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CENTRE FOR
FREE EXPRESSION

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About the Author

Jamie Cameron is now Professor Emerita, having retired in January 2020 from Osgoode Hall Law School, where she was a full-time member of faculty since 1984. Over the years, she has taught and written widely on a variety of constitutional and public law issues, including the *Charter of Rights and Freedoms*, freedom of expression and the press, US constitutional law, judicial biography, and criminal law. She has extensive publication and editorial experience, including the Board of Editors for Ontario Reports (since 1990); she is a past editor in chief of Osgoode Hall Law Journal and an editor or co-editor of more than twelve books. Her professional service includes the Board of Directors and Advisory Board for the Canadian Civil Liberties Association (for over 25 years), BC Civil Liberties Association, Centre for Free Expression, and Harry Crowe Foundation. She is now a member of the Ontario Review Board (since 2013) and Nunavut Review Board (since 2018), both of which are adjudication boards dealing with mentally disordered criminal offenders.

About the Centre for Free Expression

The Centre for Free Expression at Toronto Metropolitan University focuses on issues related to freedom of expression and the public's right to know. This includes campus free expression, academic freedom, hate speech, censorship, disinformation, access-to-information, whistleblower protection, anti-SLAPP legislation, corporate and government surveillance, and freedom of the press. The Centre sponsors public educational events, does research, provides advice and engages in advocacy on these issues. Our work is undertaken in collaboration with academic and community-based organizations across Canada and internationally.

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FREEDOM OF EXPRESSION AND THE *CHARTER*: 1982-2022

Jamie Cameron[1]

Blog 1: Section s.2(b) solitudes: *City of Toronto v. Ontario* and *Ward v. Quebec*

Section 2(b) solitudes

Late in 2021, the Supreme Court of Canada rendered two of its most consequential *Charter* decisions on freedom of expression in recent years: *City of Toronto v. Ontario* and *Ward v. Quebec*. That endpoint in 2021 is the starting point of a 5-part series on s.2(b) of the *Charter* and its passage from 1982 to the present. The series begins with *City of Toronto* and *Ward*, two decisions dividing the Court 5-4 and pointing in opposite directions that raise perplexing questions about expressive freedom – and the Court itself. Of particular concern is the bloc mentality of these decisions and how it undermined principled decision making on important s.2(b) issues.

In *City of Toronto*, the majority judges rejected the s.2(b) claim arising from provincial legislation that fundamentally altered City Council and disrupted the process during Toronto's 2018 municipal election. Meanwhile, the minority opinion forcefully defended s.2(b) and the imperative to protect democratic expression during an electoral process.

In *Ward v. Quebec* the roles reversed but the voting blocs stayed in alignment. There, *City of Toronto*'s majority bloc granted s.2(b) unprecedented protection from limits under human rights legislation. At the same time, the minority bloc that so faithfully protected s.2(b) in *City of Toronto* utterly rejected expressive freedom.

The majority bloc in both decisions comprised the Chief Justice, and Justices Moldaver, Coté, Brown and Rowe, and the minority consisted of Justices Abella, Katakatsanis, Martin and Kasirer. No member of the Court broke ranks from one decision to the next, and no judge supported – or rejected – s.2(b) in both cases.

While the majority opinion in *City of Toronto* ranks as one of the Court' most indefensible s.2(b) decisions in the first forty years of the *Charter*, the dissent in *Ward* is troubling because the dissenting judges acted on their unreserved distaste for Mike Ward's comedy routine, sacrificing expressive freedom in the process. Mixing and matching the opinions highlights the polarized conceptions of expressive freedom that were at work in the Court. If pairing the *Ward* majority and the *City of Toronto* minority would protect s.2(b), reading the *City of Toronto* majority and *Ward* minority together confirms how vulnerable s.2(b) is to judicial will and outcome-oriented decision making.

City of Toronto: positive rights and "extreme government action"

In the middle of the 2018 municipal election, the province of Ontario enacted legislation – the *Better Local Government Act* (*BLGA*) – that fundamentally re-structured Toronto City Council.

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When Council was precipitously and without warning reduced from 47 to 25 members, boundaries and ballots had to be hastily re-arranged and re-done, and candidates for office had to start over, in re-drawn, enlarged and often unfamiliar wards. The *BLGA* was promptly and vigorously challenged under s.2(b) of the *Charter* and the concept of unwritten constitutional principles.

On its face, *City of Toronto* could – and should – have been seen as a relatively straightforward s.2(b) case.[2] Under *Irwin Toy*'s purpose-effects test, government action that affects expressive freedom violates s.2(b) and must be justified under s.1 of the *Charter*. With cornerstone rights of democratic participation at stake, the caveat that the expressive activity must serve s.2(b)'s underlying values did not arise.

It was difficult to deny that the *BLGA* disrupted an ongoing electoral process in an unprecedented way. Any claim that there was no impact on the s.2(b) rights of a large metropolitan electorate actively engaged in the electoral process strained credulity. All things considered, it was surely the purpose of the *BLGA* to derail the process and force the election under a plan for City Council that was imposed on municipal government by provincial fiat.

Two factors complicated the s.2(b) claim. First, the *BLGA* restructured City Council without prohibiting or restricting freedom of expression. Legislation that notionally was enacted without regard to the election was silent as to s.2(b) and its rights of democratic participation. From that perspective, interrupting the electoral process might seem like no more than a coincidence.

Second, separate s.2(b) claims were conflated throughout the litigation. While the legislation's impact on electoral expression raised a process-based claim, a challenge to the restructuring of City Council posed substantive issues. Even at the Supreme Court of Canada, more than two years after the election, the challenge to the composition of City Council was not abandoned. This conflation of claims enabled the majority bloc to convert a negative entitlement of freedom from government interference in an electoral process into a positive claim requiring the province to affirmatively maintain, or refrain from changing, the pre-*BLGA* structure of City Council.

The negative-positive artifice was the cornerstone of Wagner C.J. and Brown J.'s majority opinion. Conceding that the entitlement "superficially resembles a negative claim," the majority transformed freedom from government interference in a municipal election into a positive but passive obligation not to act.[3] Through that convolution, a conventional entitlement of non-interference became an affirmative entitlement requiring the government not to alter City Council. The majority bloc was adamant that s.2(b) could *not* impose a positive obligation on the province *not* to exercise its unfettered jurisdiction over municipal government under s.92(8) of the *Constitution Act*.

In the blurring of entitlements, the majority bloc also treated the electoral, process-based claim as a positive obligation. That enabled the Chief Justice and Brown J. to discount the *BLGA*'s

[2] *City of Toronto* provoked deep polarization between the judges on the subject of unwritten constitutional principles. That part of the decision is beyond the scope of this comment.
[3] *City of Toronto*, para. 32.

irrefutable effects on electoral boundaries, candidates, campaigns, and the electorate. In doing so, the majority opinion raised the threshold for breach under s.2(b) by a factor of two. First, engaging positive rights analysis moved the bar from *Irwin Toy*'s undemanding purpose-effects test to *Baier v. Alberta*, the statutory platform doctrine, and its elevated threshold of substantial interference.

Second *and in addition*, *City of Toronto* shifted the threshold upward from *Baier* to an alarming and dizzying standard of "*extreme* government action" that "*extinguishes* the effectiveness of expression" and "radically frustrates" expressive freedom.[4] According to the majority bloc, it would require government action in the order of an unimaginable 2-day election to present the kind of interference that might trigger a breach of s.2(b).[5] The Court could scarcely have been less equivocal, pronouncing that short of monumental interference rendering participation in an electoral process all but impossible, the provinces are free to change the rules of municipal elections, any time and in any way they choose.[6]

There was no need to unwind the 2018 municipal election or invalidate the *BLGA*. Rights of participation in the municipal election were separate from a challenge to the restructuring of City Council, and a declaration would confirm the violation of s.2(b)'s fundamental rights of democratic participation. That remedy would make it clear that the government's choices were to restructure City Council before, after, or not at all, but not during a municipal election.

Such a declaration might have made political noise but would not involve the courts in micromanaging elections or place institutional relations at risk. In federal and provincial elections, the legislature is dissolved and cannot act against s.2(b) or other *Charter* rights during the writ period. Other issues that arise during election campaigns, such as who is entitled to participate in leadership debates, are handled by the courts as a matter of course.

On s.2(b), there was little, if any, common ground between the majority and minority opinions. Led by Abella J., the minority bloc wrote an unflinching defence of expressive freedom and its integral role in the electoral process. Dismissing the positive rights analysis as irrelevant, the minority judges held that the foundational framework of *Irwin Toy* – its purpose-effects test – applied. Abella J. did not hesitate to conclude that by radically redrawing electoral boundaries during an election that was almost two-thirds complete, the legislation interfered with "the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse."[7] The minority judges in *City of Toronto* would have provided a remedy and granted declaratory relief.

If *City of Toronto* raised an unconventional claim, it is only because the provincial government's disruption of a municipal election was so extraordinary. It is beyond disheartening that the majority bloc refused to defend s.2(b) at a moment of signal need – when the provincial government mischievously undermined the City of Toronto's electoral process. It is a toss-up what is worse: the majority bloc's dismissal of s.2(b)'s foundational rights of democratic participation,

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[4] *City of Toronto*, paras. 27, 36, 37, 39, 40.
[5] *Ibid.*, para. 27.
[6] *Ibid*., paras. 33, 37, 39.
[7] *Ibid.*, para. 157.

or its manipulation of a positive-negative dichotomy to subvert *Irwin Toy* and reduce the scope of the guarantee.

Ward v. Quebec, "incitement" and human rights legislation

Though its voting blocs did not budge, the Court flipped on the s.2(b) issue in *Ward v. Quebec*. While the majority bloc protected expressive freedom as assiduously as it had rejected it in *City of Toronto*, the minority judges who championed s.2(b) in *City of Toronto* were visceral in their rejection of expressive freedom in *Ward*.

From a dispassionate perspective, *Ward v. Quebec* could also be considered a relatively uncomplicated s.2(b) case. In principle, the question was whether s.4 of the *Quebec Charter* and its open-ended guarantee safeguarding an individual's dignity violated s.2(b) of the *Charter*.[8] Quite apart from *Ward*'s underlying facts it was imperative, at the least, to place limits on the guarantee to ensure that s.4 of the *Quebec charter* does not infringe and chill the exercise of expressive freedom.

In other ways *Ward* was not an easy case. Mike Ward is a comedian whose public take-down of a disabled teenager with some celebrity status was mean and, to many, not funny at all. Unlike *City of Toronto*, where s.2(b)'s rights of democratic expression presented the constitutional guarantee in its strongest light, *Ward* asked the Court to prioritize Ward's tasteless and offensive expression over Mr. Gabriel's right to be free from discrimination.

Ward left no doubt of the Court's sympathies and the majority opinion – as in *City of Toronto* – was once again all hard edges. Pronouncing that the *Quebec Charter* was "not enacted to encourage censorship", Wagner C.J. and Coté J. restricted the *Quebec Charter*'s jurisdiction over expression as much as possible.[9] Insisting that the *Quebec Charter* does not address matters of emotional harm or offer a substitute for a private action, the majority opinion set an onerous standard for breach of s.4's guarantee of dignity.

Ward accepted that expression short of hate can be limited, but set an almost unattainable standard of inciting discriminatory effects. To establish discrimination it must be shown, first, that a reasonable person would view the expression as "inciting others" to vilify or detest the humanity of the targeted individual; and second, that a reasonable person would view the expression as likely to lead to discriminatory treatment of the individual by others.[10]

It is striking that *Ward* introduced and endorsed incitement as the s.2(b) standard. Incitement is first amendment vocabulary, and prior to *Ward* was not part of s.2(b)'s doctrinal tradition. There is no reason to consider this an accident that occurred in the process of translating the reasons from French to English. Rather, the language of incitement represents a strong and

[8] *See* s.4 (protecting dignity, honour and reputation) and s.3 (protecting fundamental freedoms, including freedom of expression).
[9] *Ward*, para. 5.
[10] *Ibid.*, para. 83 See also paras. 6, 108, 109 (repeating the language of incitement).

deliberate turn to a more absolute view of expressive freedom.[11] In this way, *Ward* dramatically restricted the scope of the *Quebec charter*'s guarantee of dignity.

On the merits, and despite acknowledging that artistic expression does not have special status, Chief Justice Wagner and Coté J. found that a reasonable person would understand the content – or artistic context – and not be incited by Ward to vilify Gabriel or detest his humanity. If others were "inspired" to make fun of him, Ward's words still did not "encourage" third parties to discriminate against Gabriel.

The majority bloc in *Ward* protected expressive freedom more unequivocally than almost any other decision in the s.2(b) jurisprudence on objectionable or offensive content, and it provoked a forceful dissent from Justices Abella and Kasirer. In their view, the case was about Gabriel's rights and not Ward's freedom.[12] For that reason, the dissenting opinion failed to address s.2(b) and freedom of expression in a principled way.

To some extent, Justices Abella and Kasirer responded in kind to the majority opinion, escalating the stakes from a question about s.4's guarantee of dignity and leaning in to a more inflammatory discussion of bullying.[13] That discussion made a direct appeal to the indignation and anger many may have felt about the content of Ward's comedy act, but did little to explain how s.4 should be interpreted to avoid violating s.2(b) of the *Charter*.

In addition, the dissenting opinion reversed the burden, calling on Ward to "point to why" his rights should prevail. Placing the onus on Ward to defend his freedom was wrong in principle and contrary to established *Charter* doctrine.[14] Moreover, the minority opinion relied on conclusory statements that Ward's comedy routine was not in the public interest and otherwise was essentially valueless.[15] Dismissing his expressive content as lacking in value and unworthy of constitutional protection was also wrong in principle. The minority opinion's turn to a focus on expressive content raises concerning questions about how much progress s.2(b)'s guarantee really has made in the last forty years.

Conclusion

What *City of Toronto* and *Ward* portend for s.2(b)'s future is open to question. Though the two claims were distinctive there was a pathway in principle for s.2(b) to succeed in each instance. And so it remains difficult to fathom how the majority could so intransigently reject s.2(b) in *City of Toronto* and so avidly support it in *Ward.* At the same time, the minority opinions also revealed highly selective conceptions of expressive freedom. Generally, the 2021 decisions confirm that it requires judicial courage to enforce s.2(b) when it is vulnerable to political imperative or the instinct to suppress offensive content. That vulnerability is what *City of Toronto* and *Ward* shared in common and the reason why expressive freedom should have prevailed in both.

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[11] All members of the majority endorsed the reasons, including the English version.
[12] As they said, *Ward* is not primarily a case about artistic freedom, but is a case about the rights of vulnerable and marginalized individuals. Para. 117.
[13] *Ibid.*, paras. 194-98.
[14] In their words, Mr. Ward must "point to why the harm to his expressive rights is such that the speech in this case should not be considered to be discrimination". *Ibid.*, para. 207.
[15] On content, public interest, and the "value" quotient of Ward's expression, see paras. 214-17.

The next four parts explore the themes and key tenets of the jurisprudence on expressive freedom, chronologically and in (approximate) 10-year increments, before offering thoughts on how s.2(b) is positioned for the future. The next in the series, provisionally titled “Section 2(b): the numbers and their stories”, will provide an overview of s.2(b)’s output in the first forty years and a themed analysis of its landmark decisions from 1982-1990.

Blog 2: A quantitative and qualitative inventory of s.2(b) of the *Charter*: 1982-2022

Freedom of expression under the Charter

Day in and out, the news attests that freedom of expression is as precarious as ever, in Canada and around the world – imploring us at all times to remain vigilant and not take freedom for granted.

Except when commissioned to play a part in this narrative, the Supreme Court of Canada is a bystander to most free speech controversies that bubble up in public discourse. That said, the Court plays a pivotal role in conditioning our conception of this vital freedom. Since 1982, the Supreme Court has been instrumental in determining when freedom of expression is protected under s.2(b) of the *Charter*, and when infringements are permitted under s.1's reasonable limits clause. In this way, the s.2(b) jurisprudence forms the bedrock of what expressive freedom means to Canadians today.

2022 is a signpost year that marks the *Charter*'s 40th anniversary. As explained in Part 1 "Section 2(b) Solitudes", this paper traces s.2(b)'s evolution from 1982 to the present. The second part provides an inventory of the jurisprudence, placing the numbers on lead, and to flavour the discussion, concludes with two lists of notable decisions for and against s.2(b)'s guarantee of expressive freedom.

This mix of quantitative and qualitative analysis sets the stage for the discussion that follows. Part III introduces s.2(b)'s foundational landmarks and explores the rise and hegemony of the "contextual approach", a methodology that serves more to justify limits than to protect expressive freedom – as demonstrated by decisions on hate propaganda, human rights legislation, the *Criminal Code*, and other restrictions on expressive content. Part IV considers the open court principle and status of the press and media under s.2(b) of the *Charter*. Part V introduces the concept of *Charter* values and examines the Court's resistance to "positive" rights under s.2(b), before concluding with some reflections.

Expressive freedom's numbers

It is difficult to call up the mood of the early years after 1982, when the Court's first impressions of the *Charter* were eagerly awaited. How the Court would respond and what path the *Charter* would take were unknown. In the beginning, the Court dispelled some of the suspense by acting on its mandate of judicial review and invigorating the *Charter*. Some guarantees, including s.2(b), counted important victories in the 1980s, and in 1986 *R. v. Oakes* set an exacting standard for *Charter* violations to meet under s.1's concept of reasonable limits. At the time, *Oakes*'s all-purpose test re-inforced the view that the *Charter* could and would transform Canada's legal culture. To this day the *Oakes* test remains the mainstay of the s.1 analysis.

As for tabulating s.2(b)'s successes and failures, Mark Twain once quipped that "[d]ata is like garbage" and warned that "[y]ou'd better know what you are going to do with it before you collect it". Forty years on, an inventory of the jurisprudence is not just a set of numbers, but a

framework for the narrative arc of s.2(b)'s evolution and a window on the stories that make data meaningful.

The work begins by acknowledging that a quantitative inventory has qualitative properties. For instance, an unabridged count of wins and losses can inflate or deflate perceptions of expressive freedom's relative success or failure. And, while each decision counts, some play a formative role in s.2(b)'s story and others are not especially significant. As well, the presence or absence of dissenting and concurring opinions inflects the impression that arises from raw data.

The process of counting also affects s.2(b)'s presentation because there are companion cases, decisions with no more than tangential discussion of s.2(b), and instances when the claim fails and succeeds at the same time. Accepting that others might count up a little differently, adding or subtracting at the margins, the numbers below are generally reliable.

According to my inventory, the Supreme Court rendered 85 decisions under s.2(b) from 1982 to the present. Though slow to start, the momentum picked up and the pace of decision making was relatively even, as the distribution of decisions across time reveals.

	#decisions	win/loss	success rate
1982-89	10	3 W 7 L	30%
1990-99	26	11 W 15 L	42%
2000-09	25	11 W 13 L	44%
2010-22	24	9 W 14 L	37%
Total	85	34 W 49 L	40%

While the first period generated about 12% of total claims, at roughly 29% each, the output in the next three was relatively even. Overall, the claim succeeded in 34 cases and failed in 49, for a tally of about 40% wins and 56% losses. Twice, or in roughly 2% of cases, the result was mixed or indeterminate. While noted, fluctuations in the success rate can be attributed to a number of factors and are not especially significant.

Section 2(b)'s expressive freedom issues

The s.2(b) jurisprudence handily outstrips the output of its fellow travellers under s.2 – freedom of conscience and religion (s.2(a)), freedom of peaceful assembly (s.2(c)), and freedom of association (s.2(d)). A fundamental freedoms behemoth, s.2(b)'s guarantee of expressive freedom has generated myriad challenges to statutory provisions, engaged common law and administrative decision making, and addressed a rich assortment of issues that includes the open court principle, freedom of the press and media, all manner of expressive content, access to government property for expressive purposes, and positive rights. Regardless the issue, the jurisprudence is organized around the *Charter*'s textual structure of breach (s.2(b) and justification (s.1).

Defining freedom of expression and setting a standard for its violation was a critical step at the *Charter*'s outset, and s.2(b) is notable for its relatively low threshold of breach. In 1989,

Irwin Toy v. Quebec proposed a broad and almost unlimited scope of entitlement that required most infringements to be justified under s.1.

On the initial question of breach the inventory qualifies a widespread impression that establishing a violation of s.2(b) is an easy matter. In 21 instances, or almost 25% of its decisions, the Court found no infringement of the guarantee. If it was weak in some instances, the claim raised key questions in others, such as search warrants and production orders against the press and media, positive rights, freedom from compelled expression, and *Irwin Toy*'s exception for "violent forms of expression".[16]

Not only that, s.2(b) has not always fared well under s.1. The invalidation of statutory provisions and rules provides one metric of the *Charter*'s impact on expressive freedom. In 43 decisions, the Court struck statutory provisions, bylaws, and other forms of regulation 15 times and upheld them 28 times, for a success/fail rate of about 31 to 69%. After invalidating provisions 12 times between 1986 and 2000, the Court has only done so three times since then, and only twice in decisions of significance.[17] As well, the jurisprudence employs doctrinal techniques to read provisions down or avoid striking them down through a "saving" interpretation.[18]

Notable anomalies also emerge, the most troubling of which is the Court's reluctance to protect s.2(b)'s rights of democratic participation. Despite consistently proclaiming that expression related to democratic self government is s.2(b)'s primal value, the jurisprudence failed at critical moments to protect the entitlement. Just 3 claims have succeeded, and in 9 others the Court rejected s.2(b)'s democratic rights in an electoral setting.[19] The Court's resistance to these core entitlements seriously undermines s.2(b) and its role in preserving the integrity of the democratic process.

The Court has never ruled in favour of a "positive" right under s.2(b), and three of its decisions on democratic participation concerned positive rights.[20] Most recently *City of Toronto v.*

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[16] Weak claims include *Mackay v. Manitoba* (1989), *Moysa v. Alberta (Labour Relations Board)* (1989), *Walker v. Prince Edward Island* (1995), *Siemens v. Manitoba* (2003), and *UL Canada v. Quebec* (2005). Other claims rejected include *CBC v New Brunswick* and *CBC v. Lessard* (1991, the "Search Warrant decisions"), *R. v. National Post* (2010), and *R. v. Vice Media* (2018)(forms of search against the press), *Haig v. Canada* (1993), *NWAC v. CanadaI* (1994), *Baier v. Alberta* (2007), and *City of Toronto v. Ontario* (2021) (positive rights in the political process), *Slaight Communications v. Davidson* (1989) and *Lavigne v. OPSEU* (1991) (compelled expression), and *Suresh v. Canada (Min. of Citizenship & Immigration)* (2002) and *R. v. Khawaja* (2012)(the "violent forms" exception to s.2(b)'s scope of protection).

[17] *Greater Vancouver Transportation Authority v. Canadian Federation of Students* (2009), and *Alberta (Information and Privacy Commissioner v. UFCW, Local 401* (2013); the less significant decision is *R. v. Guignard.* (2002).

[18] See *R v. Sharpe* (2001), *Little Sisters Book & Art Emporium v. Canada* (2000), *City of Montreal v. 2952-1366 Quebec Inc.* (2005), and *BC Freedom of Information and Privacy Ass'n v. BC* (2017). In *Sharpe* the Court upheld the *Criminal Code*'s child pornography provisions but placed narrowed their application to mitigate the impact on expressive freedom.

[19] The wins are *Osborne v. Canada* (1991), *Libman v. Quebec* (1997), and *Thomson Newspapers v. Canada* (1998); the losses are *Mackay v. Manitoba* (1989), *Haig v. Canada* (1993), *Harper v. Canada* (2000), *Siemens v. Canada* (2003), *Harper v. Canada* (2004), *R. v. Bryan* (2007), *Baier v. Alberta* (2007), *BC Freedom of Information and Privacy Ass'n v. BC* (2017), and *City of Toronto v. Ontario* (2021).

[20] *Haig v. Canada* (1994), *Baier v. Alberta* (2007), and *City of Toronto* (2021). Claims of access to government property for expressive purposes, which are a form of affirmative entitlement, are protected by s.2(b).

Ontario expanded the definition of positive rights and added doctrinal barriers to narrow the scope of s.2(b) and exclude these claims from the guarantee. Meanwhile, a generous conception of political expression that includes investigative journalism and access to political processes accentuates the Court's failure to protect s.2(b)'s core commitments.[21]

Elsewhere the Court's reticence has been less marked. Despite asserting that limits are easier to justify, it issued four landmark decisions on commercial advertising in the early years.[22] And, after two initial losses, labour-related claims have been a favourite of the Court, which has singled this expressive content out for praise and granted it privileged protection under s.2(b).[23]

The *Criminal Code* is another s.2(b) bellwether. While the Court invalidated non-penal statutory and other regulatory measures 14 times – in 12 instances before 2000 – *Criminal Code* provisions were challenged ten times and the claim only succeeded once, in *R. v. Zundel*.[24]

Nor has s.2(b)'s broad conception of entitlement done much to protect expressive content under s.1, where the Court relaxed the standard of justification to ensure that limits would be upheld. As numerous examples attest – *i.e.*, the *Code*, human rights legislation, defamation, the legal profession, immigration, customs, and anti-terror legislation – the Court has a poor record of protecting s.2(b) where content restrictions are at issue. Though trends are difficult to predict, the tide that ran strongly in that direction may have turned back, to some extent, in *Ward v. Quebec*, which dismissed a human rights claim arising from a stand-up comedian's routine that targeted a disabled youth.

Meanwhile, s.2(b)'s course under the common law has its own narrative: initially slow to act, the Court modified the common law to comply with the *Charter* 7 times between 2000 and 2017, in large part because of corrections to the law of defamation.[25] Elsewhere, the Court's review of discretionary decision making has been mixed, both before and after its "*Charter* values" decision in *Doré v. Barreau du Quebec*.

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[21] See, e.g., *Native Women's Association of Canada v. Canada* (1994), *New Brunswick Broadcasting Corp. v. Nova Scotia (Speaker of the House)* (1993), *R. v. National Post* (2010).

[22] *Ford v. Quebec* (1988), *Devine v. Quebec* (1988), *Rocket v. Royal College of Dental Surgeons* (1990), and *RJR-Macdonald v. Canada* (1995).

[23] *RWDSU v. Dolphin Delivery Ltd.* (1986) and *BCGEU v. B.C.* (1988) were followed by s.2(b) wins for labour in *Lavigne v. OPSEU* (1991), *UFCW, Local 518 v. Kmart Canada Ltd.* (1999), *RWDSU, Local 558 v. Pepsi-Cola Canada* (2002), and *Alberta (Information and Privacy Commissioner) v. UFCW, Local 401* (2013).

[24] The claim failed in *Canadian Newspapers Co. v. Canada* (1988, publication ban), *The Solicitation References*, (sexual solicitation, 1990), *R. v. Keegstra* (1990, hate propaganda), *R. v. Butler* (obscenity and pornography, 1992), *R. v. Lucas* (defamatory libel, 1998), *R. v. Sharpe* (child pornography, 2001), *Toronto Star Newspapers v. Canada* (publication ban, bail hearings, 2010), and *R. v. Khawaja* (anti-terrorism "motivation" clause, 2012). Though the open court principle was successful, *CBC v. New Brunswick* (closed proceedings, 1996) is included in the count because the challenge to the *Code* provision failed.

[25] Apart from open justice see *RWDSU v. Dolphin Delivery* (1986); after 2000, see *RWDSU Local 558 v. Pepsi Cola* (2002, secondary picketing), *WIC Radio Ltd. & Mair v. Simpson* (2008, defamation), *Grant v. Torstar Corp.* and *Cusson v. Quan* (2009, defamation), *Globe & Mail v. Canada* (2010, journalist-source privilege), *Malhab v. Diffusion Metromedia CMR Inc.* (2011, civil law), and *Crookes v. Newton* (2011, defamation).

At 18 decisions, the open court principle accounts for just over 20% of the Court's s.2(b) docket in the first 40 years. This principle is concerned with publication bans and restrictions on access to proceedings, and on these issues, s.2(b) posts winning numbers, with 11 wins against 8 losses.[26] The pattern began with the pre-*Charter* decision in *Nova Scotia v. Macintyre*, gathered momentum with the Court's landmark in *Dagenais v. CBC*, and reached its apex in *Re: Vancouver Sun*, which ordered the proceedings open when a secret investigative hearing was held under Parliament's post 9/11 anti-terror legislation. Though the success rate tapered in recent years, the s.2(b) jurisprudence embeds exemplary protection for freedom from publication bans and limits on access to court proceedings. Outside this context, the Court's attention to the issue of prior restraint has been negligible.

Though freedom of the press and media are "included" in the text of s.2(b), the Court has been reluctant to squarely acknowledge that freedom of the press and media is a free-standing *Charter* entitlement. Albeit with some exceptions, this resistance is found in decisions on newsgathering activities and confidential journalist-source relationships.[27] At different times, Justices McLachlin and Abella forcefully maintained that press and media rights should receive independent *Charter* protection; in 2017 Parliament took steps to address the deficits in this jurisprudence by enacting the *Journalistic Sources Protection Act*.[28]

Expressive freedom, s.2(b), and the judges

Dissenting and concurring opinions also serve as bellwethers, among other things, of styles of decision making, collegial relations within the Court, and the conceptual preferences of its judges. The nature and incidence of dissents and concurrences on s.2(b) issues in the first 40 years pose rich and important questions. In rough quantitative terms, there have been more than 20 dissenting and concurring opinions in significant s.2(b) decisions. The Court has also been unanimous in at least twelve decisions. In some instances, such as the Bill 101 cases, *Libman v. Quebec*, and *Grant v. Torstar*, the Court was protective of expressive freedom. In others, such as *R. v. Butler*, *R. v. Sharpe* , *Doré v. Barreau du Quebec*, *Saskatchewan (Human Rights Commission) v. Whatcott*, and *R. v. Khawaja*, the Court rejected the s.2(b) claim.[29]

Four chief justices have presided during the *Charter*'s first forty years: Dickson (1984-90); Lamer (1990-2000); McLachlin (2000-17); and Wagner (2018-present). Over this period, s.2(b) has never had a steadfast champion on the Court.

Though Justice Dickson's pre-*Charter* opinion in *Macintyre* brilliantly framed and anticipated the open court principle, he otherwise wrote against expressive freedom in another pre-*Charter* case, and in 4 early decisions under s.2(b).[30] On this record, it would be difficult to consider him an advocate of expressive freedom. His successor, Chief Justice Lamer, wrote the Court's landmark opinion in *Dagenais v. CBC*, but otherwise did not distinguish himself on s.2(b)

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[26] *A.B. v. Bragg Communications Inc.* (2012) counts twice because the Court refused a publication ban but anonymized the victim's initials.
[27] The Search Warrant cases (1991), *National Post* (2010), *R. v. Vice Media Canada Inc.* (2018).
[28] S.C. 2017, c.22.
[29] The Court's decisions in *Sharpe* and *Whatcott* gave expressive freedom partial protection.
[30] The decisions against expressive freedom are *Fraser v. PSSRB* (1985), *BCGEU* (1988), *Keegstra* (1990), *Canada (Human Rights Commission) v. Taylor* (1990), and *Slaight Communications* (1989).

issues.[31] More recently, Chief Justice Wagner has written three times since taking office in 2018, including joint majority opinions in *City of Toronto v. Ontario* and *Ward v. Quebec*.[32]

Justices McLachlin and Abella have played leading roles and written more frequently on s.2(b) than any other members of the Court. Justice McLachlin's 20 opinions on s.2(b) issues championed expressive freedom during her early years on the Court, though not as much when she became Chief Justice.[33] With 16 opinions on s.2(b), Justice Abella is a close second. Her jurisprudence reveals a striking duality: though no other member of the Court has done more to defend the guarantee's democratic values – *i.e.*, democratic participation, democratic accountability, truth-seeking, the rights of the press and media, and transparency – she withdraws her support for expressive freedom that targets or impinges on vulnerable individuals and groups. In capturing that duality, her final two s.2(b) decisions in *City of Toronto v. Ontario* and *Ward v. Quebec* define Abella J.'s conception of expressive freedom.

The late Justice Cory supported expressive freedom in two open court decisions, as well as on labour expression, but wrote majority opinions in two of the Court's most disappointing decisions – *Hill v. Church of Scientology* and *R. v. Lucas* – on civil defamation and defamatory libel.[34] His reliance on the contextual approach placed Canada years behind common law countries in modernizing the law of defamation, and further entrenched a methodology that was counterproductive to s.2(b)'s goal of protecting expressive freedom. Meanwhile, Justice Bastarache's majority opinions on electoral expression are paradoxical: after invalidating the 72-hour opinion poll blackout in *Thomson Newspapers v. Canada*, he upheld third party spending limits, absent evidence of harm, in *Harper v. Canada*.

Though Justice Iacobucci's name does not usually feature in discussions of s.2(b), he wrote important decisions on publication bans in the open court context, and a signature dissent on prior restraint in *Little Sisters*.[35] Outside the open court setting, he is the only member of the Court who has taken on that issue.

This discussion leads to the list of the Court's notable s.2(b) decisions for and against s.2(b).

Top ten decisions for and against expressive freedom

Set out below are the lists of what in my opinion is notable in the s.2(b) jurisprudence, on the pro and con sides of the ledger. To some degree, these lists bypass important decisions and obvious choices in favour of unlikely selections. Alternative lists are readily imaginable, and I agree that debating the lists would be a worthwhile discussion. In brief explanation, the outcome

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[31] Lamer J. was the lead author of the Court's anonymous decisions in *Ford v. Quebec* (1988) and *Irwin Toy v. Quebec* (1989), which protected s.2(b). In *Canadian Newspapers Co. v. Canada* (1988) and *The Solicitation References* (1990) he rejected the s.2(b) claim, and in *Slaight Communications* (1988) he wrote a partial dissent.
[32] See also *Denis v. Coté* (2018).
[33] These include *Rocket v. Royal College of Dental Surgeons* (1990), the Search Warrant dissents (1991), the *Keegstra* and *Taylor* dissents (1990), *R. v. Zundel* (1992), and *RJR-MacDonald v. Canada* (1995).
[34] On open justice, see *Edmonton Journal v. Alberta* (1989) and *Vickery v. Nova Scotia (Supreme Court Prothonotary)* (1991); on labour expression, see *UFCW Local 518 v. Kmart Canada Ltd.* (1999).
[35] On open justice, see *R. v. Mentuck* and *R. v. O.N.E.* (2001), and *Re Vancouver Sun* (with Arbour J.)(2004).

– and even the impact of decisions – was less important than the central principles at stake and the Court's conception of expressive freedom.

There are a mix of majority and dissenting opinions, and some members of the Court appear on both sides of the ledger. While some decisions are mentioned, others are not; likewise, some decisions will be discussed below, and others will not. The only non-*Charter* decision included, because of its importance to the evolution of the open court principle, is *Macintyre*. The lists are chronological and are not arranged in any hierarchical or rank order. The key is majority opinion (MO); dissent (D); and concurrence (C).

While the first list identifies decisions that marked moments of commitment to expressive freedom and courage in defending s.2(b), the second demonstrates how s.2(b)'s guarantee of expressive freedom was set aside in favour of assumptions about the entitlement, including the perceived value or harm of expressive content.

For s.2(b) and expressive freedom:

1. *Nova Scotia v. Macintyre* (Dickson MO, 1982)
2. *The Search Warrant Cases* (McLachlin D, 1991)
3. *Dagenais v. C.B.C.* (Lamer MO, 1994)
4. *C.B.C. v. New Brunswick* (LaForest MO, 1996)
5. *Thomson Newspapers v. Canada* (Bastarache MO, 1998)
6. *Little Sisters Book & Emporium v. Canada* (Iacobucci D, 2000)
7. *Re Vancouver Sun* (Iacobucci & Arbour MO, 2004)
8. *R. v. Vice Media* (Abella C, 2018)
9. *City of Toronto v. Ontario* (Abella D, 2021)
10. Three dissents: *Slaight Communications v. Davidson* (Beetz, 1989); *City of Montreal v. 2952-1366 Quebec Inc.* (Binnie, 2005); and *Baier v. Alberta* (Fish, 2007)

Against s.2(b)'s guarantee of expressive freedom:

1. *Slaight Communications v. Davidson* (Dickson MO,1989); *Lavigne v. OPSEU)*(Wilson and McLachlin C, 1991)
2. The *Search Warrant* cases (above) (Cory MO,1991)
3. *Hill v. Church of Scientology of Canada* & *R. v. Lucas* (Cory MO, 1995 and 1998)
4. *Harper v. Canada* (Bastarache MO, 2004)
5. *Baier v. Alberta* (Rothstein MO, 2007)
6. *R. v. National Post* (Binnie MO, 2010)
7. *R. v. Khawaja* (McLachlin MO, 2012)
8. *Doré v. Barreau du Québec* (Abella MO, 2012)
9. *Law Society of B.C. v. TWU* (MO, 2018)
10. *City of Toronto v. Ontario* (Wagner and Brown MO, 2021)

As acknowledged, this inventory simply provides a backdrop to and impression of s.2(b)'s evolution. As such, this data bank now invites a deeper look at key elements of the jurisprudence.

Part III turns its attention to *Irwin Toy*'s analytical framework for s.2(b) and the role of the contextual approach under s.1. These concepts set the foundation for s.2(b), and especially the jurisprudence on expressive content and its status under the *Charter*.

Blog 3: Section 2(b) Building Blocks: *Irwin Toy* and the contextual approach

Building blocks

The s.2(b) building blocks are found on both sides of the *Charter* equation: a definition of expressive freedom under the guarantee and standard of justification to determine reasonable limits under s.1. The bedrock of s.2(b) methodology was set during the *Charter*'s first decade, when *Irwin Toy Ltd. v. Quebec* proposed a framework for s.2(b) analysis and *Edmonton Journal v. Alberta* introduced the idea of a "contextual approach." Both were decided in 1989, and each marked a pivotal development that set s.2(b)'s path in a particular direction. The principles embedded in these landmarks have been persistent over time and, at this checkpoint forty years on, remain authoritative. Regrettably, they have not served s.2(b)'s guarantee of expressive freedom especially well.

The Quebec Trilogy: The Bill 101 cases and Irwin Toy

Late in 1987, the Court heard a trilogy of appeals from Quebec that were fraught with significance. The Bill 101 cases – *Ford v. Quebec* and *Devine v. Quebec* – set Quebec's "visage linguistique" and the French-only outdoor sign law against the right of non-francophone members of the community to display signs in other languages. Meanwhile, *Irwin Toy* seemingly posed the more modest question whether s.2(b) protects commercial expression, including the right of corporations to aim advertising at children. To avoid a potential quorum issue, the Court expedited the Bill 101 cases and postponed decision in *Irwin Toy*.

Late in 1988, the Court invalidated the outdoor sign law and the province moved immediately to re-enact the legislation and deploy the legislative override under s.33 of the *Charter*. Doing so had poignant implications for the *Meech Lake Accord*, which was under ratification at the time and then failed in 1990. Premier Bourassa's decision to use s.33's override to protect French language rights was conflated with concerns about the *MLA*'s distinct society clause. At that juncture in post-patriation history, the Bill 101 cases could hardly have been more significant for Quebec.

Irwin Toy was released a few months later, after Quebec invoked s.33, and what a difference a few months made. While *Ford* and *Devine* applied a robust standard of justification under s.1, *Irwin Toy* backed away, proposing an approach that eased the state's burden and enabled the Court to uphold the legislation. It is speculative whether the result in *Irwin Toy* might have been different if the Quebec trilogy had been decided together. Still, comparing the s.1 discussion before and after the override makes it difficult to imagine the Court releasing three decisions that prescribed such mis-aligned standards of justification.

The Bill 101 cases made it unnecessary to address the status of commercial advertising in *Irwin Toy*, but the Court went ahead, providing a landmark interpretation and proposing a two-part test for breach of s.2(b)'s guarantee of expressive freedom.

Step 1's definition of expression as "any attempt to convey meaning" is unlimited and inclusionary, conferring *prima facie* protection on all content, regardless how odious or offensive. Under that view, expressive content receives indiscriminate protection under s.2(b) – to avoid

censorial exclusions – and the question of limits is reserved to s.1. That part of *Irwin Toy*, which prohibits the state from discriminating against expression because of its content, is solidly grounded in principle.

Still, there were problems because *Irwin Toy* both simplified and complicated the question of breach. First, the conveys-meaning definition of expression addressed a factual question – what is expression? – that obviated the need for qualitative discussion of the violation. Put another way, step 1 all but conceded the question of breach and required little or no discussion of expressive freedom. Under a *prima facie* concept of breach, the nature or severity of the infringement did not matter. Yet a generous interpretation of s.2(b)'s guarantee of expressive freedom need not be simple. The problem was that *Irwin Toy*'s oversimplification of the s.2(b) analysis shifted the momentum to s.1 and the question of justifiable limits. The impact of the violation and its consequences for expressive freedom were lost in that process.

Irwin Toy's second step grafted a supplementary test onto the conveys-meaning test, which took the form of a purpose-effects analysis. In contrast to the content neutrality of step 1, the purpose-effects test imposed a burden on some to prove that their expressive activity serves s.2(b)'s aspirational values (*i.e.*, truth seeking, democratic self-government, self fulfillment). That created a hierarchy under s.2(b) that depended on the nature of the breach. While purposeful infringements went directly to s.1, a different approach applied when government action adversely affected expressive freedom. More onerously, a breach under the effects test required proof that expressive content served s.2(b)'s underlying values. Not only did that introduce a contradiction between step 1's content-neutral and step two's content-grounded conceptions of entitlement, it lodged the idea that the scope of s.2(b) might depend on whether its content or message are seen as valuable.

Under s.1, the Court clawed the standard of justification back, altering the *Oakes* test to make it easier to uphold limits. Unlike *Ford* and *Devine*, which applied *Oakes* in a rigorous manner, *Irwin Toy* created a double standard of justification. According to this hierarchy, a strict version of *Oakes* would apply when the state acted as the "singular antagonist" of the individual – as in the criminal justice system – but an attenuated standard would suffice when the state mediated between competing social interests or acted to protect the vulnerable. Though the mechanism was only partly successful, *Irwin Toy*'s dichotomous standard of justification validated the idea that the *Oakes* test could be changed to avoid protecting expressive freedom under s.1.

It bears noting that the Court's landmark in *Irwin Toy* upheld the infringement of expressive freedom. With two in dissent and only three members of the Court signing the majority opinion, *Irwin Toy* could not be described as a strong opinion. If initially unclear whether s.2(b)'s interpretation might be re-considered by a full panel of the Court – and with the exception of the purpose-effects test – *Irwin Toy*'s s.2(b) framework has been resilient over the years. At the same time, the Court's antagonist-mediator model was less successful, and was quickly supplanted by the contextual approach.

The idea of a contextual approach, which appeared in Justice Wilson's sole concurrence in *Edmonton Journal v. Alberta* later in the same year, was a turning point for s.2(b).

Justice Wilson, the contextual approach, and R. v. Keegstra

Bertha Wilson was a *Charter* loner, known for her sole concurrences as well as for her dissenting opinions, and her concurrence in *Edmonton Journal* was one of her most influential. Within months of *Irwin Toy,* where she was one of three judges in the majority, she expressed dissatisfaction with an abstract and ennobled approach to the concept of expressive freedom. In *Edmonton Journal* Wilson J. agreed that statutory restrictions on reports of specified domestic proceedings violated the open justice principle but wrote separately to explain why setting s.2(b)'s aspirational values against competing interests was not a fair contest. In particular, she complained that an abstract approach to expressive freedom advantaged s.2(b), tipping the scales in the guarantee's favour and against competing interests.

Justice Wilson's contextual approach comprised two essential elements. First, her approach would place the interests at stake "in sharp relief", allowing an analytical juxtaposition or comparison that was not available under an abstract conception of expressive freedom. Without naming it, Wilson J. was reaching, intuitively, for the final step of proportionality under *Oakes*, where the salutary benefits and deleterious consequences of a violation confront one another. Second, she made the pivotal observation that expressive activity is not monolithically valuable, and that the degree to which it should be protected in particular circumstances will depend on its context. Equating the content and context of expression in that manner pointed the way toward an approach that transparently judged the relative merits of expressive activity.

Wilson J.'s *Edmonton Journal* concurrence stopped short of proposing a concrete doctrinal form for the contextual approach. That step was taken the following year in *R. v. Keegstra*, another turning point for s.2(b) in which a Court divided 4-3 but upheld the *Criminal Code*'s hate propaganda provision. According to *Irwin Toy*, that provision was subject to a strict s.1 test because the state acted as the singular antagonist of individuals in criminalizing expression. Though both were part of *Irwin Toy*'s majority, Dickson CJ and Wilson J abandoned that concept, and the Chief Justice instead developed a "contextual approach" that tested expressive content against s.2(b)'s underlying values. In concept, that approach notionally placed expressive content along a high-low spectrum of value, permitting the Court to attenuate the standard of justification for "low value" expression. In this, *Keegstra* marked a crucial step in s.2(b)'s evolution, introducing a mechanism for testing expressive content against abstract values to lower the standard of justification under s.1.

In short, that is how the contextual approach enabled the Court to measure expressive activity against s.2(b)'s underlying values – of truth-seeking, democratic self-government, and self fulfillment – to determine whether its content warranted protection under s.1. Oddly, the contextual approach is a contradiction in terms because it uses *abstract* values to discount particular expressive content. As such, it provided a pretext and tool for engaging in the kind of content discrimination that *Irwin Toy* expressly prohibited. In *Keegstra*, the idea of context enabled the Court to relax the s.1 test and uphold the *Criminal Code* limits because hate propaganda is low-value expression.

Ironically, the genesis of this approach traces to Wilson J.'s lingering disappointment after the *Labour Trilogy* refused to constitutionalize labour relations entitlements under s.2(d)'s

guarantee of associational freedom. In short order, the contextual approach was transformed into a doctrine and grafted onto the *Oakes* test, where it enabled the Court to uphold limits on "low value" expression. The contextual approach has dominated the s.2(b) jurisprudence since *Keegstra* was decided in 1990.

The contextual approach and its legacy

The contextual approach infuses the s.2(b) jurisprudence. Following *Keegstra*, the Court employed the idea of value-assessment or content discrimination to uphold a variety of limits on expressive activity. Under this pattern, the jurisprudence evaluated objectionable or offensive expression against s.2(b)'s lofty values and consistently found limits on low value expression easy to justify under s.1.

Examples of this methodology include the *Criminal Code*'s provisions on obscenity and child pornography (*R. v. Butler*; *Little Sisters Book & Art Emporium v. Canada*; *R. v. Sharpe*); defamatory libel and common law defamation (*R. v. Lucas*; *Hill v. Church of Scientology of Canada*); human rights legislation (*Ross v. New Brunswick School District No. 15; Saskatchewan (Human Rights Commission v. Whatcott*); and Holocaust denial and tobacco advertising (dissenting opinions in *R. v. Zundel*, *RJR-MacDonald v. Canada*). Though the concept of a high-low spectrum suggested that high-value expression would be rigorously protected under s.1, the Court deferred to Parliament, relaxed the standard of justification, and upheld limits on electoral expression (*Harper v. Canada*; *R. v. Bryan*). Even in cases that engaged s.2(b)'s core values, the Court found ways to relax the requirements of s.1 and uphold limits.

Meanwhile, the Court bestowed singular protection on labour expression, including leafletting, picketing, and secondary picketing, describing it as high value expression and entitled to vigilant protection under s.1. (See *UFCW, Local 518 v. Kmart Canada Ltd.*, *RWDSU, Local 558 v. Pepsi-Cola Canada*).

In principle, the contextual approach undermines s.2(b)'s guarantee of expressive freedom in two central ways. First, it confuses and conflates the concepts of value and harm, at times assuming that expression perceived as valueless is also harmful, and more generally treating value as a proxy for harm. This methodology profoundly and unavoidably compromises s.2(b) and its guarantee of expressive freedom. Second, the contextual approach suppresses the constitutional violation of freedom of expression, essentially rendering it invisible and removing it from consideration under s.1. Once the Court declares that expressive content lacks value the analysis is done. There is little need to discuss the nature and severity of the infringement, the insult to freedom, or the violation's impact on s.2(b).

Conclusion

The s.2(b) jurisprudence is complex, presenting diverse branches that have evolved over the years, not all of which can be considered in this paper. The jurisprudence is centered on and pivots on the building blocks that were set in place with the 1989 decision in *Irwin Toy* and introduction of the contextual approach. Here we have briefly explained the analytical flaws of this methodology, under s.2(b) (*Irwin Toy*) as well as s.1 (the contextual approach). The point is that, as long as it remains in place, the s.2(b) jurisprudence will be hobbled by the contradictions

of *Irwin Toy* and a s.1 methodology that is unsound in principle and incapable of protecting s.2(b)'s guarantee of expressive freedom.[36]

Irwin Toy and the contextual approach provide the general framework for s.2(b) analysis and are accompanied and supplemented by several issue-specific doctrines. Part IV considers two very important branches of s.2(b) doctrine: the first is the open court or open justice principle, and the second concerns the status of the press and media under s.2(b) of the *Charter*.

[36] Elsewhere I have outlined a proposal to overhaul this methodology. Among other things, the proposal would eliminate the purpose-effects test and revise the analysis of breach under s.2(b), and then eliminate the contextual approach under s.1 and explain how the *Oakes* analysis must be revised to adequately protect freedom of expression. See "Resetting the Foundations: Renewing Freedom of Expression under Section 2(b) of the Charter" (2022), 105. S.C.L.R.(2d) 120-51; SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4132543

Blog 4: Newsgathering, open court, and freedom of the press and media

Section 2(b)'s democratic values: openness, transparency, and accountability

Section 4 addresses the open court or open justice principle and freedom of the press and media. Juxtaposing the two reveals how differently the Court responded to two issues that support the democracy-promoting values of openness, transparency and accountability. Over the years I have praised the open court doctrine as the most principled branch of the Supreme Court's s.2(b) jurisprudence. This doctrine is grounded in the Court's recognition that openness and its underlying values of transparency and accountability are directly connected to the legitimacy of the justice system. Although attention to the open court principle has tapered in recent years, the bedrock is in place and the doctrinal foundation is strong.

Meanwhile, freedom of the press and media under the *Charter* tells a different story. To start, s.2(b) guarantees freedom of expression and adds, "including freedom of the press and media". It is difficult to know how this textual signal, positioning the entitlement as an offshoot or subset of expressive freedom, affected the Court's conception of a free press. Even as it endorses its vital role in democratic governance, the Court has steadfastly refused to interpret and enforce freedom of the press as an independent *Charter* guarantee.

Open justice/open court

Open court and public access to court proceedings predated the *Charter* and are an established feature of common law tradition. Though statutory and judge-made limits closing courtrooms and imposing publication bans were too easily made, there was never a doubt that openness was the baseline or default principle of the justice system.

Justice Dickson's pre-*Charter* decision in *Nova Scotia v. MacIntyre* is the template for open justice under s.2(b). It would be difficult to overstate the importance of his conclusion that – once executed – search warrants are subject to the open justice principle. Explaining that "covertness is the exception and openness the rule", Dickson J. added that the "sensibilities" or privacy of those involved are no basis for limits on openness. In imperative terms, he held that public accessibility can only be curtailed where it is necessary to protect "social values of superordinate importance".

Perhaps in part because of its foundation in common law tradition, the open court principle encountered little resistance under the *Charter* and evolved quickly after 1982. The key decisions in constitutionalizing open court are *Edmonton Journal v. Alberta*, *Dagenais v. CBC*, *CBC v. New Brunswick*, *R. v. Mentuck/ONE*, and *Re Vancouver Sun*, which was decided in 2004 and marked the highwater mark for s.2(b)'s open court jurisprudence.

Edmonton Journal invalidated a statutory publication ban on the disclosure of information in matrimonial proceedings, and was followed by *Dagenais*, which set the fair trial rights of priests charged with committing offences against young victims against the CBC and its plan to air "The Boys of St. Vincent". The lower court not only prohibited the CBC from broadcasting the docudrama anywhere in Canada, but also banned publication of the *fact* of the application and any material relating to it until the trials were over.

Prior to *Dagenais*, the common law favoured the preservation of fair trial over access to information about the criminal justice system. Stating that there is no hierarchy of rights, Chief Justice Lamer's majority opinion declared that s.2(b)'s guarantee of expressive freedom is the co-equal of s.11(d)'s right to a fair trial. He adapted the *Oakes* standard of justification to judge-made orders and prescribed a robust two-step standard for publication bans. Under this test, a ban cannot be granted unless it is necessary to prevent a real and substantial risk to fair trial – because alternative measures are not reasonably available – and the salutary effects of a ban outweigh its deleterious consequences for open court.

Before long, the *Dagenais* test was generalized to other open court contexts. In *CBC v. New Brunswick*, Justice La Forest's majority opinion adapted it to the administration of justice, and after *Mentuck* confirmed that modification the standard was known as the *Dagenais/Mentuck* test. This test and its insistence on an evidentiary foundation for limits is more rigorous than other branches of the s.2(b) jurisprudence. In *New Brunswick*, La Forest J. emphasized the need for a "sufficient evidentiary basis" to justify restrictions on access to court. In the circumstances, he found no undue hardship to the privacy of young sexual assault victims during a 20-minute hearing on sentencing. On a different view of the competing interests, particularly the privacy of these victims, that decision could easily have gone the other way.

New Brunswick also addressed the nexus between open court, transparency and accountability values, and the role of a free press in a democratic society. Justice La Forest stated that "[d]ebate in the public domain is predicated on an informed public, which is in turn reliant upon a free and vigorous press". In addition, he held that freedom of the press not only encompasses the right to transmit news, "but also the right to gather this information". As he observed, a press guarantee would have little value if it did not include protection for newsgathering activities.

In *Re Vancouver Sun*, the Court divided 5-4 on the constitutionality of closed investigatory hearings under the *Criminal Code*'s anti-terrorism provisions. One suspects the Court did not welcome a mechanism that involved judges in the investigative process of the state. In this instance, an investigatory *hearing* on the Air India crash was held entirely in secret, in the same courthouse and in parallel with the Air India *trial*. Justices Iacobucci and Arbour pushed back hard against the proposition that adherence to the open court principle would compromise the investigation. Stating that the level of secrecy imposed was unnecessary, they confirmed that the presumption of openness can only be displaced after considering the competing interests at every stage of the process. At the very least, the majority opinion's insistence on open court made the use of this controversial investigative mechanism considerably more difficult. Any reading of Justice Bastarache's dissenting reasons would confirm that the majority opinion placed open court at its very apex.

Toronto Star v. Ontario, decided in 2005, marked the final step in building an open court doctrine. There, the Court spoke of "more than two decades of unwavering decisions" in affirming that access to search warrants is presumptively favoured. Focusing again on the evidentiary basis for limits on open court, Fish J. held that a sealing order is only available when particularized grounds show that disclosure would subvert the ends of justice.

Toronto Star marked the point at which the momentum for unwavering decisions on open court began to falter. In 2010, and over Abella J.'s dissent, the Court upheld the *Criminal Code*'s mandatory publication ban – at the request of an accused – on information disclosed at bail proceedings. In 2011, no member of the Court dissented from two decisions from Quebec rejecting open court issues about access to exhibits and access to court spaces for newsgathering purposes, such as courthouse interviews.

Though the Supreme Court wavered and the lower courts struggle to comply with its requirements, the open court doctrine is robust. I have often said that the *Dagenais/Mentuck* test and standard of a sufficient evidentiary basis for limits on open court are a model for s.2(b). As discussed above, the Court dilutes the *Oakes* test to avoid protecting s.2(b), especially where controversial or objectionable expressive content is at stake. In lieu of an evidentiary basis, the Court relies on the low value of expressive content and common sense – as a proxy for evidence of harm – to justify limits on expression. This double standard can and should be addressed by aligning s.2(b) content jurisprudence with open court's robust standard of justification.

Freedom of the press and media

The Court took a different view when police sought access to newsgathering materials through search warrants, productions orders, or disclosure of a journalist's confidential sources. In this setting, the Court professed to protect press interests through common law and judge-made rules, but consistently refused to treat interference with newsgathering as a violation of s.2(b).

A search warrant or production order against a member of the press engages s.8's guarantee of a reasonable search *and* s.2(b)'s press clause. In *CBC v. Lessard* and *CBC v. New Brunswick*, decided in1991, the Court upheld search warrants against the CBC, finding that any implications for the press could be absorbed into s.8's concept of reasonable search. After stating that the press should receive special consideration, Cory J. treated its status as the target of a police search as the "backdrop" to the s.8 analysis. In addition, he maintained that a member of the press should be just as willing to volunteer information to the police as a member of the public. Meanwhile, L'Heureux Dubé J. declared that the press has no "special privileges" under s.2(b). These remarks misapprehend the purpose of a free press and its need for independence from the state in discharging its role as the "watchdog" of democracy.

Though the "*Lessard* framework" incorporates press considerations into s.8 – like the availability of alternative sources of information – these criteria are an inadequate proxy for the s.2(b) and its free press clause. There is a principled difference between rolling s.2(b) considerations into s.8 and finding a violation of s.2(b) that requires a guarantee-specific analysis. Justice McLachlin saw the difference and dissented on her own in both CBC cases. She extolled the values of a free press, found a violation of s.2(b), and proposed a robust analysis to test the validity of search warrants. She was the only member of the Court to focus on s.2(b) and also to find that both search warrants unjustifiably violated freedom of the press.

Many years later, the Court had an opportunity to re-consider the *Lessard* framework in *R. v. Vice Media*, a decision that unanimously upheld production orders against one of Vice Media's journalists. The majority opinion refined the analysis but flatly refused to address s.2(b), maintaining that s.8 protects the interests of the press. Justice Abella's concurring opinion all but

erupted on the page, calling for recognition of the constitutional role of a free press and a harmonized analysis, with proportionality balancing under s.2(b) to test state interference with newsgathering. Her forceful advocacy for a constitutional concept of the press did not prevail, but led to a 5-4 divide in the Court.

Though *Vice Media* showed some insight into the role of the press, the Court remained unwilling to protect the press and media under s.2(b). This blind spot is also found in the Court's response to confidential sources and the journalist-source privilege.

In *R. v. National Post*, Justice Binnie candidly aired his objection to a constitutional approach, stating that throwing a "constitutional immunity" around an ill-defined group of writers and speakers and their "sources" would "blow a giant hole in law enforcement and other constitutionally recognized values such as privacy". There, the Court refused to protect a journalist's confidential source (*i.e.*, a document sent in a plain brown envelope) in a years-long and prize-winning investigation into the so-called Shawinigate scandal and possibility of corruption in the Prime Minister's Office. After paying obeisance to the value of a free press, the Court dismissed the *Charter*, concluding that the generic common law standard for privilege – the 4-part Wigmore test – was sufficient to protect the interests of a free press. In this, the Court missed the point on the onus of proof (*i.e.*, which rests on the journalist under Wigmore), and what was at stake in a lengthy process of investigative journalism.

To some degree, *Globe and Mail v. Canada*, which was decided around the same time, provided important correctives. There, the role of a confidential source – "ma chouette" – was pivotal in bringing the Quebec sponsorship scandal to light. Without shifting the burden of proof, LaBel J. introduced a safeguard that first requires any party seeking access to a confidential source to establish the relevance of the evidence. In this way, the Court imposed a threshold, gate-keeping onus on the party seeking disclosure to establish the relevance of that information. Under this approach, the burden does not shift to a journalist until that threshold is met.

Globe and Mail also considered the impact of a source's conduct in illegally disclosing information to a journalist. The issue arose in discussion of the publication ban but addressed the status of confidential sources. One of the difficulties in protecting an anonymous source is that some secrets have to be kept (*i.e.*, the identity of a source) so that others (*i.e.*, the details of the sponsorship scandal) can be told. Justice LeBel held that a journalist is not prevented from using information that is illegally disclosed by a source, because "the breach of a legal duty on the part of a source is often the only way that important stories, in the public interest, come to light". Importantly, *Globe and Mail* acknowledged the pivotal connection between newsgathering, investigative journalism, and the role of confidential sources.

It is disappointing that the Court's journalist-source decisions circumvented s.2(b) and took few steps, apart from the rhetorical, to customize the Wigmore test to the constitutional status of the press and media. At the initiative of Senator Carignan – and at the time of the Chamberland Commission – Parliament responded in 2017 with the *Journalistic Sources Protection Act* (*JSPA*). This legislation addresses the deficiencies of the Wigmore test, creates a presumption in favour of journalist-source privilege, and prescribes statutory standards for determining when the public

interest in disclosure outweighs the privilege that attaches to journalist-source relationship. The *JSPA* shifts the burden of proof from the journalist, who is required under Wigmore to prove that the confidential relationship should be protected, to the party seeking disclosure of a confidential relationship that is presumptively protected by law. As the Court noted in *Denis v.Coté*, a decisions discussing the *JSPA*, that on its own marked a significant shift in the law.

The *JSPA* is an important initiative but not a fix-all. It is federal legislation and applies only to federal law. In addition, it adopts a definition of journalist that limits the *JSPA*'s protections to those who are engaged in the occupation of journalism. Still, the legislation offers a model for the courts to follow, and the *JSPA*'s principal recommendations can migrate to the common law through a process of judicial adoption.

Conclusion

The Court unfailingly acknowledges s.2(b)'s democratic values and applauds the democratic role of a free press. While the open court doctrine vigorously supports those values, the jurisprudence on the press and media does not. There, the Court purports to protect the press but refused to constitutionalize its newsgathering activities. Yet as La Forest J. recognized, in the context of open court, that is what distinguishes this entitlement from freedom of expression, and defines its core. Freedom of the press must be recognized and protected as an independent *Charter* right that rests on distinctive underlying values that are of central importance to democratic governance.

This paper is not comprehensive in its reflections on the first forty years of s.2(b) jurisprudence under the *Charter*. Part V will address the concept of positive rights under s.2(b) because it is a rising concern in the jurisprudence, and end the series with an outline of my proposal for an overhaul of the s.2(b) methodology. The goal of that proposal is to set the *Charter*'s guarantee of expressive freedom on a principled basis, under a holistic approach that revises doctrine under s.2(b)'s concept of breach and s.1's standard of justification for determining reasonable limits.

Blog 5: Looking ahead: a plan for section 2(b)'s future

Introduction

Up to this point, we have commented on *City of Toronto v. Ontario (2021)* and *Ward v. Quebec* (2021); offered a quantitative and qualitative synopsis of the s.2(b) case law; provided a critique of *Irwin Toy* and the contextual approach; and addressed the Supreme Court of Canada's jurisprudence on the open court principle and freedom of the press and media.

This final part returns to two foundational issues: the first concerns the positive rights doctrine, which received an emboldened, substantive boost in *City of Toronto*; and the second is s.2(b)'s current methodology, specifically *Irwin Toy*'s standard of breach and s.1's reliance on the contextual approach. I address these issues, rather than others, because of their importance to the conceptual integrity and evolution of s.2(b)'s guarantee of expressive freedom.

The objective of this paper more generally is to spark concern and debate about the building blocks of the s.2(b) jurisprudence. Though expressive freedom has been granted protection under the *Charter*, the guarantee's building blocks do not rest on an insightful and principled conception of expressive freedom. I suggest in brief how s.2(b)'s building blocks can be re-thought and re-constructed to set expressive freedom under the *Charter* on a more principled plane in the future.

Negative thoughts on positive obligations

Most violations of s.2(b) occur when the government prohibits expressive activity or otherwise interferes with expressive freedom. On some occasions, the exercise of s.2(b) rights depends on access to property or services that are owned and regulated by the state. Entitlements such as access to government property (*i.e.*, public streets and parks) and processes (*i.e.*, the administration of justice) are managed by issue-specific doctrines. In a handful of decisions – the most important of which are *Haig v. Canada* (1993), *Baier v. Alberta* (2007), *Greater Vancouver Transportation Authority v. Canadian Federation of Students (Translink)* (2009), and *City of Toronto* (2021) – the Court addressed the issue of positive obligations under s.2(b).

The Court's majority opinions in *Baier* and *City of Toronto* relied on a hard negative-positive distinction to exclude the entitlement from s.2(b). Rather than nonsuit these claims, *Baier* introduced an onerous standard of breach for "positive" obligations under s.2(b). Subsequently, and though *Translink* discouraged reliance on it, *City of Toronto* invoked and escalated the *Baier* doctrine, introducing a threshold that requires proof of "extreme government action" that "radically frustrates" expressive freedom. In this way, the Court adopted a double standard under s.2(b), which singles "positive" obligations out for an exacting standard that can rarely be met.

In *City of Toronto*, the Court dismissed a s.2(b) challenge to provincial legislation that restructured City Council during a municipal election by designating the claim a positive obligation. There, the issue was whether the *Better Local Government Act* (*BLGA*) interfered with democratic rights during an electoral process (*i.e.*, a negative entitlement or freedom from interference with those rights). The other view was that those who challenged the *BLGA* were essentially claiming an affirmative constitutional right to preserve the composition of City Council (*i.e.*, a positive obligation on government not to change the *BLGA*).

The majority opinion reasoned that the province has constitutional authority to alter City Council, and that there is no s.2(b) right relating to the structure of City Council, during an election or not. That conclusion enabled the Court to deflect issues about the *BLGA*'s impact on s.2(b)'s democratic rights to the *Baier* doctrine, and then articulate a near-insurmountable threshold for breach.

Without directly prohibiting expressive activity, the *BLGA* had profound consequences for all participants in a municipal election. Cutting City Council almost in half in the middle of the election required electoral boundaries to be re-drawn, ballots to be re-printed, and candidates to re-start their campaigns in new municipal ridings, amid widespread confusion in the electorate. The positive-negative dichotomy allowed the Court to vault *Irwin Toy*'s low threshold, create a prohibitive standard of violation, and conclude that the *BLGA*'s mid-election changes to City Council did not radically frustrate s.2(b)'s democratic rights.

On the evidentiary record before it, the Court could only deny the scale of the interference with s.2(b)'s democratic rights by altering *Baier* and elevating the standard of breach. *City of Toronto*'s threshold set a barrier that will make it next to impossible for entitlements defined as "positive" to establish a breach of s.2(b). Under this doctrinal scheme, the initial classification of an entitlement as positive or negative will be determinative in most instances. As such, *City of Toronto* placed unprecedented restrictions on the scope of s.2(b).

City of Toronto's re-modelling of *Baier* marks a backward step for expressive freedom and must be overruled at the earliest opportunity. The Court's decision diverged to some extent from other decisions on positive rights. For instance, both *Haig v. Canada* and *Translink* queried the positive-negative distinction, acknowledging that it can be unreliable and can be misused to narrow the scope of s.2(b). And while *Baier* dismissed the claim, the Court held that the positive rights doctrine targets issues of under inclusion, where the legislature grants opportunities to exercise s.2(b) rights to some, but not all, speakers. There was no issue of under inclusion in *City of Toronto* and, as the dissent pointed out, *Baier*'s narrow and focused doctrine simply did not apply.

In *Translink*, Justice Fish wrote a concurring opinion that opposed the positive rights doctrine. He challenged *Haig*'s concept of "statutory platforms" and the *Baier* doctrine, maintaining that the decision was never intended to break "fresh constitutional ground" and should be limited to its specific facts. Fish J. went on to explain that there is "no principled basis" for a doctrine that bases s.2(b) on an idea of access – or permission – to use a statutory platform. As he stated, not every claim can be "comfortably shoehorned into one preconceived slot or another."

The concept of positive obligations serves little purpose and functions primarily to exclude claims from s.2(b). *Haig*'s underinclusive residency rules for voting in a federal referendum had a negative impact on expressive freedom, and the Court could have found a s.2(b) violation on that basis. As for *Baier*, the statutory provision prohibited school employees from running for school board office and fell within a traditional concept of s.2(b), as Fish J. concluded in dissent. Neither *Translink* (which excluded political and allowed commercial advertising on the exterior of city

buses), nor *City of Toronto* (in which the *BLGA*'s indisputably interfered with democratic rights) raised a question of positive entitlement.

The rigid distinction between negative and positive obligations should be rejected in favour of an approach that, apart from doctrines for the open court principle and access to public property, integrates and treats s.2(b) claims the same way.

Renewing s.2(b)'s concepts of breach and justification

I now would like to set out a scheme for the renewal of s.2(b)'s guarantee of expressive freedom. The proposal that is sketched in brief here has been developed in two longer articles that analyze the deficiencies of the current methodology and explain in more detail how it should be modified.[37] The elements of the proposal are difficult to condense but consist of three key steps. The first, which was addressed in Part III on "Section 2(b) building blocks", analyzed the problems that are embedded in the current methodology. The second and third steps, undertaken here, begin the task of reconstructing s.2(b)'s doctrinal foundations.

The first point is that any proposal for s.2(b)'s renewal must be holistic, spanning and co-ordinating the concepts of breach and justification. Each side of the current analytical framework compromises expressive freedom, and both must be considered together.

At present, the s.2(b) methodology is skewed against expressive freedom. On the issue of breach, in most instances s.2(b) requires no more than a perfunctory analysis. Once a *prima facie* entitlement is established, the focus shifts to s.1 and the question of justifiable limits. Lost in the haste to reach s.1 is any consideration of the meaning of freedom, or of the nature, severity, and gravity of the violation. Expressive freedom is disadvantaged on arrival at s.1, because the failure to establish the substantive nature of the infringement under s.2(b) conditions the analysis of reasonable limits.

Under s.1, the problems for expressive freedom are compounded by an approach that uses s.2(b)'s abstract values to conduct a putatively contextual analysis and support a conclusion in most cases that "low value" expressive content deserves little or no constitutional protection. The contextual approach is transparently outcome oriented and invariably serves to diminish the status of expressive freedom under s.1.

In these ways, the current methodology belittles expressive freedom at both stages of the analysis and must be corrected holistically, under ss.2(b) and s.1.

<u>Section 2(b) and a "case to meet"</u>

In 1989, *Irwin Toy* granted s.2(b) a seemingly open-ended interpretation that required most limits to be justified under s.1. Yet expressive freedom did not fully benefit from this generosity,

[37] See Jamie Cameron, "Resetting the Foundations: Renewing Freedom of Expression under Section 2(b) of the Charter." Pp 120-151 in B. Bird and D. Ross, eds., *Forgotten Foundations of the Canadian Constitution*. LexisNexis Canada, 2022. The second paper, Jamie Cameron, "Renewing Freedom of Expression, Part 2: From the Contextual Approach to Proportionality Balancing" is forthcoming, 2023.

because *Irwin Toy*'s *prima facie* definition of expression made the question of breach too easy. Section 2(b)'s underlying values receded to the background, and there was no doctrinal incentive, under *Irwin Toy*, to discuss the infringement. A bare bones finding of breach proceeded to s.1, where the reasonable limits analysis was not troubled by concerns about the severity of the violation.

The point can be placed in perspective. In *Saskatchewan (Human Rights Commission) v. Whatcott (2013)* – the Court's landmark decision upholding a hate speech provision in human rights legislation – the analysis of breach required no more than one paragraph, but the s. 1 analysis took 88 paragraphs to discuss. To compare, the Court's decision in *Fraser v. Canada* (2020), which was 356 paragraphs long, was the opposite, focusing almost exclusively on s.15's equality guarantee. While the majority reasons spent 99 paragraphs on s.15 and only 12 on s.1, the two dissenting opinions did not address s.1 at all. Whatever else might be said about the imbalance between breach and justification in the equality jurisprudence, the Court cannot be accused of brushing lightly over the question of entitlement under s.15.

Addressing the imbalance between breach and justification in expressive freedom cases is a central tenet of my proposal. The two-step *Irwin Toy* test, comprising the attempt-to-convey meaning test and purpose-effects analysis, is incomplete. The first step defines expression but does not address the question of infringement, and the purpose-effects test failed in that role because it was invariably bypassed in the analysis.

The s.2(b) analysis of breach can be elevated and re-oriented in two relatively simple but critical steps. The first eliminates the purpose-effects step and the second introduces a standard of violation that completes the analysis of breach. In doing so, it borrows the *Amselem* standard from s.2(a). Under s.2(b), the modified *Amselem* test would require proof of an interference with expressive freedom that is more than trivial or insubstantial. Combining *Irwin Toy*'s definition of expression with *Amselem*'s standard of violation produces an approach to breach – the *Irwin Toy/Amselem* test – that addresses the scope of the entitlement *and* its infringement by the state.

Another element must be added to incorporate substantive content into the analysis of breach. In determining whether an infringement is more than trivial or insubstantial, courts must consider the magnitude and scale of the interference with expressive freedom, explaining how and in what ways the infringement impacts s.2(b).

A s.2(b) doctrine with the elements discussed here sets up a s.2(b) "case to meet" under s.1. The importance of this cannot be overstated. Courts must be explicit about the violation of expressive freedom to inform the analysis of justification and ensure that the infringement is given sufficient weight under s.1. Put another way, the s.2(b) analysis must present a case to meet under s.1 that goes beyond a conclusory finding of *prima facie* breach, because the rights violator can only be held accountable under s.1 if the violation is taken seriously under s.2(b).

These changes to s.2(b) are designed to affect the complexion of the s.1 analysis and compel courts to grapple with a conception of the entitlement that is informed by a rights-protecting perspective of expressive freedom.

Justifying "justifiable" limits

Since its landmark decision in *Irwin Toy*, the Court has found ways to alter the s.1 analysis downward and uphold limits on expressive freedom. *Irwin Toy*'s suggestion of a differential standard and higher/lower threshold under s.1, depending on whether the state was acting as a "singular antagonist", or making policy choices and protecting the vulnerable, was quickly eclipsed by the contextual approach. Introduced in *Edmonton Journal* and incorporated into the s.1 analysis in *Keegstra*, the contextual approach has been dominant for most of the s.2(b)'s history.

As explained on several occasions, this approach is flawed at several levels. In the first instance, it employs s.2(b)'s aspirational values to rate or gauge the content of expression. Where objectionable content is concerned there is no contest, and the contextual approach enables courts to discount expressive activity, deeming it low in value and for the most part unworthy of constitutional protection. Second, the stated purpose of this approach is to calibrate – and manipulate – the evidentiary threshold under s.1. Third, in doing so, the contextual approach problematically conflates the evidentiary question of harm with a subjective assessment of expressive content's value. Under this approach, outcomes turn on subjective perceptions of expressive content's value, and not on evidence of harm. For these reasons, the contextual approach is anathema to a principled conception of expressive freedom.

The contextual approach is not only counter productive to s.2(b)'s freedom purposes but unnecessary at this point in time. At the outset, it served two analytical purposes. First, to some extent a contextual approach under s.1 compensated for the poverty of the s.2(b) analysis, which was limited to a conclusion that the state had interfered with an attempt to convey meaning. The proposal sketched above has addressed that deficit by introducing a standard of breach that entails discussion of the infringement.

Second, and though it was flawed in doing so, the contextual approach undertook some of the functions that could be – and are now – served by a robust conception of proportionality balancing. At the time the contextual approach crystallized, the final step in the *Oakes* test was either overlooked or dealt with in passing. After remaining passive in the analysis for a long time, this step has more recently come into its own. Without yet realizing its potential, proportionality balancing creates a mechanism, within the structure of *Oakes*, to squarely confront and address the consequences of the infringement and test the benefits of the violation against those consequences.

My proposal for re-structuring the s.1 analysis rejects the contextual approach in favour of a renewed form of proportionality balancing that adequately factors the violation of expressive freedom into the calculus. Re-vitalizing this step requires recognition of its role in the *Oakes* test: to enable a right or freedom to prevail against an infringement that is otherwise justifiable. Because it only arises after a violation has passed the other steps of the *Oakes* test, the goal of proportionality balancing is rights protection: to determine whether the deleterious consequences for s.2(b) are outweighed by the salutary benefits of a limit that is justifiable.

This is where the renewed analysis of breach under the proposed *Irwin Toy/Amselem* test becomes significant, because it anchors the proportionality balancing. In specific terms, s.1's

consideration of the deleterious consequences of the infringement draws s.2(b)'s analysis of the breach directly into s.1. At this stage, the state must demonstrate that the benefits of infringing the guarantee justify the consequences for constitutional rights. The deleterious consequences of an infringement are front and centre in that analysis, and an infringement cannot prevail without a full and fair analysis of its impact on expressive freedom.

This, in brief, is the proposal. Much more should be said about how proportionality balancing can be structured to ensure that the analysis is evidence based and robust in nature. For now, a couple of examples in the jurisprudence suffice. For two exemplary models of proportionality balancing under s.2(b) – each of which addresses the deleterious consequences of the violation in detail – see Justice Abella's dissenting opinion in *R. v. Bryan* (2007) and the joint Abella-Cromwell opinion in *Alberta (Information & Privacy Commissioner) v. UFCW, Local 401* (2013). In each instance, the reasons model the way proportionality balancing engages s.2(b)'s values and tests the salutary benefits of the violation against a detailed analysis of its deleterious consequences for expressive freedom. These opinions illustrate how proportionality balancing can incorporate s.2(b)'s guarantee of freedom and the implications of an infringement into s.1.

As stated above, the purpose of this proposal is to generate debate and discussion about s.2(b) and what must be done now to address longstanding problems in the jurisprudence.

Conclusion

The courts play little or no role in resolving the enormous array of expressive freedom issues that arise daily, in Canada and around the world. Expressive freedom will always be a fragile entitlement because it calls on a democratic community to show "democratic humility", or forbearance from censorship in the face of opinions, ideas, and expressive activities that threaten conventions and expectations of conformity with societal values. Even so, the courts play an essential and formative role, not only in setting constitutional standards, but in conditioning the community's conception of expressive freedom and understanding of reasonable but justifiable limits.

It matters greatly what courts say about expressive freedom and how they decide s.2(b) cases. The starting point in any conception of the guarantee is the foundation, or building blocks, of expressive freedom. The methodology that evolved in the first forty years of the *Charter* places expressive freedom at ongoing risk because of fault lines in the foundations. The premise of this paper is that for s.2(b) to realize its promise, the jurisprudential foundations must be shifted and placed on new building blocks. If that can be done – if there is a judicial will to re-consider the bedrock of expressive freedom – s.2(b) could look quite different at its check-in on the next *Charter* milestone.