

Freedom of Expression in Canada

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The Constitutional Situation Before the Charter

Any discussion of this topic should start with our basic constitutional document - the British North America Act of 1867,¹ now entitled the Constitution Act 1867. As mentioned in my accompanying paper on Equality Rights, the Constitution Act 1867 did not include a Bill of Rights with provisions for individual human rights protection, but rather such group rights as those of language, s. 133, and of separate (originally confessional) schools, s. 93.

Apart from these group rights provisions, our human rights and fundamental freedoms were determined essentially by the Preamble to the Constitution Act 1867, and especially a statement therein which declared that the original colonies were to be "federally united with a Constitution similar in Principle to that of the United Kingdom." Until 1982 and the adoption of the Canadian Charter of Rights and Freedoms, that is what really determined the strengths and weaknesses of protections of human rights and fundamental freedoms, ie, federalism and the principles of the United Kingdom Constitution.

Federalism in itself is a protection for civil liberties. The only truly functioning federal systems in the world - there are some that are not truly federal in operation - provide basic protections for human rights and fundamental freedoms, even in the absence of a Bill of Rights. Let me mention just three reasons for this - two political and one judicial. The first is that when you have, as in our case, eleven different governments, protection of civil liberties can be more effective, because one is able to compare one government with another and apply political pressure on the government that might be overriding or infringing these liberties. A second is that no one government can totally determine all rights and obligations. These are divided between the two levels.

Third, if one has a court which is activist in terms of promoting or protecting human rights and fundamental freedoms, federalism can provide somewhat of a protection through what may be called the power allocation technique of judicial review. If the deprivations of a particular right or freedom are those of one level of government, then the Supreme Court may find that the subject matter is within the jurisdiction of the other level. In our particular case, not invariably but frequently, many of the deprivations resulted from provincial action. One example, right at the turn of the century, is the case known as *Union Colliery v Bryden*.² An amendment to the Mines Act of our western-most province, British Columbia, which excluded Chinese people from working underground in coal mines, was held to be invalid, not because the enactment was discriminatory, but because it was beyond the jurisdiction of the provincial Legislature in that it constituted naturalisation and aliens legislation, which was within federal jurisdiction.

More recently and more particularly with respect to freedom of expression, we have two further examples. One case arose in the western province of Alberta,³ in which three of the six judges of the Supreme Court held that a legislative attempt to interfere with press freedom, in terms of requiring newspapers to print government refutations of articles critical of the government, was beyond the jurisdiction of the province because such regulation was part of the criminal law power, a matter within federal jurisdiction. Similarly, in 1937, the Legislature of the province of Quebec, our French-speaking province, enacted a law which prohibited the propagation of "Bolshevik" or Communist "propaganda". Again, when the Supreme Court came to deal with this law, it did not do so from the point of view of a civil liberty which had to be protected, but rather on the basis that such a statute was part of the criminal law.⁴ In both cases references were also made to the facts that the Parliamentary system was one of the features of the United Kingdom Constitution that Canada had inherited and that although such a system is based upon the supremacy of Parliament, it also requires "free public opinion and free discussion throughout the nation of all matters affecting the state."⁵ The rights of free opinion, public debate and discussion are necessary to parliaments and governments.⁶

Another aspect of civil liberties protection that was evolved out of the Preamble is based upon that basic principle of the United Kingdom Constitution known as the "Rule of Law". One of the leading decisions in the Supreme Court of Canada with respect to the "Rule of Law"⁷ implemented the proposition that, unless a government agent can find the source of his power specifically in a law, that power does not exist. In that we have the contrast, also under the principle of the rule of law, with the position of a citizen, who is free to do whatever he or she wishes, *unless* it is prohibited by law. The person involved was one Maurice Duplessis, who was not only Premier of the Province of Quebec, but also its Attorney-General and, by statute, legal adviser to the Liquor Commission of Quebec. The Liquor Commission, on his orders, revoked the licence of one Roncarelli, who had been bail bondsman for Jehovah's Witnesses on numerous occasions. Although the case took about sixteen years to get to the Supreme Court of Canada (which illustrates one of the difficulties with judicial protection of human rights), nevertheless, when it did get there, the Court held that, despite Duplessis' many positions, there was nothing in the Liquor Licencing Act which gave him the authority to order the revocation of the licence and therefore the revocation was invalid.

One of the techniques available to the Court, which is associated with the application of the "Rule of Law," is what may be referred to as the "restrictive interpretation technique." Its best illustration is in a case known as *Boucher v The King*,⁸ wherein the Supreme Court narrowly interpreted the crime of "sedition" in the Criminal Code to hold, in effect, that very strong criticism of governments and of courts, and the creation of disaffection amongst citizens, were not enough to meet the definition of sedition, and so Boucher was acquitted.

All of these judicial protections are possible when one refers to "a Constitution similar in principle to that of the United Kingdom," except that one must keep in mind that that Constitution also includes the doctrine of Parliamentary Supremacy. The result is that whatever the courts, through the Rule of Law, may protect, Parliament, through Parliamentary Supremacy, may take away.

We have then a series of cases, one of which was *Cunningham v Tomey Homma*,⁹ which concerned the British Columbia Franchise Act, which denied the franchise to people of

Chinese, Japanese and Indian (both native Indian and Indians from the Asian sub-continent) origin. Tomey Homma was a Japanese-Canadian citizen who challenged the exclusion. The very same Judicial Committee of the Privy Council which had decided the earlier *Bryden case*, mentioned earlier, held in this case that courts were not concerned with the wisdom of legislation and, since it was clearly within the jurisdiction of the province to determine what the franchise should be, that was the end of the matter. Obviously, the decision is not that surprising if you consider that the franchise in Canada was withheld from people of Asiatic origin until after World War II, and that women did not have the vote in Canada until after World War I and, within the Province of Quebec, not until during World War II.¹⁰ So one can see why the Court could easily determine that the franchise was a privilege rather than a right. But clearly, once one had determined that a law was within the jurisdiction of the legislature enacting the law, then, because of Parliamentary Sovereignty or Supremacy, there could be no challenge.

Before leaving this sub-topic, one has to make reference to the Canadian Bill of Rights of 1960.¹¹ Section 1 thereof "recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex . . . (d) freedom of speech . . . and (f) freedom of the press." However, the Bill of Rights (1) applied only to the federal level; and (2) was not entrenched as part of the Constitution Act 1867. More importantly, it was never recognized by the Supreme Court of Canada as being a constitutional and overriding document.¹² Moreover, the words "have existed and shall continue to exist" were so applied by a majority of the Supreme Court as to result in a "frozen concepts" interpretation, which limited the extent of civil liberties protections to that in 1960, when the Bill of Rights was enacted.¹³

The result was that s.s. 1(d) and (f) were never applied by the Supreme Court so as to protect freedom of expression. No case involving those subsections reached the Supreme Court. The major Supreme Court decision dealing with freedom of expression - *A-G Canada and Dupond v Montreal*¹⁴ - concerned provincial legislation, which was not subject to the Bill of Rights. At issue in this case was the validity of a City of Montreal by-law which gave the Executive Committee of the city the power to prohibit all assemblies, parades or gatherings for a period of thirty days. The basic division on the Supreme Court between the majority of six and the minority of three was whether the by-law related to a matter of a "merely local and private nature" (s. 92(16) of the Constitution Act 1867) and thus within provincial jurisdiction, or a matter of the criminal law, within federal jurisdiction. However, Beetz J, on behalf of the majority, also went on to assert a number of very revealing "propositions" in response to a contention that the by-law was -

. . . in relation to and in conflict with the fundamental freedoms of speech, of assembly and association, of the press and of religion which were inherited from the United Kingdom and made part of the Constitution by the preamble of the British North America Act 1867, or which come under federal jurisdiction and are protected by the Canadian Bill of Rights. The *Reference re Alberta Statutes* was relied upon.¹⁵

His response, which illustrates the predominant views of the majority of the Supreme Court of Canada during the period of 1960 to 1982, when the Canadian Bill of Rights was in full effect, included the following:

1. None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.
2. . . .
3. Freedoms of speech, of assembly and association, of the press and of religion are distinct and independent of the faculty of holding assemblies, parades, gatherings, demonstrations or processions on the public domain of a city. This is particularly so with respect to freedom of speech and freedom of the press as considered in the *Reference re Alberta Statutes (supra)*. *Demonstrations are not a form of speech but of collective action. They are of the nature of a display of force rather than of that of an appeal to reason; their inarticulateness prevents them from becoming part of language and from reaching the level of discourse.*¹⁶ [emphasis added]

Freedom of Expression and the Charter

(a) The Pertinent Provisions

The drafters of the Charter were very conscious of the main defects of the Bill of Rights referred to above and drafted proposals to remedy them.¹⁷ The most important change was that the new Charter is Part I of the Constitution Act 1982, by s.-s. 52(1) of which it is proclaimed that:

s. 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

By s.-s. 52(3) it is provided that:

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

The amendment provision pertinent to the Charter is s.-s. 38(1), which requires -

- (a) resolutions of the Senate and House of Commons; and
- (b) resolutions of the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, according to the then latest general census, at least fifty *per cent* of the population of all the provinces.

Thus, the Charter is constitutionally entrenched.

The result of constitutional entrenchment was that the Supreme Court held, right from the very first decision concerning the Charter - *Law Society of Upper Canada v Skapinker*¹⁸ - that the Charter should not receive the restrictive interpretation given to the Bill of Rights. The "frozen concepts" interpretation was specifically rejected,¹⁹ and the paramountcy of the Charter applied. The result was that in a whole number of cases, decisions under the Bill of

Rights were overridden in favour of similarly worded civil libertarian and human rights values in the Charter.²⁰

Furthermore, s.-s. 32(1) applies the Charter not just to the federal sphere, but also -

- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Thus both the federal and provincial spheres are subject to the Charter.

At the same time, s. -s. 32(1) has been interpreted (in *Retail, Wholesale and Department Store Workers v Dolphin Delivery*)²¹ as having a limiting effect in that it is restricted to "government action" and does not apply to such private activities as secondary picketing of a private enterprise.

Before dealing more specifically with freedom of expression, it is important to note two provisions, one providing for a judicially-imposed limitation on the rights and freedoms set out in the Charter (s. 1) and one providing for a legislative override (s. 33):

Guarantee of Rights and Freedoms

s. 1 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.

. . .

s. 33 (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Section 2 of the Charter proclaims the fundamental freedoms, including the freedom of expression. These are clearly inspired by, although less detailed than the comparable provisions in Arts 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights. Thus, whereas s. -s. 2(b) of the Charter refers to "freedom of thought, belief, opinion

and expression, including freedom of the press and other media of communication" (a freedom which is more detailed than the others set out in s. 2, eg, freedom of association), Art 19 of the Covenant is more exigent and still more detailed. Thus, para 2 provides:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

And, further, the right in para 1 "to hold opinions without interference" is explicitly excluded from the limitations clause set out in para 3 thereof.

(b) The Two-Step Analysis under section 2(b)

The fundamental approach to determining if there has been an infringement of s. -s. 2(b) of the Charter was set out in *Irwin Toy Ltd v Quebec (A-G)*,²² which concerned Quebec legislation prohibiting commercial advertising directed at children under thirteen years of age. In the result, all members of the court held that the legislation contravened s.-s. 2(b) of the Charter, although three of the five members of the panel also held that it constituted a reasonable limit under s. 1.

In coming to the conclusion that the legislation violated s.-s. 2(b), the three members of the majority asserted that there were two "steps" to be taken or questions to ask:

The First Step: Was the Plaintiff's Activity Within the Sphere of Conduct Protected by Freedom of Expression?

The Second Step: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?²³

In the course of answering these two questions, the majority set out a number of observations and criteria that have been applied since²⁴ and so it is useful to set them out at least as they were summarized:²⁵

When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no *content* of expression or (2) which conveys a meaning but through a violent *form* of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief

consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

In the instant case, the court held that "the plaintiff's activity is not excluded from the sphere of conduct, protected by freedom of expression."

In *Irwin Toy* the majority asserted that activity is expression if it attempts to convey meaning. Activity cannot be excluded from the scope of the guarantee of free expression on the basis of the content or meaning being conveyed. While all *content* of expression is protected, some *forms* of expression, such as violence, are *not* protected. However, if meaning is sought to be expressed, it need not be "redeeming" in the eyes of the court to merit the protection of s.-s. 2(b), whose purpose is to ensure that thoughts and feelings may be conveyed freely in non-violent ways without fear of censure. Even physical activity, such as sexual activity, can be expression.²⁶ Thus, even obscenity may come under s.-s. 2(b), although prohibition of exhibition and sale may be saved under s. 1.

Before leaving this topic it should be mentioned that the approach taken to freedom of expression seemed to be that only expression communicated directly through physical harm is excluded from s.-s. 2(b) as being violent.²⁷ Once it was determined that a particular activity was expression, it was covered by s.-s. 2(b). Any limitation or exclusion would have to be justified under s. 1. However, in *Committee for the Commonwealth of Canada v Canada*,²⁸ which was concerned with the validity of an administrative banning of the handing out of leaflets in an airport terminal, the overwhelming majority (in five separate judgments) held that an individual's freedom to express himself or herself on government-owned property is protected under s.-s. 2(b) if the form of expression is compatible with the principal function or intended purpose of the place. Only one judge dealt with that limitation under s. 1.²⁹ Subsequent decisions³⁰ would seem to have re-emphasized the *Irwin Toy and Keegstra* approach.

A case similar to *Committee for the Commonwealth*, which concerns prohibition of television coverage of ingress to and egress from a courtroom, is now before the Supreme Court of Canada on appeal from a deeply divided Ontario Court of Appeal decision in *R v Squires*.³¹ Perhaps the Supreme Court decision will clarify the seeming anomaly of *Committee for the Commonwealth*.

(c) Section 1 Limitations

If an activity is found to be an expression protected by s.-s. 2(b), the next step is to determine whether a limitation of it is reasonable. At a very early stage in Supreme Court Charter jurisprudence, in 1984, in the case of *Hunter v Southam*,³² it was held that the onus of proving the applicability of s. 1 was on the one who raised it. In 1986, in *R v Oakes*,³³ the details of the tests in s. 1 were elaborated by Dickson CJC and, since they are essentially applied to this date, the summation of them in a subsequent case³⁴ is authoritative:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as "little as possible"; and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

A full discussion of s. 1 is beyond the scope of this paper and the comments on it are so numerous³⁵ that I do not wish to add to them. I hope next to illustrate its application by brief references to some kinds of limitations that have been upheld. One general comment applicable specifically to s. 1 limits on expression that could be referred to here is that, in determining whether government controls of expression are reasonable limits within s. 1 of the Charter, the courts must examine the extent to which the expression at stake in a particular case promotes freedom of expression principles, namely: the search for the truth; the gaining of self-fulfillment by articulating thoughts and ideas as one sees fit; the requirement of freedom of expression as a basis of representative democracy.³⁶

Let me just add briefly that the contrast in the results in *Zundel and Keegstra* gives some indication of the application of s. 1. In *Keegstra*, the legislation at issue was the Criminal Code prohibition of hate literature. In *Zundel*, it was the old "false news" prohibition in that Code. *Keegstra* involved anti-Semitic propaganda generally, while *Zundel* dealt more specifically with Holocaust denial. The hate literature provision was upheld as a reasonable limit, while the "false news" provision was not. The difference appears to be that the "false news" provision had an ancient origin no longer appropriate, it was too broadly drafted and vague, and the "hate literature" provision was considered more suitable for the purpose. The "hate literature" provision also reflected the non-discrimination values of s. 15 of the Charter and the multicultural values of s. 27.

(d) Some Examples of Activities Involving Expression and the Reasonability of Limits Thereto

In a case which involved secondary picketing of a private employer, although the Supreme Court held that the Charter did not apply to private action, it held that picketing was included in freedom of expression.³⁷ However, in another case it was held that s.-s. 2(b) does not protect mandatory payment of union dues.³⁸

In two very important Quebec cases³⁹ involving restrictions on the public use of languages other than French, the Supreme Court held that one's choice of language was protected by s.-

s. 2(b) and the limitation in the Charter of the French Language was *not* a reasonable limit as being overbroad.

Several cases have held that "commercial" speech is protected by s.-s. 2(b) and includes advertising, but restrictions may be more easily justified under s. 1.⁴⁰

A scheme for reimbursement of election expenses under the Manitoba Elections Finances Act was held⁴¹ not to violate s.-s. 2(b), because it did not prohibit taxpayers from expressing their beliefs. However, prohibition of partisan political expression and activity by federal public servants was held⁴² to violate s.-s. 2(b) and to not be a reasonable limit, because the restriction was overbroad in not making distinction between the ranks of the public service.

A Criminal Code provision for mandatory banning of any publication identifying the victim of sexual assault upon such victim's application, was held to contravene freedom of the press, but was held to be a reasonable limit within s. 1.⁴³ On the other hand, a provision of the Alberta Judicature Act, which prohibits the publication of any detail relating to matrimonial proceedings other than the names, addresses and occupations of the parties and witnesses, was held⁴⁴ to violate s.-s. 2(b) and was found not justifiable under s. 1.

In an interesting case, an adjudicator's order that an employer answer any reference inquiry respecting a former employee exclusively by sending a specified letter, was held to have infringed s.-s. 2(b), but was saved by s. 1 as being reasonable.⁴⁵

I have mentioned earlier that the Criminal Code provision which prohibits the wilful promotion of hatred against an identifiable group, infringes s.-s. 2(b) of the Charter, but is saved by s. 1.⁴⁶ Similarly, s. 13(1) of the Canadian Human Rights Act, which makes it a discriminatory practice to communicate by telephone any message likely to expose persons to hatred or contempt on the basis of race or religion, infringes s.-s. 2(b) of the Charter, but is saved by s. 1.⁴⁷ However, the provision in the Code which prohibits a person from wilfully publishing a statement that he knows is false and causes or is likely to cause injury or mischief to a public interest, infringes s.-s. 2(b) and cannot be saved by s. 1.⁴⁸

Finally, s. 163(8) of the Criminal Code, which provides an exhaustive test of obscenity, infringes s.-s. 2(b), but is saved by s. 1 in its aim to prevent harm to society.⁴⁹

Endnotes

1. 30 & 31 Vict, c 3 (UK).
2. [1899] AC 580.
3. Re Alberta Statutes (Alberta Press Bill case) [1938] SCR 100.
4. Switzman v Elbling (the Padlock case) [1957] SCR 285.

5. Supra, n 3, 146, per Cannon J.
6. Supra, n 4, 306, per Rand J.
7. Roncarelli v Duplessis [1959] SCR 121.
8. [1951] SCR 265.
9. [1903] AC 151.
10. For references to some of these denials and their terminations see chapter I of W S Tarnopolsky, *Discrimination and the Law in Canada*, Toronto: De Boo, 1982, now in a revised edition by W F Pentney, 1985.
11. SC 1960, c 44, now RSC 1985, App III. For a detailed discussion of the Bill, its history and the relevant jurisprudence, see W S Tarnopolsky, *the Canadian Bill of Rights*, Toronto: Carswell, 1966, 2nd rev ed, Carleton Library Series, 1975 and W S Tarnopolsky, "The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms" (1981) 44 *Law and Contemporary Problems* 169, 182-6.
12. See my futile and totally overlooked arguments to the contrary in my book on the Canadian Bill of Rights, *ibid*, chapters III and IV.
13. Supra, n 9, chapter IV.
14. [1978] 2 SCR 770.
15. *Ibid*, 796.
16. *Ibid*, 796-97.
17. I can attest to this as one of the federal drafters of the Charter and one of the most consistent critics of the interpretation of the Bill of Rights by the Supreme Court of Canada.
18. [1984] 1 SCR 357 at 366.
19. *Hunter v Southam* [1984] 2 SCR 145 at 155; *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 343-44.
20. For example:

Cf: *R v Big M Drug Mart Ltd* [1985] 1 ACR 295 at 333, 343-44, 18 DLR (4th) 321 13 CRR 64 with *Robertson and Rosetanni v The Queen* [1963] SCR 651;

Cf: *R v Therens* [1985] 1 SCR 613 at 638-39 and 640, 18 DLR (4th) 655, 13 CRR 193 with *Chromiak v The Queen* [1980] 1 SCR 471;

Cf: *R v Oakes* [1986] 1 SCR 103 at 124-25, 26 DLR (4th) 200, 19 CRR 308 with *R v Appleby* [1972] SCR 303;

Cf: Reference re Section 94(2) of the Motor Vehicle Act RSBC 1979, [1985] 2 SCR 486 at 509-511, 24 DLR (4th) 536, 18 CRR 30 with *Duke v The Queen*, [1972] SCR 917;

Cf: *R v Smith* [1987] 1 SCR 1065 at 1066-70 with *Miller and Cockriell v The Queen* [1977] 2 SCR 680;

Cf: *Brooks v Canada Safeway Ltd* [1989] 1 SCR 1219 at 1221 with *Bliss v A-G of Canada* [1979] 1 SCR 183.

21. [1986] 2 SCR 573.
22. [1989] 1 SCR 927. See the comments of Dale Gibson, "Constitutional Law - Freedom of Commercial Expression under the Charter - Legislative Jurisdiction over Advertising - A Representative Ruling: *A-G Oue v Irwin Toy Ltd*" (1990) 69 Can Bar Rev 339, and David Lepofsky "The Supreme Court's Approach to Freedom of Expression - *Irwin Toy v Quebec (A-G)* - and the Illusion of Section 2(b) Liberalism" (1993) 3 Natl Jo of Constitutional Law 37.
23. Ibid, 967 and 971.
24. See, eg, *Royal College of Dental Surgeons v Rocket* [1990] 2 SCR 232 at 244-45 and *R v Keegstra*, [1990] 3 SCR 697 at 728-30.
25. Supra, n 22 at 978-79. For the full discussion see pp 967-78. There are a large number of publications concerning freedom of expression in Canada. Amongst the many, see a book of essays - David Schneiderman, ed, *Freedom of Expression and the Charter*, Toronto Thomson Publishing, 1991; P W Hogg, *Constitutional Law of Canada* 3d ed, Scarborough: Carswell, 1993, Part III, chapter; Clare Beckton, "Freedom of Expression" in E Ratushny and G Beaudoin, eds *Canadian Charter of Rights and Freedoms* 2d ed, Scarborough; Carswell, 1992, chapter 5; Nicole Duplé, "Les limites intranséques et les limitations étatiques de la liberté d'expression: l'interprétation téléologique et contextualisée" in *The Charter: Ten Years Later*, Cowansville: Les éditions Yvon Blais Inc, 1992 39; A W MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68 Can Bar Rev 713; S L Martin, "Canadian Perspectives on Freedom of Expression" (1991) *Contemporary Law* 517.
26. *R v Butler* [1992] 1 SCR 452.
27. See *Irwin Toy*, supra, and *Keegstra*, supra, n 24.
28. [1991] 1 SCR 139. See, eg, at 156-58, per Lamer CJC and at 226-27, per Cory J.
29. The lone dissenter was L'Heureux-Dubé J. For trenchant criticism of the approach of the majority see Jamie Cameron, "A Bumpy Landing; The Supreme Court of Canada

and Access to Public Airports under s. 2(b) of the Charter" (1992) 2 Media and Comm L Rev 91.

30. See, eg, *R v Zundel* [1992] 2 SCR 731 and *R v Butler* [1992] 1 SCR 452.
31. (1992) 11 OR (3d) 385.
32. [1984] 2 SCR 145 at 169.
33. [1986] 1 SCR 103.
34. *R v Chaulk* [1990] 3 SCR 1303 at 1335-36.
35. See, eg, Jamie Cameron, "The Original Conception of Section 1 and its Demise: A comment on *Irwin Toy Ltd v Attorney-General of Quebec*" (1989) 35 McGill LJ 253; Dale Gibson, "Reasonable Limits under the Canadian Charter of Rights and Freedoms" (1985) 15 Man LJ 27; P W Hogg, "Section 1 Revisited" (1991) 1 NJCL 1; André Morel, "La clause limitative de l'article 1 de la Charte canadienne des droits et libertés: une assurance contre le gouvernement des juges" (1983) 61 Can Bar Rev 81.
36. *R v Keegstra*, supra, n 24, 759-67, per Dickson CJC.
37. *RWDSU v Dolphin Delivery* [1986] 2 SCR 573 at 586-88. Also see *BCGEU v BC (A-G)* [1988] 2 SCR 214 at 244-45.
38. *Lavigne v OPSEU* [1991] 2 SCR 211 at 258-63.
39. *Ford v Quebec (A-G)* [1988] 2 SCR 712 and *Devine v Quebec (A-G)* [1988] 2 SCR 790.
40. *Irwin Toy*, supra, n 22; *Ford v Quebec (A-G)*, ibid; and *Royal College of Dental Surgeons v Rocket*, n 24.
41. *Mackay v Manitoba* [1989] 2 SCR 357 at 366-67 per Cory J.
42. *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69 at 88-90 per Sopinka J.
43. *Canadian Newspapers Company Ltd v Canada (A-G)* [1988] 2 SCR 122 at 129.
44. *Edmonton Journal v Alberta (A-G)* [1990] 2 SCR 1326 at 1341-42 and 1350-51 per Cory J.
45. *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1050 and 1057, per Lamer J.
46. *R v Keegstra*, supra, per Dickson CJC and *R v Andrews*, [1990] 3 SCR 870, per Dickson CJC.

47. Canada (Human Rights Commission) v Taylor [1990] 3 SCR 870, per Dickson CJC.
48. Zundel, supra, n 30.
49. Butler, supra, n 30, at pp 509-10, per Sopinka J for the court.