THE DIFFICULT RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND ITS REASONABLE LIMITS

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I

INTRODUCTION

It is not an exaggeration to claim that entrenching the Charter of Rights and Freedoms in the Constitution in 1982 revolutionized Canadian law and political debate. Developed and composed both to cement Canadian unity and to give a new beginning to the protection of fundamental rights, this new principal piece of the basic law has made a major contribution toward creating new alliances and refocusing debates on the basis of a dialectic whose terms of reference are no longer based on the distribution of legislative powers. While language guarantees and mobility rights are without a doubt the best illustrations of the political objectives pursued by the drafters, it is more toward the legal guarantees and fundamental freedoms that we must turn to assess accurately the profound changes introduced into Canada's legal structure by the Charter.

The Canadian Supreme Court, relying on the new mandate granted them by the drafters, the fact that the Charter is not limited to recognizing and declaring the existence of already existing rights, and the possibility recognized in section 1 of placing limits on the guaranteed rights without being required to give them an unnecessarily restrictive scope, has had no difficulty freeing itself from the excessively conservative judgments that had drained the Canadian Bill of Rights of all its meaning. This new judicial

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1. The sections of the Charter relevant to the discussion in this article read as follows:

§ 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.

§ 2: Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

2. To be persuaded of the little weight given by the Supreme Court to the judgments rendered under the Bill of Rights, see, for example, R. v Big M Drug Mart Ltd., [1985] 1 SCR 295; R. v Therens, [1985] 1 SCR 613; R. v Oakes, [1986] 1 SCR 103.
activism, especially as it emerged in judgments concerning freedom of expression, has produced results that are surprising to say the least.

A brief look back is necessary to understand fully the scope of the changes that have been made to this fundamental freedom in the last ten years. It was essentially through arguments based on respect for the distribution of legislative powers that it was traditionally possible to get Canadian courts to show some concern for fundamental rights.3 Occasional attempts were made to infer the existence of an “implied bill of rights” from the preamble of the Constitution Act, 1867.4 On the basis of the fact that the Canadian Constitution is based on the same principles as that of the United Kingdom, and that it consequently introduced parliamentary democracy as the form of government, it was determined that freedom of political expression had to be sheltered from any legislative infringement because it was essential to maintaining that political system. In the end, however, this theory won over only a few judges of the Supreme Court5 before permanently being ruled out.6 By expressly establishing freedom of speech, the Canadian Bill of Rights could have given rise to interesting developments and more effective protection (at least in the spheres under federal jurisdiction) of this fundamental freedom, but the ambiguous wording adopted by Parliament proved inadequate to convince the courts to shelf indefinitely the sacrosanct principle of parliamentary sovereignty. What is more, no dispute based on the alleged infringement of this freedom ever made it to the Supreme Court, so that Court never had the opportunity to rule on the exact scope of this concept.

II

The First Words

Thus, it was solely in its instrumental version, as an accessory to the functioning of parliamentary institutions and to a certain form of democracy, that freedom of expression had been allowed into Canadian courts before 1982. There were many who expected the judiciary to interpret section 2(b) of the Charter just as restrictively. In fact, the first two judgments rendered

3. Although it is agreed that human rights and freedoms are not a sphere of powers within the meaning of the Constitution Act, 1867, the courts have often invalidated provincial statutory provisions infringing fundamental freedoms (especially freedom of expression and of religion) on the ground that they were traditionally dealt with under the criminal law, which is a sphere of exclusive federal jurisdiction. See Reference re Alberta Statutes, [1938] SCR 100; Switzman v Elbling, [1957] SCR 285; McKay v R., [1965] SCR 798; Saumur v City of Quebec, [1953] 2 SCR 299; Birks & Sons (Montreal) Ltd. v City of Montreal, [1955] SCR 799.

4. The first paragraph of the preamble reads as follows: “Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom . . . .” Constitution Act, 1867, preamble, para 1 (emphasis added).

5. See Reference re Alberta Statutes, [1938] SCR 100 at 132-33 (Duff concurring); Switzman, [1957] SCR at 326 (Abbott, majority opinion).

by the Supreme Court to apply that constitutional provision\(^7\) did not dispel that skepticism; by confirming the paramount importance of political debate, the majority in both cases carefully avoided breaking with past jurisprudence and in so doing confirmed the apprehensions of those who did not trust judges to draw all possible conclusions from the entrenchment of rights.

The Court did show some openness in the freedom of expression cases by dismissing once and for all the nonfunctional distinction between action and expression. In recognizing that there is “always some element of expression” in picketing,\(^8\) Justice McIntyre implicitly made a break with Dupond\(^9\) and refused to delve into the subtle distinctions in which the American jurisprudence abounds on this topic.\(^10\) On the other hand, the refusal to exclude secondary picketing from the scope of section 2(b) solely because its primary concern is to exert economic pressure and cause financial loss might lead to the belief that the Court is no longer resistant to the idea of giving some protection to commercial expression.\(^11\) Nothing, however, was less certain. By making abundant references to prior cases (to reiterate that freedom of expression is a basic characteristic of Canadian parliamentary democracy),\(^12\) the Supreme Court was sending conflicting signals that could not be reconciled easily. The result was that judges gave themselves the greatest possible room to maneuver by foregoing a discussion on the intricacies of freedom of expression and by refusing to detail their thoughts on the bases of, and justifications for, this fundamental right.

It was therefore necessary to await the cases of Ford v. Quebec (Attorney General)\(^13\) and, above all, Irwin Toy Ltd. v. Quebec (Attorney General)\(^14\) for clarification of the status of commercial speech and to know where the Supreme Court now stood with regard to freedom of expression. In Ford, the Court had to rule on the validity of certain provisions of Quebec’s Charter of the French Language, according to which French was the only language (subject to certain exceptions) permitted for public signs, commercial advertising, and corporate names. Given the opinion that language is closely linked to the content of the message sent, the Court had no difficulty


\(^8\) Dolphin Delivery Ltd., [1986] 2 SCR at 588.

\(^9\) [1978] 2 SCR 770. Only Justice Beetz, in a dissenting opinion, seemed to want to maintain this distinction.

\(^10\) On the other hand, Justice McIntyre was very careful to mention that freedom of expression “would not protect the destruction of property, or assaults, or other clearly unlawful conduct.” Dolphin Delivery, [1986] 2 SCR at 588. We will return to this dividing line later.

\(^11\) It must be said, on the other hand, that the majority had no difficulty recognizing that the limits placed on secondary picketing were justifiable without even resorting to the inflexible test developed in R. v Oakes, [1986] 1 SCR 105.

\(^12\) Relying on Boucher v The King, [1951] SCR 265, and Switzman, [1957] SCR 285, as well as Reference re Alberta Statutes, [1938] SCR 100. Justice McIntyre was confident in recalling that freedom of expression is not a creation of the Charter but has always been perceived as one of the bases of the historical development of Western society’s political, social, and educational institutions. Dolphin Delivery, [1986] 2 SCR at 583-88.

\(^13\) [1988] 2 SCR 712.

\(^14\) [1989] 1 SCR 927.
concluding that freedom of expression brings with it the freedom to express oneself in the language of one’s choice. As soon as it is agreed that some acts might have an expressive content, it necessarily follows that language (like art, for that matter) must be protected because it is the favored medium of expression and cannot be disassociated from it.

The question remained, however, whether the freedom to express oneself in the language of one’s choice could be claimed for sending messages of a commercial nature. After having reviewed American and Canadian jurisprudence on the topic, the Court held that the freedom of expression guaranteed by section 2(b) of the Charter could not be limited to political expression. Strangely, the Court felt a need to reinterpret the pre-Charter jurisprudence to justify this result and even made an effort to demonstrate that Justice McIntyre had “clearly” agreed to include commercial speech within the scope of constitutionally protected expression. Nevertheless, it was in openly rejecting the American category approach and refusing to consider itself bound by the various values that have traditionally buttressed the freedom of expression that the Ford Court really broke new ground.

If the five judges who took part in this judgment are correct, the difficulty is not so much knowing whether freedom of expression should be interpreted as encompassing particular categories of expression, but instead whether there is a reason why the guarantee should not extend to a particular type of expression. Moreover, an answer to this question cannot be based on attempts to define the values that underlie freedom of expression, because such an approach would have the effect of merging the question of whether a given means or form of expression is included in the interests protected by the value of freedom of expression with the question of whether, on final analysis, that means or form of expression calls for protection from any infringement under the scheme of the Canadian Charter. According to the Court, these two questions are distinct and must be analyzed separately.

This part of Ford raised more questions than it answered. Was the Court implying that the choice of the fundamental values on which the protection of freedom of expression is based does not affect its scope? Is the almost ritual incantation of the principle that fundamental rights must be given a large and liberal interpretation enough to establish that freedom of expression has been infringed and to place on the government the burden of proving that the infringement is nevertheless reasonable and justified in a free and democratic

15. “Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one’s choice. Language is not merely a means or medium of expression; it colors the content and meaning of expression.” Ford, [1988] 2 SCR at 748.

16. In Reference re Criminal Code (Man.), [1990] 1 SCR 1123, 1182, Justice Lamer rightly indicated that the various artistic forms, like language, must be analyzed in terms of both form and content: Is it really possible to conceive . . . of the content of a piece of music, a painting, a dance, a play or a film without reference to the manner or form in which it is presented? It seems to me that just as language colors the content of writing or speech, artistic forms colour and indeed help to define the product of artistic expression.

society? Although some passages of the Court's opinion might give this impression, this short cut is inconsistent with the spirit of the Charter and would even tend to trivialize the rights and freedoms set out therein. The Court itself does not appear to have taken this path, as it agreed on the need to examine the interests and purposes supposedly protected by freedom of expression to determine whether there was an infringement in the case in question. Using this analysis, the Court found that commercial expression "plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy," and, therefore, it calls for constitutional protection.

By refusing to commit itself on the philosophy and values underlying freedom of expression in Canada and by minimizing the possible role of the basis of that constitutional guarantee in identifying potential infringements thereof, the Court in Ford dodged the debate on commercial speech that has been raging in the United States. This was accomplished by concealing the reasons why commercial speech was elevated to the rank of a "fundamental" freedom. In fact, this thorny question was resolved in a single sentence with the adoption without further debate of the theory developed by the U.S. Supreme Court in Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council Inc. This theory equates freedom of commercial expression to the individual autonomy of consumers. It has not been accepted unanimously in America, however, and Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico is evidence of the conflict that continues to divide the judges of the U.S. Supreme Court on this topic. Even before that decision was rendered, it was agreed in Canada that false advertising and advertising whose purpose is to propose an illegal transaction could be prohibited. After the Ford decision, the government can also restrict or prohibit advertising for the sole purpose of not promoting an otherwise legal activity as long as the right to carry out that activity does not enjoy constitutional protection. In doing this, the Court refused to pay particular attention to individuals who make economic choices and by implication called into question the premise that had led it to give constitutional status to commercial speech.

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18. "Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of § 2(b) of the Charter." Id at 766-67.

19. It may not be irrelevant to recall that the Supreme Court was well aware of this aspect of the problem when it wrote in Big M Drug Mart, [1985] I SCR 295, 344, that the purpose of a right or freedom "is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter."


The arguments for and against expanding the concept of expression to include commercial speech are well known, and they cannot be dealt with in an original manner here without going beyond the restricted context of the analysis undertaken. Nevertheless, the dearth of arguments developed by the Court to justify the protection it intends to grant that form of expression is surprising. The actual result is not surprising, as the Canadian Charter is consistent with a neo-liberal tradition based on the development of individual autonomy, which adapts itself poorly to the government intervention that serves as a vehicle for some of society's choices. The Court, however, should have justified its reasoning in the *Ford* opinion. For example, it would have been desirable had the philosophical and historical context of freedom of expression in Canada, which differs markedly from the American tradition in view of the role of the government and of free enterprise, been analyzed more elaborately. Similarly, the meaning of the term "fundamental freedom" should have been more specifically defined. While it is accurate to claim that government interference is very often inconsistent with individual freedom, it is equally accurate to say that genuine autonomy presupposes the legislature's active intervention if necessary. This is especially true with respect to commercial advertising, as it is often aimed at conditioning or leading the consumer's economic choices rather than favoring enlightened decisions. There is no question that elected authorities are in a better position than industry and advertising agencies to harmonize the various opposing interests and ensure a certain equality between the parties.

It should not be felt that the Canadian Supreme Court is insensitive to these concerns. On the contrary, it has expressly granted the legislature considerable room to maneuver in socio-economic matters and has on several occasions reaffirmed that the commercial nature of regulated expression "is not necessarily without constitutional significance." In fact, all of the restrictions on purely commercial speech that have been challenged before


24. This would of course recognize the crucial distinction made by Isaiah Berlin between negative freedom ("liberty from") and positive freedom ("liberty of"). See *Two Concepts of Liberty* in Isaiah Berlin, *Four Essays on Liberty* 118-72 (Oxford U Press, 1969).


Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy." [1989] I SCR at 993-94, quoting *R. v Edwards Books & Art Ltd.*, [1986] 2 SCR 713, 772. In the same vein, see also the comments of Justice Lamer in *Reference re Criminal Code (Man.)*, [1990] I SCR at 1144.
the Supreme Court have been found to be reasonable.\textsuperscript{26} In Ford, the emphasis was on the choice of language; the question of whether freedom of expression extended to commercial signs was asked on a secondary basis.\textsuperscript{27} Only Rocket, in which the Court ruled invalid a regulation restricting not only the form advertising by members of a professional corporation could take, but also the information they could transmit, could be seen as an exception to the rule just stated.\textsuperscript{28} The Rocket Court significantly reduced the scope of its decision, however, by making a distinction between advertising for standardized products and more subjective claims regarding the quality of services involving the exercise of professional judgment, and by giving the impression that regulating the latter would face fewer constitutional obstacles. This is especially true because it concerned the exercise of a regulatory power and not a legislative policy adopted by democratically elected representatives. Ultimately, it is even permissible to ask whether the Court was seeking to protect unrestricted competition more than freedom of expression in this decision.

These first few Supreme Court judgments have quickly set the tone and make it possible to conclude that the judiciary will not shy away from the new mandate the drafters of the Charter have given it. The theoretical tenets of this new judicial activism, however, are flimsy and fraught with ambiguities and contradictions. All of the freedom of expression decisions rendered by the Supreme Court are related to two postulates: (1) the freedom of expression established by section 2(b) of the Charter applies to every expressive activity regardless of the meaning or message the person carrying out the activity seeks to transmit; and (2) the reasonableness of a restriction on this fundamental freedom must be analyzed on the basis of the specific facts of each case rather than by considering the type of speech in question. As I will now attempt to show, each of these two theories is fallacious, and the judges can support them only by performing many legal contortions.

III

The Impossible Neutrality

Although Ford effectively put an end to the debate raised by including commercial speech as part of the freedom of expression, it was in Irwin Toy that the Supreme Court better explained its position and clearly showed its

\textsuperscript{26} I refer here to Irwin Toy, which concerned provisions regulating advertising aimed at children, and to Reference re Criminal Code (Man.), [1990] 1 SCR 1123, which recognized the reasonableness of a provision aimed at prohibiting solicitation for the purposes of prostitution in public places.

\textsuperscript{27} The Court itself confirmed this point of view when it wrote the following in Irwin Toy:

\begin{quote}
Having determined that freedom of expression prevents prohibitions against using the language of one's choice, the question became whether, in the Court's words (at p. 766) "a commercial purpose removes the expression . . . from the scope of protected freedom."
\end{quote}

Thus, while choice of language was the principal matter in those appeals (Ford and Devine), the commercial element to the expression in issue raised an ancillary question.

\textsuperscript{28} Rocket, [1990] 2 SCR at 232.

preference for a contextual approach toward interpreting restrictions on commercial speech. The result was a test that has been applied in all subsequent judgments and can accurately be regarded as *locus classicus* of freedom of expression in Canada.

Although it is not free of contradictions, the approach taken in *Irwin Toy* was the first real attempt to separate the internal limits of freedom of expression from those that could be placed on it under section 1 of the Charter. In other words, the exercise in which the Court engaged consisted of making a distinction between justifications and arguments based on definition. Faithful to its liberal interpretation of the rights and freedoms guaranteed by the Charter, the Court began by postulating that human activity cannot be excluded from the scope of section 2(b) solely on the basis of its content or its meaning. Being aware that all the acts an individual might perform do not necessarily come under freedom of expression, however, the Court retreated from this strict interpretation and created rules that are much more subtle than they appear to be at first glance.

First, the *Irwin Toy* Court agreed that an activity will not be protected as an expression if it neither transmits nor attempts to transmit a meaning, or if it transmits a meaning in a violent form. Second, if the activity lies within the sphere of protection, it must be determined whether the purpose or effect of the government action at issue was to restrict freedom of expression. The Court concluded that the government’s *purpose* is to control the transmission of a meaning if it directly restricts the content of the expression or if it restricts a form of expression related to the content. If the government did not intend to place restrictions on the expression, but only did so incidentally to its attempt to attain another purpose, the burden will shift to the person complaining that his rights have been infringed. This burden can be overcome by proving that the *effect* of the government’s action was to infringe the freedom the complainant is guaranteed under the Constitution. To do this, the complainant must establish a relationship between the message he wanted to transmit and one of the values underlying the freedom of expression: the search for the truth, participation in society, or personal enrichment and self-fulfillment.

The *Irwin Toy* Court’s method of interpretation obviously requires several comments. This reading of section 2(b) initially appears to confirm the intention already shown by the Court not to ensnare itself in a logic based on categories or on narrow rationalizations of the freedom of expression. Does this mean that the very concept of freedom of expression is totally meaningless and that the burden is on the government to satisfy the stringent standard of section 1 as soon as an infringement of freedom of expression is alleged? Although this perception is widely held, it does not correspond to reality or to the Court’s reasoning. On the contrary, a careful reading of the

30. The Court developed this analysis at length in *Irwin Toy*, and my synthesis has been inspired by its own summary. Id at 966-78.
approach proposed in *Irwin Toy* leads to the conclusion that limits of a definitional nature are more numerous than they might seem to be.

The first internal limit, which flows from section 2(b) itself, is based on the form or medium of expression. By excluding violent forms of expression, the Court made an initial breach in the universality of the protection provided by this freedom. This statement could be countered by saying that this exception does not really endanger the principle that activities cannot be excluded from the sphere of guaranteed freedom of expression because of the message they transmit. Nevertheless, it can be recognized that in agreeing to draw this distinction it is necessary to give the words a meaning and to take account at the very least of their linguistic and historical connotations. Moreover, it is not at all certain that this distinction is completely neutral in terms of content. By not clearly stating the premise on which it based this dichotomy, the Court denied itself a tool that could have rendered the dichotomy operational and in so doing opened a Pandora’s box of sorts.

The Supreme Court in *Irwin Toy* avoided following American precedent by abandoning any attempt to make a distinction between acts and expression. The extreme fluidity of the American jurisprudence on this topic is illustrative of the difficulty of such an undertaking. On the other hand, some conduct is essentially in the nature of action rather than of expression; this is certainly true of violent acts such as murder and rape. In spite of the feelings and emotions conveyed by such acts, nobody would seriously claim that prohibiting them would infringe the freedom of expression of those who commit them. Thus, it should not be seen as surprising that the Court showed no reluctance in removing violence from the scope of section 2(b) of the Charter.

The whole problem is obviously to define what is meant by “violent forms of expression.” In *Dolphin Delivery*, its first judgment related to freedom of expression, the Court emphasized that no protection would be granted to threats of violence, to the destruction of property, or to “other clearly unlawful conduct.” In a dissenting opinion, Justice McIntyre subsequently limited the scope of his comments by explaining that the other conduct he had in mind was that which was “clearly unlawful” and calculated to infringe

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31. Id at 966.

32. The Court illustrated its position with the example of a single person who decides to park his car in a zone reserved for the spouses of government employees in order to show his disagreement with or indignation at the method chosen to distribute limited resources. Although parking a car is normally a purely physical activity, the Court gave the opinion that the person in question might call on the fundamental freedom guaranteed by § 2(b) if he could show that his act had expressive content. Id at 969.


35. [1986] 2 SCR at 588.
constitutional rights. The majority, however, did not follow him on this point, as they limited the exception to violence and threats of violence.\(^{37}\)

The Court in \(Dolphin Delivery\) did not elaborate further upon this thorny question because it was not required to do so to resolve the issue at hand. Only Justice Lamer, in an individual opinion, agreed to make some additional comments on this topic without being compelled to do so by the facts before him. Freeing himself from the judicial reserve in which Canadian courts often still cloak themselves, he began by repeating that certain forms of expression might be separated from the content they are intended to transmit. These unprotected forms of expression concern acts of violence and are often direct attacks on the physical liberty and integrity of another person. This would explain why most, if not all, of these violent forms of expression are crimes. Without going so far as to claim that Parliament’s criminalization of a given activity automatically excludes it from the scope of section 2(b) of the Charter, he implied that Criminal Code offenses whose \textit{actus reus} might consist of words or of other forms of expression were closely related to the unprotected forms of expression.

The Court directly addressed this question in \(R. v. Keegstra\).\(^{39}\) The statute involved in this case was section 319(2) of the Criminal Code, under which the accused was charged with having willfully promoted hatred against an identifiable group by making anti-Semitic statements. Counsel for the Attorney General had tried to argue that the willful promotion of hatred was an activity that, in its form and consequences, was analogous to violence or threats of violence. Referring to a passage from \(Irwin Toy\) to the effect that “freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure,”\(^{40}\) the government argued that hate propaganda was prejudicial to the ability of members of target groups to convey thoughts and feelings and should for that reason be likened to

\(^{36}\) Justice McIntyre explained himself on this topic in his dissenting opinion in \(B.C.G.E.U., [1988] 2 SCR\) at 252. On that occasion, the Court was requested to assess the validity of an order made by the Chief Justice of British Columbia’s Supreme Court prohibiting a union representing striking court employees from picketing the courts of justice. Taking the opposite view from the majority, for whom this picketing came under section 2(b) of the Charter because it had an expressive content and because it had not been tainted by violence or threats of violence, Justice McIntyre made the following distinction: “This is not a case such as \(Dolphin Delivery\) which required a balancing of conflicting rights. What is in issue here is the question of whether any person or group may have a Charter right to engage deliberately in conduct calculated to abridge the Charter rights of others. In my view, no such right can exist and resort to § 1, which can only have application where there has been an infringement of a Charter right, was therefore unnecessary.”

\(^{37}\) It is revealing that in \(Irwin Toy\), the majority quoted the passage from \(Dolphin Delivery\) in which Justice McIntyre excluded threats of violence and acts of violence, but omitted the sentence in which he referred to “other clearly unlawful conduct.”\(^{1989}\) 1 SCR at 970. Along the same lines, see also \(Rocket, [1990] 2 SCR\) at 245.

\(^{38}\) Moreover, Justice Lamer summarized his thoughts in the following words: “It is sufficient to here reiterate that all content of expression is protected while the set of forms that will not receive protection is narrow and includes direct attacks by violent means on the physical liberty and integrity of another person.” See \(Reference re Criminal Code (Man.), [1990] 1 SCR\) at 1186 (emphasis in the text).

\(^{39}\) \(1990\) 3 SCR 697.

\(^{40}\) Id at 731, quoting \(Irwin Toy, [1989] 1 SCR\) at 970.
violence and threats of violence. All the judges rejected this argument in the end, although for very different reasons.

The approach adopted by Chief Justice Dickson on behalf of the majority was the most consistent with the philosophy embraced by the Court in its previous decisions. Since the content of expression is irrelevant to determining the scope of section 2(b), *Irwin Toy* implies that only those messages transmitted directly by physical violence should be left without constitutional protection. Thus, extending the exception to threats of violence is inconceivable because such threats can be classified only by reference to their meaning. Consequently, it is unnecessary to determine whether the threatening aspects of hate propaganda can be seen as threats of violence.41

Although this new narrowing of the exception originally proposed in *Dolphin Delivery* and confirmed in all the subsequent decisions was somewhat unexpected, it is nevertheless a logical conclusion. As soon as it is argued that human activity cannot be removed from the scope of guaranteed freedom of expression because of its content, it is hard to see reasons that could justify excluding any speech, however offensive or inflammatory it might be. In theory, the form that such expressive activity might take would be unimportant as long as the objective was to transmit a meaning. For example, if the fact of parking one's car in a place where parking is prohibited might in some circumstances be interpreted as an expressive act and a sign of protest,42 the same must be true *a fortiori* of threats of violence and of defamatory or hateful words. Violent acts such as murder or rape could also be seen as having an expressive content in that they demonstrate unrefined feelings and passions. This dimension, while not negligible, is nevertheless so secondary to the harm inflicted on the victim that it does not merit consideration.

It is not because of its low expressive content that Chief Justice Dickson refused to grant any protection to violent behavior, but rather because of "the extreme repugnance of this form to free expression values justifying such an extraordinary step."43 This is surprising because it reintroduces an analysis based on the definition of this fundamental freedom. Insofar as it is agreed that the scope of the guarantee of freedom of expression depends on the values underlying it, does this not mean leaving the door wide open to the

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41. The basic points of Chief Justice Dickson's reasoning on this topic are found in the following passage:

While the line between form and content is not always easily drawn, in my opinion threats of violence can only be so classified by reference to the content of their meaning. As such, they do not fall within the exception spoken of in *Irwin Toy*, and their suppression must be justified under § 1. As I do not find threats of violence to be excluded from the definition of expression envisioned by § 2(b), it is unnecessary to determine whether the threatening aspects of hate propaganda can be seen as threats of violence, or analogous to such threats, so as to deny it protection under § 2(b).

[1990] 3 SCR at 733.

42. *Irwin Toy*, [1989] 1 SCR at 969.

consideration of certain other forms of expression, and even the censure of certain types of messages? While attacks on physical integrity certainly prejudice the self-fulfillment of the persons concerned and their ability to communicate, is the same not true of attacks on their dignity and on their mental integrity? These questions highlight the tension that continues to exist in the interpretation of section 2(b) of the Charter and leads to the feeling that the Court should reconsider its position when it has to assess the consistency of certain other provisions of the Criminal Code with section 2(b). Without pushing the logic through to the end, it is hard to see how inciting to mutiny, promoting a prize fight, making false statements to obtain a firearms acquisition certificate, perjury, counselling suicide, or the commission of an offense, to give just a few examples, could be regarded as the exercising of a fundamental freedom and likened to expressive acts consistent with the values on which that constitutional guarantee is based. To reach this result, the Court must abandon the fiction that section 2(b) protects the entire content of expression regardless of the meaning or message one is trying to transmit. On the other hand, the Court could show greater consistency at the section 1 stage while avoiding sending conflicting signals to citizens. Chief Justice Dickson's account, in which he tried to show that restrictions on hate propaganda might be justified more easily than other infringements of freedom of expression because such messages provide little to the values this fundamental freedom was intended to promote, is paradoxical.\footnote{44} The minority, meanwhile, does not deny that threats of violence, like violence itself, are foreign to the values pervading free expression. Rather, the minority refuses to extend the scope of this exception to cover hate propaganda and the promotion of hatred because it would in no way harm the smooth operation of democracy.\footnote{45} Unfortunately, Justice McLachlin's reasoning on this point is not thorough enough. Unless the concept of discrimination, which was the very basis of the challenged provision,\footnote{46} is ignored, it is hard to see how it can be claimed that hate propaganda could be

\footnote{44. Although Chief Justice Dickson persists in claiming that "the protection of extreme statements, even where they attack those principles underlying the freedom of expression, is not completely divorced from the aims of § 2(b) of the Charter," id at 765, it is hard to see under what circumstances this profession of faith could have real repercussions. When he adds in the same breath that "hate propaganda should not be accorded the greatest of weight in the § 1 analysis," id, and repeats the conclusion reached in \textit{Rocket} concerning commercial speech, according to which the standard of justification will be less strict, it is hard to imagine how a restriction on hate propaganda could be said to be unreasonable.}

\footnote{45. Relying on a very narrow notion of violence and of threats of violence, the minority had first ruled out the possibility of likening hate propaganda to either of those exceptions. That approach is highly debatable, however. Why would violence only imply the use of physical force to inflict injuries on persons or cause damage to property? Is not the psychological damage suffered by individuals as a result of racist comments, although harder to assess, at least just as real? Can it really be said with certainty that hate propaganda does not have the effect of compelling the reviled group to act in a certain way? A detailed discussion of these questions would obviously go beyond the context of this brief presentation. One would have been entitled to expect the minority not to duck these problems and to deal with them in somewhat greater depth than they did.}

\footnote{46. It should not be forgotten that section 319(2) forbids the wilful promotion of hatred against any "identifiable group," which is defined as "any section of the public distinguished by colour, race, religion or ethnic origin."}
compared to outrageous attacks made by protagonists in the heat of a political debate. It may be “impossible to imagine a vigorous political debate on a contentious issue in which the speakers did not seek to undermine the credibility of the ideas, conclusions and judgment of their opponents.”47 This, however, has nothing to do with a diatribe against a group of persons who are easily identifiable by unchanging personal characteristics. Moreover, it only adds to the confusion to concede that there might be a vast difference between unflattering descriptions of political opponents and section 319(2) of the Criminal Code, but that it is “a difference of content rather than of form.” After all, should threats of violence not also be analyzed on the basis of their content?48 Regardless of its flaws, this judgment has to its credit that it situates the debate where it should take place. Nonetheless, it would have been preferable to take the broader objectives of the Charter into consideration in drawing the outline of freedom of expression rather than focusing only on the values upon which that freedom is based.

The preceding pages lingered at length over violent forms of expression to try to show not only that the Supreme Court has agreed to exclude certain types of messages at the very stage of definition, but that it is also, to say the least, perilous to claim the ability of dissociating form and substance entirely. However, this exercise must not shift focus from the other limits to freedom of expression that flow from section 2(b). In Irwin Toy, the Court explained that an infringement of freedom of expression can be found only if the purpose or effect of the government’s action was in fact to restrict the protected expressive activity. Although this second stage was not worded in terms of scope of application, it unquestionably added other qualifications even before the government could be required to justify its intervention. This result is especially striking when the complainant alleges that the government’s action, although perfectly acceptable in principle, has the effect of restricting his freedom of expression. Since that action is presumed by the Court to be valid, the onus is on the plaintiff to establish that his purpose was to transmit a message related to attaining the truth, participating in society, or achieving personal enrichment or self-fulfillment. In placing this burden on the plaintiff, the Court attributed significant consequences to a distinction whose relevance it did not even try to justify, and also contravened the principle it had stated earlier in the decision when it wrote that one cannot “exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed.”49

On the other hand, government action for the purpose of controlling the transmission of a message is presumed invalid only in certain circumstances. If the restriction concerns a form of expression related to the content, the presumption will apply; if, on the other hand, the government’s intention was

47. Keegstra, [1990] 3 SCR at 832 (McLachlin).
48. Moreover, it should not be forgotten that this is the very reason given by Chief Justice Dickson for refusing to exclude them from the scope of the protection provided by section 2(b).
to prevent the physical consequences of a particular conduct, the presumption
will not apply. This dichotomy will be difficult to implement in reality, first
because the government might, as the Court itself recognized, occasionally try
to disguise its intentions. Above all, however, expression, when transmitted
by means of conduct or of an act, will more often than not be related
inseparably to certain physical consequences.\textsuperscript{50} This new disposition toward
freedom of expression makes it possible once again to note that the Court is
not totally resistant to the idea of restricting the scope of this fundamental
freedom at the very stage of defining it. To agree that certain government
objectives, such as cleanliness and order,\textsuperscript{5} will prevail over the interests of
those who carry out expressive activities, is to agree that reconciling the
various opposing forces is not always carried out through the investigation
required under section 1 of the Charter.\textsuperscript{52}

\textbf{IV}

\textbf{Categories Return to the Surface}

As revealed in the discussion above, section 2(b) of the Charter does not
protect without distinction all expressive activities an individual might carry
out. In fact, certain types of speech will be unprotected not just for reasons
related to the form they take, but also (although in a less obvious manner)
because of the content they convey. Nevertheless, the Supreme Court
continues to favor a contextual approach by restricting and minimizing as
much as possible the breaches it makes in the universality of application of
freedom of expression. This preference appears to originate in the belief that
fundamental rights will be better protected if the judge is authorized, while
taking the specific facts of each case into account, to weigh the values that
might conflict with those rights.\textsuperscript{53} However, refusing to protect certain

\textsuperscript{50} The test proposed by the Court to clarify its comments is somewhat circular and is found in
the following passage: "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 behavior of others, or does it consist,
rather, only in the direct physical result of the activity." Id at 976. This distinction is in fact very
close to that developed by the American courts between restrictions related to content and those
related to the time, place, and manner of expression.
\textsuperscript{51} Id at 974-75.
\textsuperscript{52} American courts have also engaged in this debate under the first amendment. \textit{Schneider v
State}, 308 US 147 (1939). See also John Hart Ely, \textit{Legislative and Administrative Motivation in
\textsuperscript{53} In \textit{Keegstra}, all the judges were won over to this method of analysis and supported the
1326, 1355-56, from which Chief Justice Dickson quoted the relevant passage:

\begin{center}
\textit{a particular right or freedom may have a different value depending on the context. It may
be, for example, that freedom of expression has greater value in a political context than it
does in the context of disclosure of the details of a matrimonial dispute. The contextual
approach attempts to bring into sharp relief the aspect of the right or freedom which is truly
at stake in the case as well as the relevant aspects of any values in competition with it. It
seems to be more sensitive to the reality of the dilemma posed by the particular facts and
therefore more conducive to finding a fair and just compromise between the two competing
values under section 1.}
\end{center}

\cite[1990]{3 SCR at 737}. See also id at 796 (McLachlin).
categories of communication whose inherent value is questionable could pave the way to excluding other speech whose only flaw is that it presents a minority point of view.54

The caution displayed by the Supreme Court and the Court's ability to resist the temptation of interpreting the notion of "freedom of expression" too restrictively are admirable. Interpretation of the Charter by the courts must continue for several years before it will be possible to consider excluding too many expressive activities en bloc at their definitional stage. If that is correct, though, it will also be necessary to beware of hasty generalizations when the time comes to consider a restriction's consistency with section 1 of the Charter. These decisions rendered by the Court concerning freedom of expression are not free from ambiguity.

While being careful not to argue expressly in terms of categories, the Court has recognized on several occasions that the limits placed by legislatures on some types of speech are more easily justified than those placed on others.55 Although the Court refuses to categorize, it is clear that judges will show greater deference to the government when the government intervenes to regulate commercial speech and hate propaganda, rather than when the government attempts to regulate the diffusion of political ideas.56

54. Chief Justice Dickson was referring to this slippery slope when he wrote the following passage:
   Additionally, condoning a democracy's collective decision to protect itself from certain types of expression may lead to a slippery slope on which encroachments on expression central to § 2(b) values are permitted. To guard against such a result, the protection of communications virulently unsupportive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.
   Keegstra, [1990] 3 SCR at 766.

55. In Rocket, [1990] 2 SCR at 247, Justice McLachlin wrote that restrictions placed on commercial speech by the legislature could be justified more easily than other infringements. Moreover, the openness with which the validity of restrictions on this type of expression was considered in Irwin Toy and in the Reference re Criminal Code (Man.) provides a perfect illustration of this point of view. The opinion written by Chief Justice Dickson in Keegstra is also very revealing. In writing that "the expression prohibited by § 319(2) is not closely linked to the rationale underlying § 2(b)" and that "expression intended to promote the hatred of identifiable groups is of limited importance when measured against free expression values," [1990] 3 SCR at 762, he was therefore reasoning in conceptual terms and placed very little importance on the comments of the accused or the context in which they were made.

56. It is mainly in the application of the second branch of the proportionality test that the variation in standards will make itself felt. In Oakes, [1986] 1 SCR at 139, which concerned the validity of a reversal of the burden of proof, the Court inflexibly required that the means used to attain an otherwise important objective infringe the right to be presumed innocent "as little as possible." R. v Edwards Books and Art Ltd., [1986] 2 SCR 713, on the other hand, concerned an assessment of the constitutionality of legislation prescribing statutory holidays and the opening and closing hours of businesses; after finding that the legislation infringed freedom of religion, the Court nevertheless held that it was a reasonable limit by significantly increasing the flexibility of its proportionality test. The Court indicated inter alia that the legislation did not have to be perfectly suited to the objectives being pursued to stand up to a judicial review, as simplicity and administrative convenience were legitimate concerns for the legislature. It even added that "the courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line" and that it was not the role of the Court "to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable." Id at 782-83. As a result, it is possible to
This modulation of the criteria a restriction must satisfy has been commented upon abundantly by legal theorists,\(^5\) and, moreover, the Court has not made a mystery of it. The Court explained in *Irwin Toy* that the Charter was not supposed to serve as an instrument of better situated individuals and that it was necessary to be mindful of the legislature’s representative function in seeking to protect vulnerable groups.\(^5\)\(^8\)

The link made between the type of expression that is infringed and the severity of the examination required by section 1 of the Charter is less clear. According to the Court, one of the principal benefits flowing from a liberal interpretation of the rights and freedoms guaranteed by the Charter lies in the flexibility offered by section 1 to place conflicting values in their factual and social context. Courts can thus assess a restriction’s constitutionality on a case-by-case basis. In practice, however, the judges’ attitudes depend more on the significance they attach to the type of expression on which the restriction is based than on the words or acts of the individual who complains that his rights have been infringed.

The Court’s category-based approach may reflect an intuition that is profoundly rooted in the majority of citizens, according to which all types of expression do not have equal value and do not merit the same degree of protection. Of course, the difficulty will consist entirely of determining how optimally to guarantee freedom of expression without straying too far from the population’s instinctive perceptions. The full development and consolidation of this fundamental freedom in Canada ultimately will depend on the solution to this equation.

Those who are repelled by the idea of turning section 2(b) into a sieve and who for that reason reject excessively systematic exclusions have a legitimate objection. An overly narrow definition of freedom of expression certainly could result in an absence of protection for a very large number of expressive activities and thus lead us down a slippery slope. An overly liberal approach, however, giving the status of fundamental freedom to all communications without distinction, would also beget many problems.

As many American authors agree, the more the scope of a right or a freedom is broadened, the greater the risk of reducing its force.\(^5\)\(^9\) In Canada, this phenomenon is manifested in the development of a variable, and more or


\(^5\)\(^8\). [1989] 1 SCR at 993-94.

\(^5\)\(^9\). Professor Frederick Schauer, on whom the Supreme Court of Canada has frequently relied, wrote the following on this topic:

> The scope of a right and the strength of that right . . . most often occur in inverse proportions to each other . . . The broader the scope of the right, the more likely it is to be weaker, largely because widening the scope increases the likelihood of conflict with other interests, some of which may be equally or more important.

less stringent, test to assess a restriction's reasonableness: the farther removed from the freedom of political expression, the more likely the courts will be to support the choice of the legislature or of the government. The result is that the courts will send conflicting signals to citizens. Consequently, the credibility of the Charter will decline if the courts first give the status of fundamental freedom to certain types of traditionally unprotected expressive activities and then reimpose the restrictions that were originally placed on them.

The circumstantial approach required by section 1 unquestionably gives the judiciary sufficient maneuvering room to avoid categories and predetermined tests if it wants to take advantage of this flexibility. The result, however, could be greater uncertainty for citizens. As was shown by Irwin Toy and Keegstra, which were decided by majorities of only four to three, attempting to gauge the reasonableness of an action can result in highly different assessments. Moreover, if it is necessary to reject all generalizations and stick to a strictly case-by-case approach, each case will be buffered by each judge's biases and arbitrariness.

There is nothing unusual in this dilemma for the American judiciary. The argument between Supreme Court justices who want to interpret the first amendment inflexibly and those who favor a protection modulated according to the circumstances and opposing interests continues to rage. Although the Canadian Charter is worded differently from the American Constitution and contains an express limitation clause, it is subject to the same debate over how best to guarantee the importance of freedom of expression.

This is not to say that the parameters of the discussion, the arguments that were developed, and the solutions that were adopted in the United States must be transposed slavishly into the Canadian context. The Supreme Court of Canada has already shown originality and independence in rejecting, for example, the "public forum" theory and the "action-expression" distinction established by the U.S. Supreme Court when ruling on the problems of hate propaganda and commercial speech. Thus, there is no reason to think that the Canadian judiciary and legal profession will not continue to consider the history and values that breathe life into the Charter in developing a uniquely Canadian method of protecting the freedom of expression.

V

Conclusion

Although anticipating the method that might ultimately be adopted to regulate speech in Canada was not this article's aim, that method should make it possible to place restrictions on expressive activities on the basis of both the definition of this fundamental freedom and the justifications permitted by

("The wider the reach of First Amendment coverage, the greater seems to be the juridical affinity for instrumental reasoning, balancing tests, differential levels of scrutiny, and pragmatic judgments.").
section 1 of the Charter. In the words of the Supreme Court, rights must be interpreted in a teleological perspective by reference
to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.60

Thus, the various rights and freedoms guaranteed by the Charter must be weighed and reconciled in the context of section 2(b) itself; consequently, a contextual analysis would be of very little use. On the other hand, it is at the section 1 stage that the political, economic, and social objectives the government might pursue on behalf of the majority should be balanced against the rights and freedoms of citizens with which those objectives might collide.61 In this second case, the facts and specific circumstances of each case might easily be decisive when determining whether the rights of individuals should give precedence to the interests of the community.

This distinction between arguments of principle, which are aimed at asserting rights, and political arguments, which are instead aimed at convincing someone of the validity of a community objective, is not new.62 Although this dividing line will not always be easy to draw, it at least adheres to the internal structure of the Charter and could make it possible to give a more consistent answer to the question of whether the reasoning should be on the basis of definition or of justification. Moreover, this way of looking at freedom of expression cases would explain the intuitive disquiet some might feel in reading Keegstra in view of the objection met with by all those who have invoked the right to equality and international law to exclude hate propaganda from the scope of freedom of expression.

60. Big M Drug Mart, [1985] 1 SCR at 344.
61. In Oakes, [1986] 1 SCR 103, in which the Supreme Court presented the procedure to follow in assessing the reasonableness of a limit to a right or freedom, Chief Justice Dickson wrote the following on behalf of the majority:

The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, § 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

Id at 136 (emphasis added).