred. As Chief Justice Dickson observed, the focus of the section “is solely upon likely effects, it being irrelevant whether an individual wishes to expose persons to hatred or contempt on the basis of their race or religion” (*Taylor* 1990, 66). In *Keegstra* 1990, Dickson CJ decided that the *Criminal Code* ban on hate speech was a justified restriction on freedom of expression, because it extended only to speech that *wilfully* promotes hatred. Nevertheless, in the *Taylor* 1990 decision, he held that the absence of an intention requirement did not undermine the constitutionality of s. 13, because the purpose of human rights legislation is to “compensate and protect” the victim rather than “stigmatize or punish” the person who has discriminated (*Taylor* 1990, 70). Even though “the section may impose a slightly broader limit upon freedom of expression than does section 319(2) of the *Criminal Code* ... the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision” (*Taylor* 1990, 61).¹⁰

¹⁰ The absence of a formal intention requirement in the law may not be so significant, since it is hard to imagine that hatred could be stirred up unintentionally or unwittingly. In *Keegstra* 1990, the court said that the intention to promote hatred could generally be inferred from the speaker’s words. Someone who expressed extreme views will either have intended to stir up hatred, or, at least, recognized this as the possible outcome of their speech. Indeed, in all of the cases in which the CHRT found a breach of s. 13, the expression was so extreme that it is unlikely that

A number of years later in *Whatcott* 2013, the Supreme Court held that the hate speech ban in the Saskatchewan Human Rights Code was, with one modification, a justified restriction on the Charter's freedom of expression right. Section 14 (1) (b) of Saskatchewan code prohibits signs and other forms of representation that "exposed or tended to expose to hatred ... a person or class of persons based on one of the prohibited grounds", which included race, ethnicity, gender, sexual orientation, and disability. The section, though, also prohibits speech that "ridicules, belittles or affronts the dignity" of a person based on such grounds and the court decided that this element of the ban could not be sustained under the Charter, and severed it from the rest of the section.

In upholding the remainder of the ban, the court followed its earlier decision in *Taylor* 1990. Justice Rothstein, writing for the court, noted that the harm of hate speech goes beyond the "emotional distress" caused to individual group members. Hate speech, he said, has a "societal impact": "If a group of people are considered inferior, sub-human, or lawless, it is easier to justify denying the group and its members equal rights or status" (*Whatcott* 2013, 74). In this way hate speech "lays the groundwork for later, broad attacks on vulnerable groups [which] can range from discrimination to ostracism, segregation, violence and, in the most extreme cases, to genocide" (*Whatcott* 2013, 74). Hate speech "seeks to de-legitimize group members in the eyes of the majority, reducing their social standing and acceptance in society" and making it "easier to justify discriminatory treatment" (*Whatcott* 2013, 71).

Rothstein J. confirmed that the test for whether speech is likely to "stir up hatred" is "whether a reasonable person aware of the context and circumstances surrounding the expression, would view it as exposing the protected group to hatred" (*Whatcott* 2013, 56). Rothstein J. thought that it is unrealistic to expect proof of "a precise causal link" between the speech and harm and that instead common sense and experience (of the reasonable person) can serve to establish the connection in a particular case (*Whatcott* 2013, 132). The decision-maker must look at the content and tone of the speech, such as the use of inflammatory and derogatory language, to determine whether the speech is likely to encourage hatred in the audience.

Justice Rothstein emphasized that the ban catches only a narrow category of extreme expression – speech that vilifies the members of a group, accusing them "of disgusting characteristics, inherent deficiencies, or immoral propensities" (*Whatcott* 2013, 43). The ban, said Rothstein J., does not extend to speech that merely discredits, humiliates, or offends the members of a group. Drawing on the jurisprudence of the Canadian Human Rights Tribunal, he identified certain "hallmarks of hate" (indicators of extreme speech), such as portraying a group as "a powerful menace that is taking control of the major institutions in society and depriving others of their livelihoods, safety, freedom of speech

the addition of an intention or knowledge requirement would have led to a different result. In most of these cases the call for violence against the target group was explicit (Moon 2008).

and general well-being”, or “as preying upon children”, or as responsible “for the current problems in society and the world”, or “as dangerous or violent by nature, devoid of any redeeming qualities and ... innately evil”, or as like “animals, vermin, excrement, and other noxious substances” (*Whatcott* 2013, 44-5). The various hallmarks of hatred, set out by Rothstein J., involve claims about the inferiority or dangerousness of the target group that may encourage or reinforce hateful views among the audience. Despite Justice Rothstein’s assertion that the ban does not target the “ideas” expressed but simply the “mode” of their public expression, these claims express extreme or hateful views about the members of certain groups (*Whatcott* 2013, 51).

In both the *Whatcott* 2013 and *Taylor* 1990 decisions, there is a tension between the Supreme Court’s broad description of the purpose of the human rights code ban on hate speech and its narrow definition of the scope of the ban. The purpose of the ban, according to the court, is to prohibit speech that negatively affects the dignity or status of the members of an identifiable group and is tied to the code’s larger purpose of “prevent[ing] the spread of prejudice and ... foster[ing] tolerance and equality in the community” (*Taylor* 1990, 37). But if the purpose of the ban is understood in such broad terms, it is difficult to see why its scope should be confined to extreme or hateful expression. Speech that encourages feelings of dislike and suspicion may well lead to acts of discrimination. Group stereotyping, for example, may have a damaging impact on the group’s standing in the community, and may encourage discriminatory treatment of its members.

However, any attempt to exclude all racial or other prejudice, including stereotypes, from public discourse would require extraordinary intervention by the state. Because discriminatory speech is so commonplace, it is impossible to establish clear and effective rules for its identification and exclusion. Because discriminatory attitudes and assumptions are so pervasive, it is vital that they be confronted and contested in the public sphere – that they be treated as objectionable or erroneous political views that must be publicly addressed.

Insults and harassment

There are a variety of laws in Canada that restrict insults directed at individuals or groups in closed environments. It is accepted that racist, sexist, and other insults should be banned in the workplace, in schools, and in other similar environments, where they are difficult to avoid. The workplace environment is both closed and hierarchical and so a higher standard of civility may reasonably be expected. There is also increasing support for bans on racist and other insults in public spaces, such as the streets.

When insults are directed at group members in the workplace or the streets, the abuser and the abused, occupy the same physical space – the school yard, the office, the street. The insults can be difficult to avoid whether they come from one or a few individuals in the workplace or from a succession of unconnected individuals in the

streets. Most abuse, though, now takes place online – on twitter, and other social media platforms. Social media has enlarged the space in which harassment and abuse occur. The parameters of the virtual space that abuser and abused occupy are less easily defined and can encompass a potentially large group of individuals. Abuse online can be anonymous, extensive, and persistent.¹¹

Several provinces have enacted cyber-bullying laws, which apply primarily in the education context. These laws prohibit a number of activities, such as threats, harassment, counselling suicide, and impersonating someone online.¹² The Criminal Code prohibits criminal harassment (s. 264(1)) and uttering threats (s. 264.1(1)), and now includes a ban on publishing or transmitting intimate images of a person, without that person's consent (s. 162.1(1)).

Access to State Property

The right of access to state-owned property under s. 2(b) took shape in two Supreme Court of Canada judgments, *Commonwealth of Canada* 1991, and *Montreal By-Law* 2005. In *Commonwealth of Canada* 1991, the court described government ownership of property as “quasi-fiduciary” in nature, noting that the government “owns places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns” (*Commonwealth of Canada* 1991, 154). L'Heureux-Dube J. recognized that, if “the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property (except with permission), then there would be little if any opportunity to exercise their rights of freedom of expression” with the consequence that “only those with enough wealth to own land, or mass media facilities ... would be able to engage in free expression” (*Commonwealth of Canada* 1991, 198).

In *Commonwealth of Canada* 1991, officials at Dorval airport in Montreal prevented members of the Committee for the Republic of Canada from communicating their political views to passersby in the public areas of the airport. The committee members were told that their activities (speaking with passersby and distributing leaflets) violated a federal airport regulation that prohibited the “conduct [of] any business or undertaking, commercial or otherwise at an airport, and any form of soliciting or advertising”. The

¹¹ The 2021 Supreme Court of Canada decision of *Ward* 2021 highlights some of the challenges in addressing insults or harassment in the new communication landscape. The majority judgment focused on the impact of the speech on Ward's audience and whether this speech was likely to lead them to treat Gabriel and other disabled individuals as less than human. The majority decided that the speech was not sufficiently extreme to breach the anti-discrimination provisions of the Quebec Charter of Human Rights and Freedoms. The dissenting judgment focused instead on the impact of the speech on Gabriel himself and whether he would feel bullied or humiliated by it.

¹² In *Crouch* 2015 a Nova Scotia court struck down the province's cyber-bullying law on the ground that it was an unnecessarily broad restriction of freedom of expression because it applied to both private and public communication, provided no defences and did not require proof of harm. The N.S. government has now reintroduced a more narrowly drawn cyber-bullying ban.

committee members challenged the restriction on their activity, arguing that under the Charter they had a right to express themselves in the public areas of the airport and that this right had been violated by the airport authorities.¹³

The court agreed that the airport authority's interference with the committee members' communication of political views in the public areas of the terminal amounted to a restriction on freedom of expression that could not be justified under s. 1. However, three different approaches to the issue of communicative access to state property were put forward by the members of the court.

Chief Justice Lamer thought that the question of whether an individual has a right to communicate on state-owned property should be resolved under s. 2(b) and should depend simply on whether the communication is compatible with the state's use of the property. In his view, the state does not breach s. 2(b) when it restricts expression that is incompatible with its use of the property. However, a restriction that is not based on the incompatibility of the expressive activity with the state's use of the property must be justified by the state under s. 1. Lamer J. illustrated the flexibility of his test, using the example of the Library of Parliament:

[N]o one would suggest that an individual could under the aegis of freedom of expression, shout a political message of some kind in the Library of Parliament or some other library. This form of expression in such a context would be incompatible with the fundamental purpose of the place, which essentially requires silence. When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function. To refer again to the example of a library, it is likely that wearing a T-shirt bearing a political message would be a form of expression consistent with the intended use of such a place. (*Commonwealth of Canada* 1991, 157)

In the case before the court, Lamer CJ. found that leafletting in the public areas of the airport was compatible with the ordinary operation of the property.

However, Chief Justice Lamer's compatibility standard could be applied either strictly or loosely. It is almost always possible to find that a particular act of communication is incompatible, to some degree, with the state's property use because it may cause some disruption or inconvenience. As well, state properties often serve multiple purposes. While the streets and parks, for example, may serve as spaces for public interaction and discussion, they are mainly used for transportation and recreation. These different functions will sometimes be in tension or conflict with each other. Resolving this tension, though, is not simply a matter of deciding that one use of the property (communication) is incompatible with the state's primary use of the property.

Madame Justice L'Heureux-Dube, in her concurring judgment, took the view that any

¹³ At issue in the case, as well, was whether the distribution of political leaflets was caught by the airport regulation, which seemed to be directed primarily at commercial activity.

time the state restricts expression on its property it violates s. 2 (b) and must justify the restriction under s.1. Any restriction of expression on state property then must satisfy the substantial purpose, rational connection, minimum impairment, and proportionality standards of s. 1. In her view, no other approach fits with the broad construction the Supreme Court has given to s. 2 (b) in its earlier decisions. In the case before the court, L'Heureux-Dube J. found that the airport's restriction on communication in its public areas violated s. 2 (b) and that the limit was not justified under s. 1. She considered airports to be "contemporary crossroads", the functional equivalent of other public thoroughfares, and so should be on the same "constitutional footing" as streets and parks (*Commonwealth of Canada* 1991, 205).

L'Heureux-Dube J., while claiming to reject the "rigid categorization" of the US. public forum doctrine, thought that certain state properties could, as a matter of fact, be described as public arenas (a term she used to distinguish her approach from the American public forum doctrine), in the sense that they are generally open to the public and can easily accommodate public communication. In her view, "some but not all, government-owned property is constitutionally open to the public for engaging in expressive activity" (*Commonwealth of Canada* 1991, 198). She thought that "the Charter's framers did not intend internal government offices, air traffic control towers, prison cells and Judges' Chambers to be made available for leafleting or demonstrations" (*Commonwealth of Canada* 1991, 198). She argued that when deciding whether a property should be viewed as a "public arena" and "appropriately open for public expression", the courts should consider such things as "the traditional openness of such property for expressive activity"; "whether the public is ordinarily admitted to the property as of right"; "the compatibility of the property's purpose with such expressive activities"; "the impact of the availability of such property for expressive activity on the achievement of s. 2(b)'s purpose"; and "the availability of other public arenas in the vicinity for expressive activities" (*Commonwealth of Canada* 1991, 203).

Justice L'Heureux-Dube argued that, when assessing access claims, the courts should engage in a flexible balancing of competing interests; yet her approach under s 1 involved dividing state properties into two categories, public arenas, and non-public arenas/private state properties, based on a general judgment about the compatibility of communicative access with the state's property use. The decision to attach the label public arena or private space to a particular property is the critical step in Justice L'Heureux-Dube's s 1 approach. It matters how a state-owned property is classified, because the two kinds of property seem to attract different standards of review. If a property is classified as a public arena, public communication must be permitted, unless the state can show good reasons for restricting it. L'Heureux-Dube J. thought that "those areas traditionally associated with, or resembling, sites where all persons have a right to express their views by any means at their disposal, should be vigilantly protected from legislative restrictions on speech" (*Commonwealth of Canada* 1991, 225). In the case of properties that are not public arenas, however, restrictions on access will always be justified. L'Heureux-Dube J. held that the open area of the airport was a public arena, so that the airport authorities had breached the group's s. 2(b) right when it prevented them from speaking.

McLachlin J. adopted what she saw as the reasonable “middle ground” on the issue of communicative access to state property, “between the extremes of the right to expression on all government property and the right to expression on none” (*Commonwealth of Canada* 1991, 242). She thought that if the state had “the absolute right to prohibit and regulate expression on all property which it owns”, as an incident of ownership, the purpose of freedom of expression - to permit members of society to communicate their ideas and values to others - would be “subverted” (*Commonwealth of Canada* 1991, 230). She also rejected as extreme the position that any denial of communicative access to government-owned property violates freedom of expression and must be justified under s. 1 of the Charter. In her view, the purposes of freedom of expression do not justify “conferring on the public a constitutional right to express itself publicly on all public property, regardless of its use and function” (*Commonwealth of Canada* 1991, 231). McLachlin J. argued that, when deciding access cases, the court should “focus on determining when, as a general proposition, the right to expression on government property arises” (*Commonwealth of Canada* 1991, 236). In her view, a state restriction on communicative access to property will not breach s 2(b), if it is determined that communication on that property will not advance the values underlying the freedom. However, if the court decides that communicative access to the property will advance the freedom’s underlying values, a restriction on communication in that place will violate s.2 (b) and the court must then determine under s.1 whether the state has other grounds to support the restriction on expression. She held that the open area of the airport was a public forum.

In Justice McLachlin’s view, communicative access to certain state-owned properties, such as prison cells, judge’s private chambers, private government offices, and publicly owned broadcasting facilities, will not advance the values of democracy, truth, and autonomy that underlie the constitutional protection of freedom of expression: “These are not places of public debate aimed at promoting either the truth or a better understanding of social and political issues. Nor is expression in these places related to the open and welcoming environment essential to the maximization of individual fulfillment and human flourishing” (*Commonwealth of Canada* 1991, 241). A restriction on communicative access to a *private* state-owned property will not violate s.2(b) and so will not require justification under s. 1. On the other hand, McLachlin J. considered that the purposes of the guarantee of free expression are served by protecting expression in public forums, such as streets and parks, that have “by tradition or designation been dedicated to public expression” (*Commonwealth of Canada* 1991, 241). The use of these places for political, social, or artistic expression “would clearly seem to be linked to the values underlying the guarantee of free speech” (*Commonwealth of Canada* 1991, 241). A restriction on communicative access to a public forum will violate s. 2(b) and so will require justification under s. 1.¹⁴

In *Montreal By-law*, 2005, McLachlin C.J., along with Deschamps J., again adopted a

¹⁴ In *Ramsden* 1993, a case decided shortly after *Commonwealth of Canada* 1991, the Supreme Court of Canada held that a municipal ban on placing posters on utility poles breached the Charter, under any one of the tests put forward in *Commonwealth of Canada* 1991.

version of the public forum doctrine. This time, though, she wrote for the majority of the court. The case concerned a charge brought against a strip club under a city by-law that prohibited the projection of noise out onto the street using sound equipment. In addressing the issue of access to state-owned property, the majority made a small adjustment to the second part of the test the court had previously set out in *Irwin Toy* 1989 for determining whether s. 2(b) had been breached. The first part of the test asks whether the act - in this case the sound projected on to the street by the strip club -- has “expressive content”. At the second stage, the court must decide whether either the “method or location” of the expression remove that protection. In its original version, as set out in the *Irwin Toy* 1989 decision, this second step of the test excluded from the scope of s 2(b) any expression that was violent in form. The court in *Irwin Toy* 1989 recognized that its broad definition of expression, at the first step of the test, meant that violent acts, including terrorist action, might fall within the protection of the right, and so decided to carve out an exception for such acts. In *Montreal By-law* 2005, the court added to this exclusion of violent acts, an exclusion of expression that occurs in certain locations. The majority argued that just as certain methods of expression do not deserve protection under s. 2(b), because they do not advance the values underlying the freedom, communication in certain locations should also be denied protection because it does not advance these values.

For the majority in *Montreal By-law* 2005, the central question, in every case involving communicative access to state-owned property, is whether free expression on the particular property will undermine the values that underlie the commitment to free expression – truth, democracy, and self-realization. In answering this question, the court will consider “the historical or actual function of the place” (*Montreal By-law* 2005, 74). Access to state-owned properties that have historically been open to the public will ordinarily be protected under s. 2(b), because speech in such a place will advance freedom of expression values. The court will also consider the actual function of a state-owned property: whether the space is “essentially private” in its operation or instead public, in the sense that the “function of the space — the activity going on there ... [is] — compatible with open public expression” (*Montreal By-law* 2005, 76). The majority observed that “[m]any government functions, from cabinet meetings to minor clerical functions, require privacy” so that enabling free access to these places for communication “might well undermine democracy and efficient governance” (*Montreal By-law* 2005, 76). This test provides a “preliminary screening process” in which it is determined that some locations fall within, and others outside, the scope of s. 2 (b) protection, allowing people to “know where they can and cannot express themselves” (*Montreal By-law* 2005, 79). It also means that governments will “not be required to justify every exclusion or regulation of expression under s.1” (*Montreal By-law* 2005, 77). In the case before the court, the majority found that the streets are public spaces “where expression of many varieties has long been accepted” (*Montreal By-law* 2005, 81). The majority saw no reason to think that permitting expression there “would subvert the values of s. 2 (b)” (*Montreal By-law* 2005, 81). The majority, however, went on to find that the by-law was a justified restriction under s.1.

McLachlin CJ. and Deschamps J. claimed to derive a public/private forum distinction

from an assessment of the freedom of expression value of access to different state properties. It may be that in many or most cases, communicative access to private government offices, and similar state-owned properties, will not generate reflection or debate and will simply interfere with the state's use of its property. But we cannot exclude in every case the possibility that communication on/in one of these properties might advance the values of freedom of expression, particularly if we accept that communication is deserving of protection even when it is disruptive or confrontational. A protestor's self-realization may be advanced, for example, if she/he is able to enter the prime minister's office and speak to her/him or to call out to passersby from the office's window, even though these actions will interfere with other important interests. The classification of properties as either public or private then rests not, as the majority claimed, on an assessment of the contribution of communicative access to the values that underlie the freedom (a vague standard in any event) but instead on a judgment about the general compatibility of expression with the state's use of the property. If a property is classified as a private forum (if it is not ordinarily open to the public or if expression is generally incompatible with its use) then all expression can be excluded, even expression that might not significantly disrupt the state's property use.

In the *Commonwealth of Canada* 1991 and *Montreal By-Law* 2005 cases, the court recognized that discussion of public issues would be seriously impeded if private citizens did not have some right to communicate on state-owned property and so rejected the argument that state-owned property fell outside the scope of Charter review and was insulated from all claims of access. Yet, at the same time, the court was unwilling to treat the denial of communicative access to state property as simply a restriction on expression that violates the Charter, unless it advances a substantial public interest. Instead, the court gave the state's property *use* a form of priority over the individual's communicative access. Rather than deciding in each case whether the individual's access claim is compatible with the state's property use, the court makes a general threshold judgment about the openness or accessibility of the property to public communication. If a property is classified as a public forum, then communicative access will be protected, even though it may sometimes involve a degree of interference with ordinary or alternative uses of the property. An individual should be free to communicate on the property unless her/his speech breaches some other legal standard or needs to be regulated to make space for other uses of the property including speech by others. On the other hand, if the property is considered a private forum, because communicative access is generally incompatible with its use by the state, the state can exclude all communicative access, without need for additional justification.

Public forums do not come neatly packaged with clear and fixed parameters. The court's definition of the shape or scope of a particular public forum or private space will almost certainly be affected its understanding of the available alternatives. A private government location may be narrowly defined, carved from a larger arena - a judge's chambers rather than a courthouse (*CBC* 2011). As well, there may be times when access is so important that the state should be required to accommodate communication even if this involves compromising its use of the property. Sometimes there may be no other locations for the communication of a particular message. While

the need to ensure safety and security at a prison, for example, will justify the restriction of most claims of access, the denial of all access claims would preclude meaningful investigation into prison operations by the press or representatives of public interest groups.¹⁵

In *Vancouver Transit 2009*, the city transit authority sold advertising space on the outside of transit vehicles. The authority's longstanding policy, though, was to accept commercial ads but not political ads. This policy was challenged by the Canadian Federation of Students and the BC Teachers' Federation, both of which wanted to place ads on transit vehicles in advance of a provincial election. The Supreme Court of Canada in *Vancouver Transit 2009* held that the city's transit vehicles were public forums, where individuals interact with one another (*Vancouver Transit 2009*, 43). The important question, said the court, is "whether the historical or actual function ... of the space [is] incompatible with expression or suggest that expression within it would undermine the values underlying free expression" (*Vancouver Transit 2009*, 42). Even though buses have not been used for advertising "as long as city streets, utility poles and town squares", they have been and continue to be used for this purpose in Vancouver and elsewhere (*Vancouver Transit 2009*, 42). It followed then, said the court, that expressive activity "neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression" (*Vancouver Transit 2009*, 42). The court then found that the exclusion of political advertising from transit vehicles breached s. 2(b) and could not be justified under s.1. The court was unsympathetic to the transit authority's arguments that passengers are a captive audience or that the authority might be associated with the messages, particularly since "political speech ... is at the core of s. 2(b) protection" (*Vancouver Transit 2009*, 80). While the transit authority could decide to discontinue the practice of selling advertising space on its vehicles, so that the property ceased to be a public forum, as long as it continued to sell advertising, it could not exclude access to speakers based on the content of their speech.¹⁶

Public demonstrations and street speech

Public protest

Even though public assemblies are protected under s.2(c) of the Charter, freedom of peaceful assembly, cases involving demonstrations or assemblies are often addressed under s.2(b), as freedom of expression issues. The scope of s.2(c) is discussed in the

¹⁵ McLachlin CJ. and Deschamps J. in *Montreal By-law 2005*, 78: "[W]e must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. ... [T]he public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations."

¹⁶ In the US, the courts have called these spaces "designated public forums" – expressive forums created by the state.

background paper by Professor Jamie Cameron.

Street speech, such as public demonstrations and street corner leafletting, was once viewed as an important alternative to communication in the mainstream/established media. At an earlier time, the concentration of media ownership, and the reliance of newspapers and broadcasters on advertising as their primary source of revenue, meant that critical perspectives were often excluded from these forums. The streets were sometimes the only platform available to those who lacked either the resources or connections to access the mainstream media.

The communication landscape, though, has changed dramatically since the courts first championed the individual's access to the 'poor man's printing press'. The emergence of the internet, as a significant conduit for the expression of ideas and information, seemed to lessen concerns about media concentration and unequal access to communicative opportunities. Yet, despite the rise of new media, public demonstrations and leafletting continue to occur with the same and perhaps even greater frequency. The continuing appeal of street speech may reflect, first, a desire to create a common space in which public engagement (politics) is possible. The fragmentation of public discourse, quickened by the rise of new media, has led to the loss of a shared public conversation, and a common body of information on which community members can draw when discussing, and deciding on, collective action. Because street speech occurs in a publicly accessible space, its message can (appear to) reach a general audience. Second, while the internet overcomes geographic distances, a demonstration in public space bridges physical and emotional distance, by bringing individuals together, and giving them a sense of presence, and connection with others, that is lacking in mediated forms of communication (Castells 2015, 10). In contrast to the disembodied, depersonalized, and passive character of internet communication, street speech is experienced as performative and physically engaging. Third, a street protest can make visible the extent and depth of support for a position.

Street demonstrations are often intended as a challenge, rather than simply a contribution, to the dominant political discourse. The object of the demonstration is to confront others or to gain attention by disrupting ordinary life, or the ordinary use of public spaces. In *Bracken* 2017, the Ontario Court of Appeal, emphasized that a "a protest does not cease to be peaceful simply because protestors are loud and angry" (*Bracken* 2017, 51). In that case a lone protestor standing at the entrance to the city hall had communicated his message using a megaphone. In *Fleming* 2019 the Supreme Court of Canada confirmed that the police could not prevent lawful expression because this expression "might provoke or enrage others" (*Fleming* 2019, 66).

A demonstration is an act of solidarity, a coming together of similarly minded individuals, but also collective act of expression. It is meant to be outward looking, to engage a broad audience and contribute to public discussion. Bystanders are seldom the demonstration's intended or ultimate audience, nor are the politicians or corporate leaders, who may be the subject of the protest, but are usually protected from direct exposure to the protesters. Despite its apparent 'publicness', street speech is unlikely to

reach a significant audience, unless it is covered by the traditional/mainstream media or gains significant exposure on social media.

The physical or performative character of a demonstration means that its message is often simple and unnuanced. A street march can express emotion or feeling, but cannot itself convey a thoughtful, developed political position. For this reason, street protests are sometimes described as action rather than speech – a physical display rather than a discursive engagement (*Dupond 1978*). But while demonstrations may not be an effective vehicle for the communication of ideas and positions on complex public policy issues, they can raise the profile of an issue or concern that has not been given attention in the mainstream media. Demonstrations create other opportunities for speech, including media interviews and reporting of the movement's platform or demands. Online communication and street demonstrations are not simply alternative modes of protest but are instead complementary components of most contemporary protest movements. Street protests are organized, promoted, and reported online.

Because demonstrations have a physical and collective character, they can cause public disturbance. Indeed, public protests are often significant or effective as speech, precisely because they are confrontational and potentially disruptive. Because demonstrations invariably interfere with other *ordinary* property uses, municipal governments (and courts) must decide how to trade-off competing speech and security/safety interests. Protests in parks or street corners that involve small groups of individuals are unlikely to cause any significant interference with other uses of these spaces. Larger demonstrations, though, can cause significant disruption to other interests, even if only temporarily, and so their timing and location are often the subject of negotiation between the protestors and the municipal authorities. Demonstrators may be required to give advance notice or obtain a licence before engaging in any large street protest. In some cases, the authorities have sought to confine particular protests to “designated” protest spaces or “free speech zones”. This has become an increasingly popular way to contain protests and minimize their disruptive impact, particularly in the case of demonstrations targeting high-profile political meetings. Unless a permission is unreasonably withheld, or the conditions attached to it are unreasonably constraining – removing the protest from public view or limiting its potential audience - the courts are unlikely to intervene. These practical arrangements, and the policing of demonstrations, are discussed in Professor Robert Diab's background paper.

Protest camps

The Occupy movement began as a protest in Zuccotti Park in New York City in 2011, but quickly spread around the world, including to Canada. The protest was a response to the global financial crash that occurred a few years earlier. Initially, the protest, was directed at the questionable dealings of major financial institutions that had led to the crash, the failure of governments to hold these institutions to account, and the unjust way in which the costs of the crash fell on the least well-off in society. Occupy, though, also became a general protest against the growing disparity in wealth in the US and

elsewhere, between the 1% and the rest. Over time, another dimension to the Occupy message emerged, with the establishment of encampments that were intended to provide a model for a more democratic and sustainable form of community.

Because the locations of the Occupy encampments in Canada were public forums, such as the St James Park in Toronto, individuals had a right to protest in these spaces. The issue that eventually led to the shutting down of the encampments in Toronto and elsewhere was the extent to which these encampments interfered with other 'ordinary' uses of the properties. The argument accepted by the Canadian courts was that because the protest involved fixed structures, took up large sections of these public spaces, and were operating for an indefinite period, they prevented others from making use of these properties.¹⁷

In *Batty* 2011, Brown J. of the Ontario Superior Court judge upheld a Trespass Notice issued by the City of Toronto that required the removal of structures, equipment, and debris from the park. The judge accepted that part of the protestors' message was that "it is both possible and necessary to build a community structure different from that prevailing in most places of our society" (*Batty* 2011, 108).¹⁸ However, in the judge's view, the Charter did not give the protestors a right to "appropriate[e] to their own use – without asking their fellow citizens – a large portion of the common public space for an indefinite period" (*Batty* 2011, 12). He noted that the trespass order only limited the form and scope of the protest and would not prevent the protestors from spending up to 18 hours a day at the park continuing their protest.

Fixed structures erected in public spaces, for the time they are up, exclude other people or activities from the space they occupy. There is no easy answer to the question of how such spaces should be shared, between different people and uses, which is a reminder that the regulation of protest involves practical trade-offs between competing uses of public space. However, in upholding the trespass order, the judge in *Batty* 2011 seemed to give significant weight to commercial interests and neighbourhood aesthetics. In the judge's view, the ordinary or primary use of the property, personal recreation, should not be impeded for any length of time by exceptional political uses. Many of the residents, who complained about the encampments, said they felt uncomfortable strolling with friends, or walking their dogs, in the park. Many storekeepers in the vicinity complained that their business had been negatively affected because potential customers were avoiding the area.

¹⁷ In *Zhang* 2010, the BC Court of Appeal held that a billboard and meditation hut erected beside the street by members of the Falun Gong, as part of a protest against the treatment of the group by the Chinese government, was protected expression under s. 2(b). The Court went on to find that a City of Vancouver by-law that prohibited the erection of any structures along the streets, without advance permission from the city was overbroad because it failed to set out a purpose, or to provide a procedure and guidelines for obtaining a permit. An amended version of the by-law was upheld in *Zhang* 2014. The revised by-law provided specific guidelines concerning the erection of structures that were part of a political protest.

¹⁸ Legal action also led to the shutdown of occupy encampments in other cities, such as Calgary, Victoria, and Vancouver.

In *Weisfeld* 1994, a case that was decided a few years after *Commonwealth of Canada* 1991, a 'peace camp' on Parliament Hill, had been established by a group that was protesting Cruise missile testing in Canada. The protestors erected several tents, and later a make-shift shelter, and maintained a table with pamphlets and petitions. The group was eventually served with a notice under the provincial trespass law, requiring them to dismantle the camp. When they refused to do so, the RCMP intervened and took down the tents and structures and arrested one of the protestors who refused to leave his shelter. Shortly after the police action, the Public Works Nuisance Regulations were amended to prohibit the erection, use, or occupation of any structure on Parliamentary grounds, without the permission of the Minister. The Federal Court of Appeal dismissed a claim by the protestors that the removal of the tents and structures under the trespass law, and the ban on structures in the amended regulation, were unconstitutional. Justice Linden decided that, while these actions breached s. 2(b), they were nevertheless justified restrictions under s.1. Linden J. thought that in addition to "safety, health, maintenance, and security concerns" the government also had a legitimate interest in "preserving the aesthetic beauty of Parliament Hill", which is "a powerful symbol of Canada" and its "democratic traditions".

Captive audiences

In a society in which communication, other than with family, friends, and co-workers, is mostly mediated (through broadcast, print, and internet) listening is generally a choice. The ability of individuals to opt out of online conversations or to choose not to read or access information from particular sources has contributed to the formation of 'echo chambers', in which individuals are exposed to a limited range of perspectives. Even when individuals choose to read or listen to opinions, with which they disagree, because the communication is mediated, they are not required to react to its message or to engage in any way with the speaker.

However, in public spaces, such as the streets, individuals may be directly exposed to, or confronted with, messages they find objectionable. As earlier noted, the courts have been willing to uphold restrictions on speech that is harassing, because it is directed at particular individuals or groups, often in a persistent way, and is intended to denigrate or humiliate them. In exceptional situations, the courts have also been willing to uphold speech restrictions that protect 'captive audiences' from offensive speech in public locations, even when the speech is not directed at particular individuals.

Restrictions protecting captive audiences represent a second tier of censorship. Even if a particular form or content of expression is not harmful in a way that would justify its general restriction, if it is judged to be offensive or objectionable, its location may be regulated to protect audiences from exposure. In deciding whether to recognize a captive audience claim, a court must consider, first, how easy, or difficult, it is for the unwilling audience to avoid exposure to the communication, and second, whether the communication is offensive or objectionable to such an extent that an unwilling audience

should be protected from exposure. There is no simple answer to the question of how direct the exposure to the speech must be before the audience is 'captive'. Nor is there a simple or objective way for a court to decide whether the speech is so offensive or objectionable that a captive audience ought to be protected from it. Such a determination cannot rest simply on an individual's assertion that she/he is offended by the speech. It must rest instead on conventional or community standards of propriety or decency, which are variable and contestable (*Vancouver Transit* 2009, 77).

The Supreme Court of Canada, in *Labaye* 2005, said that individuals have a right not to be confronted with sexually explicit images they find offensive or inappropriate. In the court's view, individuals should be free "to live within a zone that is free from conduct that deeply offends them" (*Labaye* 2005, 40). The court described the harm of being confronted in public with "unacceptable and inappropriate conduct", as "the loss of autonomy and liberty that public indecency may impose on individuals in society, as they seek to avoid confrontation with acts they find offensive and unacceptable" (*Labaye* 2005, 40). However, judgments about decency necessarily rest on conventional standards of propriety. While many in the community may be offended by, and favour the exclusion of, certain images, others may take no offence to these images.

Several Canadian provinces have enacted laws establishing bubble or buffer zones around abortion clinics. The Access to Abortion Act in BC, for example, creates access zones around abortion clinics, and the homes and offices of abortion providers.¹⁹ These zones, which are carved out of space this is otherwise public, exclude protestors from the immediate vicinity of clinics, and ensure unobstructed access for the clinic's employees and patients. The BC Court of Appeal in *Spratt* 2008 held that the BC law was a reasonable restriction on the freedom of expression rights of anti-abortion protestors. In the court's view, the law was intended to ensure "equal access to abortion services", to enhance "privacy and dignity for women using the services" and to improve "security for service providers" (*Spratt* 2008, 71). The court thought that "[w]omen entering the clinic should not be held hostage to the message the protestors wish to send" (*Spratt* 2008, 82). The buffer zone established by the law "offers distance and therefore protection to the staff and patients of the clinic from the physical threats and emotional upset caused by the actions of the protestors and the proximity of their strong message" (*Spratt* 2008, 76). The court also thought that because "the line between peaceful protest and virulent or even violent expression against abortion is easily and quickly crossed ... a clear rule against any interference" is the best way to achieve the law's purpose (*Spratt* 2008, 80). When the object of the law is to ensure unimpeded access, it is impractical to require the authorities to make a decision about "each individual approach to everyone entering the clinic" (*Spratt* 2008, 80).

The B.C. Court of Appeal in *Spratt* 2008, drew on an earlier Ontario case, *Dieleman* 1994. In that case an Ontario superior court judge, when issuing an injunction against protests in the immediate vicinity of several abortion clinics, said that freedom of expression "does not include the right to have one's message listened to"

¹⁹ The zone for clinics could be up to 50 metres and for service providers' homes, 160 metres.

*Dieleman*1994, 723). The judge thought that “an important justification for permitting people to speak freely is that those to whom the message is offensive may simply ‘avert their eyes’ or walk away. Where that is not possible, one of the fundamental assumptions supporting freedom of expression is brought into question” (*Dieleman*1994, 724).

However, while audience members should not be required to stop and listen to a speaker’s words, they are not entitled to have the public sphere organized in such a way that they can avoid exposure to messages they would rather not hear. Captive audience claims should only succeed when an individual is directly confronted with messages that are offensive or invasive, based on conventional standards of privacy and decency. Protection from exposure to speech we don’t like must be exceptional, otherwise we risk turning public spaces into places that can only be used for personal or commercial purposes.²⁰

Disinformation and the Challenge to Freedom of Expression

Lying and the *Zundel* case

In *Zundel* 1992, a leading writer and publisher of Holocaust denial material was prosecuted under s. 181 of the Criminal Code, which prohibits the wilful publication of “a statement, tale or news that [the publisher] knows is false and causes or is likely to cause injury or mischief to a public interest”. Section 181 had been included in the first Canadian Criminal Code in 1892. The crime of spreading ‘false news’ had been introduced in England in 1275 (although repealed there in 1887) and was intended to protect the nobility from scurrilous attacks. The case against Zundel was brought under this obscure provision because the Attorney-General of Ontario had declined to give his consent to the prosecution of Zundel under the Criminal Code ban on the wilful promotion of hatred. While the case began as a private prosecution, the crown took carriage of the case prior to the trial. A jury found that Zundel knew that his claims were false and so found him guilty of the offence. However, the Supreme Court of Canada in a majority judgment written by McLachlin J. decided that s.181 breached s. 2(b) and could not be justified under s.1.

McLachlin J. decided not just that lies fall within the scope of s. 2(b) because they convey a message but that they sometimes have public value:

Exaggeration - even clear falsification - may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty to animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., ‘cruelty must be stopped.’ A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or

²⁰ *Vancouver Transit*2009, 77: “Citizens ... are expected to put up with some controversy in a free and democratic society.”

geographical location of persons potentially infected with the virus. ... All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the examples above from the possibility of constitutional protection. I cannot accept that such was the intention of the framers of the Constitution (*Zundel* 1992, 754).

McLachlin J. thought that lies sometimes have value and so are protected under s.2 (b), particularly when they advance worthy ends. But as is the case with all lies, they are an abuse of the communicative relationship, and they undermine general trust in public discourse. Her examples of valuable lies, and most notably the doctor's exaggerated claims about vaccination, have not aged well. In recent years, there has been a proliferation of disinformation online that is unimpeded by the filtering or fact-checking of traditional media and has encouraged distrust of authority and expertise. This disinformation includes assertions that medical experts are making false claims about the safety and effectiveness of vaccines.

Once McLachlin J. had decided that lies are protected speech, so that s. 181 breached s.2(b), it fell to the state to justify this restriction on expression under the terms of s.1. In Justice McLachlin's view, neither the language of the provision nor its legislative history pointed to a legitimate purpose for the law. She thought that even if the dissenting judges were right that the purpose of the provision could now be viewed as the protection of racial and social tolerance, the ban on false news was vague and overbroad and so failed the minimal impairment element of the *Oakes* test. She was concerned that in applying the provision a court would infer "knowledge of falsity" when the statement "diverge[d] from prevailing or officially accepted beliefs" (*Zundel* 1992). She thought then that an individual might be convicted under the provision "for virtually any statement which does not accord with currently accepted 'truths'" (*Zundel* 1992).²¹

The internet and disinformation

The emergence of the internet, as a significant conduit for personal conversation and public discussion, seemed to lessen concerns about media concentration and unequal access to communicative resources. The internet opened public discourse to more voices. It became possible for individuals to by-pass existing media structures and to communicate to others without filters.

However, our reliance on the internet has contributed significantly to the fragmentation

²¹ In *Alvarez* 2012, the US Supreme Court similarly affirmed the free speech value of lies. The court struck down the Stolen Valor Act 2005, which prohibited an individual from falsely claiming to have received a military medal. Alvarez had been charged with wearing a medal that had not been awarded to him. Four members of the court held that "falsity" was not enough to remove speech from First Amendment protection and expressed concern that deceit would often be inferred from the falsity of the speech.

of audiences. This is an issue that predates the internet but has been exacerbated by it. While the internet provides access to a remarkably wide range of views and information, internet users tend to expose themselves to a relatively narrow range of opinions that reinforce the views they already hold. Selective access occurs by choice but also by design. The habit of going to sources that confirm one's existing views (confirmation bias) is reinforced by the algorithms used by search engines such as Google and platforms such as YouTube and Facebook that direct individuals to sites that are similar to those they have visited in the past. This may not count as censorship, at least as that term is commonly used, but it has the same effect – determining or selecting the information and opinions to which individual users are exposed. The result of this selection is what is sometimes referred to as an 'echo chamber' or 'filter bubble' – in which individuals hear their existing views fed back to them or become immersed in more and more extreme versions of these views, while believing they are being exposed to views that are either mainstream or widely-held.

The character of public speech has changed in the internet era: how we speak to one another and how we receive that speech. Audiences have become more fragmented. Disinformation and conspiracy theories seem to spread easily and widely. (The issue of disinformation is addressed in the background paper by Professor Emily Laidlaw.) There is little common ground in the community on factual matters or the reliability of different sources of information, which has made it difficult, even impossible, to discuss issues and to agree or compromise on public policy. An individual's beliefs, even 'beliefs' about factual matters are often based not on judgment or reason but instead on group membership. Those who hold competing positions seem rarely to engage with one another and, when they do, their engagement is often combative. A growing number of people feel they should not be expected to hear speech with which they disagree, or which is critical of their views. The spaces or platforms in which public speech occurs have become increasingly privatized and therefore outside the scope of the constitutional right to freedom of expression.

The principal threat to public discourse then may no longer be censorship, and state censorship in particular, but rather the spread of disinformation (within a fragmented public sphere) that undermines agreement on factual matters, and trust in different sources of information or knowledge.

Note on freedom of the press

Section 2 (b) of the Charter provides that "everyone" has the "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication". The terms "press" and "media" in s 2(b) seem to refer, not to particular institutions, but rather to the various methods or means of communication. Everyone has the right to express themselves using the different media that may be available to them. An individual has the right to express him/herself by speaking to others face to face or through mediated forms of communication such as the press, radio, television, or the internet. In this way, the Charter's language is different from that of the First

Amendment of the US Bill of Rights, which provides that “Congress shall make no law ... abridging the freedom of speech, or of the press”. In the US, the separation of these two rights has sometimes been taken to mean that “the press” have special rights, as an institution, that stem from the role they play in a democratic society of informing the public on important issues and holding governments to account.

In Canada, the courts have sometimes said that organizations engaged in gathering and disseminating news and opinion may be able to make claims that others cannot make. In *CBC v. NB* 1996, LaForest J., writing for the majority of the Supreme Court of Canada emphasized the importance of “a free and vigorous press” in informing the public and supporting meaningful debate in the public domain (*CBC v. NB* 1996, 23). In a more recent decision, Justice Abella stressed the importance of a “strong, independent and responsible press” that “holds people and institutions to account, uncovers the truth and informs the public” (*Vice Media* 2018, 125). She noted that s. 2(b) “contains a distinct constitutional press right which protects the media’s core expressive functions – its right to gather and disseminate information for the public benefit without undue interference” (*Vice Media* 2018, 112). In *Denis* 2019, a case involving source confidentiality, the court emphasized the “unique” role of the media in the “maintenance of a free and democratic society” (*Denis* 2019, 45). Yet, at the same time, the court in *Denis* 2019 insisted that freedom of the press is not a distinct right – that freedom of expression, “includes freedom of the press” and “protects both those who express ideas and opinions and those who read or hear them” (*Denis* 2019, 46).

Prior to the internet, the functions of gathering and disseminating news were performed by particular institutions, generally large-scale newspapers, and broadcasters, and so freedom of the press was associated with the institutional media. It was at the time natural to conflate institution and function. However, with the rise of the internet as the main vehicle for the communication of news and opinion, the link between function and institution has been broken. In addition to the online versions of traditional media, there are now many small-scale online news sites and blogs operated by citizen journalists. Low entry costs have made it possible for almost anyone to set up a website that provides news and opinion.

Despite the court’s occasional suggestions that the institutional media have certain special rights, any special claims made by the media arise not from their organizational structure or institutional status but rather from the function they perform, the collection and dissemination of news (Oliphant 2013, 289). Freedom of expression protects certain actions, such as news gathering, that are not in themselves expressive, but are necessary to effective communication and meaningful public discourse. Press rights then are special in this limited sense. Freedom of the press claims can be made by any individual or group that is engaged in the important task of gathering and disseminating news. These claims may include the protection of source confidentiality and access to locations that are not automatically open to everyone. It may also be the case that freedom of the press rights, while formally available to anyone who gathers and disseminates news, can only be made by organizations and individuals that adhere to the professional standards that are traditionally, although not invariably, followed by

mainstream media, such as checking sources and correcting errors. The requirement of due diligence in reporting is not always met by citizen journalists or smaller partisan news sites, either because they lack the necessary resources to fact check or because accuracy is not their primary concern.

Two areas in which “the press” (those engaged in journalism) have successfully made free speech claims that are either not available to others or are broader in scope than the claims open to others are (i) the “responsible communication” defence to a defamation claim and (ii) the protection of confidential sources. In both cases, the special rights’ claim is based on the function performed by the individual or group – news gathering and dissemination. The right is, or should, only be available to individuals or organizations that adhere to the ethical standards of journalism. This is explicit in the case of the “responsible communication” defence, and an element of the public interest requirement that must be met by journalists claiming the right to protect confidential sources. The recognition of these press rights has occurred not through the direct application of the Charter but instead through the reinterpretation of common law rules to conform with Charter values (defamation) or through legislative intervention (source protection).

Conclusion

The convoy protests brought to the fore, once again, some of the challenges in adapting freedom of expression doctrine to the new communication landscape. The old categories and distinctions of free speech doctrine do not easily map on to this new landscape. Free speech doctrine took shape in a different communication environment and must adapt to different media structures and communication practices and to a new set of concerns and issues. The principal threat to public discourse may no longer be censorship, and state censorship in particular, but rather the spread of disinformation, within a fragmented public sphere, that undermines agreement on factual matters, and trust in different sources of information or knowledge.

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