

The Right to Offend: a Canadian Constitutional Principle



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through education, communication and litigation

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Executive Summary

Some people say they support free speech “as long as it doesn’t offend anyone, or hurt someone’s feelings.” But this position fails to grasp the very purpose of this constitutional right, which is to protect speech that is unpopular, offensive, hurtful, or viewed by the majority as “wrong” or “false.” The view of the majority has no need of constitutional protection; it is tolerated in any event.

Canada’s tradition of tolerance for free speech dates back to England in the 1600s. English pamphleteer Thomas Scott expanded upon the necessity for free speech in a series of religious pamphlets, in which he argued that both Christian and humanist ideals could only be fulfilled in the absence of tyranny, and that the best way to eliminate tyranny is through free and frank speech. In 1644 the English poet John Milton published *The Aeropagitica*, urging Parliament to rescind its Licensing Order, which had placed publishing under government control. On the European continent, the French philosopher Voltaire was a vocal supporter of freedom of expression, which he saw as essential in the struggle against tyranny and oppression. To Voltaire is commonly attributed the saying “I disapprove of what you say, but I will defend to the death your right to say it.” In the 18th century, British politician and philanthropist William Wilberforce relied on freedom of expression in his successful campaign to turn public opinion against the slave trade.

With roots in both England and France, free speech is a Canadian value. Canada’s forbearers supported the ideal of citizens engaging in free and open discussion with one another and with their governments. This tradition was firmly in place by the time of Confederation in 1867. The Canadian’s right to offend his or her fellow citizens through the peaceful expression of opinion was clearly established and rooted in Canadian law long before the *Canadian Charter of Rights and Freedoms* came into force in 1982.

From the 1930s to the present, the Supreme Court of Canada has upheld free speech as a constitutional principle, describing it as a “fundamental concept” of Canadian society and democracy, forming the basis for the historical development of the political, social and educational institutions of western society. Canada’s highest court has repeatedly asserted that freedom of expression is essential to intelligent and democratic self-government, and that it allows for an open exchange of views, thereby creating a competitive market-place of ideas which will enhance the search for the truth. The Court has gone so far as to assert that democracy cannot exist without this freedom to express new ideas and to put forward opinions about the functioning of public institutions. The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticise and express dissentient views is a safeguard against state tyranny and corruption.

Canada’s tradition of free speech extends even to “extreme” statements, as long as they are communicated in a non-violent form; it is through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive.

The purpose of free expression is to promote truth, political and social participation, and self-fulfilment. That purpose extends to the protection of unpopular minority beliefs which the majority regard as wrong or false. The majority cannot use its perception of 'truth' or 'public interest' as a reason to suppress the minority's perception. The freedom of expression guarantee is most important to disadvantaged individuals and vulnerable groups, who lack the money and influence to promote their opinions.

Laws and policies which restrict freedom of expression have a dangerous “chilling effect” which leads to self-censorship among citizens. A restriction on speech affects not only those caught and prosecuted, but also those who may refrain from saying what they would like to because of the fear that they will be caught. Thus, restrictions on freedom of expression inhibit worthy minority groups and individuals from saying what they desire to say, for fear that they might be prosecuted.

As an essential precondition of the search for truth, freedom of expression is a means of promoting a "marketplace of ideas" in which competing ideas vie for supremacy. While freedom of expression provides no guarantee that the truth will always prevail, freedom of expression promotes the vigorous and honest search for truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems should be allowed to rise to the top.

Freedom of expression is an important Canadian constitutional principle, enshrined for several centuries in our history, culture and Constitution. Consistent with this tradition, neither our legal heritage nor our Constitution confers a right on citizens to be free from offense or hurt feelings caused by another's speech. In other words, the right to express oneself peacefully constitutes a right to offend.

Our Common Law Heritage

Censorship of speech by government authority is not new. In 1275 the Statute of Westminster introduced the offence of *De Scandalis Magnatum*. This made it illegal to say or publish "false news" which might sow discord between people, or that might result in slander against the King or other men of stature within the British realm. This law was enforced by the King's Council, then by the Star Chamber, and eventually by the common law courts. The objective of this law was to prevent the dissemination of statements which could have threatened the privileges enjoyed by the landowning elite. The offence of spreading false news was not abolished until 1887.

Canada's tradition of tolerance for free speech dates back to England in the 1600s. Thomas Wilson described, and advocated for, freedom of speech in the third book of *The Arte of*

Rhetorique, published in the 1620s.¹ In that same decade, English pamphleteer Thomas Scott championed the idea that Parliament was to be a place of open communication between the king and the representatives of his subjects. He expanded upon the necessity for free speech in a series of religious pamphlets, in which he argued that both Christian and humanist ideals could only be fulfilled in the absence of tyranny, and that the best way to eliminate tyranny is through free and frank speech.²

In 1644 the English poet John Milton published *The Aeropagitica*, urging Parliament to rescind its Licensing Order passed in the previous year. The Licensing Order placed publishing under government control; writers had to submit their works to a government body for approval prior to being allowed to publish them. In *The Aeropagitica*, Milton spoke of “the value of intellectual diversity and debate, and of its contribution to the overall advancement of learning.” He argued that even wrong ideas had merit.³ At the conclusion of the Glorious Revolution in England, the Bill of Rights was passed by Parliament in 1689,⁴ enshrining Parliamentary freedom of speech, which was eventually extended to all citizens.

On the European continent, the French philosopher Voltaire was a vocal supporter of freedom of expression, which he saw as essential in the struggle against tyranny and oppression. Voltaire was a lawyer and a great orator who frequently criticized the Catholic Church, thus finding himself in trouble with the authorities.⁵ To Voltaire is commonly attributed the saying “I disapprove of what you say, but I will defend to the death your right to say it.”⁶

In the 18th century, noted British politician and philanthropist William Wilberforce, together with the *Society for effecting the abolition of the slave trade*, relied on freedom of expression in order to change public opinion. Over a period of 25 years, Wilberforce and others lobbied Parliament to end Britain’s extremely profitable slave trade. Prior to its dissolution in 1807, the slave trade

¹ <http://www.uoregon.edu/~rbear/arte/arte4.htm>

² <http://books.google.ca/books?id=xVmXl6wrpEC&pg=PA103&lpg=PA103&dq=Thomas+Scott+and+Freedom+of+Speech&source=web&ots=nK3r9nUw3l&sig=Krp3nGBYhVjKsAqe4pP7-BrcTq4&hl=en#PPA104,M1>

³ <http://www.stlawrenceinstitute.org/vol14mit.html>

⁴ http://www.constitution.org/eng/eng_bor.htm

⁵ <http://www.kirjasto.sci.fi/voltaire.htm>

⁶ <http://www.brainyquote.com/quotes/authors/v/voltaire.html>

had been responsible for over 80% of Britain's foreign income.⁷ By 1833 Britain had also abolished slavery itself, in its own colonies. This effort to abolish the slave trade and slavery itself could not have succeeded without a strongly developed practice of free expression existing in the United Kingdom, both within Parliament as well as among the populace. Even during the War with France in 1793, such agitation and public advocacy was common place, and it went largely unimpeded due to the acceptance of free expression in post-enlightenment Britain.

After the *Great Reform Act* of 1832, laws forbidding political libel were done away with. Following the 1843 Report of the *Select Committee of the House of Lords on Defamation*, the law of defamation was restricted to private cases. These were significant steps away from government control over what citizens thought and said. At the same time, individuals' reputations were still protected through the common law of libel and slander, making it necessary for people to continue to exercise caution when speaking about living individuals. But people were becoming increasingly free to articulate their opinions, beliefs and ideas in the realms of science, philosophy, art and literature, without government censorship.

In his writings *On Liberty* published in 1869, the English philosopher John Stuart Mill made what was thought to be one of the strongest arguments in support of unfettered free speech at that time.⁸ Concerned with the tyranny of government, Mill argued for the need to control it. He saw a free citizenry as the only force capable of controlling such tyranny. He asserted that without the freedom to express oneself, the restraining of state tyranny by the citizenry would be impossible, thereby posing a grave threat to freedom generally. Mill argued that the majority, be it demographic or of opinion, should not be able to criminalize the minority for simply being. From this concern we have today's concept of the "Tyranny of the Majority."⁹

The protection of minority opinion is a primary purpose of free speech. William Wilberforce's opposition to slavery was not the majority opinion when he first raised it, nor was the concept of freedom of speech within Parliament the majority view when Thomas Scott first raised the idea in the 1620s. The ability to express oneself freely in Britain allowed for these once marginal

⁷ <http://www.brycchancarey.com/abolition/wilberforce.htm>

⁸ <http://www.bartleby.com/130/2.html>

⁹ <http://www.utilitarianism.com/ol/one.html>

ideas to become commonly accepted values. The same has held true for public policy changes in Canada, such as women acquiring the right to vote. In Canada and other countries around the world, ideas once viewed as “extreme” or “offensive” have, through advocacy and debate, become mainstream ideas.

With roots in both England and France, free speech is a Canadian value. Canada’s forbearers supported the ideal of citizens engaging in free and open discussion with one another and with their governments. This tradition was firmly in place by the time of Confederation in 1867.

In stark contrast to the gradual historic expansion of the individual’s freedom to speak and write without fear of government censorship and penalties, Canada’s legal heritage has never conferred a right on individuals to be “free from” offence or hurt feelings. The reason is obvious: when one person has the right to be free from feeling upset or offended by another’s peaceful expression, this negates and repudiates the right of all other citizens to express themselves freely.

Even the law of defamation (libel in written form; slander in oral form) does not protect people from offence or hurt feelings. Rather, the law of defamation protects an individual’s reputation from false allegations, while still allowing the Defendant to resist the Plaintiff’s claim with the defence of truth. The law of defamation discourages people from making untrue statements about living individuals, but it does not place any “chilling effect” on political, scientific, literary, philosophical or religious ideas and opinions. In short, Canadian law has never recognized a “right” to be free from hurt feelings or offence that results from the peaceful expression of opinions.

Restrictions on free speech by federal and provincial human rights legislation are a radical departure from Canada’s long-standing tradition of tolerance for free expression. But that topic is addressed at www.CanadianConstitutionFoundation.ca in another paper: “Kangaroo Courts?”

Canada's Legal Tradition of Freedom of Expression

The Canadian's right to offend his or her fellow citizens through the peaceful expression of opinion was clearly established and rooted in Canadian law long before the *Canadian Charter of Rights and Freedoms* came into force in 1982.

In *Reference re: Alberta Legislation*, [1938] S.C.R. 100, Chief Justice Duff held that:

...the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.

He also stated:

The law by which the right of public discussion is protected existed at the time of the enactment of the British North America Act.

In a concurring judgement, Cannon J. noted:

It appears that in England, at first, criticism of any government policy was regarded as a crime involving severe penalties and punishable as such; but since the passing of *Fox's Libel Act* in 1792, ... it is not criminal to point out errors in the Government of the country and to urge their removal by lawful means...

...

Under the British system, which is ours, no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of the government. Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest. There must be an untrammelled publication of the news and political opinions of the political parties contending for ascendancy. As stated in the preamble of *The British North America Act*, our constitution is and will remain, unless radically changed, "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a

democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State...

In *R. v. Boucher*, [1951] S.C.R. 265, a Jehovah's Witness was charged under section 133 of the Criminal Code for publishing seditious libel. He and others from his congregation distributed pamphlets entitled *Québec's Burning Hate for God and Christ and Freedom Is the Shame of all Canada*. In the context of Quebec in the 1950s these pamphlets were extremely offensive. Nevertheless, the Supreme Court of Canada set aside Mr. Boucher's conviction, upholding his right to publish statements critical of Quebec's government and society, as long as there was no intention to incite violence against the government.

In *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, Jehovah's Witnesses circulated their religious pamphlets to passersby in the streets of Quebec City, in violation of a municipal by-law which forbade the distribution of pamphlets in the streets without permission from the City's Chief of Police. This by-law made the Chief of Police a government censor of speech who was answerable to his political masters, and Premier Maurice Duplessis was determined to suppress this very unpopular religious minority. The Jehovah's Witnesses challenged the city's by-law, arguing that it had the effect of censoring religious and political expression. The Supreme Court of Canada upheld of the Jehovah's Witnesses' fundamental human rights to religious freedom and freedom of speech:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.

Rejecting the argument that this municipal by-law merely provided for the control of the usage of the streets for distributing literature, the Supreme Court saw this as an issue of free expression.

A few years later, the Supreme Court of Canada struck down Quebec's "Padlock Act" for its ancillary effect of attacking both freedom of association and freedom of expression. In *Switzman v. Elbling*, [1957] S.C.R. 285, John Switzman sued Freda Elbling for having broken the lease

concerning a house in Montreal. Freda Elbling broke the lease when she learned that John Switzman was a Marxist who planned to turn the house into a communist meeting hall. She feared the “*Padlock Act*,” known officially as “*An Act to Protect the Province against Communistic Propaganda*,” under which she could have lost her house for up to one year if the authorities found it to be a communist meeting place.

The Court considered two sections of the *Act*:

3. It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever.

4. The Attorney-General, upon satisfactory proof that an infringement of section 3 has been committed, may order the closing of the house against its use for any purpose whatsoever for a period of not more than one year; ...

Writing for the majority of the Court, Rand J. stated:

The object of the legislation here, as expressed by the title, is admittedly to prevent the propagation of communism and bolshevism, but it could just as properly have been the suppression of any other political, economic or social doctrine or theory;

Justice Rand held that, unlike laws against slander and libel, the impugned *Act* was not a reasonable restriction on free speech. As a common right shared by all citizens, Justice Rand described freedom of speech as “the ultimate stabilizing force” of social cohesion:

But the analogy is not a true one. The ban is directed against the freedom or civil liberty of the actor; no civil right of anyone is affected nor is any civil remedy created. The aim of the statute is, by means of penalties, to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities. There is nothing of civil rights in this; it is to curtail or proscribe those freedoms which the majority so far consider to be the condition of social cohesion and its ultimate stabilizing force.

Referencing the preamble of the *British North America Act*, Justice Rand also wrote:

This constitutional fact is the political expression of the primary condition of social life, thought and its communication by language. Liberty in this is little less vital to man's mind and spirit than breathing is to his physical existence.

Continuing with the tradition that was firmly in place at Confederation, both the *Canadian Bill of Rights* (1960) and the *Canadian Charter of Rights and Freedoms* (1982) included express protection for free expression. For obvious reasons, neither the *Canadian Bill of Rights* nor the *Charter* contains any right to be free from offense or hurt feelings resulting from another's speech.

Section 1 of the *Canadian Bill of Rights* reads:

It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
- (b) the right of the individual to equality before the law and the protection of the law;
- (c) freedom of religion;
- (d) freedom of speech;
- (e) freedom of assembly and association; and
- (f) freedom of the press.

Section 2 of the *Canadian Charter of Rights and Freedoms* reads:

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.

In *National Indian Brotherhood v. CTV Television Network Ltd.*, [1971] A.C.F. No. 12, the Federal Court affirmed that the right of free expression extended to journalism. The National Indian Brotherhood felt that the film titled *The Taming of the Canadian West* depicted Indians in a manner that was both inaccurate and offensive. The Court rejected the application for an injunction against the broadcaster on the basis of the free speech provision of the *Canadian*

Bill of Rights. Had the Court allowed the applicants their injunction, it may have opened a floodgate of cases like this, thereby scuttling both Sections 1(d) and 1(f) of the *Bill of Rights* which guaranteed freedom of speech and freedom of the press respectively.

In *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, a union sought a declaration allowing it to stage strikes on the premises of two different but connected companies. The Supreme Court of Canada held that non-violent secondary picketing is protected by the *Charter* as freedom of expression, even if it results in economic pressure on a company or a breach of contract. Writing for a unanimous Court, McIntyre J. upheld freedom of expression as a “fundamental concept” of Canadian society and democracy, at paragraph 12:

Freedom of expression is not, however, a creature of the Charter. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

Canada’s heritage of freedom of expression also extends to commercial speech. In *Ford v. Quebec (Attorney General)*, [1988] S.C.J. No. 88, the Supreme Court of Canada dealt with the competing values of freedom of expression and the preservation of the French language and culture as prescribed by Quebec’s *Charter of the French Language*. The Court considered both the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*. In a unanimous decision the Court held, at paragraph 54:

It is apparent to this Court that the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter* and s. 3 of the *Quebec Charter* cannot be confined to political expression, important as that form of expression is in a free and democratic society. The pre-*Charter* jurisprudence emphasized the importance of political expression because it was a challenge to that form of expression that most often arose under the division of powers and the "implied bill of rights", where freedom of political expression could be related to the maintenance and operation of the institutions of democratic government. But political expression is only one form of the great range of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society. In our view, the commercial element does not have this effect. 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 s. 2(b) of the *Charter*. It is worth

noting that the Courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the *Quebec Charter*. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

In *Ford*, the Supreme Court of Canada reiterated the rationale for the preservation of free expression, at paragraph 56:

Generally the values said to justify the constitutional protection of freedom of expression are stated as three-fold in nature, as appears from the article by Professor Sharpe referred to above on "Commercial Expression and the Charter", where he speaks of the three "rationales" for such protection as follows at p. 232:

The first is that freedom of expression is essential to intelligent and democratic self-government.... The second theory is that freedom of expression protects an open exchange of views, thereby creating a competitive market-place of ideas which will enhance the search for the truth....

The third theory values expression for its own sake. On this view, expression is seen as an aspect of individual autonomy. Expression is to be protected because it is essential to personal growth and self-realization.

In *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, the Edmonton Journal challenged Section 30 of the *Alberta Judicature Act*, which forbids the publication of details relating to matrimonial proceedings, as violating the Sections 2(b) *Charter* guarantee of freedom of expression. The Supreme Court of Canada granted the application. Writing for the majority, Cory J. emphasized the importance of protecting freedom of expression, at paragraph 3:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized.

In *R. v. Keegstra*, [1990] S.C.J. No. 131, writing for the majority of the Supreme Court of Canada, Chief Justice Dickson held, at paragraph 25:

That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian Courts prior to the enactment of the *Charter*. The treatment of freedom of expression by this Court in both division of powers and other cases was examined in *Dolphin Delivery Ltd.*, supra, at pp. 583-88, and it was noted that well before the advent of the *Charter* -- before even the Canadian Bill of Rights was passed by Parliament in 1960, S.C. 1960, c. 44 -- freedom of expression was seen as an essential value of Canadian Parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the *Charter*, and occasionally even appeared to take on the guise of a constitutionally protected freedom (see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, per Duff C.J., at pp. 132-33; and *Switzman v. Elbling*, [1957] S.C.R. 285, per Abbott J., at p. 326). While the pre-*Charter* era saw a role for the freedom of expression, then, with the *Charter* came not only its increased importance, but also a more careful and generous study of the values informing the freedom. As is evident from the quotation just given, the reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971).

Dickson C.J. maintained that while the speech in *Keegstra* did relay hateful messages, hate speech was not to be read out of the ambit of Section 2(b) *Charter* protection. He observed that the speech didn't contain any threats of violence, or urge anyone to do anything against anyone else.

In *Keegstra*, Chief Justice Dickson continued, at paragraph 30:

Apart from rare cases where expression is communicated in a physically violent form, the Court thus viewed the fundamental nature of the freedom of expression as ensuring that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee" (p. 969). In other words, the term "expression" as used in s. 2(b) of the *Charter* embraces all content of expression irrespective of the particular meaning or message sought to be conveyed (Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), supra, at p. 1181, per Lamer J.).

Chief Justice Dickson also stated, at paragraph 89:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

Chief Justice Dickson went on to state, at paragraph 93:

It must be emphasized 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 s. 2(b) of the Charter. As noted already, suppressing the expression covered by s. 319(2) does to some extent weaken these principles. It can also be argued that it is partly through a clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive (see Braun, *op. cit.*, at p. 490. In this regard, judicial pronouncements strongly advocating the importance of free expression values might be seen as helping to expose prejudiced statements as valueless even while striking down legislative restrictions that proscribe such expression. 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 s. 2(b) values are permitted. To guard against such a result, the protection of communications virulently unresponsive of free expression values may be necessary in order to ensure that expression more compatible with these values is never unjustifiably limited.

In *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, the applicants were peacefully distributing political pamphlets to passersby in an airport when they were barred from doing so by R.C.M.P. officers, who claimed that their activities violated the Government Airport Concession Operations Regulations. The Supreme Court of Canada upheld the right of applicants to distribute their pamphlets. Writing for a unanimous Court, L'Heureux-Dube J. maintained, at paragraph 65:

As this Court has discussed on several prior occasions, notably in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and *Keegstra*, *supra*, many different theories have been advanced for promoting freedom of expression. Emerson, "Toward a General Theory of the First Amendment" (1963), 72 *Yale L.J.* 877, at pp. 878-79, is often cited for delineating the basic rationales for judiciously preserving freedom of expression:

The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including

political, decision-making, and (4) as maintaining the balance between stability and change in the society.

In *R. v. Zundel*, [1992] S.C.J. No. 70, the Supreme Court of Canada found Section 181 of the *Criminal Code* to be an unreasonable and unjustifiable infringement of the *Charter* guarantee of freedom of expression. Section 181 read:

*Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.*¹⁰

The Court held that Parliament failed to identify a pressing social problem that would warrant such an interference with basic civil liberties. Writing for the majority of the Court in *Zundel*, Madam Justice McLachlin maintained, at paragraph 21:

It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions.

She went on to state, at paragraphs 22-23:

The purpose of the guarantee is to permit free expression to the end of promoting truth, political or social participation, and self-fulfilment. That purpose extends to the protection of minority beliefs which the majority regard as wrong or false: *Irwin Toy*, supra, at p. 968. Tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view. As Holmes J. stated over sixty years ago, the fact that the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate": *United States v. Schwimmer*, 279 U.S. 644 (1929), at pp. 654-55. Thus the guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event.

¹⁰ Criminal Code, R.S.C., 1985, c. C-46, s. 181.

All communications which convey or attempt to convey meaning are protected by s. 2(b), unless the physical form by which the communication is made (for example, a violent act) excludes protection.

She went on to say, at paragraph 28, that even a lie is protected by the *Charter's* freedom of expression guarantee:

The first difficulty results from the premise that deliberate lies can never have value. Exaggeration -- even clear falsification -- may arguably serve useful social purposes linked to the values underlying freedom of expression. A person fighting cruelty against animals may knowingly cite false statistics in pursuit of his or her beliefs and with the purpose of communicating a more fundamental message, e.g., 'cruelty to animals is increasing and must be stopped'. A doctor, in order to persuade people to be inoculated against a burgeoning epidemic, may exaggerate the number or geographical location of persons potentially infected with the virus. An artist, for artistic purposes, may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie; consider the case of Salman Rushdie's *Satanic Verses*, viewed by many Muslim societies as perpetrating deliberate lies against the Prophet.

Regarding metaphoric speech, McLachlin J. pointed out, at paragraph 32:

A given expression may offer many meanings, some which seem false, others, of a metaphorical or allegorical nature, which may possess some validity. Moreover, meaning is not a datum so much as an interactive process, depending on the listener as well as the speaker. Different people may draw from the same statement different meanings at different times.

The freedom of expression guarantee is most important to disadvantaged individuals and vulnerable groups, who lack the money and influence to promote their opinions. McLachlin J. stated, at paragraph 52-53:

Section 2(b) of the Charter has as one of its fundamental purposes the protection of the freedom of expression of the minority or disadvantaged, a freedom essential to their full participation in a democracy and to the assurance that their basic rights are respected.

...

History has taught us that much of the speech potentially smothered, or at least 'chilled', by state prosecution of the proscribed expression is likely to be the speech of minority or traditionally disadvantaged groups.

In *Zundel*, the Supreme Court of Canada recognized, at paragraphs 53-64, the danger of the “chilling effect” that a law can pose to freedom of expression, stating at paragraph 61:

The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups or individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry? Should a concerned citizen fear prosecution for stating in the course of political debate that a nuclear power plant in her neighbourhood "is destroying the health of the children living nearby" for fear that scientific studies will later show that the injury was minimal? Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact? Should a member of an ethnic minority whose brethren are being persecuted abroad be prevented from stating that the government has systematically ignored his compatriots' plight?

In *Keegstra*, McLachlin J. explained, at paragraphs 173-175, how the “chilling effect” hurts the quest for truth:

Another venerable rationale for freedom of expression (dating at least to Milton's *Areopagitica* in 1644) is that it is an essential precondition of the search for truth. Like the political process model, this model is instrumental in outlook. Freedom of expression is seen as a means of promoting a "marketplace of ideas", in which competing ideas vie for supremacy to the end of attaining the truth.

...

While freedom of expression provides no guarantee that the truth will always prevail, it still can be argued that it assists in promoting the truth in ways which would be impossible without the freedom. One need only look to societies where free expression has been curtailed to see the adverse effects both on truth and on human creativity. It is no coincidence that in societies where freedom of expression is severely restricted truth is often replaced by the coerced propagation of ideas that may have little relevance to the problems which the society actually faces. Nor is it a coincidence that industry, economic development and scientific and artistic creativity may stagnate in such societies.

...

Moreover, to confine the justification for guaranteeing freedom of expression to the promotion of truth is arguably wrong, because however important truth may be, certain opinions are incapable of being proven either true or false. Many ideas and expressions which cannot be verified are valuable. Such considerations convince me that freedom of expression can be justified at least in part on the basis that it promotes the "marketplace of ideas" and hence a more relevant, vibrant and progressive society.

In *Dagenais v. Canadian Broadcasting Corp.*, [1994] S.C.J. No. 104, the Supreme Court of Canada set aside a publication ban where the issue of freedom of expression clashed with the right to a fair trial. The Court maintained that common law discretionary rules must be applied within the boundaries of the *Charter*. Speaking for the majority of the Court, Justice McLachlin stated, at paragraph 221:

The right to broadcast a fictional cinematic work falls squarely within the ambit of s. 2(b) of the *Charter* and the limits on freedom of expression imposed by the ban must be justified under s. 1.

In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, the Court, at paragraph 3 addressed the relationship between freedom of expression and democracy as follows:

The freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to any notion of democratic rule. The liberty to criticise and express dissentient views has long been thought to be a safeguard against state tyranny and corruption.

In discussing the nature of Canadian democracy in *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, a unanimous Court again took up the central role of freedom of expression in building and maintaining a free and democratic society, stating at paragraph 668:

...we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

In *Haydon v. Canada*, [2000] F.C.J. No. 1368, two employees of Health Canada were drug evaluators who, in the course of their duties, became concerned with the drug approval process and how it was being applied regarding growth hormones for meat, milk stimulation and antibiotics. The applicants aired their concerns in a television interview on Canada AM. Health Canada officials reprimanded the employees, citing a breach of duty of loyalty to the employer. The employees challenged the letters of reprimand as breaching their Section 2(b) *Charter* right to freedom of expression. The Court agreed. There was a common law duty of confidentiality owed to Health Canada by the employees, but that duty existed concurrently with the right of freedom of expression as exercised by the employees.

In *R. v. Guignard*, [2002] 1 S.C.R. 472, a man erected a sign on one of his buildings expressing his dissatisfaction with his insurance company. He was charged with violating a municipal bylaw which forbade the displaying of advertising signs outside of an industrial zone. The Supreme Court of Canada struck down the by-law as an unreasonable and unjustifiable infringement of free expression. Writing for a unanimous Court, Le Bel J. stated at paragraph 20:

This freedom plays a critical role in the development of our society. It makes it possible for all individuals to express their views on any subject relating to life in society (see Sharpe, supra, at para. 23). The content of that freedom, which is very broad, includes forms of expression the importance and quality of which may vary.

Epilogue

As demonstrated by Supreme Court of Canada decisions from the 1930s to the present day, freedom of expression is an important Canadian constitutional principle, enshrined in our history, culture and Constitution. Consistent with this tradition, neither our legal heritage nor our Constitution confers a right on citizens to be “free from” offense or hurt feelings caused by another’s speech. In other words, the right to express oneself peacefully constitutes a right to offend. Some people say they support free speech “as long as it doesn’t offend anyone.” But this position fails to grasp the very purpose of this constitutional right, which is to protect speech that is unpopular, offensive, hurtful, or

viewed by the majority as “wrong” or “false.” As the Supreme Court of Canada held in *Zundel*:

The view of the majority has no need of constitutional protection; it is tolerated in any event.