

FREE SPEECH RIGHTS

FREEDOM OF EXPRESSION UNDER THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

FREEDOM OF EXPRESSION IS THE RIGHT TO SPEAK, TO DISSENT, TO EXPRESS YOURSELF, AND TO LISTEN TO THE EXPRESSION OF OTHERS. IT IS A FOUNDATIONAL RIGHT OF ANY DEMOCRATIC SOCIETY.

Section 2(b) of the *Canadian Charter of Rights and Freedoms* guarantees “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.” The right to free expression is subject to **any reasonable limits** that may be justified in a free and democratic society, as is prescribed by **s. 1 of the Charter**.

Section 2(b) protections apply to all individuals in Canada regardless of citizenship or immigration status. The *Charter* applies to government action and therefore s. 2(b) limits how *government* actors can restrict your expression. Like all other *Charter* rights, it generally does not apply to private actors unless they are controlled by a government body or are performing a government action or function of some sort.

The Supreme Court of Canada (SCC) has identified the following three broad principles and values that underlie the guarantee of freedom of expression in the *Charter*:

- (1) Seeking and attaining the truth;
- (2) Fostering and encouraging the participation in social and political decision-making; and
- (3) Cultivating individual self-fulfillment through expression.¹

WHAT IS “EXPRESSION”?

The SCC has defined expression extremely broadly. It has held that an activity is “expressive” if “**it attempts to convey meaning**”.² According to this definition, conduct such as wearing a t-shirt with a message, holding a banner, chanting at a protest, performing street theatre, as well as communication forms such as dance, music, writing, paintings, films, etc. would all be considered protected forms of expression.

“**Content neutrality**” is the governing principle of the Supreme Court’s definition of expression.³ This means that, with few exceptions, the content of a statement cannot deprive it of the protection afforded to it by s. 2(b), no matter how offensive it may be.⁴ Based on this expansive, content-neutral approach to expression, the Court has held that the right to freedom of expression encompasses communication for the purpose of prostitution⁵, the dissemination of hate propaganda⁶, the deliberate dissemination of falsehoods and defamatory libel⁷, and even child pornography.⁸

Violent expression is **NOT** protected by s. 2(b) of the *Charter*.⁹ This includes, threats of violence, which are not protected expression pursuant to s. 2(b).¹⁰

¹ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at 976; *Montréal (City) v 2952-1366 Québec Inc*, [2005] 3 SCR 141 at 74 [*Irwin Toy*].

² *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123 at 1187 [*Prostitution Reference*].

³ Peter Hogg, *Constitutional Law of Canada*, 5th Ed (Toronto: Thomson Reuters Canada, 2019) (loose-leaf revision), s. 43.

⁴ *R. v Keegstra*, [1990] 3 SCR 697 at 828 *Keegstra*.

⁵ *Prostitution Reference*, *supra*.

⁶ *Keegstra*, *supra*.

⁷ *R. v Lucas*, [1998] 1 SCR 439.

⁸ *R. v Sharpe*, [2001] 1 SCR 45.

⁹ *Irwin Toy*, *supra*, at 970; *Keegstra*, *supra*.

¹⁰ *R. v Khawaja*, [2012] 3 SCR 555.



REASONABLE LIMITS CLAUSE (S. 1 OF THE CHARTER)

Charter rights are not absolute and can be infringed if the courts determine that the infringement is reasonably justified. Section 1 of the *Charter* is often referred to as the “reasonable limits clause” because it can be used to justify a limitation on a person’s *Charter* rights. Once a *Charter* infringement has been found, the court will apply a balancing test to assess whether the government interests outweigh those of the individual claiming their *Charter* right has been violated. The test is referred to as the *Oakes* test after the case of *R v Oakes* (1986), in which the SCC interpreted the wording of s. 1 and established the basic legal framework for how s. 1 would apply to a case.¹¹

The *Oakes* Test proceeds as follows:

1. There must be a *pressing and substantial objective* for the law or government action.
2. The means chosen to achieve the objective must be *proportional* to the burden on the rights of the claimant.
 - i. The objective must be *rationaly connected* to the limit on the *Charter* right.
 - ii. The limit must minimally impair the *Charter* right.
 - iii. There should be an overall balance or *proportionality* between the benefits of the limit and its deleterious effects.

Because of the wide breadth of s. 2(b), infringements of freedom of expression are often found at the section 1 stage of the legal analysis where the court must consider if a law is a reasonable limit on one’s freedom of speech.

HATE PROPAGANDA AND HATE SPEECH

Hate propaganda is material that promotes hatred against minority groups. Hate speech is a term used to describe speech aimed at an individual or group that is offensive or even hateful and may have no value other than to disparage the person or group based on their identity, such as race, national origin, religion, etc. Even such speech that is offensive and hurtful cannot be prohibited or punished unless it amounts to incitement, defamation, obscenity, or harassment.

Various federal and provincial legal frameworks have developed in Canada to regulate hate speech, and these laws often interact with the *Charter* right to freedom of expression under s. 2(b). Some examples in the criminal and human rights contexts are provided below.

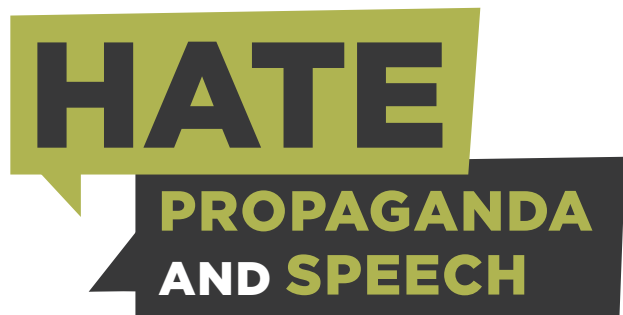
i. Criminal Law

The *Criminal Code of Canada* at ss. 318 to 320 prohibits hate propagation.

- (a) **Advocating genocide** of a section of the public identifiable on the basis of certain grounds, including colour, race, religion, ethnic origin, sex, sexual orientation, mental or physical disability (punishable by up to five years in prison)¹²;
- (b) **Public incitement of hatred** against an identifiable group in a way that is likely to lead to breach of the peace (punishable by up to 2 years in prison)¹³;
- (c) **Publicly communicating statements** willfully promoting hatred against an identifiable group (subject to defences of good faith, truth and others) (punishable by up to 2 years in prison).¹⁴

An “identifiable group” is defined as “any section of the public distinguished by colour, race, religion, national or ethnic origin, age, sex, sexual orientation, gender identity or expression, or mental or physical disability”.¹⁵

The threshold is very high for a speech to amount a criminal offence under one of the provisions outlined above.



¹¹ *R. v Oakes*, [1986] 1 SCR 103.

¹² *Criminal Code* (R.S.C., 1985, c. C-46) at s 318(1).

¹³ *Ibid* at s 319(1).

¹⁴ *Ibid* at s 319(2).

¹⁵ *Ibid* at s 318(4).

