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# Freedom of Expression and Location: Are There Constitutional Dead Zones?

Brian Slattery\*

## I. INTRODUCTION

Do reporters have the right to conduct interviews in courthouse hallways? May political activists hand out leaflets in shopping centres? Are journalists entitled to attend disciplinary hearings in the chambers of the law society? Do advertisers have the right to place ads on public buses?

These questions have one thing in common: they all concern the exercise of freedom of expression in certain *locations* — courthouses, shopping centres, private offices, buses. But do all locations without exception benefit from the guarantee of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*,<sup>1</sup> or do some fall beyond its scope?

The Supreme Court first dealt with this issue in the *Commonwealth* case<sup>2</sup> in 1991, where it split into three distinct camps, each supporting a different approach. This split remained unresolved until the *Montréal* case<sup>3</sup> in 2005, where the Court endorsed the view that certain places — such as private government offices — are categorically excluded from section 2(b) because of their historical or actual function. However, the Court advanced this view only tentatively, in an explicit *obiter dictum* that played no actual role in the decision. So it is a matter of interest that

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<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter “Charter”]. Section 2(b) provides: “Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...”.

<sup>2</sup> *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.) [hereinafter “*Commonwealth*”].

<sup>3</sup> *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) [hereinafter “*Montréal*”].

in the recent *Vancouver* case,<sup>4</sup> the Supreme Court has thrown caution to the winds and formally endorsed the *Montréal* approach.

I believe the Court has taken a wrong turn on this point, one that leads down a blind alley. My task is to show why and to point a way out. I start with the *Irwin Toy* case,<sup>5</sup> which establishes the basic analytical framework for section 2(b). I then review the line of cases in which the Supreme Court specifically addresses the question of location, culminating in the *Vancouver* decision.<sup>6</sup> I conclude with a critique of these cases and a suggested solution.<sup>7</sup>

## II. THE BASIC FRAMEWORK

According to *Irwin Toy*,<sup>8</sup> when there is a claim that freedom of expression has been infringed, a court follows a three-stage process. At the first stage, the court inquires whether the claimant's activity qualifies as *expression* under section 2(b). If the answer is affirmative, the court moves to the second stage where it considers whether the impugned governmental act can actually be said to *infringe* the right. If an infringement is found to exist, the court moves to the third and final stage where it asks whether the infringement can be *justified* under section 1 of the Charter, which allows for reasonable limits on Charter rights.<sup>9</sup>

In dealing with the first stage, the Supreme Court distinguishes between the *content* and the *form* of the activity. In relation to *content*, the Court observes that freedom of expression was entrenched in the Constitution so as to ensure that everyone can manifest their thoughts, opinions and beliefs, however unpopular, distasteful or contrary to the mainstream. In a free, pluralistic and democratic society, we prize a diversity

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<sup>4</sup> *Greater Vancouver Transportation Authority v. Canadian Federation of Students – British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter "*Vancouver*"].

<sup>5</sup> *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"].

<sup>6</sup> *Supra*, note 4.

<sup>7</sup> For valuable background, see B. Jamie Cameron, "A Bumpy Landing: The Supreme Court of Canada and Access to Public Airports Under Section 2(b) of the *Charter*" (1992) 2 *Media & Communications L. Rev.* 91; Richard Moon, "Access to Public and Private Property Under Freedom of Expression" (1988) 20 *Ottawa L. Rev.* 339; and Richard Moon, "Freedom of Expression and Property Rights" (1988) 52 *Sask. L. Rev.* 243.

<sup>8</sup> *Supra*, note 5. The majority opinion was jointly authored by Dickson C.J.C. and Lamer and Wilson J.J. The following account draws on paras. 40-53.

<sup>9</sup> Section 1 provides: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

of ideas and opinions for their inherent value both to the community and to the individual. In the words of Rand J., freedom of expression is “little less vital to man’s mind and spirit than breathing is to his physical existence”.<sup>10</sup>

In light of this fact, the Court concludes that we cannot exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The Court notes that some human activity is purely physical and does not convey or attempt to convey a meaning. It might be difficult to characterize certain mundane tasks, like parking a car, as having expressive content. However, if the claimant can show that such an activity is performed to convey a meaning, it would fall within the protected sphere.

For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.<sup>11</sup>

This example is interesting because it relates to a location (a zone in a parking lot) that is closed to the general public and reserved specifically for the spouses of government employees. Significantly, the Court treats the application of section 2(b) here as unproblematic so long as the activity has expressive content.

The Court goes on to discuss the requisite *form* of expressive acts. Here again it adopts a generous approach, holding that expressive content can be conveyed through an infinite variety of forms, such as the written or spoken word, the arts, and even physical gestures or acts. The only activities excluded are those that take the form of violence; clearly murderers and rapists cannot invoke freedom of expression to justify their acts.

The Court now turns to the second stage of the inquiry, which deals with the question of *infringement*. It holds that a governmental act infringes freedom of expression if it restricts a claimant’s attempt to convey meaning in either purpose or effect, with either mode being sufficient.

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<sup>10</sup> *Switzman v. Elbling*, [1957] S.C.J. No. 13, [1957] S.C.R. 285, at 306 (S.C.C.).

<sup>11</sup> *Irwin Toy*, *supra*, note 5, at para. 41.

In relation to purpose, the Court says that a governmental act infringes section 2(b) if it singles out particular meanings that are not to be conveyed or restricts a form of expression in order to control the audience's access to the meaning being conveyed or the speaker's ability to convey it. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. So, for example, a rule against handing out pamphlets restricts a particular form of expression (pamphlets) and so infringes section 2(b). By contrast, an anti-littering law only aims to control the physical consequences of certain conduct regardless of its meaning and so does not infringe the section in purpose.

However, even if the purpose of the governmental act passes muster, the act may still have an invalid effect. Here, says the Court, claimants must show that their activity promotes at least one of the basic values underlying freedom of expression, namely: (1) seeking and attaining the truth; (2) participating in social and political decision-making; and (3) individual self-fulfillment and human flourishing. For example, where demonstrators contend that an anti-noise by-law has the effect of limiting their freedom of expression by preventing them from shouting slogans, they must prove that their activity attempts to convey a meaning that reflects one of these values.

It may be seen that the Court's infringement test can be readily satisfied in most cases. Even where the governmental act does not aim to restrict expression, claimants will normally be able to show it has that effect. Indeed it is not easy to imagine situations where the latter would not hold true — not, at least, without resorting to unusual examples, such as shouting for shouting's sake (but then, people usually shout for some purpose).

In summary, for an activity to qualify as "expressive" at the first stage, a claimant need only show that it attempts to convey a meaning in a non-violent way. For a governmental act to infringe the right at the second stage, it need only restrict it in purpose or effect. Since these hurdles are relatively low, in most cases the inquiry moves to the final stage, where the court considers whether the infringement may be justified under section 1. Here a court applies the test laid down in the *Oakes* case<sup>12</sup> and considers the full range of factors bearing on both the governmental act and the expressive activity, balancing one off against the other.

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<sup>12</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

One feature of this scheme has a special relevance for our inquiry — and we will briefly note it here, postponing full discussion until later. The first stage of the *Irwin Toy* analysis focuses entirely on the *expressive activity* to the exclusion of the law or governmental act that allegedly infringes it. That is, the question whether an activity falls within the scope of section 2(b) depends entirely on the character of the activity — its content and form — and not at all on the character of the impugned restrictive law. An activity that fails to gain the protection of section 2(b) — such as a violent assault — is excluded because of its inherent attributes. The character of the restrictive law does not affect the matter one way or the other. It is only at the second and third stages of the inquiry that the court turns its attention to the law or act allegedly infringing the right.

### III. THE QUESTION OF LOCATION: THREE VIEWS

At which stage in the *Irwin Toy* analysis does the question of location arise? The answer is not immediately clear; something may be said for each of the three stages.

The question arose in the *Commonwealth* case.<sup>13</sup> The claimants, who were officers of a fringe political group, undertook promotion and recruitment activities at Montréal International Airport.<sup>14</sup> The Airport was Crown property and governed by regulations issued under federal legislation. Armed with placards, leaflets and magazines, the claimants walked through the departure area of the airport terminal — an area open to the public. They approached passers-by, informing them about the goals of the group and soliciting members, but they did not attempt to hold meetings, make speeches or use loudspeakers. A police officer asked them to stop. When they objected, they were taken to the assistant manager of the airport, who told them that regulations prohibited any business, undertaking, advertising or solicitation in the airport without ministerial authorization.

The claimants brought an action seeking a declaration, *inter alia*, that the federal government had not respected their freedom of expression under section 2(b), arguing that the open areas of the airport constituted a

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<sup>13</sup> *Supra*, note 2.

<sup>14</sup> The following account of the facts draws on *Commonwealth*, *supra*, note 2, at paras. 26, 50-52, supplemented by *Committee for the Commonwealth of Canada v. Canada*, [1986] F.C.J. No. 1036, [1985] 2 F.C. 3, at paras. 1-4 (F.C.T.D.).

public forum where this freedom could be exercised. They were successful at trial and the Crown appealed. When the case reached the Supreme Court of Canada, the Court dismissed the appeal and upheld the claimants' right to use the public areas of the airport for expressive purposes, with all judges agreeing that freedom of expression had been infringed and that the infringement could not be justified under section 1. However, in reasoning to this conclusion, the Court split into three factions, headed respectively by Chief Justice Antonio Lamer, Justice Beverley McLachlin and Justice Claire L'Heureux-Dubé.<sup>15</sup> Each judge championed a different stage of the *Irwin Toy* analysis as the appropriate venue for discussing the issue of location: one arguing that it went to the question of section 2(b)'s *scope*, another that it concerned the section's *infringement*, and the third that it was a matter of *reasonable limits* under section 1. Their views merit detailed attention.

### 1. Location and Scope

In his opinion, Lamer C.J.C. argues that the question of expression on public property arises primarily at the first stage of the *Irwin Toy* analysis, where the court determines whether the expressive activity falls within the scope of section 2(b).<sup>16</sup> He observes that the freedom of an individual to communicate in a place owned by the government must necessarily be circumscribed by the interests of the government and the citizenry as a whole. The individual will only be free to communicate in a place owned by the state if the form of expression is compatible with the principal function or intended purpose of the place. The form of expression cannot have the effect of depriving citizens of the effective operation of government services and undertakings.

For example, says the Chief Justice, no one would suggest that an individual is free to shout a political message in the Library of Parliament. This form of expression is incompatible with the basic purpose of the place, which requires silence. When individuals communicate in a public place, they must consider the function of the place and adjust their means of communication accordingly. By contrast, wearing a T-shirt

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<sup>15</sup> Justice Sopinka concurs with Lamer C.J.C., and Cory J. also expresses agreement with this basic approach (at para. 212). Justice Gonthier agrees with the approach of McLachlin J. (at para. 210). Justice LaForest leaves the question open for future consideration, while tending to favour the approach of McLachlin J. (at paras. 45-46).

<sup>16</sup> The following account is based on *Commonwealth*, *supra*, note 2, at paras. 1-22.

emblazoned with a political slogan would likely be consistent with the library's purpose.

The Chief Justice observes that the fact that one's freedom of expression is intrinsically limited by the function of a public place is an application of the general rule that one's rights are circumscribed by the rights of others. It also accords with observations made in the *Irwin Toy* case, where the Supreme Court held that certain forms of expression — notably acts of violence — do not enjoy the protection of section 2(b).

If the expression takes a form that is inconsistent with the function of the place, it falls outside the sphere of section 2(b). To take another example, says the Chief Justice, if people picketed in the middle of a busy highway, this form of expression might well be incompatible with the principal function of the place, which is to provide for the smooth flow of traffic. In such a case, freedom of expression would not be restricted if a government representative obliged the picketers to express themselves elsewhere.

The Chief Justice concludes that it is only when claimants have proven that their form of expression is compatible with the function of the place that the requirements of section 2(b) will be satisfied and the analysis can proceed to section 1. While the state's main interest is to ensure the effective operation of its property, that is not its only concern; there is also, for instance, the objective of maintaining law and order, which might justify certain limitations on section 2(b). Thus, the chair of a municipal council would generally be justified in limiting the speaking time allotted to councillors so as to give everyone a chance to contribute. Such a concern, says Lamer C.J.C., comes under section 1 of the Charter, as do many others.

This last example highlights a difficulty with the Chief Justice's approach. It is not clear how to draw the line between matters that arise under section 2(b) and those that are deferred to section 1. If one municipal councillor insists on shouting in the council chamber while another one speaks for hours on end, it is not clear why the former matter arises at the first stage under section 2(b) (as the Library of Parliament example suggests), while the latter matter is left for section 1 (as the municipal council example indicates). Arguably, restrictions on both shouting and filibustering are equally suited for consideration under section 1.

Indeed, the Chief Justice's overall approach is somewhat surprising given his initial observations on the fundamental differences between the

Constitutions of the United States and Canada.<sup>17</sup> The American Bill of Rights, he observes, contains no clause similar to section 1 of the Charter, which gives governments the opportunity to justify limitations on constitutional rights. American doctrine on the question of expressive location results from an attempt to strike a balance between individual and governmental interests in the absence of a provision equivalent to section 1. Canadian courts, he concludes, should disregard the “nominalistic” approach taken by American courts in this area and instead balance the underlying interests directly. It is curious, then, that the Chief Justice assigns such a limited role to section 1 in carrying out this balancing.

## 2. Location and Infringement

By contrast, McLachlin J. argues that the question of location arises, not at the first stage of the *Irwin Toy* process, but rather at the *second stage* where a court decides if the governmental act actually infringes the claimant’s freedom of expression.<sup>18</sup> She begins by observing that freedom of expression does not historically imply freedom to express oneself wherever one pleases. In other words, freedom of expression does not automatically comport freedom of forum. For example, it has not historically conferred a right to use another’s private property for expressive purposes. Proprietors have the right to determine who uses their property and for what purposes. Moreover, the Charter does not extend to private actions. So it is clear, she concludes, that section 2(b) does not give the right to use private property as a forum for expression.

However, the matter is less clear when public property is involved. Since the Charter applies to governmental action, the government must make its property available as a forum for public expression to the extent required by section 2(b). How far, then, should the section be read as guaranteeing access to government property for use as a forum for public expression?

When the right of free expression is viewed in its historical and philosophical context, says McLachlin J., several matters become clear. First, the government *qua* proprietor does not have the absolute right to prohibit and regulate expression on all property it owns. To the contrary, there is a venerable tradition that some types of state property — such as

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<sup>17</sup> *Id.*, at paras. 7-9.

<sup>18</sup> This account draws on *id.*, at paras. 214-52.

streets and parks — are proper forums for public expression. Were this not true, little would remain of the right.

On the other hand, it is clear that section 2(b) does not comprehend the right to use all government property as an expressive forum, regardless of its function:

There is no historical precedent, whether in England, the United States or this country, for extending freedom of expression to purely private areas merely because they happen to be on government-owned property. Freedom of expression has not traditionally been recognized to apply to such places or means of communication as internal government offices, air traffic control towers, publicly-owned broadcasting facilities, prison cells and judges' private chambers. To say that the guarantee of free speech extends to such arenas is to surpass anything the framers of the Charter could have intended.<sup>19</sup>

This conclusion, says McLachlin J., is supported by pragmatic considerations. The state should not be obliged to defend in the courts restrictions on expression which do not raise the values and interests traditionally associated with the free speech guarantee. Any other view threatens to trivialize the Charter guarantee. A threshold test is required to screen out cases that clearly fall beyond the purview of section 2(b), even before reaching section 1. The threshold should not be so high as to exclude persons with legitimate claims. Nevertheless, a claimant should have to make a *prima facie* case that expression on the public property in question engages traditional free speech concerns and hence falls within the ambit of section 2(b).

Justice McLachlin concludes that the protection afforded by section 2(b) lies somewhere between the extremes of absolute government control over expression on state-owned property on the one hand and protection for all expression on state-owned property on the other. She acknowledges that the “compatibility with function” test proposed by Lamer C.J.C. represents such an intermediate approach, but she questions whether it is a useful and appropriate tool for screening out claims. Doubtless, the compatibility of the property's purpose with free expression is a factor in determining whether a governmental restriction is constitutional under section 1. However, it is doubtful whether it is the only factor. It is also unclear if it properly arises at the initial stage under section 2(b). Moreover, argues McLachlin J., the concept of function presents difficulties. Does it mean normal function? Minimal or essential

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<sup>19</sup> *Id.*, at para. 227.

function? Optimal function? At what point does expression become incompatible with function? Presumably, it is only severe impairments of function that would render section 2(b) inapplicable, while limitations relating to optimal (as opposed to minimal) function would fall to be justified under section 1. Yet drawing this line may prove difficult in practice.

In short, argues McLachlin J., the concept of function proves to be a relative one. In some cases, the right of free expression might be considered important enough to interfere to some extent with the function of government property. In others, the impairment of function will be so great in comparison with the expressive interest as to justify exclusion or limitation of the expression. The concept of function thus involves a balancing of interests which arguably serves better as part of the section 1 test than as a threshold for screening out claims which raise no *prima facie* expressive interest.

So, concludes McLachlin J., the test under section 2(b) should be primarily *definitional* rather than one of *balancing*. Once it has been determined that expression at the location in question falls within the scope of section 2(b), the analysis moves to section 1 where the court weighs and balances the conflicting interests — the individual’s interest in using the forum for expressive purposes against the state’s interest in limiting expression on the particular property. The problem, then, is one of “defining what types of government property should *prima facie* be regarded as constitutionally available for forums for public expression”.<sup>20</sup>

At this point, the argument takes a surprising turn. Given McLachlin J.’s characterization of the problem, one would expect her to proceed by characterizing the kinds of government property that qualify for constitutional protection. Instead, she shifts the focus from *government property* as such to *governmental restrictions* on expression in certain locations. She refers to the *Irwin Toy* decision, which, as seen earlier, distinguishes between two classes of restrictions: (1) those that have the *purpose* of preventing certain meanings from being conveyed; and (2) those that are not aimed at content but have the *effect* of restricting expression. She observes that limitations on forums for public expression may fall into either of these classes. For example, a ban on anti-war messages on Parliament Hill might be viewed as essentially content-based, because it identifies certain messages that may not be conveyed in that location. On the other hand, many restrictions on forums for public expression are

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<sup>20</sup> *Id.*, at para. 240.

content-neutral. Their purpose is not to single out particular meanings but rather to avoid the harmful consequences of the conduct in question, such as by preventing interference with the proper functioning of government-owned property.

This analysis, argues McLachlin J., supports a two-part test, which depends on the class into which the restriction falls. If the government's *purpose* is to restrict the content of expression through limiting the forums where it can be made, then this restriction is usually impermissible and section 2(b) applies. On the other hand, if the restriction is content-neutral, the claimant must prove that it has the *effect* of restricting freedom of expression. In this case, *Irwin Toy* requires the claimants to show that their expressive activity in the location promotes one of the purposes underlying section 2(b), namely: (1) the seeking and obtaining of truth; (2) participation in social and political decision-making; and (3) the encouragement of diversity in forms of individual self-fulfilment and human flourishing. Only if such a purpose can be established is the claimant entitled to the protection of section 2(b).

The effect, says McLachlin J., is to screen out many potential claims to the use of government property as a forum for public expression. While the precise boundaries of these three purposes may be a little uncertain, the central elements of the test are relatively clear and capable of ready application.

It would be difficult to contend that these purposes are served by “public” expression in the sanctum of the Prime Minister's office, an airport control tower, a prison cell or a judge's private chambers, to return to examples where it seems self-evident that the guarantee of free expression has no place. These are not places of public debate aimed at promoting either the truth or a better understanding of social and political issues. Nor is expression in these places related to the open and welcoming environment essential to maximization of individual fulfillment and human flourishing.

It is equally clear that the purposes of the guarantee of free expression are served by permitting expression in other forums and that s. 2(b) should apply to them. To borrow the language of the American “public forum” doctrine, the use of places which have by tradition or designation been dedicated to public expression for purposes of discussing political or social or artistic issues would clearly seem to be linked to the values underlying the guarantee of free speech.<sup>21</sup>

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<sup>21</sup> *Id.*, at paras. 249-250.

What is puzzling about this analysis is its contention that one may identify the classes of government property that merit section 2(b) protection, not by analyzing the characteristics of such properties, but by scrutinizing governmental restrictions on their use. For under the latter approach it seems reasonably clear that expression on a given property will sometimes qualify for protection and sometimes not, depending on the purpose and effect of the particular restrictive measure. This seems true even of places that McLachlin J. identifies as obviously beyond the scope of section 2(b). For example, where a prison policy prohibits inmates from writing letters complaining of ill-treatment, the policy singles out certain meanings that are not to be conveyed and hence has the *purpose* of limiting freedom of expression. So section 2(b) would presumably apply to prison cells in this context, notwithstanding McLachlin J.'s claim that a prison cell is a place "where it seems self-evident that the guarantee of free expression has no place". If the test is intended to exclude certain governmental locations on a "definitional" basis, it does not appear to succeed.

In any case, it is doubtful if the test serves an effective screening function. Even in cases where governmental limits on the use of public property do not have the *purpose* of restricting expression, in most cases they surely have the *effect* of doing so. Justice McLachlin's argument on this point is not very convincing. She treats it as self-evident, for example, that public expression in the Prime Minister's office would not serve any of the underlying purposes of section 2(b). But this seems dubious. What better example of political participation than a private chat with the Prime Minister? The reason why a claim of expressive access to the Prime Minister's office is objectionable does not lie in its *purposes* (which may well serve the causes of truth and political participation) but rather in its impact on the *functioning* of that office, which requires a high degree of privacy. This consideration suggests the need for a balancing process akin to that proposed by Lamer C.J.C. — a process which McLachlin J. has cogently argued belongs under section 1 rather than section 2(b).

### 3. Location and Reasonable Limits

This point brings us to the approach espoused by L'Heureux-Dubé J.<sup>22</sup> She argues that expressive activities cannot automatically be

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<sup>22</sup> The following account draws on *id.*, at paras. 110-148.

excluded from section 2(b) simply because they take place in locations not traditionally associated with public expression. Limits on expression in such locations may well be reasonable, but the government has the burden of demonstrating this under section 1. Even if a group of demonstrators were to choose the chambers of the Supreme Court of Canada as a forum for expression, governmental restrictions on their activities would require justification under section 1 — though L’Heureux-Dubé J. hastens to add that presumably such justification could be readily furnished.

When calibrating the section 1 barometer, the political quality of the stifled expression must be weighed against the governmental interests. Unlike the American system, in which distinct tests are required for various “types” of expression, section 1 is flexible enough to accommodate all such types, with the result depending on the governmental objectives and the means selected to advance them. This enables the court to take a contextual rather than a categorical approach, focusing not only on the scope of the right but also on the setting in which the expressive claim is made.

In the case at hand, observes L’Heureux-Dubé J., the government relies heavily on its property interest in the airport, arguing that it has the same rights as any other owner with respect to its property — rights that are exclusive. The only qualification arises from the fact that the government often dedicates its property for use by the public, which consequently has the right to use it for the purposes intended by government.

Justice L’Heureux-Dubé agrees that the section 1 analysis must be sensitive to the unique relationship between government and its property. However, if members of the public had no right whatsoever to distribute leaflets or engage in other expressive activity on government-owned property except with permission, they would have little opportunity to exercise their rights. Only those with enough wealth to own land or mass media would be able to engage in free expression, which would subvert the basic purposes of section 2(b).

On the other hand, says L’Heureux-Dubé J., the Charter’s framers did not intend such places as internal government offices, air traffic control towers, prison cells and judges’ chambers to be made available for leafletting or demonstrations. Evidently freedom of expression under section 2(b) does not provide a right of access to all property, whether public or private. Such a wholesale transformation of government property is not necessary to fulfil the Charter’s purposes or to avoid a stifling

of free expression. The logical compromise is to recognize that some, but not all, government-owned property is constitutionally open to the public for expressive activity. Restrictions on expression in certain places will obviously be harder to defend than in others. A number of criteria help determine which locations should be considered public, including:

- (1) the traditional openness of such property for expressive activity;
- (2) whether the public is ordinarily admitted to the property as of right;
- (3) the compatibility of the property's purpose with such expressive activities;
- (4) how far the property's availability for expressive activity will help achieve the purposes of section 2(b);
- (5) the symbolic significance of the property for the message being communicated; and
- (6) the availability of other public arenas in the vicinity for expressive activities.<sup>23</sup>

To sum up, L'Heureux-Dubé J.'s opinion presents a cogent argument for the view that section 1 is the most appropriate forum for dealing with the issue of location. The view is attractive because it respects the internal architecture of the Charter and allows for a contextual rather than categorical approach.<sup>24</sup> Unfortunately, however, the opinion's major point is sometimes obscured by language that could be taken to suggest that restrictions on expression in certain government-owned locations — internal government offices, air traffic control towers and the like — may be justified across the board. Yet it is precisely the advantage of section 1 that it allows for a more fine-grained approach — one that acknowledges that, no matter what the location, certain restrictions on expression will not be justifiable, even if many others will.

There is one significant objection to L'Heureux-Dubé J.'s approach — voiced especially by McLachlin J. — which should be noted here. According to the *Oakes* case,<sup>25</sup> once a Charter inquiry moves to section 1, the burden of proof always shifts from the claimant to the government. It seems counterintuitive, argues McLachlin J., that the government should have to justify in every case limitations on access to such places

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<sup>23</sup> This summary is based on *id.*, at para. 147.

<sup>24</sup> See Cameron, *supra*, note 7, at 95, 106-108.

<sup>25</sup> *Supra*, note 12.

as private governmental offices, judges' chambers and security zones in airports. The problem is indeed a real one. However, it may arise less from L'Heureux-Dubé J.'s approach than from an overly rigid application of the *Oakes* formula.

#### IV. THE AFTERMATH OF *COMMONWEALTH*

For some years after the *Commonwealth* decision,<sup>26</sup> the Supreme Court avoided any attempt to resolve the division of opinion in the case. When the issue of location arose in the *Ramsden* case<sup>27</sup> in 1993, the Court held that, on the facts, the result was the same no matter which approach was taken. On any view, a municipal by-law banning posters on public property infringed freedom of expression in section 2(b) and could not be justified under section 1.

Thus the matter stood for more than a decade. However, the issue could not be skirted indefinitely, and in 2005 it came up again in the *Montréal* case.<sup>28</sup> The claimant was a strip club operating in a commercial zone of downtown Montreal. To attract customers, the club set up a loud-speaker in its main entrance, which amplified the music and commentary from the show going on inside. One night, a police officer on patrol heard the music from a nearby intersection and charged the club with violating a municipal by-law that prohibited noise produced by sound equipment "heard from the outside". In court, the club raised the defence of freedom of expression under section 2(b) of the Charter.

The trial judge rejected the argument and convicted the club. The case went on appeal, eventually reaching the Supreme Court of Canada. In a judgment written by Chief Justice Beverley McLachlin and Justice Marie Deschamps, the Court ruled by a strong majority that the by-law infringed the claimant's freedom of expression but that it could be justified as a reasonable limit under section 1.<sup>29</sup> As for the question of the by-law's application to the location in question — the public streets of Montreal — the Court concluded that on any of the three approaches proposed in the *Commonwealth* case, the emission of noise onto the public street was protected by section 2(b). So it was unnecessary to

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<sup>26</sup> *Commonwealth*, *supra*, note 2.

<sup>27</sup> *Ramsden v. Peterborough (City)*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.).

<sup>28</sup> *Montréal*, *supra*, note 3.

<sup>29</sup> Justice Ian Binnie dissented.

determine which approach should be adopted.<sup>30</sup> However, in an effort to clarify the matter, the Court went on to express the following views.

The application of section 2(b) is not attracted by the mere fact of government ownership of the place. There has to be a further enquiry to determine if the place represents the type of public property which merits the section's protection. Expressive activity should be excluded from the scope of section 2(b) only if its method or location clearly undermines the values that support the guarantee. The Court drew a parallel with violent modes of expression, which are not protected because they prevent dialogue, block the self-fulfilment of the victim and impede the search for truth.

Following this line of thought, the Court proposes the following test:

The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

- (a) the historical or actual function of the place; and
- (b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.<sup>31</sup>

To some extent, as the Court observes, this test represents a fusion of several views expressed in the *Commonwealth* case. Notably, it picks up McLachlin J.'s reference to the basic values underpinning section 2(b) and attempts to incorporate these into the test. However in other respects the test seems more indebted to the approach of Lamer C.J.C. Thus it adopts his view that the question of location arises at the first stage of the analytical process, where the court considers the scope of section 2(b), rather than at the subsequent "infringement" stage, as McLachlin J. thought, or at the final "justification" stage, as L'Heureux-Dubé J. argued. It also reflects the Chief Justice's emphasis on the function of the place, while making it clear that both historical and actual function are relevant.

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<sup>30</sup> *Montréal*, *supra*, note 3, at paras. 60-70.

<sup>31</sup> *Id.*, at para. 74.

Nevertheless, the test departs from Lamer C.J.C.'s approach in one fundamental way. It tacitly ignores his call for a "balancing" between the form of the expression and the function of the place, and so doing, rejects his view that no place is completely bereft of section 2(b) protection. Rather it adopts a broadly "categorical" approach, one that focuses on the character of the place and its general suitability for expression. In effect, the test aims at determining whether the place *itself* merits section 2(b) protection, regardless of the character of the expressive activity carried on there.

In the *Montréal* case, the Court offers its viewpoint as an explicit *obiter dictum*. Nevertheless, *dicta* that fall from on high have a way of slipping into the mainstream of jurisprudence. Such is the case here. When the question of location arose in the recent *Vancouver* decision,<sup>32</sup> the majority of the Court simply reproduced the *Montréal* test and applied it. The claimants, a student group and a teachers' federation, attempted to purchase advertising space on the sides of buses operated by public transit authorities in British Columbia.<sup>33</sup> The student group sought to post ads encouraging more young people to vote in a forthcoming provincial election. For its part, the teachers' federation wished to voice concerns about changes in the public education system. For years, the transit authorities had earned revenue by posting advertisements on their buses. However, they refused the claimants' ads, invoking written policies that forbade ads expressing political viewpoints. The claimants went to court, arguing that the policies violated their freedom of expression.

The trial court dismissed the action, concluding that section 2(b) was not infringed. The claimants appealed and the case found its way to the Supreme Court of Canada, which ruled by a strong majority that the advertising policies of the transit authorities infringed the claimants' freedom of expression and could not be justified under section 1.

Speaking for the majority, Justice Marie Deschamps explains that the Court has long taken a generous and purposive approach to the interpretation of freedom of expression.<sup>34</sup> An activity that conveys or attempts to convey meaning will *prima facie* be protected by section 2(b). Furthermore, in such cases as *Commonwealth*, *Ramsden* and *Montréal*, the Court recognized that the section protects the right to express oneself in certain public places. However, observes Deschamps J., section 2(b) is

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<sup>32</sup> *Supra*, note 4.

<sup>33</sup> This summary is based on *id.*, at paras. 2-7.

<sup>34</sup> The following account draws on *id.*, at paras. 27-28, 36-47.

not without limits, and governments will not be required to justify every restriction on expression under section 1. The method or location of the expressive activity may exclude it from protection. Just as violent expression falls outside the scope of section 2(b), individuals do not have a constitutional right to express themselves on all government property. One basic issue, then, is whether the claimants' proposed expressive activity should be denied section 2(b) protection on the basis of its location — the sides of public buses.

In dealing with this issue, Deschamps J. adopts the approach taken in the *Montréal* case and poses the following questions. First, do the claimants' proposed advertisements have expressive content that brings them within the *prima facie* scope of section 2(b)? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by section 2(b), do the transit authorities' policies infringe the guarantee? Finally, if they do, can they be justified under section 1?

For Deschamps J., the first question is not problematic, because the proposed ads clearly have expressive content. The third question is also uncontroversial, because the transit policies have the explicit purpose of restricting the content of ads, specifically targeting political speech. However, the second question, which concerns location, requires closer attention.

Here Deschamps J. reproduces the *Montréal* test, focusing on two main factors:

- (1) the historical or actual function of the place; and
- (2) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

With respect to the first factor, Deschamps J. observes that the trial judge found there was no history of political advertising on buses, and that he considered this fact pivotal in ruling against the claimants. However, comments Deschamps J., content is not relevant to the determination of the function of a place. This conclusion, we may note, flows from the "definitional" character of the *Montréal* test, whereby the character of the particular expressive activity (to wit, political advertising) does not affect the question whether the place receives protection.

Where the historical or current function of a place includes public expression, continues Deschamps J., this is a good indication that expression in that place is constitutionally protected. Thus, a podium erected for

public use in a park would necessarily have a function that does not conflict with the purposes of section 2(b) but rather enhances them. However, she notes, most cases are not this straightforward, because they concern places whose primary function is not expression. In such instances it is useful to look at past or present practice, which can help identify any incidental functions that may have developed.

Justice Deschamps applies this approach in the following passage:

While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use — *both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.*<sup>35</sup>

We may note that, at the end of this passage, Deschamps J. strays into a form of “balancing test”, insofar as she considers the impact of the particular expressive activity on the function of the location. As seen earlier, the *Montréal* approach apparently frowns on such an exercise, focusing rather on the characteristics of the place as a venue for expression.

Be that as it may, Deschamps J. now turns to the second factor mentioned in *Montréal*, namely, whether other aspects of the place suggest that expression within it would undermine the values underlying section 2(b). She draws attention to the transit authority’s argument that the buses should be characterized as *private* publicly owned property, to which the public cannot reasonably expect access. However, she holds that this position is untenable. The very fact that members of the public have access to advertising space on buses indicates that they would expect constitutional protection of their expression in that space. Moreover, a bus is by nature a public, not a private, space. Unlike activities that take place in certain government buildings or offices, those that occur on public buses do not require privacy and limited access. Buses operate on city streets and form an integral part of the public transportation system. People using the streets are exposed to messages on the sides of buses just as they are to messages on utility poles and other public spaces. Like a city street, a bus is a public place where individuals can interact with one another and their surroundings. Thus, rather than undermining the purposes

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<sup>35</sup> *Id.*, at para. 42 (emphasis added).

of section 2(b), expression on the sides of buses could enhance those purposes by furthering democratic discourse and perhaps even truth-finding and self-fulfilment.

In sum, concludes Deschamps J., this is not a case in which the Court must decide whether to protect access to a space where the government has never before recognized a right to such access. Rather, the question is whether the side of a bus, as a public place where expressive activity is already occurring, is a location where constitutional protection for free expression would be expected. There is no aspect of the location that suggests that expression within it would undermine the values underlying free expression — to the contrary. It follows that the side of a bus is a location where expressive activity is protected by section 2(b).

One might be forgiven, perhaps, for thinking this is much ado about nothing. The blandness of the Court's conclusion seems disproportionate to the lengthy and prolix analysis. And indeed this is a major problem with the *Montréal* test. In the end, it is hard to see how *location alone* can ever serve to exclude the application of section 2(b) without reference to the character of the expressive activity and the laws restricting it. Let me explain.

## V. ANALYSIS

Three basic approaches to the question of location may be identified. The first focuses simply on the characteristics of the place in question — inquiring into such matters as its historical and current functions and its general suitability for expressive activities. This approach, which is exemplified by the *Montréal* decision, holds that the inquiry should be carried out at the first stage of the *Irwin Toy* process, which concerns itself with the scope of section 2(b).

The second approach broadens the canvas somewhat and considers both the character of the place and also that of the expressive activity, balancing one factor against the other. This approach, represented by Lamer C.J.C.'s opinion in the *Commonwealth* case, also designates the first stage of the analytical process as the appropriate venue.

The third approach broadens the canvas still further and considers not only the place and the expressive activity but also the restrictive law, exploring the interaction among these three factors. This approach, which is exemplified in different ways by both L'Heureux-Dubé J. and McLachlin

J. in the *Commonwealth* case, holds that the matter cannot be settled at the initial stage but only at a later stage in the analytical process.

I will argue that neither the first nor the second approach stands up to critical scrutiny and that the third approach is the only truly viable one. The argument consists of three propositions. For clarity, I set them out here at the start:

- (1) There is no place — public or private — that is categorically excluded from the protective scope of section 2(b); the contrary view confuses freedom of expression with the right of expressive access.
- (2) The question of location is inextricably linked to the character of the restrictive law, which forms an essential part of the inquiry.
- (3) The issue of location cannot be resolved at the initial stage of the *Irwin Toy* analysis, but only at a later stage where the Court considers the impugned law — preferably under section 1.

I now explore these points in greater detail.

### **1. No Places Are Excluded from Section 2(b)**

The guarantee of freedom of expression in section 2(b) extends to all locations within the territorial reach of the Charter. There is no place — public or private — that is excluded categorically from the protective scope of the section.

Consider the places that have been cited as paradigmatic examples of locations not covered by section 2(b). These include privately owned property, internal government offices, air-traffic control towers, state-owned broadcasting facilities, prison cells, judges' chambers, the Cabinet Room and the Prime Minister's office.<sup>36</sup>

Of course, it is obvious that individuals do not have the right of *free access* to such places in order to express themselves. An aspiring Walpole is not entitled to camp in the Prime Minister's office in order to participate in high-level political discussions. And a budding Rumpole has no right to barge into a judge's chambers to bend her ear about a case. But it does not follow that these places are categorically excluded from the scope of section 2(b). It only shows that certain laws — common law and statutory — that restrict access to such places are justified.

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<sup>36</sup> *Commonwealth*, *supra*, note 2, at paras. 218, 227, 249, *per* McLachlin J.; *Montréal*, *supra*, note 3, at paras. 64, 76, *per* McLachlin C.J.C. and Deschamps J.

A few examples may help clarify the point. No one can doubt the wisdom of regulations that limit public access to air-traffic control towers. But this does not mean that these towers fall into an expressive “dead zone” beyond section 2(b)’s reach. Think of a law that requires air-traffic controllers to communicate exclusively in English when on the job. There seems little doubt that such a law would infringe the controllers’ freedom of expression and require justification under section 1. As the Supreme Court held in the *Ford* case,<sup>37</sup> language is so intimately related to the form and content of expression that there cannot be true freedom of expression if one is prohibited from using the language of one’s choice. The fact that the law relates specifically to air-traffic control towers, which are off-limits to the general public, does not insulate it from scrutiny under section 2(b). The same would hold true of laws governing the language employed by broadcasters in state-run television facilities, to say nothing of the language used in judges’ chambers.

Take another example. We all know that many governmental activities require privacy and that the general public cannot reasonably claim unrestricted access to essentially “private” governmental offices for expressive purposes. However, it does not follow that such offices fall outside section 2(b)’s scope. Consider the following scenario. A public servant gives a reporter a confidential government document relating to the torture of Afghan detainees. She does this behind closed doors, in a government office not open to the general public. She is prosecuted for wrongful communication of a secret document contrary to the *Security of Information Act*.<sup>38</sup> In her defence, she claims the protection of section 2(b). It seems clear that her case passes the threshold for Charter protection, even though the expressive act took place in a private governmental office. The result would be no different if it occurred in the public servant’s own living room or for that matter a prison cell. The real question is whether the restrictive law is reasonable and justified — a matter eminently suited for consideration under section 1.

There is no need, perhaps, to multiply examples. But a final one may cap the point. High-school classrooms are not locations to which the general public can claim free access for expressive purposes. Considerations of security, privacy and order dictate the need for strict restrictions on who may enter such places. This does not mean, however, that section

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<sup>37</sup> *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712, at para. 40 (S.C.C.).

<sup>38</sup> R.S.C. 1985, c. O-5, s. 4(1).

2(b) fails to protect expression in classrooms, which indeed are nurseries of free inquiry. The point is illustrated by the *Keegstra* case,<sup>39</sup> where a high-school teacher was charged with the criminal offence of wilful promotion of hatred<sup>40</sup> for communicating anti-Semitic statements to his students in the course of his classes. The teacher argued that the *Criminal Code* provision unjustifiably infringed his freedom of expression under the Charter. The Supreme Court held unanimously that the teacher was entitled to invoke the protection of section 2(b), but went on to rule by a majority that the *Criminal Code* provision represented a reasonable limit under section 1. The fact that the teacher's expressive activities took place in a school classroom — a location closed to the general public — was tacitly regarded as posing no obstacle to the application of section 2(b).

As these examples show, the *Montréal* case is wrong to suggest that a location may fall outside the scope of section 2(b) simply because of its inherent characteristics. There are no expressive dead zones. Even quintessentially private places stand to benefit in certain contexts from the guarantee of freedom of expression. It does not, of course, follow that section 2(b) overturns all laws restricting *expressive access* to such places. That is a different matter — one properly addressed under section 1.

## 2. Location Is Linked to the Restrictive Law

The question of location is relevant to freedom of expression only where a restrictive law makes it so. As such, location cannot be considered in isolation from the law that renders it significant.

Consider this example. A “sit-in” occurs in the principal's office of an Ontario public school. One of the protesters, Amanda, is charged with trespass contrary to section 2(1) of the *Trespass to Property Act*.<sup>41</sup> Another protester, Bakari, is charged with the criminal offence of defamatory libel<sup>42</sup> for statements written on a placard he is carrying. Both protesters claim the protection of section 2(b). The location of the expressive activity is legally significant in Amanda's case, because the offence of trespass is linked essentially to the place where the expressive

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<sup>39</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter “*Keegstra*”].

<sup>40</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 319(2).

<sup>41</sup> R.S.O. 1990, c. T.21. Under s. 1(2), the Act applies to school sites.

<sup>42</sup> *Criminal Code*, R.S.C. 1985, c. C-46. For discussion, see *R. v. Lucas*, [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.).

activity occurs. Thus, the Crown will likely argue that Amanda's freedom of expression does not give her the right to enter the principal's office to voice her views. But location does not arise as an issue in Bakari's case, because the *Criminal Code* provision under which he is charged prohibits the publication of a libel generally – not just in certain places.<sup>43</sup> Thus, the question whether Bakari has the right to be in the office is irrelevant to the argument, which focuses on the elements of the impugned law. In sum, the issue of location is a live one in Amanda's case but not in Bakari's. The difference stems from the laws under which they are charged.

This point is overlooked in both the “definitional” approach taken in *Montréal* and the “balancing” approach of Lamer C.J.C. in *Commonwealth*. Both maintain that the question of location may be disposed of at the first stage of the *Irwin Toy* analysis, with no reference to the impugned law. Consider, for example, this passage from the Chief Justice's opinion in *Commonwealth*:

In my view, if the expression takes a form that contravenes or is inconsistent with the function of the place where the attempt to communicate is made, such a form of expression must be considered to fall outside the sphere of s. 2(b). For example, if a person tried to picket in the middle of a busy highway or to set up barricades on a bridge, it might well be concluded that such a form of expression in such a place is incompatible with the principal function of the place, which is to provide for the smooth flow of automobile traffic. In such a case, it could not be concluded that freedom of expression had been restricted if a government representative obliged the picketer to express himself elsewhere.<sup>44</sup>

What is invisible here is *the law that actually governs the situation*. In reading this passage, of course, we silently supply the statutory and common law rules that restrict the ability of individuals to obstruct highways and bridges. Indeed Lamer C.J.C. tacitly refers to such laws in the final sentence, where he speaks of a government official obliging picketers to remove themselves. But the powers of officials flow entirely from the law — which the Chief Justice fails to specify. Without considering the scope and tenor of the restrictive law, how can we determine whether the picketer's claim succeeds or fails? No doubt, certain laws

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<sup>43</sup> This might not be the case were Bakari charged under s. 299(a), which requires that the libel be exhibited “in public”. However, the charge is laid under s. 299(b), which only requires that the libel be caused “to be read or seen”.

<sup>44</sup> *Commonwealth*, *supra*, note 2, at para. 21.

that prevent individuals from engaging in expressive activities on highways represent reasonable limits on freedom of expression. But it does not follow that such laws are immune to constitutional scrutiny simply because of the location and character of the expressive conduct. The question of location is inextricably linked to the nature of the law in question — a matter best assessed under section 1.

The point is reinforced by the Library of Parliament example discussed in Lamer C.J.C.'s judgment. The Chief Justice speaks there as if the question may be settled simply by determining whether the form of the expressive activity is compatible with the principal function of the library — shouting a political slogan, he intimates, is not compatible, while wearing a T-shirt with a slogan may well be. But the matter cannot be resolved so simply. We need to know something about the law that actually governs the case — the rules and regulations of the library, as underpinned by the law of property.

Suppose a teenager on a school tour is ejected from the Library of Parliament for wearing a skimpy muscle shirt with the slogan “Politicians suck”. He goes to court claiming that his freedom of expression has been violated. The government argues that the case falls outside the scope of section 2(b) because the Library of Parliament is not a location to which the general public has a general right of access. Under Lamer C.J.C.'s approach, the court should decide the question by asking whether the teenager's conduct is compatible with the principal function of the place. But we cannot know which aspect of the claimant's conduct is relevant without knowing the salient rule.

Imagine two different rules, each serving as a possible basis for the teenager's expulsion:

1. “Threatening, abusive, discriminatory or harassing language or conduct of any kind is not allowed.”
2. “Members of the public must wear shirts and shoes and other appropriate attire.”<sup>45</sup>

The constitutional argument takes a different form depending on the rule. With the first rule, under Lamer C.J.C.'s test, the question is whether “abusive” language — the crude slogan — is compatible with the function of the library. In the second case, the question is whether the wearing of “inappropriate” attire — the skimpy muscle shirt — is

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<sup>45</sup> Both rules are found in the Rules of Conduct of the Toronto Public Library, reproduced on the website, online: <[http://www.torontopubliclibrary.ca/abo\\_pol\\_rules\\_of\\_conduct.jsp](http://www.torontopubliclibrary.ca/abo_pol_rules_of_conduct.jsp)>.

compatible. We cannot know which question is correct unless we know which rule is being applied. The test can only be carried out by tacitly “smuggling” the law into the inquiry.

In short, the restrictive law that gives rise to a claim under section 2(b) is an essential part of the inquiry when the question of location is raised. Any approach that purports to resolve the matter without taking the law into account seems misguided. This holds true as much for the *Montréal* approach as it does for that of Lamer C.J.C.; neither approach permits reference to the impugned law in dealing with issues of location.

It could be argued that, in reality, these two approaches are mainly concerned with *rights of expressive access* rather than freedom of expression more generally. That is, they are directed at cases where a person seeks to use section 2(b) to gain entry for expressive purposes to a place to which, under the general law, the public has limited or no right of access. This focus, it is argued, explains the character of the tests advanced and goes a long way to making sense of them. So long as the tests are confined to this context they may serve a useful purpose.

There can be little doubt that certain judges had the right of expressive access primarily in mind when they crafted their approaches to the question of location. But even if we limit their remarks to this context, it does not extricate them from the difficulties already noted. The reason is simple. When individuals claim the right of expressive access to a location from which they are generally barred, their claim necessarily calls into question certain aspects of the law which restricts their access. As such that law forms a vital part of the inquiry.<sup>46</sup>

### 3. The Question of Location Is Best Considered under Section 1

If the question of location does not properly arise at the first stage of the inquiry, it must obviously be considered at a later stage, where the

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<sup>46</sup> Recall that restrictive laws are not confined to “written laws”, such as statutory provisions, regulations or by-laws. They also take the form of common law rules — especially rules governing property, private and public. Although the Charter does not apply to the common law governing relations between private parties, it does apply to common law rules governing the actions of governmental parties. See *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573, at paras. 25-39, esp. para. 34 (S.C.C.). Moreover, the phrase “prescribed by law” in s. 1 of the Charter has been held to include the common law: *R. v. Thomsen*, [1988] S.C.J. No. 31, [1988] 1 S.C.R. 640, at para. 15 (S.C.C.), citing *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613, at 645 (S.C.C.). The point was approved in *Commonwealth*, *supra*, note 2, at paras. 157-158, *per* L’Heureux-Dubé J., and at paras. 261-262, *per* McLachlin J., and was reiterated in *Vancouver*, *supra*, note 4, at para. 52.

court turns its attention to the impugned law — that is, either at the second stage (dealing with the question of infringement) or at the third stage (dealing with the question of justification under section 1). As between the two, the final stage under section 1 offers the more suitable venue because it allows a court to canvass the full range of considerations arising in the concrete context of the case.

The second stage, where a court considers whether the law infringes freedom of expression, offers only limited opportunities for such a review. Indeed as we saw earlier, under the criteria set out in *Irwin Toy*, it must be a rare day when an impugned law is not found to infringe freedom of expression — at least in effect if not in purpose. One could, of course, revamp these criteria in order to allow a court to consider a fuller range of factors in a more critical light. However, such an exercise would involve a major departure from the *Irwin Toy* framework, with implications extending far beyond the current subject.

It follows that questions pertaining to location are best determined at the final stage under section 1, where the court assesses whether the impugned law constitutes a reasonable limit on the right. Here it is worth recalling the comments of Dickson C.J.C. in the *Keegstra* case,<sup>47</sup> where he discusses the merits of section 1:

... I agree with the general approach of Wilson J. in *Edmonton Journal* ... where she speaks of the danger of balancing competing values without the benefit of a context. This approach does not logically preclude the presence of balancing within s. 2(b) — one could avoid the dangers of an overly abstract analysis simply by making sure that the circumstances surrounding both the use of the freedom and the legislative limit were carefully considered. I believe, however, that s. 1 of the Charter is especially well suited to the task of balancing, and consider this Court's previous freedom of expression decisions to support this belief. It is, in my opinion, inappropriate to attenuate the s. 2(b) freedom on the grounds that a particular context requires such; the large and liberal interpretation given the freedom of expression in *Irwin Toy* indicates that the preferable course is to weigh the various contextual values and factors in s. 1.<sup>48</sup>

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<sup>47</sup> *Supra*, note 39.

<sup>48</sup> *Id.*, at para. 40.

The point could hardly be put better. I might only add that, in deciding such questions under section 1, courts will have the opportunity to develop a flexible body of criteria that adapts the traditional *Oakes*<sup>49</sup> test to the specific context of location. In so doing they may wish to reconsider the question of where the burden of proof appropriately lies in this context.

Such a process will inevitably carry courts further down the road away from the simplistic premise that section 1 imports a monolithic standard applying to all Charter guarantees in the same way. This would be a welcome development. Different Charter rights require somewhat different forms and standards of justification, ones that are tailored to the particular rights in question and in effect form part of their basic structures.<sup>50</sup>

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<sup>49</sup> *Supra*, note 12.

<sup>50</sup> The general point is argued in Brian Slattery, "The Pluralism of the Charter: Revisiting the *Oakes* test", in Luc Tremblay & Grégoire Webber, *The Limitation of Charter Rights: Critical Essays on R. v. Oakes* (Montréal: Éditions Thémis, 2009), at 13-35. As Jamie Cameron says: "Over time, each of the guarantees will be read as though s. 1 is appended to it, in order to enable justificatory criteria which is responsible to each, to evolve" (*supra*, note 7, at 118, note 100).