THE SUPREME COURT AND FREEDOM OF EXPRESSION

BY JAMIE CAMERON

A FURTHER LAMENT

Professor David Beatty titles his review of the first fifteen years of constitutional rights in Canada "Lament for a *Charter*". Dissatisfied with the Supreme Court of Canada's cutbacks on constitutional rights, he expresses a certain nostalgia for the early days, when the *Charter* seemed so promising and auspicious. Also lamentable in the early history of constitutional rights, but not discussed at length by Professor Beatty, is the saga of section 2(b), the *Charter*'s guarantee of expressive freedom.

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There it is the Court's conception of section 2(b), rather than the results in particular cases, that is problematic. As might be expected, the jurisprudence thus far has been mixed. Expressive freedom boasts important victories, including *Ford* v. *A-G Quebec* (striking Quebec's ban on English language advertising); *R* v. *Zundel* (invalidating the *Criminal Code*'s "false news" provision); *Dagenais* v. *C.B.C.* (reversing a publication ban against *The Boys of St. Vincent*); and *R.J.R.-Macdonald* v. *A-G Canada* (invalidating Parliament's tobacco control legislation). It has also sustained losses in a number of major cases like *R* v. *Keegstra* and *R.* v. *Butler* (upholding the *Criminal Code*'s hate propaganda and obscenity provisions); *Hill* v. *Church of Scientology* (protecting reputation at the expense of expressive freedom); and *Ross* v. *New Brunswick School District 15* (upholding limits on a schoolteacher's extracurricular expressive activities). More fundamental and hence more serious than any debate about those results, however, is the Court's failure, more than thirty decisions later, to develop a sound conception of expressive freedom under the *Charter*.

In broad terms, the purpose of any constitutional guarantee is to create a zone of inviolability around an entitlement, which can only be transgressed in special circumstances. The boundaries of that zone must be defined and criteria established to determine when the government's transgression of rights is permissible as a matter of reasonable limits. Thus the *Charter*'s interpretation contemplates two elements. First, the underlying values of the guarantee—the foundation of principle or rationales for privileging certain rights and freedoms—must be articulated. Second, that foundation of principle must then be incorporated into a structure of analysis that balances values to determine reasonable limits under section 1.

PRINCIPLE AND PERCEPTION

Both elements will be found in the section 2(b) jurisprudence, where they exist more in form than in substance. In terms of the foundation of principle, whether particular expressive activity is perceived as valuable should be considered irrelevant: section 2(b) would be meaningless if the *Charter* only protected "valuable" expression. Surely the foundation of the right is the *principle* of freedom, not the merits of *particular* expressive activity. In this regard, expressive freedom is rather like the criminal law, where it was recognized long ago that nine guilty should go free before one innocent person is wrongly convicted. Freedom of expression promises the best and threatens the worst of democratic society. Because the exercise of the freedom can be ugly, prohibitions on unpopular expression often appeal to the instinct to suppress the thoughts and ideas we fear and dislike the most. It is important to understand that a constitutional guarantee protects expressive activity, not to endorse particular views—whether noble or offensive—but, instead, to safeguard the principle of freedom. Hence the dilemma of section 2(b): it challenges us to know how much of the worst that an open democracy invites we must tolerate in order not to compromise, stifle, or silence the best it can also offer.

Not surprisingly, thoughts, ideas, and communications that are considered offensive, such as hate propaganda, obscenity, defamation, and tobacco advertising, have been classified at various times as low-value expression. That designation is important because it rationalizes a dramatic lowering of section 1's threshold for reasonable limits. As a result, the Charter*'s guarantee of expressive freedom is now little more than a question of subjective perception.*

TURNING THE ANALYSIS ON ITS HEAD

In tackling that challenge, the Supreme Court of Canada has turned the analysis on its head. Instead of considering how the freedom should be protected, the jurisprudence plots particular expressive activity along a spectrum of values. Although the Court claims that section 2(b) protects " all expressions of the heart and mind", it overtly evaluates expressive activity to alter the standard of transgression under section 1. Not surprisingly, thoughts, ideas, and communications that are considered offensive, such as hate propaganda, obscenity, defamation, and tobacco advertising, have been classified at various times as low-value expression. That designation is important because it rationalizes a dramatic lowering of section 1's threshold for reasonable limits. As a result, the *Charter*'s guarantee of expressive freedom is now little more than a question

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That is where the second prerequisite for the protection of rights—a structure or framework of analysis—comes in. It is trite that expressive activity can and should be limited in many instances. At the same time,

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there is a difference between prohibiting expressive activity that is demonstrably harmful, and prohibiting it simply because it is perceived as valueless. Unfortunately, the jurisprudence has collapsed that distinction: once expressive activity is characterized as "low value", the government is substantially relieved of its burden to prove that the prohibition is needed to contain or punish a harm that is linked to the expression. The jurisprudence too readily assumes that expression which is valueless is harmful as well.

Under the contextual approach the stringency of review is contingent on the value of the expression. In this way the structure of analysis mandated by *Oakes* has largely been displaced. Yet the purpose of structured criteria is to ensure that rights are protected by concrete standards of justification which have some rigour and consistency of application. That conception of reasonable limits generated complaints that *Oakes* was rigid, mechanistic, and formalistic—too much structure created a danger that limits on unpopular or controversial expression might not be saved by section 1. At the other end of the spectrum, however, the uninhibited flexibility of the contextual approach has placed section 2(b) at the mercy of the Court's subjective perceptions of the relative value of thoughts and ideas on any number of social and political issues.

The Supreme Court of Canada must reject the suggestion that the status of expressive activity depends on its perceived value. The key questions, instead, should be whether the activity is demonstrably harmful, and whether the government's prohibition is sufficiently connected to the elimination or reduction of that harm to warrant the infringement of section 2(b).

PUTTING SECTION 2(B) ON TRACK

The saga of expressive freedom may be lamentable, but section 2(b) is not beyond redemption. It is not realistic to expect any consensus on these issues and, while expression cannot be absolutely protected, nor should it be too easily limited. What the jurisprudence requires, to place the evolution of section 2(b) on track, is a conception of expressive freedom that respects its principle of freedom by fettering the judiciary's discretion to engage in *ad hoc* decision making under section 1.

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The Supreme Court of Canada must reject the suggestion that the status of expressive activity depends on its perceived value. The key questions, instead, should be whether the activity is demonstrably harmful, and whether the government's prohibition is sufficiently connected to the elimination or reduction of that harm to warrant the infringement of section 2(b). In the absence of harm, expressive activity should be protected, no matter how valuable or valueless it may seem. A focus on harm, rather than value, at least diminishes the risk that expressive activity will be punished simply because it is socially or politically unacceptable.

The Court must also renew its commitment to a structure of analysis under section 1. The undisciplined flexibility of the contextual approach should be abandoned in favour of *Oakes* and its "formulaic" criteria of a pressing and substantial objective, rational connection, minimal impairment, and proportionality. In place of subjective perceptions about the worthiness of particular views, issue-specific doctrines and levels of review can be developed to modulate section 1's concept of reasonable limits.

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