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CHARTER OF RIGHTS AND FREEDOMS: FUNDAMENTAL FREEDOMS

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TABLE OF CONTENTS

PAGE

ISSUE DEFINITION 1

BACKGROUND AND ANALYSIS 1

A. The Effect of Section 1 of the Charter on Fundamental Freedoms 1
B. Fundamental Freedoms – Whose Freedoms? 2
1. Freedom of Conscience and Religion (Section 2(a)) 3
a. Sunday Observance 3
b. Educational Issues 5
c. Family Issues 6
d. Other Issues (Payment of Tax, R.C.M.P. Uniforms, Communication with Pastor) 8

2. Freedom of Thought, Belief, Opinion, and Expression, including Freedom of the Press and Other Media of Communication (Section 2(b)) 8
a. Political Expression 9
b. Freedom of Commercial Expression 12
c. Public Access and Media Issues 14
d. Censorship/Obscenity 17
e. Hate Propaganda 21
f. Picketing/Demonstrations 24
g. Other Issues (Defamatory Libel, Statements Against Belief) 25

3. Freedom of Peaceful Assembly (Section 2(c)) 26

4. Freedom of Association (Section 2(d)) 27

SELECTED REFERENCES 29

CASES 29

CANADA

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CHARTER OF RIGHTS AND FREEDOMS: FUNDAMENTAL FREEDOMS*

ISSUE DEFINITION

The Canadian *Charter of Rights and Freedoms* came into force on 17 April 1982. This analysis concentrates on section 2 of the Charter, which deals with Canadians' "fundamental freedoms." The section affirms that everyone has the following freedoms: conscience and religion, thought, belief, opinion, and expression, which is stated to include freedom of the press and other media of communication. Also grouped under this heading are the freedoms of peaceful assembly and association. There can be little dispute that the denial of one or more of these freedoms would have a profound effect on everyone in Canada.

This paper provides a brief analysis of some of the most important cases to have emerged under section 2 since its passage, and divides the decisions covered into groups based on their subject matter. Because of the volume of material involved, in most instances detailed Charter analysis is not included. The final section provides a list of the cases to which this paper refers.

BACKGROUND AND ANALYSIS

A. The Effect of Section 1 of the Charter on Fundamental Freedoms

Section 1 of the Charter states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed

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* The original version of this Current Issue Review was published in February 1984; the paper has been regularly updated since that time.

by law as can be demonstrably justified in a free and democratic society." In many of the cases involving fundamental freedoms, the legislation in question has been found to infringe a Charter right but has been saved by section 1, on the grounds that it is a reasonable limit that is demonstrably justified.

In *R.* v. *Oakes*, decided in 1986, the Supreme Court of Canada laid down a test for deciding when an infringement of a Charter right was a reasonable limit that could be demonstrably justified, and the *Oakes* test has remained formally intact to this date. The first criterion is that the infringing law must have a sufficiently serious objective to justify limitation of a Charter right. In other words, the purpose of the law must be of sufficient importance to warrant overriding a constitutionally protected right or freedom.

Second, even when a sufficiently important objective has been established, there must be a "proportionality test" to establish that the means chosen are reasonable and demonstrably justified. This involves a three-part analysis: the law must be rationally connected to the objective; the law must impair the right no more than is necessary to accomplish the objective, and the law must not have a disproportionately severe effect on the rights infringed.

In *Dagenais*, the case involving a partial broadcasting ban on the CBC production of *The Boys of St. Vincent*, Chief Justice Lamer, speaking for the majority, clarified the question of a "disproportionately severe effect": "While the third step of the *Oakes* proportionality test has often been expressed in terms of the proportionality of the objective to the deleterious effects, this court has recognized that in appropriate cases it is necessary to measure the actual salutary effects of impugned legislation against its deleterious effects, rather than merely considering the proportionality of the objective itself."

B. Fundamental Freedoms – Whose Freedoms?

The introductory wording of section 2 states that the listed fundamental freedoms are applicable to "everyone." The Charter seems to use the words "everyone," "any person," "any member of the public" and "anyone" almost interchangeably. Professor Peter Hogg has pointed out that, in the absence of any contextual indication to the contrary, one would expect terms of such generality to include artificial as well as natural persons. It has been successfully argued that the freedoms contained in section 2 apply equally to corporations and natural persons. On the other

hand, the rights in the sections of the Charter that use the word "citizen" probably do not apply to a corporation.

1. Freedom of Conscience and Religion (Section 2(a))

Before the Charter came into force, there was no express protection for freedom of religion under the *Constitution Act, 1867*. Some limited protection was, however, given to denominational schools in section 93 of that Act. Specific legislative jurisdiction with respect to religion is not dealt with in the *Constitution Act, 1867* and the courts have had to characterize laws touching religion as coming either within section 92 or section 91 of that Act. The pre-Charter cases in this area mainly dealt with challenges by merchants to various Sunday closing laws.

The fact that "conscience" has been separated out from "religion" led to comments that the Charter might constitutionalize the right of civil disobedience when the route of opposition to law is sufficiently the product of an individual's deeply held system of moral beliefs, whether or not these are grounded in considerations normally regarded as religious. In *R.* v. *Big M Drug Mart*, the Supreme Court of Canada indicated that the freedom of conscience safeguarded by this provision relates to freedom of conscience in matters of religion. The paragraph protects against all state-imposed burdens on the exercise of religious beliefs, whether direct or indirect, intentional or unintentional, foreseeable or unforeseeable, provided they cannot be regarded as merely trivial or insubstantial.

Section 2(a) issues are discussed under the following general headings: Sunday Observance, Educational Issues, Family Issues and Other Issues.

a. Sunday Observance

A number of cases involve legislation that requires businesses to close on Sundays. In the leading case, the majority of the Alberta Court of Appeal decided that the *Lord's Day Act* was unconstitutional. It reasoned that this Act has a religious purpose in that it forces Sunday, which represents the holy day of the majority of the Christian religion, on minorities. The Court went on to say that at the very least the terms of freedom of religion and freedom of conscience in the Charter mean that henceforth in Canada governments shall not choose sides in a sectarian controversy. The minority opinion took a much wider view of this section of the Charter; they held that it supported a concept of freedom of religion aimed at the elimination of oppression and repression by civil authority on account of religious belief, and eradicated compulsion to accept any

particular doctrine. The purpose of the *Lord's Day Act* was not compulsion or interference with the religion of others.

The Supreme Court of Canada upheld the majority view of the Alberta Court of Appeal in holding the *Lord's Day Act* to be unconstitutional. In disposing of this case, Chief Justice Dickson first rejected the Alberta government's argument that Big M., a commercial operation, was not an individual and therefore did not enjoy religious rights. He stated that if the law is unconstitutional, it matters not whether the accused is a Christian, Jew, Moslem, Hindu, Buddhist, atheist, agnostic, or whether an individual or a corporation.

Consistent with his decisions in other Charter cases, the Chief Justice determined that the courts must look at the true purpose of the statute to determine whether it violates the Charter. The court held that it was clear that the Act was passed by Parliament to give legal force to a Christian religious observance of Sunday as a day of rest. It was not simply a law to make Sunday a uniform commercial closing day, nor could it be considered to be labour legislation intended to limit the number of days people are required to work.

The court concluded that since the enactment of the Charter it has become the right of every Canadian to work out his or her own religious obligations, if any, and it is not for the state to dictate otherwise.

Provincial Sunday observance statutes have been the subject of constitutional challenges since the federal legislation was struck down. Ontario's *Retail Business Holidays Act* was first challenged in 1984. In the litigation, businesses wishing to remain open on Sundays invoked both the constitutional division of powers and the guarantees in the *Charter of Rights*. The Act made it an offence for a retail business to sell or offer goods for sale on a Sunday or "other holiday." In order to keep this legislation within provincial legislative competence, the Act was said to have the secular purpose of enforcing uniform days of rest for workers, rather than the religious purpose of enforcing conformity with the requirements of one faith.

The Supreme Court of Canada, in *R.* v. *Edwards Books*, found that the purpose of the statute was indeed to provide uniform holidays for retail workers: a valid, secular purpose. The Court cited the desirability of allowing parents to have regular days off that were the same as their children's days off from school and the days off enjoyed by most other family and community members. The Supreme Court also found that an exception for small retailers, holding that this was a reasonable exception to the general rule.

The Ontario legislature passed substantial amendments to the *Retail Business Holidays Act* in 1989. An exemption was created whereby any retailer, regardless of size or the day it wishes to observe as a sabbath, may carry on retail business on a Sunday if the business is closed to the public on one other day in the week by reason of the religion of the owner. This provision was designed to accommodate retailers whose religious beliefs require them to observe a sabbath other than Sunday or Saturday. Another amendment created a municipal option permitting municipalities to override the prohibition against Sunday opening.

The amended *Retail Business Holidays Act* was challenged very soon after the amendments were enacted (*Peel*). The respondent supermarket chains opened on a Sunday, in contravention of the Act, and were charged. Ontario's High Court of Justice held the legislation invalid, finding that it infringed the freedom of religion guaranteed by section 2 of the Charter, and that it could not be saved under section 1.

The Ontario Court of Appeal found the amended Act to be constitutionally valid. Chief Justice of Ontario Dubin, for the majority, held that Southey J. had erred in holding that the Act limited freedom of religion and that the provision could not be saved under section 1. He found that the evidence fell short of proving that the impact of the Act on freedom of religion is more than trivial or insubstantial. The Court went on to hold that even if the Act did offend freedom of religion, then the limit is justified according to section 1 of the Charter.

In reaching his decision, Chief Justice Dubin referred to evidence filed on behalf of the Attorney General of Ontario that set out the nature and purpose of the new municipal option. In enacting the legislation, the Ontario legislature had relied on sociological and economic information demonstrating the continued need for a common pause day for retail workers. The provision for a municipal alteration of the provincial framework was designed to accommodate different cultural, geographic and tourism concerns in various areas of the province.

b. Educational Issues

The absence of public funding for private religious schools in Ontario was challenged in *Adler* v. *Ontario*, in which a group of parents whose children attended such schools claimed that their rights under section 2(a) of the Charter were contravened by this absence. The Ontario Court of Appeal held that the non-funding of such schools did not violate the appellants' freedom of religion guaranteed by section 2(a) since the section does not provide an entitlement to

state support for the exercise of one's religion. The decision was upheld in 1996 by the Supreme Court of Canada.

In early 1990, the Ontario Court of Appeal decided that regulations under the *Education Act* requiring two periods of religious education a week in public schools contravened freedom of conscience and religion as guaranteed by section 2(a) of the Charter. In *Canadian Civil Liberties Association* v. *Ontario*, the Court reviewed evidence on the curriculum content and decided that there was "sufficient indoctrinating material to preclude us from regarding it as trivial or inconsequential." Although children could be exempted from classes at the request of the parent, the Court found that the children might well feel pressured to remain in the classroom, where, however, they could experience stress and discomfort. Even if the regulations might seem to have a valid objective, such as the inculcation of proper moral standards, section 1 could not justify them because the indoctrination of children in the Christian faith would not be validly related to such an objective.

Compulsory school prayer came under the scrutiny of the Ontario of Appeal, which, in *Zylbergerg* v. *Sudbury Board of Education* determined that a law compelling public schools to hold prayer sessions violates the Charter's freedom of conscience and religion section, even if the law exempts a student from attending. A regulation passed under Ontario's *Education Act* infringed upon the Charter as it required the "reading of the scriptures or other suitable prayers." The Court concluded that peer pressure from other students would effectively nullify the exemption contained in the provision. In a 1989 decision dealing with similar school prayer legislation, the British Columbia Supreme Court also adopted the Ontario reasoning.

In 1986, the Supreme Court of Canada dismissed the appeal of Thomas Larry Jones of Calgary, who had argued that provisions of the *Alberta School Act* that prevented parents from educating their children at home for religious reasons violated the guarantee of freedom of religion. Mr. Justice Gerard La Forest said that the province and the nation's compelling interest in the efficient instruction of children outweighs this freedom. In order for Mr. Jones to continue teaching the children at home, he must first obtain the approval of provincial school authorities.

c. Family Issues, including Medical Treatment and Child Welfare

In 1995, the Supreme Court of Canada dealt with an Ontario case involving parents who had refused a blood transfusion for their newborn child *B.(R.).* The child had been made a temporary ward of the Children's Aid Society, and a blood transfusion had been given, ancillary to

other medical treatments. The parents appealed the wardship order, arguing that it violated their right to freedom of religion, but lost at the District Court and Court of Appeal levels.

The Supreme Court unanimously dismissed their appeal. Four judges held that section 2(a) of the Charter had not been violated because freedom of religion does not include freedom to impose upon a child religious practices that threaten his or her safety, health or life. Freedom of religion should not encompass activity that so categorically negates the freedom of conscience of another, including a child. The other five judges held that the right of parents to rear their children according to their religious beliefs is a fundamental aspect of freedom of religion under section 2(a) of the Charter. Even though the purpose of the *Child Welfare Act* is to protect children, its effect was to infringe the parents' freedom of religion. Any such infringement was, however, amply justified by the state's interest in protecting children at risk, which is a valid section 1 objective.

Courts in at least three provinces have considered whether a parent's religious beliefs and practices might validly affect the terms of a custody order, and this area of law is still unclear in spite of being addressed by the Supreme Court of Canada in two 1993 decisions. In 1989, the Ontario High Court of Justice heard an appeal by a father who was a Jehovah's Witness against an order restricting his access and precluding him from taking his sons to church on Sunday. The trial judge had found that exposing the children to conflicting religious practices could be against their interests. The Ontario Divisional Court decided on appeal, however, that unless there is compelling evidence that the sharing of religious beliefs by a parent with access is contrary to the child's best interests, the *Divorce Act* should be interpreted in a manner consistent with that parent's right to freedom of religion (*Hockey* v. *Hockey*).

In October 1993, the Supreme Court of Canada handed down decisions in two cases involving challenges to the constitutionality of the custody and access provisions of the federal *Divorce Act, 1985*. In both *P.(D.)* v. *S.(C.)*, on appeal from the Court of Appeal for Quebec, and *Young* v. *Young*, on appeal from the Court of Appeal for British Columbia, the custody and access provisions, which emphasize the best interests of children, were held not to infringe the access parent's right to freedom of religion. Both appeals had been brought by Jehovah's Witnesses, who were seeking the right to give religious instruction to their children, contrary to the wishes of the custodial parents.

d. Other Issues (Payment of Tax, R.C.M.P. Uniforms, Communication with Pastor)

In 1991, the Trial Division of the Federal Court held that taxpayers could not withhold a portion of their taxes to protest against government funding of abortions. Because taxpayers are under a legal compulsion to pay income tax, the use of tax funds for purposes offensive to their religious beliefs does not infringe upon freedom of religion. Since taxpayers do not pay the tax voluntarily, conscience is not involved. Moreover, the recognition of the "supremacy of God" in the preamble to the Constitution does not prevent Canada from being a secular state; it only prevents it from becoming officially atheistic.

Similarly, the freedom of conscience and religion of a taxpayer who objects to military or war expenditures is not infringed when the federal government devotes a portion of its revenue to military matters (*Prior)*.

In 1985, a Manitoba Queen's Bench judge ruled that a baptized Sikh could not wear a kirpan (a religious symbol in the form of a dagger with a four-inch blade) in the court-room during his trial (*Hothi*). In 1994, amended regulations permitting exceptions from the standard R.C.M.P. uniform, such as a turban instead of the usual felt hat, to be worn by members on religious grounds, were held not to infringe section 2(a) (*Grant* v. *Canada*).

In 1991, the Supreme Court of Canada considered the issue of whether communications between a pastor and an accused party in a criminal case were protected by the guarantee of freedom of religion. The court found that there was no automatic privilege for such communications, and that the extent (if any) to which disclosure of communications will infringe an individual's freedom of religion depends on the particular circumstances involved. The nature of the communication, the purpose for which it was made, the manner in which it was made and the parties to the communication will all be relevant factors (*Gruenke*).

2. Freedom of Thought, Belief, Opinion, and Expression, including Freedom of the Press and Other Media of Communication (Section 2(b))

The Charter does not use the phrase "freedom of speech." Professor Hogg points out that the references in section 2(b) to "thought, belief, and opinion," while comforting, are without import because even totalitarian regimes cannot suppress unexpressed ideas. The Supreme Court of Canada has consistently emphasized the fundamental nature of this freedom, stating in *Edmonton Journal* v. *Alberta (Attorney-General)* that, given the importance of freedom of expression in a free

and democratic society, and the absolute manner in which this freedom is guaranteed by section 2(b), the freedom should be restricted only in the clearest of circumstances.

The word "expression" has been construed by the courts to include non-verbal means of communication such as picketing and the establishment of a "peace camp" on Parliament Hill (*Weisfield*). In the 1993 case *Ramsden* v. *Peterborough (City)*, "postering" on public property, including utility poles, was held to constitute expression because it attempted to convey a meaning. By fostering political and social decision-making, postering was found to further at least one of the values underlying section 2(b), which was infringed by the municipality's prohibition of the practice. The legislative goal of the prohibition, although meritorious, was held not to justify a complete ban on postering.

For purposes of this review, the discussion of section 2(b) is divided into the categories of: political expression, commercial expression, public access and media issues, censorship/obscenity, hate propaganda, picketing/demonstrations, and other issues.

a. Political Expression

In 1991, the Supreme Court of Canada dealt with section 33 of the federal *Public Service Employment Act*, which prohibited public servants from "engaging in work" for or against a candidate or political party (*Osborne*). The Court decided that although the section implemented the constitutional convention of public service neutrality, this did not protect it from Charter scrutiny. Protecting the neutrality of the civil service was found to be a clearly important objective; however, section 33 as it stood did not constitute a "reasonable limit" on freedom of expression because it went beyond what was necessary to achieve that objective. The court was not prepared to "read down," or limit, the legislation so as to make it valid, because Parliament itself, and not the courts, must decide how the legislation is to be redrafted.

The question seems to be one of degree. In late 1989, the Ontario High Court dealt with an application by a nurse employed by the Sudbury and District Health Unit; she wished to run for the position of mayor or councillor of her town, which was included in the Regional Municipality of Sudbury and represented on the Regional Council. Under the *Ontario Municipal Act*, employees of a municipality may not hold office as a member of a council, although there is provision for leave without pay during an election campaign.

The Court found that the restriction had a valid purpose: to protect the democratic process by preserving the impartiality of the public service, and thus ensure that municipal

government can be carried on without concerns about conflict of interest (*Rheaume*). The Court considered whether the limitation was unnecessarily restrictive, especially since some Canadian provinces allow employees elected to public office to take a leave of absence rather than resign. However, the Court decided that legislation should not be declared unreasonable simply because a better solution exists.

Increasingly, election issues other than the right to vote or stand for office are being treated as "freedom of expression" concerns. For example, the provisions of the *Canada Elections Act* dealing with election expenses have generated a number of cases. In 1984, the National Citizens' Coalition mounted a court challenge against a 1983 prohibition of third-party expenditures. The government argued that the limitation was necessary as part of a legislative framework regulating the expenditures of candidates and parties and to prevent an unfair benefit to candidates with wealthy supporters. The court found that such fears alone were not a sufficient reason for limiting Charter rights, and that the government had not adequately established that such provisions were necessary. The decision, which was handed down just months before the 1984 election, was not appealed.

Bill C-114, which amended the *Canada Elections Act* in the spring of 1993, re-introduced a limit of $1,000 with respect to direct advertising by third parties. On 25 June 1993, a judge of the Alberta Court of Queen's Bench, the same court that had heard the 1984 challenge, again struck down third party spending limitations (*Somerville* v. *Canada (Attorney General)*). The court found that the new section violated the right to an informed vote (section 3) and the right to free expression (section 2(b)). A subsequent section also violated the right to freedom of association (section 2(d)), because it prevented the pooling of funds to purchase more than $1,000 of advertising. Turning to the section 1 test of whether the limitations were demonstrably justified, the court did not consider the objective of preserving "the integrity and effectiveness of party and candidate spending limits" sufficiently pressing and substantial" to invoke section 1. It seems that there was insufficient evidence before the court to establish that a lack of spending limits might affect the outcome of elections. An appeal to the Alberta Court of Appeal was dismissed.

The Supreme Court of Canada has upheld both the use of compulsory union dues for political purposes (*Lavigne*, 1991), and the use of public funds to support serious electoral candidates (*McKay*, 1989).

In 1995, the Alberta Court of Appeal dealt with a Reform Party of Canada challenge to the allocation of broadcasting time during an election under the *Canada Elections Act*. The Act

requires broadcasters to make available a total of six and one-half hours to registered political parties for the purposes of paid political advertising. Because at certain times of the year prime time advertising may be sold out in advance, broadcasters have in the past pre-empted previously sold advertising time in order to comply with the requirements of the *Canada Elections Act.* It could, therefore, prove impossible for political parties to purchase prime time advertising other than that allocated to them under the Act. The Reform Party had argued that the actual allocation formula discriminated against new or emerging political parties.

The Alberta Court of Appeal found that the broad discretion granted to the Broadcast Arbitrator under the Act relieved any unfairness that might arise from a strict application of the broadcast allocation formula. The challenged sections do not have the effect of restricting the freedom of expression of any political party; they merely reserve time that might not otherwise be available and provide for the allocation of such time. However, the court found that certain other sections had the effect of preventing a registered party from purchasing additional broadcast time, and held these to be invalid. Since total election expenses were already effectively controlled by other provisions of the Act, there is no need to further impinge upon the freedom of the parties to decide how they can best use their limited allowable expenditures.

In 1998, the Supreme Court of Canada found unconstitutional the provision of the *Canada Elections Act* prohibiting the publication of opinion polls during the final three days of a federal election campaign. A majority of the Court concluded that the provision restricts freedom of expression, and is not justified under section 1 of the Charter. The Court suggested that a more legitimate and less intrusive means of achieving the objective of protecting the public from inaccurate polls late in a campaign would be to require that methodological information must be published along with such poll results (*Thomson Newspapers Co.* v. *Canada (Attorney General)*).

The courts have, however, placed some limits on freedom of political speech. The British Columbia Court of Appeal held in 1994 that the arrest of a group of environmentalists who blocked a logging road in violation of a court injunction did not violate their freedom of speech. The injunction did not interfere with lawful expression, and the accused were otherwise free to stand and express themselves verbally or symbolically anywhere along the side road (*MacMillan Bloedel*).

In 1994, the Supreme Court of Canada held that section 2(b) did not impose on the government a positive duty to consult specific groups or to provide funding for the purpose of

assisting them to participate in formal discussions. The government had provided funding for four aboriginal groups to represent the aboriginal peoples in responding to the government's 1991 constitutional proposals; subsequently, an association representing native women had sought an order in the Federal Court requiring the government to provide it with equivalent funding and consultation. The Supreme Court found that this association had had adequate opportunities to express its views through the designated aboriginal groups, as well as direct to the government (*Native Women's Association of Canada* v. *Canada*).

b. Freedom of Commercial Expression

In *A.G. of Quebec* v. *Irwin Toy Ltd.*, the Supreme Court of Canada clearly confirmed that commercial speech is protected by the Charter. The *Quebec Consumer Protection Act* prohibits various forms of commercial advertising directed at persons under the age of 13, including television advertising. A majority of the Supreme Court ultimately upheld the law under section 1 of the Charter as being a reasonable limitation of the right to free expression.

All five Supreme Court judges confirmed that commercial free expression is protected by section 2(b), and agreed that Irwin Toy's right to free expression was violated by the law. But the court divided on whether the law was a reasonable limit on the right which could be demonstrably justified in a free and democratic society under section 1 of the Charter.

According to the majority opinion, the Quebec government had adduced sufficient evidence to justify the reasonableness of its conclusion that a ban on commercial advertising directed at children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through advertising.

Further, the effects of the advertising ban were not so severe as to outweigh the government's pressing and substantial objective, since advertisers were still free to direct their message at parents and other adults, and to engage in educational advertising.

The majority judges went on to lay down a two-step process for analyzing whether there has been a breach of section 2(b) of the Charter. The first step is to determine whether the plaintiff's activity falls within the sphere protected by freedom of expression. The second step is to ask whether the purpose or effect of the government action in issue is to restrict freedom of expression.

If the government wishes 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

would trench upon the guarantee of free expression. On the other hand, where the government aims only to control the physical consequences of particular conduct, its purpose would not trench on the guarantee.

Two cases late in 1989 also dealt with the limits on freedom of commercial expression. In *Canadian Newspapers Co.* v. *Victoria (City)*, the city refused to allow newspaper vending boxes on municipal property. The court ruled that, although commercial expression is also a protected freedom, the city had not infringed on the newspaper's freedom of expression, since it could distribute papers in other ways. The city's purpose was to preserve the aesthetic appearance of its property, for the well-being of its citizens. In the same year, in a brief judgment, the Ontario Court of Appeal confirmed that restrictions on the colouring of margarine did not interfere with the freedom of expression of margarine producers who wished to communicate that margarine is equal or preferable to butter.

In 1991, the Saskatchewan Court of Appeal held that municipal by-laws prohibiting advertising by the use of exterior signage was a justifiable limit on freedom of expression, especially where the owner of the business is aware of the restriction when he locates his business (*Pinehouse Plaza Pharmacy*).

However, some limits on commercial advertising have been rejected by the courts. In 1990, the Supreme Court of Canada found invalid those regulations made under the *Health Disciplines Act* of Ontario that classified as professional misconduct all advertising by dentists not expressly permitted by the regulations. Although the objectives of professional regulation and protection of the public were sufficiently important to override a Charter right, it was not necessary to prohibit useful information of use to the public in their choice of dentist (*Rocket*).

In 1994, the Alberta Court of Appeal found that sections of the provincial *Public Contributions Act* that restricted the ability of organizations to conduct campaigns to obtain funds for charitable purposes were unjustified restraints on freedom of expression. Banning all unlicensed requests for financial assistance was not proportional to the mischief that the legislation sought to remedy (*Epilepsy Canada)*.

In 1988, the Supreme Court of Canada considered the provisions of the *Charter of the French Language*, which prohibited a firm's name from being shown in any language other than French (*Ford*). The Court concluded that freedom of expression includes the freedom to express oneself in the language of one's choice, and that this freedom extends to commercial expression. While the aim of the legislation was legitimate, and had a rational connection with ensuring that the

visage linquistique of Quebec reflected the predominance of the French language, the ban on other languages was not necessary or proportionate. Requiring that the French language be predominant in the display, which might include any other languages, would be acceptable; however, exclusivity did not survive the proportionality test.

In 1995, the Supreme Court of Canada handed down its decision in *RJR-MacDonald Inc v. Canada (Attorney General)*, a case dealing with the *Tobacco Products Control Act*. By a narrow majority of five to four, the court found a number of the provisions of the Act to be inconsistent with the right to freedom of expression, and not to constitute reasonable limits under the section 1 test. For slightly differing reasons, the majority could not accept the sections of the Act dealing with advertising, trade mark use, unattributed health warnings, retail display and sponsorship. Protecting the public from the dangers of tobacco smoking is a valid objective, but the majority felt that the government had offered insufficient evidence to demonstrate that the good these provisions might achieve was proportionate to the seriousness of the infringement. The specific objectives of the challenged provisions were more precise than the general aim of protecting the public from the danger of tobacco.

For example, the requirement that a warning be placed on tobacco packaging was clearly justified. However, there was no evidence that significant additional benefits were gained by requiring the warning to be unattributed, or by preventing the manufacturers from placing on the packages any information not allowed by regulation.

The majority judgment accepted that a causal relationship may be difficult to establish where legislation is directed at changing human behaviour. For this reason, the Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective. However, a complete ban on a form of expression is more difficult to justify than a partial ban. The government must show that only a full prohibition will enable it to achieve its objective. Where, as in this case, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by section 1 to save the violation of free speech is not established.

c. Public Access and Media Issues

In *Southam (No. 1)* (1983), the Ontario Court of Appeal held that section 12(1) of the federal *Juvenile Delinquents Act,* which required the trials of juveniles to be held *in camera,* was

unconstitutional as it conflicted with section 2(b) of the Charter. It was determined that the rule of openness of courts fosters the necessary public confidence in the integrity of the court system and an understanding by the public of the administration of justice. The absolute ban of the public from the trial of a juvenile could not be demonstrably justified in a free and democratic society. The court did allow that there might be some basis for the exclusion of the public from certain hearings under the *Juvenile Delinquents Act*, but the absolute ban served too wide a purpose. This holding was repeated under the *Young Offenders Act* by the Ontario Court of Appeal in *Re Southam* (1986).

In *Her Majesty the Queen* v. *Canadian Newspapers*, the Supreme Court of Canada upheld section 442(3) of the *Criminal Code*, which makes it mandatory that the Court issue an order directing that the identity of the complainant in a sexual assault case shall not be published or disclosed, upon application by the complainant. The Ontario Court of Appeal had held that section 442(3) infringed section 2(b) of the Charter, and that the government had failed to demonstrate the need for a mandatory prohibition. Mr. Justice Lamer, for the Supreme Court, held that the limits imposed on freedom of the press by section 442(3) are minimal. The legislative objective is to encourage victims to report sexual assaults by protecting them from the trauma of widespread publication and thereby to suppress crime and improve the administration of justice; this is not outweighed by any limiting of freedom of the press. The publication ban provision was held to be justified on the basis of section 1 of the Charter.

The importance of media access to certain types of proceedings was emphasized by the British Columbia Court of Appeal in *Blackman*. The Court held that section 2(b) guaranteed the *prima facie* right of journalists to be present during a review board hearing pursuant to Part XX.1 of the *Criminal Code* and related to the disposition in a case where an accused person was found not guilty by reason of a mental disorder.

Section 486(1) of the *Criminal Code* allows a judge to exclude any or all members of the public from a court when, in his or her opinion, it is “in the interest of public morals, the maintenance of order or the proper administration of justice.” The section was upheld by the New Brunswick Court of Appeal in the 1994 case *Canadian Broadcasting Corp.* v. *New Brunswick (Attorney-General)*. Although the section was held to limit freedom of expression, it was saved by virtue of section 1 of the Charter. Failure to have made the exclusion order would have permitted further victimization of the victims in the case, which involved charges of sexual assault and sexual interference. Although the result was overturned by the Supreme Court of Canada in 1996, on the

grounds that the circumstances of the case did not justify the exclusion of the public from the courtroom, the Charter reasoning upholding section 486(1) was not reversed.

In contrast to the decisions discussed above, the Supreme Court has decided that an Alberta statute that limits the publication of information arising from court proceedings in matrimonial disputes is an unconstitutional limitation on freedom of expression. The court in the *Edmonton Journal* case noted the fundamental importance of the right to freedom of expression, and the historic importance of open courts in a democratic society. It decided that the provincial objectives of ensuring privacy and access to a fair trial for persons wishing to litigate matrimonial matters were sufficiently important to bring section 1 into play, but that the restrictions in the legislation were excessive.

In 1994, a publication ban was also set aside by the Supreme Court of Canada in the *Dagenais* v. *C.B.C.* case involving the television mini-series "The Boys of St. Vincent." The court weighed the competing interests of the right to free expression and the rights of the accused in the case to a fair trial. The publication ban was quashed, as the Court found it limited the broadcaster's Charter rights unjustifiably. The ban was too broad, and the judge who granted the initial ban had failed to consider reasonable alternative measures available for achieving the objective without limiting the expressive rights of third parties.

In *Moysa*, the Supreme Court was asked to rule that a qualified privilege exists for journalists testifying in Canada. The appellant had been ordered to testify before the Alberta Labour Relations Board about her communications with company officials while writing a story on a union organizing campaign. Several employees were subsequently dismissed and an unfair labour practices hearing began. The journalist claimed a qualified privilege on the grounds that her being compelled to testify at this hearing would harm her ability to gather information.

The Supreme Court decided that the constitutional issue of such a qualified privilege for journalists simply did not arise on the facts of the case. The journalist had neither been asked for nor had given a promise of confidentiality. Moreover, the evidence now sought from her was crucial, relevant, and not available from other sources. Additionally, there was nothing to suggest that her subsequent gathering of information was actually threatened.

In Nova Scotia, the Supreme Court granted an injunction against a broadcaster, thus preventing the publication of documentation protected by solicitor-client privilege.

A journalist's right to protect the identity of sources may have been limited by the *Rocca Enterprises* v. *University Press of New Brunswick* case, where it was held that, in the

absence of evidence of a relationship between the protection of identity of sources and the ability to gather news, there is no infringement of section 2(b) of the Charter in compelling a journalist to reveal the source of information.

Additionally, in late 1991, the Supreme Court of Canada confirmed a decision of the New Brunswick Court of Appeal holding that Charter protection for freedom of the press does not alter the requirements for the issuance of a search warrant, but rather provides a backdrop against which the reasonableness of the search warrant request may be evaluated. Thus, RCMP officers were entitled to a search warrant to seize CBC videotapes of illegal activity during a labour demonstration, even though the information given to the justice of peace who issued the warrant did not specify that police identification officers had also been present at the scene or why their testimony was not sufficient for prosecution.

Finally, the issue has arisen of the extent to which a provincial legislature or, by extension, Parliament itself, can deny access to the media. In 1991, the Nova Scotia Court of Appeal decided that the Legislative Assembly of the province could not entirely ban television coverage of its proceedings. The case raised the important question of whether the Charter applies to parliamentary privilege and the conventional right of Parliament to govern its own proceedings. In a judgment rendered 21 January 1993, from which Mr. Justice Cory dissented, the Supreme Court of Canada allowed the Assembly's appeal, holding that members of legislative bodies may continue to limit media access as part of their right to control legislative proceedings (*New Brunswick Broadcasting*). The Court was divided (3-4) as to the extent to which the Charter might in other circumstances apply to members of the House of Assembly or another legislative body.

d. Censorship/Obscenity

The Ontario Court of Appeal, in a reference regarding the Ontario Board of Censors, held that where the standards the board uses to censor films are not prescribed by statute, but left to the discretion of the board, the legislation imposes a limitation to freedom of expression which cannot be saved by section 1 of the Charter. While some prior censorship of film is demonstrably justified in a free and democratic society, having regard to the prevalence of censorship legislation and the criminal prohibition against obscenity, a limitation left to administrative discretion is not one prescribed by law.

In Vancouver, a zoning by-law prohibiting the retail sale of "sex-oriented products," as defined in the by-law, in any zone of the municipality was held to limit freedom of expression in

a manner permitted by section 1. The by-law itself, in its definition of "sex-oriented" products, contains clear standards and criteria for its application. The limitation was held to be a reasonable one, and also demonstrably justified, even though the municipality adduced no evidence of the effect of such products on society. The Court took judicial notice of their undesirable effects.

A Toronto by-law requiring that in licensed adult entertainment parlours the entertainers' pubic area remain covered was upheld. Even assuming that to uncover the area would be "artistic expression" and thus included in the "expression" that is protected by the Charter, the right to artistic expression was not being asserted here but rather the right to expose entertainers' pubic areas in order to stimulate liquor sales. "Burlesque dancing" was held to be a form of expression in *R.* v. *Zikman*, a decision of the Ontario Provincial Court, and the *Criminal Code* provision prohibiting nudity in a public place without lawful excuse was held to be a reasonable limit within the meaning of section 1 of the Charter. A Toronto-by-law prohibiting physical contact between an exotic dancer and another person during the dancer's performance was upheld in the 1995 Divisional Court decision in *Ontario Adult Entertainment Bar Assoc.* v. *Metropolitan Toronto*.

In 1994, the Quebec Court of Appeal struck down municipal by-laws prohibiting businesses dealing in eroticism from using images of the human body in outdoor advertising. Although the city of Montreal considered the images to be degrading and dehumanizing, particularly to women, the effects of the measure were out of proportion to the objective when the images were neither pornographic or obscene (*Cabaret Sex Appeal Inc*. v. *Montreal*).

The freedom to import a sexually explicit documentary film for use in a faculty of medicine course on sexuality was protected by a County Court decision in Manitoba. The decision of the Deputy Minister, Revenue Canada, Customs and Excise, banning the film's entry into Canada was held to have violated the academic community's freedom of expression (*Re University of Manitoba*). Section 159 [now section 163] of the *Criminal Code*, which restricts the publication, processing and distribution of obscene material, has the valid purpose of limiting the viewing of obscene material in order to protect society generally. Therefore, the provision, including the criminal law sanction, is demonstrably justified (*R.* v. *Ramsingh*). Section 159 was also upheld in a subsequent B.C. Court of Appeal case, *R.* v. *Red Hot Video Ltd.* (1985). Leave to appeal to the Supreme Court of Canada in this case was refused in 1988.

In *Re Luscher and Deputy Minister, Revenue Canada, Customs and Excise*, the prohibition against the importation of books and other materials of an immoral or indecent character contained in the schedule to the Customs Tariff (Canada) was held to contravene the Charter, and

was therefore found to be of no force or effect. Because the prohibition's first object was books, it *prima facie* infringes freedom of expression. It does not constitute a reasonable limit, saved by section 1, because of its vagueness and subjectivity. The words "immoral" and "indecent" are not defined in the legislation. They are also highly subjective and not limited to matters predominantly sexual.

Section 163 of the *Criminal Code*, which deals with selling or distributing obscene material, was considered by the Supreme Court of Canada in early 1992 in *R*. v. *Butler*. In particular, the Court closely scrutinized section 163(8), which provides that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one of more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene."

The Supreme Court held that section 163(8) was an exhaustive test of obscenity where the exploitation of sex is a dominant characteristic. The most important test as to whether such exploitation is "undue" remains the "community standard of tolerance" test. That test is concerned not with what Canadians would tolerate being exposed to themselves, but with what they would not tolerate *other* Canadians being exposed to. The Supreme Court endorsed "a growing recognition in recent cases that material which may be said to exploit sex in a degrading or dehumanizing manner will necessarily fail the community standards test." Such material is perceived to be harmful to society, and particularly to women. However, even material that offends the community standards test will not be considered "undue" if its use is required for the serious treatment of a theme. This is the "internal necessities" test, more commonly known as the "artistic defence."

Generally speaking, sex with violence will always constitute undue exploitation; sex that is degrading or dehumanizing may be undue if the risk of harm is substantial; and explicit sex that is neither violent nor degrading will generally be tolerated, unless it depicts children. When the artistic defence is invoked, the question becomes whether the undue exploitation of sex is the main object of the work, or whether the portrayal of sex is essential to a wider artistic, literary, or other similar purpose.

Since the purpose of section 163 is specifically to restrict the communication of certain types of materials according to their content, the Supreme Court was in no doubt that it infringed section 2(b) of the Charter. The objective of avoiding harm to society through the dissemination of certain obscene materials was, however, seen as sufficiently pressing and substantial to warrant a restriction on the freedom of expression. The Supreme Court also

confirmed that the objective of maintaining conventional standards of propriety, independently of any harm to society, would no longer be justified, in light of the values of individual liberty that underlie the *Charter*.

Finally, the Court found that section 163 meets the proportionality test; that is, there is a rational connection between the impugned measures and the objective of minimal impairment of the right or freedom, and a proper balance between the effects of the limiting measures and the legislative objective. There is a rational connection because Parliament is entitled to have a "reasoned apprehension of harm" resulting from the desensitization of individuals exposed to materials depicting violence, cruelty, and dehumanization in sexual relations. As for minimal impairment of rights, the legislation need not be "perfect" but only appropriately tailored in the context of the infringed right. The infringement on freedom of expression is confined to a measure designed to prohibit the distribution of sexually explicit materials which are accompanied by violence, or which, though they are without violence, are degrading or dehumanizing; thus the restriction is proportional to the objective.

The provision of the *Criminal Code* that prohibits communicating for the purposes of solicitation was upheld by the Supreme Court of Canada. Section 213 (until 1988 section 195.1) makes it an offence to "in any manner communicate or attempt to communicate with any person" for the purposes of prostitution. On 31 May 1990, the Supreme Court of Canada rendered its decision in three appeals regarding this section: *Skinner* from Nova Scotia, *Reference Re Sections 193 and 195.1 of the Criminal Code* from Manitoba, and the *Stagnitta* case from Alberta. Only in the *Skinner* case had the provision been found unconstitutional, on the basis that it contravened the right of freedom of expression as guaranteed in section 2(b) of the Charter. The majority reasons of the Supreme Court of Canada were delivered by Chief Justice Dickson, with Madam Justice Wilson and Madam Justice L'Heureux-Dubé dissenting. The Chief Justice held that the impugned section infringes the freedom of expression guaranteed by section 2(b), but not the freedom of association guaranteed by section 2(d), nor the liberty guarantee in section 7. He found that the infringement of section 2(b) is justified on the basis of section 1 of the Charter as being a reasonable limit on a protected right, and thus demonstrably justified in a free and democratic society.

In *Langer*, an Ontario court dealt with the new provisions in the *Criminal Code* respecting child pornography. A number of paintings and drawings involving explicit depictions of children engaged in a variety of sexual activities, in some cases with adults, had been seized from an

art gallery. The Crown had brought an application for an order that these depictions be forfeited to the Crown as child pornography. The owner of the paintings relied upon the statutory defence of artistic merit (section 163.1(6)), but also challenged the constitutionality of the child pornography provisions (sections 163.1 and 164 of the *Criminal Code).*

The court found the provisions to be a justified infringement of freedom of expression after amending the wording of section 164(1), the provision dealing with the seizure of impugned materials. Evidence established that the legislation was carefully designed to meet Parliament's legitimate objective of protecting children from harm, was rationally connected to the objective, and impaired the right to freedom of expression as little as possible. The court found that an artist acting with sincerity and integrity in the creation of a work would be very unlikely to run afoul of the provision. Moreover, the Court found that the paintings and drawings in question did have artistic merit; it therefore dismissed the Crown's application for forfeiture.

e. Hate Propaganda

The Supreme Court of Canada in *R.* v. *Zundel* struck down the *Criminal Code* provision prohibiting the spreading of false news. Section 181 made it an offence to wilfully publish a statement, tale or news that the person knows to be false and that has caused or is likely to cause injury or mischief to a public interest. The accused had been twice convicted of the offence by Ontario juries.

Writing for the majority, Madam Justice McLachlin held that section 181 of the Code infringes the accused's section 2(b) Charter right to freedom of expression. Section 181 contains over-broad, vague wording, making it difficult for the courts to apply. The section is not saved by section 1 of the Charter because it permits or threatens the imprisonment of people on the ground that they have made a statement that a jury deems to be false or mischievous to some public interest, thereby stifling "a whole range of speech, some of which has long been regarded as legitimate and even beneficial to our society." Also, the fact that the historical aim of the section is now out-dated, making it necessary for a new purpose to be attributed to the legislature, prevented the provision from being saved under section 1.

In a strong dissent, Justices Cory and Iacobucci (with Mr. Justice Gonthier concurring) wrote that section 181, while it infringes section 2(b) in a limited way, is not too vague because it provides clear guidelines of conduct. Because the publication of the lies which are the target of the provision operates to "foment discord and hatred," they make the concept of

"multiculturalism in a true democracy impossible to attain." The dissent also discussed the historical shift in emphasis in section 181, from 1275, when it was designed to protect the nobles and "great persons of the realm," to today, when its purpose is the protection of minorities and the preservation of Canada's mosaic of cultures; it concluded that this shift was permissible. The dissenting justices believed that the importance of the state objective, balanced against an infringement of the "extreme periphery" of the right to freedom of expression, made section 181 justifiable in free and democratic Canadian society.

In three other decisions, the Supreme Court of Canada has upheld two provisions prohibiting different forms of hate-mongering. The appeals were heard in December 1989, and decisions handed down on 13 December 1990. In *R.* v. *Keegstra* and *R.* v. *Andrews*, the impugned provision was section 319(2) of the *Criminal Code*, which prohibits the wilful promotion of hatred toward any section of the public distinguished by colour, race, religion or ethnic origin. The case of *R.* v. *Taylor* dealt with the constitutionality of section 13(1) of the *Canadian Human Rights Act*.

The majority of the Supreme Court of Canada, after a thorough historical review of anti-hate legislation, upheld both provisions, but in each case by a narrow majority. The dissents in each case, written by Madam Justice McLachlin and concurred with by Mr. Justice Sopinka and in part by Mr. Justice La Forest, are well-reasoned and persuasive, suggesting that the validity of this type of measure may be challenged again in the future.

In *Keegstra* and *Andrews*, provincial Courts of Appeal had handed down contradictory results, the Ontario Court of Appeal upholding section 319(2) and the Alberta Court of Appeal finding it unconstitutional as an unjustifiable limit on the fundamental freedom of expression guaranteed by section 2(b) of the Charter. Chief Justice Dickson (as he then was) found that section 319(2) infringed the guarantee of freedom of expression found in section 2(b) of the Charter. In determining that section 319(2) was, however, saved by section 1 of the Charter, his reasoning included a consideration of the harmful effect on society of this form of communication, Canada's commitments in international law to prohibit hate-mongering expression, and the principles underlying sections 15 and 27 of the Charter, which respectively guarantee equality and emphasize the importance of the multicultural heritage of Canadians. Both section 319(2), and the reverse onus provision in section 319(3)(a), which allows an accused to defend on the basis that his or her statements are true, were upheld under section 1 of the Charter as reasonable limits prescribed by law in a free and democratic society.

In her dissent, Madam Justice McLachlin held that the guarantee of free expression afforded by section 2(b) of the Charter should not be limited because of sections 15 or 27, or any international instruments. While finding that the legislative objective was sufficiently weighty to justify a limit on the fundamental freedom of expression, she held that it was not made clear that section 319(2) is an effective measure to prevent hate-mongering. Madam Justice McLachlin seemed to have been influenced by arguments that prosecuting individuals under a criminal prohibition may give them free publicity and martyr status. She wrote that a criminal sanction may make hate-mongerers appealing if it "dignifies them by completely suppressing their utterances." The provision failed the proportionality test; it did not impair free speech only to the minimum extent permitted by its objectives. She concluded that any questionable benefit of the legislation is outweighed by the significant infringement on the constitutional guarantee of free expression.

The *Taylor* case dealt with section 13(1) of the *Canadian Human Rights Act*, which makes it a discriminatory practice to communicate by telephone any matter that is likely to expose a person or group to hatred or contempt because they are identifiable on the basis of a prohibited ground of discrimination. The accused persons had been responsible for a telephone answering machine that delivered recorded messages denigrating the Jewish race and religion. In dissent, Justices La Forest, Sopinka and McLachlin held that section 13(1) failed to meet the proportionality test because it was too broad. The majority upheld the provision, however, saying that though the provision may impose a slightly broader limit upon freedom of expression than does section 319(2) of the *Criminal Code*, the conciliatory bent of a human rights statute renders such a limit more acceptable than would be the case with a criminal provision.

A subsequent decision by the Saskatchewan Court of Appeal applied the rationale in *Taylor* to uphold legislation prohibiting the publication or display of any sign or representation that exposes to hatred or "ridicules, belittles, or otherwise affronts the dignity of" any person in a protected group.

In a case related to hate literature provisions, the New Brunswick Court of Appeal rejected part of the order of a board of inquiry under the New Brunswick *Human Rights Act* dealing with the conduct of Malcolm Ross, a teacher who had published material arguing that western Christian civilization is being undermined by an international Jewish conspiracy. The board had ordered that Mr. Ross be removed from the classroom, and that his employment be terminated unless a non-teaching position could be found for him. Additionally, his employment was to be terminated if he published or distributed anti-Jewish writings. The trial court that first reviewed the

order had quashed the "gag" provision, and the Court of Appeal concurred. Additionally, the Court of Appeal removed those provisions of the order relating to Mr. Ross's employment, on the grounds that he had never used the classroom or school property to further his views. Because of this, the need for his removal from the classroom was not sufficiently "pressing and substantial" to override Mr. Ross's right to freedom of expression. The court decided that "to hold otherwise would... have the effect of condoning the suppression of views that are not politically popular at any given time."

f. Picketing/Demonstrations

The right to engage in secondary picketing was dealt with in *Dolphin Delivery*. In the B.C. Court of Appeal, it was held that picketing that does not have as its purpose or object the conveying of information or opinion or persuading anyone to a point of view, is a form of action rather than expression; restrictions on such picketing thus cannot contravene this provision of the Charter. A strong dissenting opinion was registered in this case by Mr. Justice Hutcheon, who expressed the view that all peaceful picketing is an exercise of freedom of expression. The Supreme Court of Canada in its decision on the appeal of this case decided that all peaceful picketing is indeed expression and is therefore guaranteed as a freedom under the Charter. It can be restrained, however, when it is obvious that it will lead to escalation of the conflict beyond the immediate parties.

Moreover, the Supreme Court of Canada has held that court employees on a legal strike can no longer picket courthouses, as such conduct amounts to criminal contempt of court. (*B.C.G.E.U.* v. *B.C.*)

The Court reaffirmed that peaceful picketing is a form of expression protected under the Charter's right to freedom of expression. Assuring unimpeded access to the courts, however, is plainly, in the court's opinion, an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom. Picketing of this type could lead to massive disruption of the court process, which would be an intolerable interference with the legal and constitutional rights of Canadians.

In *Dieleman*, an Ontario court granted an injunction against anti-abortion protest activity in the vicinity of free-standing clinics and doctors' offices. Although this injunction infringed the guarantee of freedom of expression, the physiological, psychological and privacy interests of women about to undergo an abortion constituted objectives of sufficient importance to allow the freedom to be overridden.

g. Other Issues (Defamatory Libel, Statements against Belief)

In March 1996, the Ontario Court (General Division) struck down section 301 of the *Criminal Code of Canada*, which prohibited the publication of defamatory libel, defined as matter published without lawful justification that is likely to injure the reputation of any person by exposing that person to hatred, contempt or redicule, or that is designed to insult the person to which the matter refers. The *R.* v. *Gill* case involved two individuals who had published "wanted" posters, alleging that six Kingston Penitentiary guards had tortured and killed an inmate. The Court had no difficulty finding that section 301 infringed the rights of the accused under section 2(b) of the Charter, and also that the section was not saved under section 1.

A few cases have also arisen on the issue of whether persons or organizations can be compelled to make a statement against their wishes or beliefs. In an Ontario action for libel, the judge of the Provincial Court found in favour of the plaintiff and, in addition to damages, ordered that the defendant newspaper publish a retraction and apology in the part of the newspaper where the original article had appeared. A 1989 appeal was allowed, on the grounds that the Provincial Court had no jurisdiction to order this type of equitable relief; however, the appeal judge indicated that otherwise the order would have been constitutionally valid.

The appeal judge cited a 1989 Supreme Court of Canada decision, *Slaight Communications*, in which the court upheld the order of an adjudicator under the Canada Labour Code who had found that a radio station employee had been unjustly dismissed. As well as monetary compensation, the adjudicator ordered the employer to provide the dismissed employee with a letter of recommendation setting out certain facts relating to the dispute (the "positive order"). He also ordered that any queries about the dismissed employee to any management or staff at the radio station should "be answered exclusively by sending or delivering a copy of the said letter of recommendation" (the "negative order").

Mr. Justice Beetz dissented from the decision, on the grounds that the employer could be forced to write statements that he personally might consider inaccurate or misleading. It was one thing to prohibit the disclosure of certain facts, but quite another to order a person to affirm facts regardless of whether or not he or she believed them. While the objective of protecting the employee was valid, it could have been achieved by other means, such as a letter stating that the adjudicator had found the facts in question to be true. The "negative order" in particular was, in Mr. Justice Beetz's opinion, disproportionate and unreasonable.

In *RJR-MacDonald,* discussed above under Freedom of Commercial Expression, the Supreme Court of Canada dealt with a similar issue in the comments on the unattributed warnings required by the *Tobacco Products Control Act*.

3. Freedom of Peaceful Assembly (Section 2(c))

The word "peaceful" is probably used in this subsection to make it clear that no doubt is cast on our laws regarding either breach of the peace or riots. It is also clear that there is a natural affinity between freedom of assembly and freedom of speech, as those who are denied access to the media to express their views usually rely heavily on various forms of assembly to get their message across.

In *Collins*, an Ontario court has indicated that it will give at least some weight to the right of freedom of peaceful assembly. In this case, the court deleted certain conditions that had been imposed upon an accused following his release on bail pending trial on a charge of obstructing police. These conditions required that the accused not attend a demonstration, or demonstrate, or in any way cause a disturbance, within half a mile of a plant that was used to manufacture components for weapons. The court felt that the onus was upon the Crown to show a compelling reason why the basic rights of an individual to do what is lawful should be curtailed. The court went on to say that, in order to justify an interference with fundamental rights, the Crown must show that the restriction furthers an important or substantial state interest unrelated to the suppression of expression, and that the limitation sought on this freedom is no greater than is necessary or essential for the protection of the public. If this type of reasoning continues to be applied, a situation similar to that in the *Dupond* case would require the municipality to defend the ban on assemblies by showing that all assemblies were for non-peaceful purposes.

The Ontario case of *Dieleman* dealt with an interlocutory injunction granted to the Attorney General to restrain anti-abortion protest activity. The injunction was held to infringe the freedom of peaceful assembly under section 2(c), but the limitation was found to be justified, as was the limitation on the freedom of expression guaranteed by section 2(b) in the same case (see discussion above).

4. Freedom of Association (Section 2(d))

The freedom of association guaranteed by section 2(d) includes various labour relations and collective bargaining rights, as well as certain family, political and economic association rights; it also includes a right not to associate.

In the *Maltby* case, the Saskatchewan trial court determined that limited visiting privileges given to remand inmates at Saskatchewan Correctional Centres do not violate the right to freedom of association. The restrictions imposed were determined to be incidental to a legitimate government purpose, namely security.

In *Public Service Alliance of Canada* v. *The Queen in Right of Canada* it was held that the Charter was not infringed by the *Public Sector Compensation Restraint Act* (S.C. 1980-81-82-83, c. 122), which extended compensation plans for employees in the federal public sector, fixed their wage increases for a two-year period and thus limited collective bargaining during the extension. The majority of the Supreme Court of Canada determined that freedom of association does not guarantee the right to strike or bargain collectively. Therefore, it was not necessary for the Court to investigate whether the Act would be justified under section 1. The legislatures were said to be free when they find it necessary to define and qualify in various ways the rights that flow from association.

Chief Justice Dickson, dissenting in part, and Madam Justice Wilson, dissenting, stated that the right to strike is indeed protected by the Charter. Employees in the collective bargaining process require the protection of their freedom when collectively withdrawing their services.

The right not to associate has been held not to be impaired by the mandatory collection of union dues pursuant to a check-off clause in a collective agreement. The employees remain free to oppose the union, and to work with others for the purpose of seeking to have the union's bargaining rights terminated. The compelled payment does not identify the employee personally with any of the political, social or ideological objectives that the union may support financially or otherwise. Further, it was also held in *Lavigne* v. *O.P.S. E.U.* that there is no infringement of section 2(d) of the Charter by the provision of the *Colleges Collective Bargaining Act* that deems all employees in the bargaining unit to be taking part in a strike where the union gives notice of a lawful strike, and precludes all employees from being paid salary or benefits during the period of the strike.

Another area in which differing decisions have been rendered involves the spending of union dues on political causes. The British Columbia Supreme Court decision in *B.C.G.E.U.* v. *B.C.* held that this type of spending by the B.C. Government Employees' Union did not violate the freedom of association. On the other hand in a decision by an Ontario Court it was held that it was contrary to the Charter for the Ontario Public Service Employees' Union to use compulsory union dues for non-collective bargaining activities. On appeal to the Ontario Court of Appeal, the trial decision was overturned. The Court of Appeal held that union dues and their use are private internal matters, not covered by the Charter. The court noted that the union was just doing what unions have traditionally done in Canada and in political democracies everywhere.

The Courts have consistently held that the guarantee of freedom of association provided in section 2(d) of the Charter does not extend to the filial relationships of parent and child, nor of husband and wife. In the immigration context, orders separating parent from child and husband from wife (where the marriage was for immigration purposes) have been upheld (*Re Downes and Re Horbas*).

In another Saskatchewan case, *Re S. and Minister of Social Services*, it was also determined that freedom of association could be overridden when a child is taken into protective custody because the welfare officer has reasonable grounds to believe that the health and welfare of the child is in immediate jeopardy. It was decided that the deprivation of association was in the best interests of the child and as such was a reasonable limit prescribed by law that could be demonstrably justified in a free and democratic society.

In *Catholic Children's Aid Society of Metropolitan Toronto* v. *S.(T.)*, Ontario's child welfare legislation was found not to infringe section 2(d) in requiring the denial of access by the birth parents where a child is placed for adoption. Even if this paragraph were designed to protect the association between parent and child, section 1 of the Charter must prevail to limit that freedom, in accordance with the best interests of the child. The fundamental freedoms guaranteed by the Charter have a public nature, and the desire of a parent to be with a child has no goal or purpose similar to the economic, political, religious, social, charitable or even entertainment purposes of associations.

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