Freedom of expression in 1998: Adjustments on both sides of the balance

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In 1998, two developments occurred in relation to the s. 2(b) right. These adjustments to the ongoing analysis might be seen as offering (or perhaps removing) something on each side of the balance. First, the concept of content neutrality, embodied in the definition of the right itself, faded further into the horizon of the s. 2(b) landscape. Second, the court increased the difficulty of the legislature's job in representing its constituency and/or the public interest, by adjusting evidentiary requirements in the s. 1 justification process.

Content neutrality was laid as the cornerstone of the s. 2(b) right by the Supreme Court at the outset of construction of the Canadian approach to freedom of expression. To date, the progression of Supreme Court s. 2(b) decisions has resulted in an erosion of this foundational principle. Perhaps this was predictable as a result of the conflict between a broad right and a narrow justification. Arguably, while expanding the justification analysis, in order to produce the necessary balance for some legislation to pass Charter scrutiny, the principle of content neutrality was bound to be sacrificed by the resulting framework.

In the beginning, all expressive activity was held to be protected without regard to content, as long as a meaning was intended to be conveyed.[1] In stating the first exclusion to this principle, the court found that the fundamental freedom would not protect violence or threats of violence. This exclusion was rationalized on the basis that it concerned the "form" of expression and not the "content," as the guarantee was still meant to protect *all* content.[2]

At the same time however, the court designed its s. 1 framework in the manner of a constitutional Swiss army knife—that is, s. 1 was developed as a single tool for all tasks. Although content-restrictive cases engage different issues than cases that restrict access based on time, manner, and place and restrictions on potentially harmful expression, such as hate propaganda, do not share an underlying structure with restrictions on picketing, the s. 1 justification analysis has remained singular.

After the *Edmonton Journal*[3] case, where the court moved to a "contextual approach" to attempt a better balance, the content neutrality principle was weakened further. The inherent "value" of the expression in issue became an important consideration in the court's approach to s. 1. As might have been expected, the determination of the "value" of the protected expression became based on its content. Thus, with application of the contextual approach, the content neutrality principle was depleted further at the level of justification. Previously, the court had been required to conclude that *form* and content "can be inextricably connected."[4] It now appears that *value* and content will also be linked for the time being.

This past year, the court increased its reliance on the restricted expression's "value" in the justification process. The court resolved that the "value" of expression will be determinative of evidentiary issues related to s. 1 justification. *Thomson Newspapers v. Canada (A.G.)*[5] and *R. v. Lucas*[6] provide an excellent contrast of outcomes based on the court's perceived "value" of the restricted expression. In each case the court altered the evidentiary standards relating to the types of proof required to support justification, based on its assessment of the value of the expression in issue. The court continued its earlier claims that such adjustments did not change the *standard* of proof to be met by the state to justify the infringement but dealt only with the type of evidence that could satisfy that standard. The court's theory is that the same standard might be satisfied in different ways depending on the nature of the legislative objective. This may be simply a question of semantics, as the court's measure of the expression's value results in its determination that certain forms of evidence possess the inherent capacity to meet the burden, while others do not and never will.

In *R. v. Lucas*, the constitutionality of the *Criminal Code* offence of defamatory libel was challenged. The court found that, in establishing a rational connection between the legislative objective and the measure adopted by Parliament, the civil burden was satisfied through "common sense." The court also stated that in gauging minimal impairment, it was "particularly important ... to bear in mind the negligible value of defamatory expression." This consideration "significantly reduce[d] the burden on the respondent to demonstrate that the provision is minimally impairing."[7] As a result, low-value expression can be justified with little traditional proof and a dose of evidentiary "common sense."

Similarly, the majority of the court in *Thomson Newspapers* relied on the value of the restricted expression—election poll results in the immediate pre-election period—to ascertain the appropriate type of proof required in the s. 1 process in this case. Based on the high value it attributed to the expression in issue, the court re-

jected any deference to Parliament, which had based the legislation on "a reasonable apprehension of harm" in the face of conflicting social science evidence. In effect, the court required Parliament to have *conclusive* social science evidence to justify its law. In its absence, the court did not accept that the same commonsense presumptions that had served as bases for justification in other cases[8] could satisfy the standard of proof. It is interesting to note, however, that the majority rejected the application of several presumptions that were based on *some* scientific evidence in favour of the court's own unsubstantiated "contrary logical reasoning."[9]

This latest discussion of evidentiary standards and methods of proof may be viewed as part of a natural pendulum phenomenon. The broad s. 2(b) right spawned the requirement for increasingly relaxed standards for s. 1 justification. In *Thomson Newspapers*, sensing the seemingly open-ended nature of this relaxation, the majority of the court appeared to desire some limitation to its application when occasioned by "a reasoned apprehension of harm." The result is that, on one side, the content of the protected expression will be engaged in the analysis and, on the other side, deference to the legislature in areas of inconclusive social science evidence has been limited in justification.

There are problems with this approach. Although the "value" of some expression can be clearly defined with a broad consensus, other expression may not yield an easy determination. Without any certainty as to the level of value the court will ascribe to some kinds of expression, legislators will face a challenge, before they embark on the legislative process, to obtain traditional and conclusive types of evidence in every uncertain s. 2(b) matter. Otherwise, governments will face an increased probability that they will not receive any deference and their legislation will fail Charter scrutiny.

One of the fundamental obstacles that legislators face in meeting their challenge is that social science evidence is, by its very nature, uncertain. Everyone who has ever relied on one hypothesis supported by social science evidence is aware that a contrary hypothesis with an equal amount of supporting studies always exists. Equally, for every expert who lines up on one side of a theory, there is one who is eager to line up on the opposing side. Where the court deems the value of the expression in issue to be high, and social science is the only medium of evidence, can Parliament or the legislatures ever obtain the necessary certainty required by the limitations of the adjusted approach?

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Despite the new limitations, it is clear that the court will still accept "common understandings" to support justification of restrictions in some cases, as it did in *Lucas*. However, reliance on "common sense" as an evidentiary commodity is not a satisfactory universal alternative to legislative paralysis. It is worrisome that the basis upon which the presumptions are accepted or "common understandings" are validated is that they are "widely accepted by Canadians as fact."[10] As appealing as it is to the state to be able to meet its justification through "common sense," its application is a double-edged sword. The courts need to keep in mind that the world was commonly understood to be flat before Magellan circumnavigated the globe. The real danger is that "common understandings" and "widely held beliefs" often embody biases, prejudices, and stereotypes. Potentially they are more unsafe than inconclusive social science, since the latter attempts objectivity.

It is interesting to note the three specific circumstances that the court in *Thomson Newspapers* stated were no longer appropriate for a deferential approach to the existence of harm and the scrutiny of measures chosen to address the harm, based on common sense.[11] These are, first, when contrary logical reasoning exists to refute the presumptions upon which the deference is based; second, when there are no conflicting social interests involving an imbalance of power or a vulnerable group; and, third, when there is no suggestion that the nature of the expression undermines the position of groups or individuals as equal participants in society. These principles might be advantageous in some contexts but might succumb to the frailties of "collective wisdom" in others. Although it is an abhorrent hypothetical thought, legislation that required certain minorities to self-identify might allow "common sense" and legislative deference to operate according to the new rules. This illustration obviously calls this approach into question.

At this time, it is clear the s. 2(b) model is not a finished work. As the court continues to acknowledge, the analysis requires ongoing thought and modelling due to the myriad types of expressive activity it covers, the expansive quality of the right, and the Charter's decree of balance between rights and their just limitations.

1 *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927, at 968-70, *per* Dickson C.J.

2 *Ibid.*

3 [1989] 2 S.C.R. 1326.

4 See note 1, at 968.

5 [1998] 1 S.C.R. 877.

6 [1998] 1 S.C.R. 439.

7 *Ibid.*, at 466.

8 *R. v. Keegstra,* [1990] 3 S.C.R. 697; *R. v. Butler,* [1992] 1 S.C.R. 452; and *RJR-MacDonald Inc. Canada (A.G.)*, [1995] 3 S.C.R. 199.

9 See note 5, at 957.

10 *Ibid.*, at 961.

11 *Ibid.*, at 956-62.