

## CanLII Charter Decisions Digest

### OVERVIEW – Freedom of Expression s. 2(b)

The Supreme Court of Canada has adopted a two-step inquiry to determine whether an individual's freedom of expression has been infringed. The first involves a determination of whether the individual's activity falls within the freedom of expression. The second step is to determine whether the purpose or the effect of the impugned government action is to restrict that freedom: *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (S.C.C.), 1996 CanLII 237 (S.C.C.), 1996 CanLII 237 (S.C.C.), [1996] 1 S.C.R. 825.

All activities conveying or attempting to convey meaning are expression for the purposes of s. 2(b). An exception has been suggested where meaning is communicated directly via physical violence, but no exception based on the repugnance of the content of the expression (such as hate propaganda or pornography) has been recognized: *R. v. Keegstra*, 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697; *R. v. Sharpe*, 2001 SCC 2 (CanLII), 2001 SCC 2 (CanLII), 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2. The Constitution protects the right to receive expressive material as much as it does the right to create it: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII), 2000 SCC 69 (CanLII), 2000 SCC 69 (CanLII), [2000] 2 S.C.R. 1120, 2000 SCC 69. Government may not control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content (as with a rule against handing out pamphlets), but it may legitimately aim to control the mere physical consequences of particular conduct (as with a rule against littering). In such cases, the question is whether the "mischief" consists in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or whether it consists only in the direct physical result of the activity: *Inwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (S.C.C.), 1989 CanLII 87 (S.C.C.), 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927.

While freedom of expression does not encompass the right to use any and all government property for purposes of disseminating views on public matters, it does include the right to use streets and parks dedicated to public use, subject to reasonable limitation to ensure their continued use for the purposes to which they are dedicated. This right extends to areas of airports frequented by the public: *Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (S.C.C.), 1991 CanLII 119 (S.C.C.), 1991 CanLII 119 (S.C.C.), [1991] 1 S.C.R. 139. It also protects the placement of posters on some public property, such that a complete prohibition on posterage would infringe the guarantee: *Peterborough (City) v. Ramsden*, 1993 CanLII 60 (S.C.C.), 1993 CanLII 60 (S.C.C.), 1993 CanLII 60 (S.C.C.), [1993] 2 S.C.R. 1084. Moreover, s. 2(b) ensures a right of public access to the courts, and to obtain information about court proceedings from the media: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (S.C.C.), 1996 CanLII 184 (S.C.C.), 1996 CanLII 184 (S.C.C.), [1996] 3 S.C.R. 480.

However, this does not mean that freedom of expression entails a right of access to all information under the control of the government, e.g., *Ontario (Attorney General) v. Fineberg* ~~reflex~~, (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.); *Travers v. Anderson* (1994), 171 N.R. 158 (F.C.A.).

### Obscenity / Hate Communications

Communications which wilfully promote hatred against an identifiable group without doubt convey a meaning, and are intended to do so by those who make them. Because the decision in *Irwin Toy*, *supra*, stresses that the type of meaning conveyed is irrelevant to the question of whether s. 2(b) is infringed, that the expression prohibited by s. 319(2) of the *Criminal Code* is invidious and obnoxious is beside the point. It is enough that those who publicly and wilfully promote hatred convey or attempt to convey a meaning, and it must therefore be concluded that the prohibited activity constitutes "expression" for the purposes of the first part of the *Irwin Toy* test. Further, the prohibition in s. 319(2) aims directly at words that have as their content and objective the promotion of racial or religious hatred. The purpose of s. 319(2) can consequently be formulated as follows: to restrict the content of expression by singling out particular meanings that are not to be conveyed. Section 319(2) therefore overtly seeks to prevent the communication of expression and hence meets the second requirement of the *Irwin Toy* test: *R. v. Keegstra*, 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (S.C.C.), 1996 CanLII 237 (S.C.C.), 1996 CanLII 237 (S.C.C.), [1996] 1 S.C.R. 825.

The purpose of s. 2(b) is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate". Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of "truth" or "public interest" from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or "false" view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against 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 to animals is increasing and must be stopped". This expression arguably has intrinsic value in fostering political participation and individual self-fulfilment. To accept the proposition that deliberate lies can never fall under s. 2(b) would be to exclude statements such as the example above from the possibility of constitutional protection. This Court cannot accept that such was the intention of the framers of the Constitution: *R. v. Zundel*, 1992 CanLII 75 (S.C.C.), 1992 CanLII 75 (S.C.C.), 1992 CanLII 75 (S.C.C.), [1992] 2 S.C.R. 731; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (S.C.C.), 1996 CanLII 237 (S.C.C.), [1996] 1 S.C.R. 825.

The subject matter of the pornographic materials in this case is clearly "physical", but this does not mean that the materials do not convey or attempt to convey meaning such that they are without expressive content. An example of the "purely physical" activity alluded to in *Irwin Toy*, 1989 CanLII 87 (S.C.C.), 1989 CanLII 87 (S.C.C.), 1989 CanLII 87 (S.C.C.), [1989] 1 S.C.R. 927, was that of parking a car which, if performed as a day-to-day task, cannot be said to have expressive content. Such purely physical activity may be distinguished from that form of activity which the Court is concerned with in the present appeal which, while indeed "physical", conveys ideas, opinions, or feelings. Further, the form of activity in this case is the medium through which the meaning sought to be conveyed is expressed, namely, the film, magazine, written matter, or sexual gadget. There is nothing inherently violent in the vehicle of expression, and it accordingly does not fall outside the protected sphere of activity. In *Keegstra*, 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), 1990 CanLII 24 (S.C.C.), [1990] 3 S.C.R. 697, this Court was unanimous in advocating a generous approach to the protection afforded by s. 2(b) of the Charter. Meaning sought to be expressed need not be "redeeming" in the eyes of the court to merit the protection of s. 2(b), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure. In this case, both the purpose and effect of the obscenity provisions of s. 163 of the *Criminal Code* is specifically to restrict the communication of certain types of materials based on their content. There is no doubt that s. 163 seeks to prohibit certain types of expressive activity and thereby infringes s. 2(b): *R. v. Butler*, 1992 CanLII 124 (S.C.C.), 1992 CanLII 124 (S.C.C.), 1992 CanLII 124 (S.C.C.), [1992] 1 S.C.R. 452.

The right conferred by s. 2(b) of the Charter embraces a continuum of intellectual and expressive freedom -- "freedom of thought, belief, opinion and expression". The right to possess expressive material [here, child pornography] is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought, belief, opinion and expression would be compromised. Thus the possession of expressive materials falls within the continuum of rights protected by s. 2(b) of the Charter. Prohibiting the possession of child pornography restricts the rights protected by s. 2(b) and the s. 7 liberty guarantee. While the prurient nature of most of the materials defined as "child pornography" may attenuate its constitutional worth, it does

not negate it, since the guarantee of free expression extends even to offensive speech: *R. v. Sharpe*, 2001 SCC 2 (CanLII), 2001 SCC 2 (CanLII), 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, 2001 SCC 2.

The freedom to distribute and sell is as essential to the exercise of the s.2(b) freedom as the freedom to publish, for without the means of disseminating expression, the publication would be of little value. Non-obscene adult books and magazines, no matter how tasteless or tawdry they may be, are entitled to no less protection than other forms of expression; the constitutional guarantee extends not only to that which is pleasing, but also to that which to many may be aesthetically distasteful or morally offensive; it is indeed often true that one man's vulgarity is another's lyric. However, the transcendent interest of society in the well being of children clearly justifies reasonable municipal regulation designed to discourage or limit their exposure to sexually oriented pictorial material. Nevertheless, the regulatory scheme must not be out of proportion to that objective, i.e., the net must not be cast too wide: *Re Information Retailers Association* <sup>2001</sup>reflex, (1985), 22 D.L.R. (4th) 161 (Ont. C.A.).

While it may be argued that some forms of sexual conduct may involve "making a statement" or the activity of communication, it may be that if any constitutional right is implicated it would more reasonably be a form of "liberty" protected by s. 7 of the Charter. In this respect, the experience in the United States is instructive. There, as a result of judicial decisions, there are "constitutionally protected interests in privacy and freedom of intimate association"; sexual activity, in certain situations, may be protected from legislative intrusion. This constitutional protection is not based on the First Amendment guarantee of freedom of speech but, largely, on the due process guarantee in the Fourteenth Amendment. It is true that "expression" in s. 2(b), on its surface, is a wider term than "speech" in the First Amendment, but this latter term has been given a broad interpretation that includes expressive conduct or symbolic speech: *R. v. LeBeau and Lofthouse* <sup>2001</sup>reflex, (1988), 41 C.C.C. (3d) 163 (Ont. C.A.).