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2012

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### Citation Details

Robin Elliot, "The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I - Taking Stock" (2012) 59 Sup Ct Rev 435-512.

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# The Supreme Court's Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I — Taking Stock

Robin Elliot\*

## I. INTRODUCTION

The Supreme Court of Canada has explained Canada's commitment to freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>1</sup> on the basis of the importance Canadians attach to three deeper societal values — democratic self-government, the advancement of truth and knowledge and individual self-realization. These values, in other words, have been said by the Court to provide the philosophical rationales for providing constitutional protection to freedom of expression in this country. But it is clear from the Court's section 2(b) jurisprudence as it has evolved to this point that these values have

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\* Faculty of Law, University of British Columbia. The author is grateful to Bill Black, Susan Chapman, Michael Elliot and Margot Young for their many helpful comments on earlier drafts of this paper. He is also grateful to his research assistant, Laura DeVries, for the significant contribution she made to its preparation, in particular by reviewing all of the Supreme Court of Canada's judgments on freedom of expression since the advent of the Charter with an eye to finding passages in which the Court commented on one or more of the rationales. He is also grateful to his other research assistant, Brad Por, for help with the footnoting. The author very much appreciates the funding support for this project that he received from The Foundation for Legal Research. Any errors the paper is found to contain are the sole responsibility of the author.

<sup>1</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"]. The full text of s. 2(b) reads as follows: "2. Everyone has ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication."

come to do more than that. They have also come to play important doctrinal roles. In the more significant of those roles, the values assist the Court to resolve challenges to government action based on section 2(b). But the values have also been used by the Court to assist it in resolving a narrow range of common law and statute-based cases in which freedom of expression is implicated.

Insofar as the first category of cases is concerned, those in which section 2(b) is used to challenge the constitutionality of government action, the values feature in all three of the analytical stages through which such a challenge can potentially proceed. In respect of some challenges, the Court has told us, that role will be to aid in determining whether or not the prohibited or regulated expressive activity in question comes within the sphere of protection afforded by section 2(b).<sup>2</sup> In respect of others, that role will be to help in determining whether the impugned governmental action infringes on an interest that is known, or has been held, to be protected by section 2(b).<sup>3</sup> And in respect of still others — all those in which the government is called upon to justify under section 1 of the Charter an infringement of section 2(b) — that role will be to assist the reviewing court to determine whether or not that justification has been made out.<sup>4</sup> Insofar as the second, and much smaller, category of cases is concerned, the more settled doctrinal role is played in cases in which the Court is asked to change part of the common law to better reflect the importance that section 2(b)'s presence in the Charter requires us to attach to freedom of expression.<sup>5</sup> There is also evidence, albeit very limited, of the values playing a role in cases in which the Court is asked to factor freedom of expression interests into the application of statutory provisions.<sup>6</sup>

Some of these doctrinal roles have been in place since the late 1980's, notably those relating to the finding of infringements and the application of section 1. However, the majority of them have come into being in recent years, and it is not unreasonable to infer from the jurisprudential record that the current Court has a genuine, and growing,

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<sup>2</sup> See text accompanying notes 59 to 72. It is worth noting here that the values play no role in determining whether or not the content of particular messages is protected by s. 2(b); the Court has taken the position that all non-violent attempts to convey meaning are protected regardless of content.

<sup>3</sup> See text accompanying notes 73 to 78.

<sup>4</sup> See text accompanying notes 79 to 89.

<sup>5</sup> See text accompanying notes 90 to 93.

<sup>6</sup> See text accompanying notes 94 to 96.

fondness for using the values as analytical tools in cases in which section 2(b) is invoked. That is especially true of Chief Justice McLachlin, who, as we will see, has authored or co-authored a number of the leading judgments. Whether or not that fondness translates into the addition of new such roles, one can, I think, say that use of the values as analytical tools has now become an established feature of the Court's approach to freedom of expression. As such, the values are appropriate subjects for scholarly attention. And that is particularly the case with respect to the understandings that the Court has developed of them, for it is on the basis of those understandings that the actual implementation of the doctrinal roles that the values have been assigned depends.

Important as these three values have become to the resolution of cases in which section 2(b) is invoked, it must be said that, at least to this point, the Court has provided very little in the way of guidance on the general conceptions of the values that inform its application of them. That paucity of guidance can be attributed in part to the limited number of cases in which the Court has been called upon to give effect to some of the doctrinal roles, notably those that bear on the questions of whether or not the prohibited or regulated expressive activity in question comes within the sphere of protection afforded by section 2(b), and whether or not the impugned governmental action infringes on an interest that is known, or has been held, to be protected by section 2(b). However, the Court has had numerous opportunities to consider the scope and meaning of the values at the section 1 stage of cases, particularly in cases in which it has had to deal with attacks on legislation that limits freedom of expression because of a concern by government about the potentially harmful effects of the content of particular messages — commercial advertising,<sup>7</sup> obscenity,<sup>8</sup> hate propaganda,<sup>9</sup> child pornography,<sup>10</sup> and so on. Regrettably, the Court has very rarely engaged in a careful and

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<sup>7</sup> See, e.g., *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (S.C.C.) [hereinafter "*Irwin Toy*"]; *RJR-MacDonald Inc. v. Canada*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199 (S.C.C.) [hereinafter "*RJR*"]; and *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. No. 30, [2007] 2 S.C.R. 610 (S.C.C.) [hereinafter "*Canada v. JTI-Macdonald*"].

<sup>8</sup> See, e.g., *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452 (S.C.C.) [hereinafter "*Butler*"], and *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120 (S.C.C.) [hereinafter "*Little Sisters*"].

<sup>9</sup> See, e.g., *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) [hereinafter "*Keegstra*"] and *Canada (Human Rights Commission) v. Taylor*, [1990] S.C.J. No. 129, [1990] 3 S.C.R. 892 (S.C.C.) [hereinafter "*Taylor*"].

<sup>10</sup> See *R. v. Sharpe*, [2000] S.C.J. No. 3, [2001] 1 S.C.R. 45 (S.C.C.) [hereinafter "*Sharpe*"].

considered analysis of any of the values at that stage. In most cases in which the values have factored into the analysis, in fact, the Court's treatment of them has tended to be perfunctory.

Why that is so is far from clear. Whatever the reason, it means that we lack the kind of explicit comprehensive guidance we might have hoped for by now on this important aspect of the Court's approach to freedom of expression. However, it does not mean that we are entirely without guidance. In fact, as we will see, by combining together the random bits and pieces of insights into the Court's thinking about the rationales that we can extract from the many judgments in which the Court has commented on one or more of them, we can construct a reasonably detailed — if not entirely coherent — picture of its understanding of each of them.

Defining the reach of each of these three values is not, it must be said, an easy task.<sup>11</sup> On the contrary, it is a very difficult one, and, if the Court were prepared to undertake it, would require the Court to consider and resolve a number of challenging issues. The reach of democratic self-government, for example, would depend on the specific elements of democracy that are seen by the Court to comprise that value, and to comprise it, it is important to note, not in some general theoretical sense, but in the context of section 2(b) of the Charter, the provision designed to protect freedom of expression in the constitution of a specific country, Canada, that has a particular history and set of constitutional and political traditions. The ability to criticize the government of the day, its policies and those who represent it would be covered under any plausible conception of that value. So, too, would the ability to express one's views for and against political parties and their candidates, and more generally on matters of public importance, both during and between elections. But what about the ability to criticize the courts and other bodies that perform adjudicative functions? And what about the ability to make donations to political parties, particularly on the part of large corporations and trade unions; the ability to publish the potentially misleading results of polls close to, or even on, the date of an election; and the ability to publicize the results of a federal election in parts of the country in which the polls have closed to people residing in parts of the country in which they remain open? What about the ability to use deliberate falsehoods in the course of a political debate? What role, if any, does the principle of

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<sup>11</sup> For another, much earlier and much more detailed discussion of the challenging interpretive issues raised by these values, see Richard Moon, "The Scope of Freedom of Expression" (1985) 23 *Osgoode Hall L.J.* 331, at 332-33 and 335-46 [hereinafter "Moon, 'The Scope of Freedom of Expression'"] (although he limits himself to the first and third values only).

equality play in the fashioning of a democratic system of government for this purpose? What about a much broader conception of democracy, one which accommodates not only the institutional trappings of self-government, but reaches out to include respect for individual autonomy and human dignity and a well-informed and publicly minded citizenry?

Similar challenges exist in relation to the other two values, the advancement of truth and knowledge and individual self-realization. While the meaning of truth and knowledge may be clear enough, what kinds of expression can be said to contribute to their advancement? Do the creative arts do so? Does obscene material? Do purely private communications? Are assertions of fact to be treated differently from statements of opinion, and if so, on what basis and in what respects? Does the advancement of truth and knowledge depend on people responding rationally to the statements of opinion and assertions of fact that enter the “marketplace of ideas”? If it does, how does a court evaluate the extent to which people will, or will not, respond rationally? What is the appropriate response from a court that concludes that people’s responses to a particular kind of expression will be mixed, with some responding rationally and other not? To what extent does the advancement of truth and knowledge depend on participants in the “marketplace of ideas” having equal access to it? What role should this value play in circumstances in which such equal access is highly unlikely if not impossible?

What kinds of choices should be protected by individual self-realization? Should that value be understood in terms of basic autonomy, and hence to give constitutional protection to communication bearing upon any and all of the choices that an individual could make in what he or she perceives to be his or her self-interest — for example, the choice between the toy manufactured by company A and the toy manufactured by company B, or between Dentist X and Dentist Y? Or should its reach be limited to a narrower range of choices, those relating to one’s intellectual, moral and spiritual development? If the broader view is adopted, is it possible to value some choices more highly than others, and on that basis give greater weight to some kinds of communication than others? Is rationality required in the making of a choice in order for that choice — and communications bearing on it — to be protected?

The fact that these values have come to play a variety of doctrinal roles in the resolution of section 2(b) cases is a sufficient reason to explore the question of what each of them means. But it is not the only one. Even if the values remained nothing more than the general philosophical rationales for protecting freedom of expression in a society such

as ours, there would be good reason to explore that question. And that is true for at least two reasons. The first is that, simply *qua* philosophical rationales, we are entitled to expect the Court to use them as general guides in the resolution of section 2(b) cases — as an important part of the broader context within which the clash between competing interests that is an inevitable feature of cases in which restrictions on freedom of expression are under attack has to be considered. We should expect, in other words, that the results at which the Court arrives should, in broad terms, be consistent with, and explicable in terms of, these values. The second reason is that at least the first and third of these values — democratic self-government and individual self-realization — have significance within our legal system well beyond section 2(b) of the Charter. Democratic self-government, as a constitutional value, is relevant to the resolution of disputes in a very broad range of areas, including other provisions of the Charter, other provisions of the Constitution, administrative law, and even statutory interpretation. The same can be said in respect of individual self-realization, aspects of which — respect for human dignity and autonomy, for example — underpin most if not all of the rights and freedoms spelled out in the Charter, and also play a role in the resolution of disputes in the areas of criminal law, family law, contract law and tort law. However important these three values may or may not be to the doctrine the Court uses to help it resolve cases in which section 2(b) is invoked, therefore, it is worth our while to devote time and effort to thinking carefully about their scope and meaning.

This paper is intended to contribute to the process of thinking carefully about the scope and meaning of these three values. It is essentially descriptive in nature, and is intended to put in place the building blocks for the normative analysis that follows in a second paper. It puts those building blocks in place by extracting from the Court's existing section 2(b) jurisprudence its position to this point on three critically important issues relating to the place of the three values within the broader framework of its approach to section 2(b). Part II explains how the Court came to adopt democratic self-government, the advancement of truth and knowledge and individual self-realization as the rationales for protecting freedom of expression in the Charter. Part III summarizes the bodies of section 2(b) jurisprudence in which these values have come to play the doctrinal roles described above, with an eye to clarifying the origins and precise nature of each of those roles. That summary provides an important part of the jurisprudential context within which the Court's exploration of the meanings of the three rationales has taken place. And in Part

IV, the longest and most important section, the paper attempts to extract from these bodies of jurisprudence the meanings the Court has so far given to each of the values.

The second paper will take a critical look at the meanings the Court has given to the values. That critique will be informed by the work of one of the leading American scholars in the area of freedom of expression, Frederick Schauer, and in particular on the views that he expressed on the reasons for protecting free speech in his book, *Free Speech: A Philosophical Inquiry*.<sup>12</sup> Not only do those views provide a good example of the kind of methodical, careful and dispassionate thinking about the values that I believe is necessary, they will also provide a helpful vantage point from which to engage in an evaluation of the views the Court has been expressing.

## II. ADOPTION OF THE THREE VALUES AS THE RATIONALES FOR SECTION 2(b)

Two years before it rendered its first judgment under section 2(b), the Supreme Court adopted an approach to the interpretation and application of the rights and freedoms set out in the Charter that entailed careful attention being paid to the rationales for protecting them. First enunciated in 1984 in *Hunter v. Southam Inc.*<sup>13</sup> and then fleshed out the following year in *R. v. Big M Drug Mart Ltd.*,<sup>14</sup> this approach, which became known as the purposive approach, called for courts to interpret each right and freedom in light of the purposes it was intended to further; as Dickson C.J.C. put it in the latter case, “The meaning of a right or freedom ... [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it was meant to protect.”<sup>15</sup> In that case, Dickson C.J.C. also identified a number of different sources of guidance to which it was appropriate to turn in identifying these purposes. Some of these sources, he said, are to be found in the Charter itself, while others, notably history and philosophy, are extrinsic to it.<sup>16</sup> To demonstrate both its commitment to that approach and the kind of probing and thoughtful analysis it called for, the Court devoted a good deal of time and effort in those two cases to the explora-

<sup>12</sup> Cambridge: Cambridge University Press, 1982.

<sup>13</sup> [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145 (S.C.C.).

<sup>14</sup> [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) [hereinafter “*Big M Drug Mart*”].

<sup>15</sup> *Id.*, at 344.

<sup>16</sup> *Id.*



tion of what it considered to be the sources relevant to identifying the purposes of the right to be secure against unreasonable search and seizure and freedom of religion respectively, and the interpretations it gave to those two rights very much reflected the purposes to which those explorations led.

There was every reason to believe, therefore, that a probing and thoughtful discussion of the rationales for protecting freedom of expression would feature prominently in the Court's resolution of the first section 2(b) case to come before it. That case, which was decided in 1986, was *Dolphin Delivery*,<sup>17</sup> a challenge to the validity of an injunction against secondary picketing on the part of a trade union. It would be wrong to assert that McIntyre J., who wrote for a majority of the Court in that case, paid no heed at all to the question of the rationales for protecting freedom of expression in developing his understanding of that right. He noted the connection between freedom of expression and democracy,<sup>18</sup> and one can find indications in some of the quotations he relies on from American and pre-Charter Canadian jurisprudence of support for the advancement of truth and knowledge and individual self-realization rationales.<sup>19</sup> But that is the extent of his attention to the issue. He seemed far more interested in establishing the historical and jurisprudential pedigree of freedom of expression than in exploring the rationales underlying it. Significantly, no mention whatsoever is made in his reasons for judgment of the purposive approach to interpreting the Charter and there is nothing to suggest that the rationales referred to affected in any direct way the Court's analysis of the particular free speech problem it had to resolve in that case. In the result, he held that labour picketing was a protected form of expression under section 2(b) (albeit a form that, in the circumstances of this case, had been justifiably overridden by the impugned injunction).

The link between freedom of expression and democratic self-government was noted in the Court's next two cases in which that right was considered, *Ontario Public Service Employees' Union v. Ontario (Attorney General)*<sup>20</sup> and *Canadian Newspapers Co. v. Canada (Attorney General)*,<sup>21</sup> but no mention was made in either of them of the advancement of truth and knowledge or individual self-realization, and in neither

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<sup>17</sup> *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] S.C.J. No. 75, [1986] 2 S.C.R. 573 (S.C.C.).

<sup>18</sup> *Id.*, at 583-86.

<sup>19</sup> *Id.*, at 583.

<sup>20</sup> [1987] S.C.J. No. 48, [1987] 2 S.C.R. 2 (S.C.C.).

<sup>21</sup> [1988] S.C.J. No. 67, [1988] 2 S.C.R. 122 (S.C.C.).

did the Court refer to the purposive approach to interpreting the Charter. It was not until the Court decided *Ford v. Quebec (Attorney General)*,<sup>22</sup> that these values were formally adopted as the rationales for protecting freedom of expression. That case, a challenge to provisions of Quebec's *Charter of the French Language*<sup>23</sup> requiring all outdoor commercial signs in that province to be in the French language only, raised two important issues relating to the meaning and scope of section 2(b), both of which the Court answered in the affirmative. One was whether or not freedom of expression protected the right to choose the language in which one expresses oneself; the other was whether or not it protected commercial expression. The Court did not make reference to any of the three values as such in support of its affirmative answer to the first issue, although some of its language was certainly consistent with understanding freedom of expression to be a means for furthering individual self-realization. Hence, it noted that freedom of expression is "the means by which the individual expresses his or her personal identity and sense of individuality".<sup>24</sup>

It was in the course of addressing the question of whether or not section 2(b) protects commercial expression that the Court made specific reference to democratic self-government, the advancement of truth and knowledge and individual self-realization as the rationales for protecting freedom of expression. It did so in the following passage:

Various attempts have been made to identify and formulate the values which justify the constitutional protection of freedom of expression. Probably the best known is that of Professor Thomas I. Emerson in his article, "Toward a General Theory of the First Amendment" (1963), 72 *Yale L.J.* 877, where he sums up these values as follows at p. 878:

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 society.

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<sup>22</sup> [1988] S.C.J. No. 88, [1988] 2 S.C.R. 712 (S.C.C.) [hereinafter "*Ford*"].

<sup>23</sup> R.S.Q. c. C-11, ss. 58 and 69.

<sup>24</sup> *Supra*, note 22, at 749.

The third and fourth of these values would appear to be closely related if not overlapping. 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 ...<sup>25</sup>

At no point in its discussion in *Ford* of the rationales for protecting freedom of expression did the Court engage in the searching analysis of the many potential sources of guidance on that question that cases like *Hunter v. Southam Inc.* and *Big M Drug Mart* appeared to call for. None of the pre-Charter pronouncements by members of the Court on the benefits to society that flow from freedom of expression was mentioned. While most of those pronouncements had focused on the importance of freedom of expression to the effective functioning of a parliamentary system of government, and hence perhaps been seen to have been of limited value, one of them — an eloquent passage in the reasons for judgment of Justice Rand in *R. v. Boucher*<sup>26</sup> — can be said to have invoked all three of the rationales identified in *Ford*, and therefore to have been particularly helpful to the Court’s cause. Nor did the Court acknowledge that those three rationales had all been subjected to careful scrutiny by American free speech scholars, or that there might be other rationales worth adding to the list.<sup>27</sup> The Court appears simply to have

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<sup>25</sup> *Id.*, at 764-65.

<sup>26</sup> [1950] S.C.J. No. 41, [1951] S.C.R. 265, at 288 (S.C.C.) [hereinafter “*Boucher*”].

<sup>27</sup> For a sampling of the body of literature that would have been available to the Court in 1988, see, e.g., Robert Bork, “Neutral Principles and Some First Amendment Problems” (1971) 47 *Ind. L.J.* 1; Thomas Scanlon, “A Theory of Freedom of Expression” (1972) 1 *Phil. and Pub. Aff.* 204; C. Edwin Baker, “Scope of the First Amendment Freedom of Speech” (1978) 25 *U.C.L.A. L. Rev.* 964; Harry Wellington, “On Freedom of Expression” (1979) 88 *Yale L.J.* 1105; Martin Redish,

accepted at face value the “generally” held view that these are the appropriate rationales to invoke. It is tempting to find fault with the Court for having taken this step without pausing to reflect on the wisdom of so doing, but given the novelty of the Charter and the paucity of useful Canadian sources at the time that *Ford* was decided, it is perhaps not too surprising that it did so.<sup>28</sup>

However limited its discussion of the rationale issue in *Ford* may have been, the Court has been content to stay the course with democratic self-government, the advancement of truth and knowledge and individual self-realization as the philosophical underpinnings of section 2(b),<sup>29</sup> albeit with changes occasionally being made to the wording in which they are expressed. Their status as the accepted rationales was given strong affirmation in *Irwin Toy*,<sup>30</sup> which followed closely in time on the heels of *Ford* and which also involved commercial expression. That case is probably best known for the special analytical framework that the Court created to resolve freedom of expression challenges, and it was in the course of developing that framework that the Court made reference to those values. Interestingly, and, it has to be said, surprisingly, the values were not invoked when the Court developed its understanding of the reach of freedom of expression, according to which section 2(b) protects all non-violent activities that constitute attempts to convey meaning. The Court’s justification for that very broad reach was articulated in terms of “ensur[ing] that everyone can manifest their thoughts, opinions, beliefs,

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“The Value of Free Speech” (1982) 130 U. Penn. L. Rev. 591; and Stanley Ingber, “The Marketplace of Ideas: A Legitimizing Myth” (1984) Duke L.J. 1.

<sup>28</sup> That is not to suggest that the Court was entirely bereft of potential sources of guidance on the matter (apart, of course, from the Sharpe article on which the Court relied in *Ford*, *supra*, note 22). For examples of other scholarly treatments of the philosophical underpinnings of freedom of expression as a fundamental Canadian value that predated *Ford*, see Claire Beckton, “Freedom of Expression in Canada — How Free?” (1983) 13 Man. L.J. 583; Stefan Braun, “Freedom of Expression v. Obscenity Legislation: The Developing Canadian Jurisprudence” (1985-1986) 50 Sask. L. Rev. 39; and Richard Moon, “The Scope of Freedom of Expression” (1985) 23 Osgoode Hall L.J. 331. In spite of the fact that we now have a much larger body of scholarship on freedom of expression in Canada, in which the rationales are frequently mentioned and occasionally discussed, it remains the case that very little in the way of close and extended scrutiny has been given to them. For exceptions, see Richard Moon, “Drawing the Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda” (1992) 26 U.B.C. L. Rev. 99 (focusing on the self-realization rationale); Moon, “The Scope of Freedom of Expression”, *supra*, note 11 (focusing on the democratic self-government and self-realization rationales); Keith Dubick, “The Theoretical Foundation of Freedom of Expression” (2001-2002) 13 N.J.C.L. 1 (dealing with all three rationales); and Jacob Weinrib, “What is the Purpose of Freedom of Expression?” (2009) 67 U.T. Fac. L. Rev. 165 (dealing with all three, but with a focus of self-realization).

<sup>29</sup> See, e.g., *Canadian Broadcasting Corp. v. Canada (Attorney General)*, [2011] S.C.J. No. 2, [2011] 1 S.C.R. 19 (S.C.C.) [hereinafter “*C.B.C.*”].

<sup>30</sup> *Supra*, note 7.

indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream”, and the importance those who live in “a free, pluralistic and democratic society” attach to “a diversity of ideas and opinions for their inherent value both to the community and to the individual”.<sup>31</sup>

It was when the Court turned to the part of the framework dealing with the test for finding an infringement on freedom of expression that it invoked the three values. In keeping with its prior jurisprudence, the Court acknowledged that an infringement on section 2(b) could be found on either one of two different bases, the purpose of the impugned government action or its effect. It then went on to assert that if the government in question could be shown by the challenger to have restricted a particular expressive activity because of a concern about the content of the message being communicated, the court should, on that basis alone, find the government guilty of a purpose-based infringement.<sup>32</sup> However, the Court went on to hold, if the restriction could not be shown to have been based on such a concern, but had instead been based on a governmental concern about the “physical consequences” of an expressive activity, then the challenger had the additional hurdle of having to show that that activity “promotes at least one of [the principles and values underlying the freedom]”.<sup>33</sup> And those “principles and values”, the Court said, were the three that had been identified in *Ford*, now expressed in terms of

- (1) seeking and attaining the truth is an inherently good activity;
- (2) participation in social and political decision-making is to be fostered and encouraged;
- and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.<sup>34</sup>

Having set out that part of the test, the Court acknowledged that “[t]he precise and complete articulation of what kinds of [expressive] activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case-by-case basis”, but stipulated that “the [challenger] must at least identify the meaning being conveyed and

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<sup>31</sup> *Id.*, at 968.

<sup>32</sup> *Id.*, at 974.

<sup>33</sup> *Id.*, at 976.

<sup>34</sup> *Id.*

how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing”.<sup>35</sup> In the Court’s lexicon, this kind of infringement, if established, is called an effects-based infringement.

It is worth noting that, while the language used in *Irwin Toy*<sup>36</sup> to describe the first two values tracks closely that used by Emerson and Sharpe in the relevant passages cited in *Ford*,<sup>37</sup> the language used to describe the third is quite different. The passages in *Ford* refer simply to “individual self-fulfillment” (Emerson) and “individual autonomy” and “personal growth and self-realization” (Sharpe). The term “individual self-fulfillment” appears in the *Irwin Toy* formulation, of course, but that formulation refers to a good deal more as well. It makes very explicit what is at best left implicit in the Emerson and Sharpe passages, namely that this rationale engages the interests of both speakers and listeners. It also speaks to the critically important element of the larger social and political environment in which the process of individual self-fulfillment will take place. That environment, the Court in *Irwin Toy* says, should be “an essentially tolerant, indeed welcoming [one]”.<sup>38</sup> There is, in the incorporation of this additional element, not only an appreciation that environment can play a crucial role in the success or failure of individual projects of self-fulfillment, but also a sensitivity to the position of relative disadvantage in this regard suffered by members of groups that have experienced, or are experiencing, intolerance and prejudice. And, finally, there is the reference to the value of “diversity in forms of individual self-fulfillment and human flourishing”, suggesting that this third rationale serves larger societal as well as individual goals. The implication seems to be that it is not only individuals who profit from being allowed to realize their potential but, through the diversity of ways of living that emerges, the broader society as well. The precise nature of the benefit to society as a whole is, however, left unexplained.

That the majority should have included the explicit reference to the interests of both speakers and listeners in its formulation of the third rationale is consistent with the Court’s handling of the narrow issue in *Ford* of whether section 2(b) protects commercial expression. It had already made it clear in that case that both sets of interests were engaged by this rationale. But there had been nothing in any of its earlier section 2(b) decisions

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<sup>35</sup> *Id.*, at 977.

<sup>36</sup> *Supra*, note 7.

<sup>37</sup> See text accompanying note 25, *supra*.

<sup>38</sup> *Supra*, note 7, at 976.

to suggest that the Court's conception of this rationale included the other elements added in *Irwin Toy* — the importance of environment and the benefits of diversity. One might therefore have expected some explanation for their inclusion. Regrettably, no explanation was provided. What the explanation might be, and what implications their inclusion might have for the resolution of section 2(b) cases, we are left to guess at. But their inclusion marks this formulation as different from most others, not only those of Emerson and Sharpe, but that of scholars such as Schauer as well.<sup>39</sup>

It is a striking feature of the Court's section 2(b) jurisprudence that only one of its members has ever seen fit to examine from a critical perspective the Court's commitment to democratic self-government, the advancement of truth and knowledge and self-realization as providing the philosophical underpinning of freedom of expression. The author of that examination was McLachlin J. (as she then was), and the venue was her dissenting reasons for judgment in *Keegstra*.<sup>40</sup> After noting that "[v]arious philosophical justifications exist for freedom of expression", some of which "posit free expression as a means to other ends" while others "see freedom of expression as an end in itself",<sup>41</sup> she discussed what she called the "political process rationale", which she placed in the instrumental category and which she noted was closely linked to the free speech tradition in the United States. In her view, while the validity of that rationale was "undeniable", its reach was limited, because it only served to protect "expression relating to the political process".<sup>42</sup> And that reach, she said, was "much narrower than either the wording of the First Amendment or s. 2(b) of the Charter would suggest".<sup>43</sup> As for the advancement of truth and knowledge rationale, "also instrumental in outlook", she accepted the critique that "freedom of expression provides no guarantee that the truth will always prevail",<sup>44</sup> and also acknowledged that, as a rationale, it too had limited reach, since "however important truth may be, certain opinions are incapable of being proven either true or false ... [and] [m]any ideas and expressions which cannot be verified

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<sup>39</sup> *Supra*, note 12, at 47-72.

<sup>40</sup> *Supra*, note 9. Justice McLachlin was joined in her dissent in *Keegstra* by La Forest and Sopinka JJ. We are therefore entitled to presume that the two of them agreed with her analysis of the three rationales.

<sup>41</sup> *Id.*, at 802.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*, at 803.

<sup>44</sup> *Id.*

are valuable”.<sup>45</sup> She nevertheless accepted that it is a valid rationale, noting that:

One need only look to societies where freedom of 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.<sup>46</sup>

Of the individual self-realization rationale, she said that it seeks to protect freedom of expression “for its own intrinsic value”, on the theory that, quoting Thomas Emerson, “expression is an integral part of the development of ideas, of mental exploration and of the affirmation of self”.<sup>47</sup> She made it clear that she understood this rationale to protect the self-realization interests of listeners as well as speakers, but was troubled by two aspects of it. She said that “[it] is arguably too broad and amorphous to found constitutional principle”,<sup>48</sup> and that “it does not answer the question of why expression should be deserving of special constitutional status, while other self-fulfilling activities are not”.<sup>49</sup> Neither of these concerns is explored, however, in terms of either their origins or their implications; they are both simply stated. And in spite of them, she characterized individual self-realization as “a useful supplement to the more utilitarian rationales”.<sup>50</sup>

Justice McLachlin then proceeded to invoke the observation of Frederick Schauer that over the course of history governments have shown themselves to be especially untrustworthy and heavy-handed when regulating expressive activities.<sup>51</sup> This tendency she attributed in part to the fact that “[governments] have an interest in stilling criticism of themselves, or even in enhancing their own popularity by silencing unpopular expression”.<sup>52</sup> Whatever the reasons for it, this worrisome track record, she said,

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<sup>45</sup> *Id.*, at 804.

<sup>46</sup> *Id.*, at 803-804.

<sup>47</sup> *Id.*, at 804.

<sup>48</sup> *Id.*, at 805.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> Justice McLachlin cites Schauer’s book, *Free Speech: A Philosophical Enquiry*, *supra*, note 12, in support of this assertion, but without any page reference.

<sup>52</sup> *Keegstra*, *supra*, note 9, at 805.



means that “government attempts to [curtail expression] must *prima facie* be viewed with suspicion”.<sup>53</sup>

In the concluding paragraphs of her discussion of these rationales, McLachlin J. noted that “no one rationale provides the last word on freedom of expression”, and that, “[i]ndeed, it seems likely that theories about freedom of expression will continue to develop”.<sup>54</sup> She observed that the broad wording of section 2(b) supports a broad and flexible approach to identifying the rationales underlying it, and that “[d]ifferent justifications . . . may assume varying degrees of importance in different fact situations”.<sup>55</sup> She ended this part of her judgment with an affirmation of the legitimacy of all three of the rationales that the Court had attributed to freedom of expression in *Ford* and *Irwin Toy*, noting that “each of [them] is capable of providing guidance as to the scope and content of section 2(b)”.<sup>56</sup>

Justice McLachlin’s exploration of the democratic self-government, advancement of truth and knowledge and individual self-realization rationales has not been the subject of comment in any of the Court’s subsequent section 2(b) cases. The Court appears to have proceeded on the assumption that, however vulnerable to criticism the values may be in the view of some of its members, they are the accepted rationales, and, as a result, they have continued to serve as the measuring sticks against which expressive activities have been evaluated when section 2(b) has been invoked.

### III. THE DOCTRINAL ROLES ASSIGNED TO THE THREE VALUES

Democratic self-government, the advancement of truth and knowledge and individual self-realization do more than provide the philosophical underpinning of freedom of expression as a constitutional right. They have also been assigned a range of doctrinal roles by the Court, within which they assist in the resolution of both challenges to governmental action based on section 2(b) and a narrow range of common law and statute-based cases in which section 2(b) is invoked. In each of these roles, courts are required to engage with the values in the context of the

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*, at 806.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

particular challenge before them as part of its analysis of the merits of the claim being made. The purpose of this part of the paper is to provide a description of the origins and precise nature of each of these roles.

Before turning to the first of them, however, it is important to make explicit a significant — and in my view, unfortunate<sup>57</sup> — feature of the Court’s use of the values underlying section 2(b) that would otherwise be left implicit. That is the fact that the Court in *Irwin Toy* held that section 2(b) protects any and all non-violent attempts to convey meaning, regardless of the content of the meaning being conveyed, and in particular, regardless of whether or not that content furthers any of the rationales the Court has ascribed to section 2(b). Freedom of expression is therefore a Charter right to which the purposive approach has not been applied, at least when the Court defined its reach in relation to expressive content. There have been a couple of instances — one of which predated *Irwin Toy* — in which members of the Court have used those rationales in support of granting protection to particular expressive content, but those cases are very much the exception to the rule.<sup>58</sup> The rule is that the rationales underlying section 2(b) do not have a role to play in determining the scope and meaning of freedom of expression insofar as expressive content is concerned.

As we are about to see, however, the rationales have come to play a role in defining the reach of section 2(b) in relation to access to both public property and government-held documents for expressive purposes.

## 1. Access to Public Property for Expressive Purposes

The Court’s approach to the first claim to come before it that section 2(b) guarantees access to public property for the purpose of engaging in expressive activity was a deeply fractured one. The context out of which that claim emerged involved a rule prohibiting the holding up of placards and distribution of pamphlets at Dorval Airport outside Montreal. In the result, all seven members of the Court who sat on the case agreed that the claim should succeed, and the rule was struck down. However, that shared conclusion was arrived at using three very different analytical approaches. One member of the Court in that case, *Committee for the*

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<sup>57</sup> I have criticized this feature of the Court’s approach to s. 2(b) elsewhere: see R. Elliot, “Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression” (2011) 15 *Rev. Const. Stud.* 205.

<sup>58</sup> The cases are *Ford*, *supra*, note 22 (commercial expression) and *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.) [hereinafter “*Zundel*”] (deliberate falsehoods).

*Commonwealth of Canada v. Canada*,<sup>59</sup> L'Heureux-Dubé J., was of the view that section 2(b) guarantees access to public property for expressive purposes in any and all circumstances. Three members of the Court, led by Lamer C.J.C., were of the view that section 2(b) only guarantees such access when the expressive activity in question can be said to be consistent with the primary function of the property to which access is being sought. Three other members of the Court, led by McLachlin J. (again, as she then was), were of the view that, unless it could be shown that access was being denied because of a concern about the content of the message to be conveyed, section 2(b) only guaranteed such access if engaging in expressive activity on the public property in question furthered at least one of democratic self-government, the advancement of truth and knowledge or individual self-realization.<sup>60</sup> (It should be noted that whatever access ended up being guaranteed under these different approaches to the reach of section 2(b) was subject to being overridden by a section 1 justification.)

That difference of opinion about the correct approach to take to such claims remained intact<sup>61</sup> until 2005 when the Court decided the case of *Montreal (City) v. 2952-1366 Quebec Inc.*<sup>62</sup> The claim in that case resulted from an attempt by the City of Montreal to enforce its anti-noise by-law against a strip club that was using a loudspeaker to amplify the music and commentary accompanying the show inside so that passers-by could hear them. In their joint reasons for judgment in that case, speaking for a majority of six (of seven), McLachlin C.J.C. (the only member of the Court left of those who participated in *Committee for the Commonwealth*) and Deschamps J. prescribed a new test that borrowed significantly from the approaches taken by Lamer C.J.C. and McLachlin J. in the earlier case. That new test entailed asking “whether the [public property] is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment”.<sup>63</sup> In applying this test, they said that courts should consider both “the histori-

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<sup>59</sup> [1991] S.C.J. No. 3, [1991] 1 S.C.R. 139 (S.C.C.) [hereinafter “*Committee for the Commonwealth*”].

<sup>60</sup> Justice McLachlin invoked the infringement part of *Irwin Toy* framework (see text accompanying notes 30-32, *supra*) in support of this approach.

<sup>61</sup> See *Ramsden v. Peterborough (City)*, [1993] S.C.J. No. 87, [1993] 2 S.C.R. 1084 (S.C.C.) [hereinafter “*Ramsden*”].

<sup>62</sup> [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.) [hereinafter “*City of Montreal*”].

<sup>63</sup> *Id.*, at para. 73.

cal or actual function of the place” and “whether other aspects of the place suggest that expression within it would undermine the values underlying free expression”.<sup>64</sup> Here again, therefore, the connection, or lack thereof, between expressive activity and the values said to underlie section 2(b) becomes critical to the outcome of the freedom of expression claim. And with that test now having established itself as the governing test, the role assigned to the values within it has become an important feature of the Court’s approach in this particular area of the law relating to section 2(b).

It should be noted that to this point, the Court has decided only five cases involving claims of access to public property for expressive purposes.<sup>65</sup> At least one member of the Court has considered the reach of the three values in all of them. In none of the cases, however, has any member of the Court engaged in any real analysis of the meaning or scope of any of the values; in all of them, the reasoning was brief and highly conclusory in nature. The light shed by these cases on the Court’s understanding of the values must therefore be said to be modest.

## 2. Access to Government Documents for Expressive Purposes

In *Ontario (Public Safety and Security) v. Criminal Lawyers’ Assn.*,<sup>66</sup> decided in 2010, the Court confronted for the first time a claim that access by a member of the public to government-held documents was guaranteed by section 2(b). The documents in question related to an investigation into alleged misconduct on the part of the police in Ontario, and the claim — which was ultimately unsuccessful — was made pursuant to that province’s access to information legislation. The approach the Court adopted to the claim gave the values underlying section 2(b) an important doctrinal role, although the precise nature of that role remains somewhat unclear. Drawing on both *Irwin Toy* and *City of Montreal*, McLachlin C.J.C. and Abella J., speaking for the Court, held that, when such claims are made, the first step in the inquiry “asks whether the demand for access to information furthers the purposes of

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<sup>64</sup> *Id.*, at para. 74.

<sup>65</sup> In addition to *Committee for the Commonwealth, Ramsden* and *City of Montreal*, see *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, [2009] S.C.J. No. 31, [2009] 2 S.C.R. 295 (S.C.C.) [hereinafter “*Greater Vancouver Transportation Authority*”], and *C.B.C.*, *supra*, note 29.

<sup>66</sup> [2010] S.C.J. No. 23, [2010] 1 S.C.R. 815 (S.C.C.) [hereinafter “*Criminal Lawyers’ Assn.*”].

s. 2(b)”.<sup>67</sup> If that question is answered in the affirmative, section 2(b) will be engaged, but, they said, only in a *prima facie* sense, because the protection afforded by section 2(b) will be lost “if the documents sought are protected by privilege or if production of the documents would interfere with the proper functioning of the governmental institution in question”.<sup>68</sup>

It is within the first step that the values play their doctrinal role, and that role again requires consideration of the relationship between the expressive activity in question — in this context, a claim of access to documents — and those values. The lack of clarity in relation to that role concerns the range of values to be taken into account. The fact that, in formulating that step, the Chief Justice and Abella J. referred generally to “the purposes of s. 2(b)” suggests that it is open to a claimant to try to link the expressive activity in which the documents in question would be used to any one of the three values. However, in the very next sentence, the Chief Justice and Abella J. went on to say that, “In the case of demands for government documents, the relevant s. 2(b) purpose is usually the furtherance of discussion on matters of public importance,”<sup>69</sup> which suggests that the Court had in mind only the democratic self-government and (perhaps) the advancement of truth and knowledge rationales as the relevant measuring sticks in this context; the individual self-realization rationale appears to have no role to play. That inference is supported by the fact that the analysis of the merits of the particular claim made in that case was limited to the question of whether or not access to the documents sought was “necessary for the meaningful exercise of free expression on matters of public or political interest”,<sup>70</sup> as well as by their initial articulation of the reach of section 2(b) in such circumstances, which was to the effect that “[a]ccess is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government”.<sup>71</sup>

However, there are reasons to doubt that the Chief Justice and Justice Abella intended their judgment in that case to be read in that restrictive

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<sup>67</sup> *Id.*, at para. 34. That the Court should have invoked *City of Montreal* in support of its approach is hardly surprising, given the close resemblance between a claim for access to a publicly held document and a claim for access to publicly owned property.

<sup>68</sup> *Id.*, at para. 33. The concern about “the proper functioning of the governmental institution in question” clearly reflects the Court’s new approach in *City of Montreal* to claims for access to publicly owned property.

<sup>69</sup> *Id.*, at para. 34.

<sup>70</sup> *Id.*, at para. 36.

<sup>71</sup> *Id.*, at para. 30.

way. There is nothing to suggest that, when they spoke of “the purposes of s. 2(b)” in articulating the first analytical step, individual self-realization was not to count. And it will have been noted that their later formulation of that same step contains the word “usually”, implying that in some cases the purpose for which government-held documents are sought might engage a purpose other than “the furtherance of discussion on matters of public importance”. Moreover, it was clear that the reason that the claimants wanted access to the documents in that particular case was to expose to public scrutiny the details of alleged wrongdoing on the part of police officers and Crown prosecutors in a particular criminal prosecution — matters that would clearly fit the description of “matters of public or political interest” and “the functioning of government”. Their choice of those words may therefore have been a function of the particular facts with which they had to deal.

Even if the Court remains open to considering the individual self-realization rationale as one of the “purposes” in the context of such claims, it is clear that the use to which the three values are put here is different from the use to which they are put in the context of access to public property examined above. In that context, as we saw, the burden on the challenger is simply to show that expressive activity in a particular place is *not inconsistent* with the values. Here, while the initial formulation of the first step speaks simply of the demand for access having to further the purposes of section 2(b), the test actually applied requires the challenger to show that access to the documents in question is “*necessary* for the *meaningful exercise* of free expression”. That would appear to be a much more onerous standard. The implication of that language seems clearly to be that, unless the claimant can show that his or her ability to engage “meaningfully” in the expressive activity in question depends on having access to the desired documents, section 2(b) will not be engaged.<sup>72</sup>

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<sup>72</sup> Why the Court saw fit to impose this higher standard is not explained, but it is not unreasonable to think that it reflects the fact that a claim of access to government-held documents is much more in the nature of a positive rights claim than a claim of access to publicly held property, and the courts have shown themselves to be wary of granting positive rights claims under the fundamental freedoms category. See, in this regard, *Baier v. Alberta*, [2007] S.C.J. No. 31, [2007] 2 S.C.R. 673 (S.C.C.). I am grateful to my colleague Margot Young for this insight.

### 3. Effects-based Infringements

The doctrinal role played by the values in this context has already been introduced above, in the discussion of *Irwin Toy*.<sup>73</sup> If a restriction of expressive activity cannot be said to have been prompted by a governmental concern about the content of the message being communicated, but was prompted instead by a concern about what the Court termed the “physical consequences” of that activity, the restriction will only be held to constitute an infringement on freedom of expression if the challenger can show that the expressive activity in question furthers in some fashion democratic self-government, the advancement of truth and knowledge or individual self-realization. The “or” at the end of that sentence is important. In order to meet this requirement, the challenger does not have to show that the expressive activity furthers all three of those values; one will do. But the challenger must show that it furthers at least one. Failure to satisfy that requirement will bring the challenge to an unsuccessful end.

What kinds of restrictions qualify under this rubric, which the Court refers to as “effects-based infringements”? The Court addressed that question in *Irwin Toy*, but, at least from my standpoint, its answer left a good deal to be desired. It said that a rule against handing out pamphlets would not qualify, because it was “tied to content”. And that was so, the Court said, even if the rule was designed to keep litter off public thoroughfares, because “[t]he rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails restricting its content”.<sup>74</sup> On the other hand, the Court said, a rule against littering would qualify. Such a rule, in the Court’s view, would not be “a restriction ‘tied to content’, ...[because] it aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning”.<sup>75</sup> It is difficult to quibble with the Court’s characterization of the latter rule (unless, of course, there is evidence that the rule masked a desire to get rid of certain messages to which the government objected). However, there is reason to question the characterization of the former rule. Unless it could be shown that a rule against handing out pamphlets was prompted by a concern about the messages being conveyed by particular pamphleteers, it is difficult to understand why such a rule should be characterized as “tied to

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<sup>73</sup> See text accompanying notes 33-35, *supra*.

<sup>74</sup> *Supra*, note 7, at 974-75.

<sup>75</sup> *Id.*, at 975.

content”); it would seem, like the rule against littering, to be agnostic as to content and hence to constitute an effects-based infringement.<sup>76</sup> Whatever one thinks of the examples the Court gives to explain the difference between purpose-based and effects-based infringements on freedom of expression, the doctrinal role played by the three values in relation to the latter remains intact: if the test of a purpose-based infringement cannot be satisfied, the challenger will have to show that the expressive activity in question furthers in some way at least one of democratic self-government, the advancement of truth and knowledge and individual self-realization.

Note, however, that the role of the values in this context is different from their role in the context of access to public property, and in two respects. The first, and more important, is that the focus of the inquiry here is on the relationship between the particular expressive activity in question and the three values, rather than on the relationship between any expressive activity on the public property in question and those values; it is the particular expressive activity and not the place in which it would, or did, take place that is the focus of the analysis. The second and more subtle difference is that, instead of requiring the challenger to show that the particular expressive activity in question *does not conflict with or undermine any* of those values, here the challenger is required to show that the expressive activity in question *furthers at least one* of those values. Why the Court has chosen to use different language in these two contexts is unclear. So, too, at least to this point, is the practical significance, if any, of the difference.

The role of the values in this context is also different from their role in the context of access to government-held documents. There, as we saw, the claimant bears the onerous burden of showing that such access is necessary to the meaningful exercise of free expression. Here, the claimant need only show that the expressive activity in question furthers at least one of the values, a much less onerous burden.

In spite of the lengths to which the Court went in *Irwin Toy* to distinguish between, and explain its understandings of, purpose-based and

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<sup>76</sup> My colleague Bill Black has suggested that there may well be something qualitatively different about pamphlets and ordinary litter, in that all pamphlets — but not all litter — will contain attempts to convey meaning of one sort or another. Even if that is true, however, it is still difficult to see how that difference should lead to the conclusion that a rule against handing out pamphlets is “tied to content” given the broad range of different messages that pamphlets can contain. At best, that difference could be said to argue for special vigilance on the part of the courts when they are asked to review such a rule to ensure that it does not mask an attempt to control a particular message.



effects-based infringements of freedom of expression, we have only three cases to this point in which members of the Court have applied its understanding of the latter.<sup>77</sup> All three of these cases involved claims of access to public property for expressive purposes in which the members of the Court in question, using what they considered to be the relevant test, had found that section 2(b) did protect the claimant's interest in obtaining access. The next question they had to resolve was whether or not the impugned governmental action infringed on that protected interest. And because in each of these cases (but not in the other two cases involving claims of access to public property that got to this stage)<sup>78</sup> the members of the Court were satisfied that access to the property in question for expressive purposes had been denied for reasons unrelated to the content of the message that the claimants wished to convey, that question fell to be determined on the basis of the requirements prescribed in *Irwin Toy* for an effects-based infringement. And that in turn meant that the claimant had to show that the expressive activity in question furthered at least one of the three values underlying section 2(b). In all three of these cases, that showing was held to have been made, and with very little discussion.

#### 4. Section 1

The last of the doctrinal roles played by the three values in the resolution of section 2(b) challenges to government action arises at the section 1 stage, at which point the issue for the court is whether the government in question can justify the infringement on freedom of expression that the court has held (or, as sometimes occurs, the government has conceded) to have taken place. The application of section 1 pursuant to the *Oakes* framework<sup>79</sup> and the refinements made to it in subsequent cases entails both an ends and a means inquiry. The ends inquiry requires the government whose conduct has been held to infringe on a Charter right or freedom to establish that it had a valid and "sufficiently important" purpose for engaging in that conduct, while the means inquiry requires that government to establish that that conduct is ration-

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<sup>77</sup> The cases are *Committee for the Commonwealth*, *supra*, note 59 (per McLachlin J., for three members of a seven-member panel), *Ramsden*, *supra*, note 61 (per Iacobucci J. for the Court) and *City of Montreal*, *supra*, note 62 (per McLachlin C.J.C. and Deschamps J. for six members of a seven-member panel).

<sup>78</sup> *Greater Vancouver Transportation Authority and C.B.C.*, both *supra*, note 65.

<sup>79</sup> *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.) [hereinafter "*Oakes*"].

ally connected to that purpose, that it minimally impairs the right or freedom, and that the benefits to society that flow from that conduct outweigh the costs. When the right at stake is freedom of expression, the extent to which the expressive activity in question can be said to further democratic self-government, the advancement of truth and knowledge and individual self-realization can, and often does, play a significant role in determining the outcome of those inquiries, particularly the latter two components of the means inquiry.

The origins of this role can be found in two cases decided in 1989 and 1990 respectively. In the first, *Edmonton Journal v. Alberta (Attorney General)*,<sup>80</sup> the Court was confronted with a challenge to provincial legislation restricting the ability of the media to publish information revealed in court proceedings in matrimonial disputes. In separate reasons for judgment concurring with the majority that the legislation should be struck down, Wilson J. laid the foundation for what she termed, and has come to be known as, the “contextual approach” to the application of section 1. According to that approach, the interests to be balanced at that stage of the analysis of a Charter case should be defined, not in the abstract, but in terms of the specific legislative and factual context out of which the particular case has arisen. Hence, rather than balance the right to privacy writ large against freedom of expression writ large, she argued that the relevant competing interests were the interest in not having the details of matrimonial disputes made public (an aspect of the right to privacy) and the interest in having the media cover the resolution of such disputes by the courts (an aspect of freedom of expression). She justified that approach on the following basis:

One virtue of the contextual approach ... is that it recognizes that a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under section 1 ...<sup>81</sup>

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<sup>80</sup> [1989] S.C.J. No. 124, [1989] 2 S.C.R. 1326 (S.C.C.) [hereinafter “*Edmonton Journal*”].

<sup>81</sup> *Id.*, at 1355-56.

The second case is *Rocket v. Royal College of Dental Surgeons of Ontario*,<sup>82</sup> in which the issue was the validity of a legislative regime restricting the ability of dentists in Ontario to advertise. Having held that that regime infringed on section 2(b), McLachlin J., speaking for the Court, turned her attention to the question of justification under section 1. Early in her analysis she noted that “not all expression is equally worthy of protection”<sup>83</sup> and then proceeded to assess the value of the particular form of expression at issue in that case, using as a measure the three *Ford* rationales for protecting freedom of expression. Pointing out that the motive behind dentists’ advertising “is, in most cases, merely economic”, she reasoned that the loss that they suffered if they were prevented from advertising “is merely loss of profit, and not loss of opportunity to participate in the political process or the ‘marketplace of ideas’, or to realize one’s spiritual or artistic self-fulfillment”.<sup>84</sup> However, she said, this kind of speech “does serve an important public interest by enhancing the ability of patients to make informed choices”, and moreover, “the choice of a dentist must be counted as a relatively important consumer decision”.<sup>85</sup> In this latter regard, she contrasted *Rocket* with *Irwin Toy*, where, she said, “the majority did not emphasize the consumer choice aspect, because the expression in question was advertising aimed at children, and the majority clearly felt that protection of consumer choice in children was much less important than it would be in adults”.<sup>86</sup> In the result, she concluded that the freedom of expression interest in *Rocket* was, while not at the highest importance end of the spectrum, not at the lowest importance end either. And, at least in part on the basis of that conclusion, she held that the infringement on section 2(b) embodied in the impugned legislation could not be justified.

What is significant for our purposes about this analysis is that the valuation of the freedom of expression interest in that case was very explicitly based on the extent to which the particular kind of expression in question could be said to further the three rationales for freedom of expression articulated in *Ford*. The implication of that analysis was that, the more of those rationales that can be shown to be furthered, and the greater the extent to which each of them can be shown to be furthered, the greater will be the weight to be given to the freedom of expression

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<sup>82</sup> [1999] S.C.J. No. 65, [1990] 2 S.C.R. 232 (S.C.C.) [hereinafter “*Rocket*”].

<sup>83</sup> *Id.*, at 247.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*, at 247-48.

interest in the balancing called for by section 1, and the greater the likelihood that the challenger will be successful. Here again, then, we see these three values playing an important role in the resolution of section 2(b) cases.

It remains to be noted that in some of its section 2(b) decisions, the Court has used the terms “core” and “periphery” to refer to expression interests that, using this evaluative methodology, are determined to be of particularly high or low value. For example, in *Butler*, Sopinka J., speaking for seven members of the Court, said of the freedom of expression interest implicated in the publication and distribution of obscene material that it “does not stand on an equal footing with other kinds of expression which directly engage the ‘core’ of the freedom of expression values”,<sup>87</sup> and in *RJR*, La Forest J. in his dissent concluded that tobacco advertising lay “as far from the ‘core’ of freedom of expression as prostitution, hate mongering or pornography, and [is] thus [entitled] to a very low degree of protection under s. 1”.<sup>88</sup> It might be tempting to some to treat the Court’s use of these metaphors as an indication that the Court is of the view that all expressive activities can be slotted into one of two categories, high value (core) and low value (periphery). In my view, that temptation should be resisted. Not only has the Court never adopted that interpretation of its use of the metaphors, but such an interpretation is inconsistent with the willingness that the Court has evidenced in some cases to draw subtle distinctions between expressive activities that on the face of it appear to be very similar. That willingness was certainly evident in *Rocket*, in which, as we saw above, McLachlin J. expended considerable effort in distinguishing between commercial advertising to children and commercial advertising to adults, and attaching greater weight to the latter than to the former.

## 5. Changing the Common Law

Not all of the contexts in which the rationales underlying freedom of expression have come to play a doctrinal role are the product of challenges in which section 2(b) is invoked against legislation or other governmental action. Those rationales have also come to play a role in the resolution of cases in which freedom of expression is invoked in support of an attempt to persuade the Court that a particular area of the

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<sup>87</sup> *Supra*, note 8, at 500.

<sup>88</sup> *Supra*, note 7, at para. 75.

common law is in need of revision. Such cases, it should be noted, are few and far between; this category is therefore a very small one.

The category is exemplified by the two cases in which the Court has been asked to revise the common law of defamation to better protect freedom of expression. In the first of these, *Hill v. Church of Scientology of Toronto*,<sup>89</sup> the Court was asked — but declined — to extend the reach of the existing defence of qualified privilege; in the second, *Grant v. Torstar Corp.*,<sup>90</sup> it was asked — and agreed — to create a new defence of responsible communication on matters of public interest. In both cases, the Court framed the issue before it in terms of whether or not the common law of defamation as it stood prior to the case in question having arisen struck an appropriate balance between freedom of expression (as a constitutional “value” rather than as a constitutional “right”) and the right that every person has not to have his or her reputation unfairly sullied. If the Court concluded that the common law did strike an appropriate balance, as occurred in *Hill*, there would be no reason to make the requested change; if the Court concluded that it did not, and reached that conclusion on the basis that insufficient weight was being given to the freedom of expression interest, as occurred in *Grant v. Torstar*, the requested change could be made.<sup>91</sup> In both cases, the Court factored into its analysis an assessment of the extent to which the kind of defamatory speech in question could be said to further the rationales for protecting freedom of expression. As in the context of a section 1 analysis, that assessment helped to determine the weight to be given to the freedom of expression interest in the balancing process. The other example we have of this use being made of the values underlying section 2(b) is *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,<sup>92</sup> in which the Court was asked — and agreed — to change the common law governing secondary picketing. Again, the Court measured the expressive activity at issue

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<sup>89</sup> [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130 (S.C.C.) [hereinafter “*Hill*”].

<sup>90</sup> [2009] S.C.J. No. 61, [2009] 3 S.C.R. 640 (S.C.C.) [hereinafter “*Grant v. Torstar*”]. The Court decided another defamation case at the same time, *Quan v. Cusson*, [2009] S.C.J. No. 62, [2009] 3 S.C.R. 712 (S.C.C.), in which it also recognized and applied the new defence of responsible communication on matters of public interest.

<sup>91</sup> I say “could be made” because the Court might conclude that the change being requested was of such a far-reaching nature as to call for legislative rather than judicial action, and refuse to make it on that basis even though it was satisfied of the need for change. See, in this regard, *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.).

<sup>92</sup> [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.).

against the values to help it determine the weight to be given to the freedom of expression interest in the balancing process.

## 6. Application of Legislation

I have only been able to find one case in which the Court has made use of the values underlying freedom of expression in the context of interpreting and applying the provision of a legislative enactment that poses a threat to the freedom. The case is *Sierra Club of Canada v. Canada (Minister of Finance)*,<sup>93</sup> and the legislative enactment implicated in that case was Rule 151 of the *Federal Court Rules*,<sup>94</sup> which reads as follows:

151(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

The Court had been asked in that case to issue a confidentiality order in respect of certain documentary evidence in a judicial review application, the effect of which would be to deny access to it to members of the public. The decision under challenge in that application was an agreement by the federal government to provide funding assistance to Atomic Energy of Canada Limited in respect of the construction and sale to China of two nuclear reactors, and the claim by the party making that challenge was that that decision triggered the need for an environmental assessment under section 5(1)(b) of the *Canadian Environmental Assessment Act*.<sup>95</sup> The request for the confidentiality order came from the company. In deciding whether or not to grant that order, Iacobucci J., speaking for the Court, measured “the public interest in open and accessible court proceedings” in the context of that particular case against each of democratic self-government, the advancement of truth and knowledge and individual self-realization; that measuring process was the basis upon which he assessed the strength of that “public interest”. In the result, he issued the order.

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<sup>93</sup> [2002] S.C.J. No. 42, [2002] 2 S.C.R. 522 (S.C.C.) [hereinafter “*Sierra Club*”].

<sup>94</sup> SOR/98-106.

<sup>95</sup> S.C. 1992, c. 37.

*Sierra Club* is, of course, an unusual case. It may even be unique. Not every legislative enactment that poses a threat to freedom of expression will, like section 151, effectively require the courts to take the freedom of expression interest into account when they are called upon to apply it. However, there was nothing in section 151 that required the Court to take that interest into account in precisely the way in which Iacobucci J. did. The fact that he chose to do it by making explicit use of all three of the values underlying section 2(b) suggests that the case may have a broader precedential effect than might initially be thought. Only time will tell.

#### IV. THE COURT'S UNDERSTANDING OF THE REACH OF THE THREE VALUES

Having outlined the process by which the Court came to adopt democratic self-government, the advancement of truth and knowledge and individual self-realization as the philosophical underpinnings to section 2(b), and explained the different doctrinal roles that these values have been assigned by the Court, it is time now to explore the meanings that the Court has given to each of them.

Such an exploration could be structured in a variety of different ways — on a case by case basis, beginning with *Ford* and ending with the Court's most recent section 2(b) decision in which the values have been considered; on the basis of the different doctrinal roles; on the basis of the major categories of expressive content that the Court has been called upon to consider in relation to the values (commercial expression, obscenity, hate speech, *etc.*); on the basis of issues that have shown themselves to be common to the Court's consideration of the values (such as whether and, if so, to what extent the connection between a particular expressive activity and the values is adversely affected by a finding that responses to that activity are unlikely to be rational); or on the basis of the values themselves. I decided to use the values themselves as the primary organizing principle. That choice was based on a number of considerations, the most important of which is its consistency with the purpose of this part of the paper, which is to take stock of the Court's understanding of each of the values. It has to be acknowledged, however, that this approach is not without its problems. If one believes, as I do, that what the Court has said about the reach of these values in a given case has frequently, if not always, been a product of the particular free

speech issue with which the Court was dealing in that case, a full understanding of what the Court has to say about the reach of a particular value in a given case can only be achieved if attention is paid to the jurisprudential context out of which what was said emerged. Using the values as the organizing principle also poses a challenge when, as is often the case, the Court treats them as a group rather than as distinct components of the analysis. Not only is it often difficult to disaggregate what the Court has to say about each of them in such circumstances, but one runs the risk of leaving out important aspects of the Court's thinking about them. Finally, I should note that, while the values themselves serve as the primary organizing principle, the discussion of each value has been broken down into a number of component parts, with subheadings for each, and with those subheadings often reflecting the major categories of expressive content, as well as taking account of common issues such as the significance of irrationality on the part of listeners.

The understanding that the Court has developed of each of the three values could, at least in theory, be revealed in at least two different ways. One is through the provision by the Court of general descriptions of those understandings. The Court might, for example, have chosen to articulate a particular conception of what it believes democratic self-government to entail in a case in which that value was thought to play a particularly important role. The other is through the discrete holdings that the Court has made in a series of individual cases in which, in accordance with the different doctrinal roles the Court has assigned to the values, it is called upon to measure particular expressive activities against them. When, for example, the Court holds that a particular expressive activity furthers democratic self-government, it is telling us that its conception of that value is one that includes — or at least entails the protection of — that interest. By the same token, when the Court holds that a particular activity does not further that value, it is telling us that its conception of the value is one that does not require or entail the protection of that activity. From the standpoint of the person conducting the search, the task is made much easier if the Court adopts the former approach; one simply has to find the descriptions and set them out. Regrettably, the Court has not yet adopted that approach in relation to any of the three values. It has instead heeded the advice given early on by McLachlin J. in *Committee for the Commonwealth*, where she said:



Questions will doubtless arise as to the exact ambit of the pursuit of truth, participation in the community and the conditions necessary for individual fulfillment and human flourishing. It would be wrong to attempt to comprehensively define these values at the outset. Apart from the difficulties of such a venture, there would be a risk of foreclosing constitutional protection for expression which should be protected.<sup>96</sup>

Hence, the search that I have conducted has, of necessity, been a more challenging one than it might have been. It has entailed reviewing all of the Court's section 2(b) jurisprudence with an eye to finding references to the values in the context of discussions about the connection, or lack thereof, between them and the particular kinds of expressive activities at issue in each case. Every effort has been made to be both thorough and accurate in the conduct of that review; it is certainly possible, however, that relevant references have been missed.

In conducting this search, I have been sensitive not only to the Court's position on the question of *whether or not* particular kinds of expression further one or more of the values, but also to its position on the question of *the extent to which* those that do can be said to further them. As we will see, the Court has made it clear that, in its view, different expressive activities further particular values to varying degrees. Hence, while the Court has held that all commercial expression furthers the individual self-realization of potential consumers, it has also held that some commercial expression — advertising by dentists, for example — furthers that value to a greater degree than others — for example, advertising of toys to children. A complete picture of the Court's understanding of the values requires that these kinds of distinction be included.

It is important to emphasize again that the primary objective of this part of the paper is to extract from the Court's section 2(b) jurisprudence the understanding that the Court has articulated of each of the three values. While I do make a number of observations about those understandings, these observations are of very limited scope and are intended to clarify the Court's position, not to critique it. That critique will be made in a separate paper.

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<sup>96</sup> *Supra*, note 59, at 240.

## 1. Democratic Self-Government

In *Keegstra*, Dickson C.J.C. characterized “the connection between freedom of expression and the political process” as “perhaps the linchpin of the s. 2(b) guarantee”.<sup>97</sup> What the Court often refers to as “political expression” — a shorthand way of capturing the many different expressive activities that are understood by it to further democratic self-government — has been said to lie at the “core” of freedom of expression, and hence to be of the greatest value. Infringements of “political expression” are therefore viewed by the Court as the most difficult for governments to justify under section 1.

The importance of the connection between freedom of expression and democratic self-government has long been recognized in Canadian law, and one can find numerous passages in judgments from both the pre- and post-Charter eras attesting to it. One of its earliest and most eloquent expositions came in Cannon J.’s oft-quoted passage from his judgment in *Reference re Alberta Legislation*<sup>98</sup> from the 1930s:

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 government concerning matters of public interest. There must be untrammelled publication of the news and political opinion of the political parties contending for ascendancy. ... Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. ...<sup>99</sup>

To similar effect is a frequently cited passage from Justice Cory’s much more recent reasons for judgment in *Edmonton Journal*:

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

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<sup>97</sup> *Supra*, note 9, at 763.

<sup>98</sup> [1938] S.C.J. No. 2, [1938] S.C.R. 100 (S.C.C.).

<sup>99</sup> *Id.*, at 145-46. For another early judicial exposition of the importance of freedom of expression to our system of government, see Rand J.’s reasons for judgment in *Boucher*, *supra*, note 26, at 288.

societies and institutions. The vital importance of the concept cannot be over-emphasized.<sup>100</sup>

Our interest here is less in the importance of freedom of expression to self-government than it is in the precise character or nature of the connection between the two. However, the fact that expressive activities that are seen to further the goal of democratic self-government are viewed by the Court as lying at the “core” of freedom of expression, and hence to warrant special protection, means that the definition given to democratic self-government for this purpose takes on added importance. In effect, that definition helps to determine the extent of the “core” of freedom of expression; the broader the definition is, the larger that “core” becomes.

The questions of interest to us now are: How is it that the Court sees freedom of expression as protecting and facilitating democratic decision-making? Or, more precisely, what kinds of expressive activities does the Court see as performing that function? Does the Court believe it is possible to draw meaningful distinctions between activities that do perform that function in terms of the extent to which they do so, and on that basis accord greater (or lesser) weight within the “core” to some than to others? Does the Court think it is possible, for example, to characterize some expressive activities as being truly integral to the proper functioning of a healthy democracy while characterizing others as being only loosely connected to that end?

As noted in the introductory section of this paper, the Court has made no attempt to define in anything approaching comprehensive terms the conception of democratic self-government that underlies its decision to include that value as one of the philosophical rationales underlying section 2(b). It has preferred to proceed incrementally, on a case by case basis, as Lamer C.J.C. suggested it would when he proffered a cautious approach to defining the reach of all three of the values said to underpin freedom of expression in the *Prostitution Reference*,<sup>101</sup> as he put it, “... the precise articulation of what kinds of activities promote these values is a matter for judicial appreciation to be developed on an ongoing basis”.<sup>102</sup>

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<sup>100</sup> *Supra*, note 80, at 1336.

<sup>101</sup> *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123 (S.C.C.) [hereinafter “*Prostitution Reference*”].

<sup>102</sup> *Id.*, at 1187.

The Court has, of course, said a good deal about democracy as a constitutional value in other contexts. In the *Reference re Secession of Quebec*,<sup>103</sup> in which the Court included democracy as one of the organizing or underlying principles of Canada's constitution, it listed the following as significant features of what it termed the "institutional dimension" of Canadian democracy — representative government, popular franchise, responsible government, majority rule, the ascertainment and implementation of the "sovereign will", self-government, accountability, consent of the governed, "compromise, negotiation, and deliberation", and the accommodation of dissenting voices.<sup>104</sup> The "individual dimension" was said to comprise the rights to vote and stand for election mentioned in section 3 of the Charter.<sup>105</sup> The Court has also offered some thoughts on the meaning of the term "free and democratic society" in section 1. In *Oakes*, Dickson C.J.C. included among "the values and principles essential to a free and democratic society" "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society".<sup>106</sup> Given that this list was intended to capture the elements of two distinct (even if closely related) concepts, freedom and democracy, it would be wrong to assume that all of the principles included in it were directed at both. It seems reasonable to infer, however, that "accommodation of a wide variety of beliefs" and "faith in social and political institutions which enhance the participation of individuals and groups within society" were directed primarily at the democracy component. The concept of democracy has also been discussed in cases involving denials of the right to vote in section 3 of the Charter. In the course of striking down federal legislation removing the right to vote of persons imprisoned for more than two years in *Sauvé v. Canada (Chief Electoral Officer)*,<sup>107</sup> McLachlin C.J.C. invoked "universal suffrage", "inclusiveness, equality, and citizen participation", and "respect for the dignity of every person" as integral features of Canadian democracy.<sup>108</sup>

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<sup>103</sup> [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.) [hereinafter "*Quebec Secession Reference*"].

<sup>104</sup> *Id.*, at paras. 62-68.

<sup>105</sup> *Id.*, at para. 63.

<sup>106</sup> *Supra*, note 79, at 136.

<sup>107</sup> [2002] S.C.J. No. 66, [2002] 3 S.C.R. 519 (S.C.C.) [hereinafter "*R. v. Sauvé (No. 2)*"].

<sup>108</sup> *Id.*, at paras. 33, 41, 44.

The Court does not appear to have drawn explicitly on any of these sources in developing its understanding of democracy for the purposes of section 2(b). However, as we will see, it has adopted as one of the more important elements of that understanding the notion of broadly based participation in social and political institutions. That is clearly evident in the alternative formulation of the value found in cases like *Irwin Toy*, where the Court replaced the language of democratic self-government that it had used in *Ford* with “participation in social and political decision-making is to be fostered and encouraged”.<sup>109</sup> But it is also evident in the strong commitment that the Court has shown at the section 1 stage in cases like *Harper v. Canada (Attorney General)*<sup>110</sup> to the principle of equality of access to the political process, evidence of which we will see below.

(a) *All Public Institutions*

The expressive interest at issue in the *Reference re Alberta Statutes* — the ability of privately owned newspapers in the province of Alberta to criticize the policies of that province’s government without impediment — provides a good example of an expressive activity to which the “truly integral to democratic self-government” characterization could be given. If any kind of expression can be said to lie at the “core” of freedom of expression, surely it can. It might be thought to be less obvious that the activity at issue in *Edmonton Journal* — the ability of the media to cover court proceedings — does so, if only because democracy tends to be associated in common parlance with the legislative and executive branches of government rather than the judicial branch, which we associate with different values like judicial independence and the rule of law. Yet Cory J. clearly saw that ability, too, as furthering the cause of self-government. His reference to “the functioning of public institutions” in the above passage indicates that, at least for this purpose, he was of the view that democracy should be understood to extend to all three branches of government. There is strong implicit support for that view in the *Quebec Secession Reference*, where the Court said that “... democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the ‘sovereign will’ is to be ascertained and implemented.”<sup>111</sup> And while he made no reference to that

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<sup>109</sup> *Supra*, note 7, at 976.

<sup>110</sup> [2004] S.C.J. No. 28, [2004] 1 S.C.R. 827 (S.C.C.) [hereinafter “*Harper*”].

<sup>111</sup> *Supra*, note 103, at para. 67.

passage, Cory J. did connect the two values when he said: “It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly.”<sup>112</sup>

Confirmation that the Court’s conception of democracy for this purpose extends to the functioning of all public institutions has been provided by subsequent cases. Insofar as the courts are concerned, a frequently cited authority is *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*,<sup>113</sup> in which La Forest J., speaking for the Court, explicitly linked “public scrutiny of the criminal courts” to “the concept of representative democracy”, and noted that “[t]he freedom of individuals to discuss information about the institutions of government, their policies and practices, is crucial to the notion of democratic rule”.<sup>114</sup> That same thinking is clearly reflected in the Court’s decision in the *Criminal Lawyers’ Assn.* case,<sup>115</sup> in which the government institutions were the police and Crown prosecutors. As noted above, the Court in that case incorporated the values underlying freedom of expression into its approach to claims of access to government-held documents. That approach requires the claimant to show, as a first step, that the expressive activity to which it is said the documents in question will contribute furthers one of the values, which will “usually” be “discussion on matters of public importance”. In that particular case, the Court quickly accepted that the required linkage had been established, on the basis that the documents in question were going to be used by the claimant in a critique of the conduct of the police and prosecutors in a criminal case of some notoriety, and that the police and prosecutorial service were both “public institutions” the conduct of which was clearly a proper subject of free and open discussion.

*(b) Expression Within the Electoral Process*

It will be recalled that McLachlin J. in *Keegstra* suggested that the democratic self-government rationale captured a narrow range of expressive activities — in her terms, only “expression relating to the political process”.<sup>116</sup> She did not offer a definition of the “political process” in that case, but had she, it would certainly have caught the conduct of, and

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<sup>112</sup> *Edmonton Journal*, *supra*, note 80, at 1339.

<sup>113</sup> [1996] S.C.J. No. 38, [1996] 3 S.C.R. 480 (S.C.C.).

<sup>114</sup> *Id.*, at para. 17-18.

<sup>115</sup> *Supra*, note 66.

<sup>116</sup> *Supra*, note 9, at 802.

participation in, elections. Hence, it was to be expected that the Court would hold, as it has, that democratic self-government protects the ability of the media to publish the results of election polls close to the date of an election, as well as the ability of both the media and private individuals to publicize the results of a federal election in parts of the country in which the polls have closed to people residing in parts of the country in which they remain open. Political opinion polls were described by Justice Bastarache in his majority reasons for judgment in *Thomson Newspapers Co. v. Canada (Attorney General)*<sup>117</sup> as “political information”, and of that kind of information, he said,

[w]hile opinion polls may not be the same as political ideas, they are nevertheless an important part of the political discourse, as manifested by the attention such polls receive in the media and in the public at large, and by the fact that political parties themselves purchase and use such information.<sup>118</sup>

(Justice Gonthier, in his dissent in that case, was less enthusiastic about the status of polls, suggesting that they “tend to reduce the level of political discourse to the lowest common denominator: principles are sacrificed for percentage points.”<sup>119</sup>) And the publication of election results was said by Bastarache J. in his majority reasons in *R. v. Bryan*<sup>120</sup> also to form part of that core, on the basis that “election results are of fundamental importance in a free and democratic society”.<sup>121</sup> Abella J., in her dissenting reasons in that case, also placed the publication of election results at the core of section 2(b), and said that “[i]t is difficult to imagine a more important aspect of democratic expression than voting and learning the results of [one’s] vote”.<sup>122</sup>

The Court’s conception of democratic self-government also includes the ability of individuals and artificial legal entities to spend money in support of both political causes and political parties. That it should do so was accepted virtually without discussion in *Libman v. Quebec (Attorney General)*,<sup>123</sup> in which the Court was asked to (and did) strike down provincial legislation that imposed strict limits on the ability of Quebecers to spend money in support of their position on the issues placed

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<sup>117</sup> [1998] S.C.J. No. 44, [1998] 1 S.C.R. 877 (S.C.C.) [hereinafter “*Thomson Newspapers*”].

<sup>118</sup> *Id.*, at para. 91.

<sup>119</sup> *Id.*, at para. 2.

<sup>120</sup> [2007] S.C.J. No. 12, [2007] 1 S.C.R. 527 (S.C.C.) [hereinafter “*Bryan*”].

<sup>121</sup> *Id.*, at para. 26.

<sup>122</sup> *Id.*, at para. 128.

<sup>123</sup> [1997] S.C.J. No. 85, [1997] 3 S.C.R. 569 (S.C.C.) [hereinafter “*Libman*”].

before the residents of that province in a referendum. Spending money in support of a political position was said by the Court to constitute “a form of political expression that is clearly protected by s. 2(b) of the Canadian Charter”.<sup>124</sup> The possibility that expression in support of a political position could be kept analytically distinct from the expenditure of money to pay for the communication of that expression, with the former being protected and the latter not, appears not to have been considered. A justification for the view articulated in *Libman* was provided in a later case, however. It came in the dissenting opinion (but not on this point) of McLachlin C.J.C. and Major J. in *Harper*, which dealt with limits on the ability of “third parties” to spend money in support of political parties and political causes during a federal election. That justification was founded on the conviction that section 2(b) should be understood to protect, not just the right to communicate, but the right to communicate effectively:

In the democracy of ancient Athens, all citizens were able to meet and discuss the issues of the day in person. In our modern democracy, we cannot speak personally with each of our fellow citizens. We can convey our message only through methods of mass communication. Advertising through mail-outs and the media is one of the most effective means of communication on a large scale. We need only look at the reliance of political parties on advertising to realize how important it is to actually reaching citizens — in a word, to effective participation. The ability to speak in one’s own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens.<sup>125</sup>

The same concern about effective communication within the political realm is, it should be noted, evident in some of the early cases dealing with claims under section 2(b) for access to public property for expressive purposes, but on behalf of the poor rather than the wealthy. Hence, in *Ramsden*,<sup>126</sup> Iacobucci J. quoted a lengthy passage from a book by an art historian in which it was noted that posters have always been “an effective and inexpensive way of reaching a large number of persons”, and have been called “the circulating libraries of the poor”.<sup>127</sup>

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<sup>124</sup> *Id.*, at para. 32.

<sup>125</sup> *Supra*, note 110, at para. 20.

<sup>126</sup> *Supra*, note 61.

<sup>127</sup> *Id.*, at para. 33.



(c) *Discussion of Matters of Public Interest*

Expressive activities associated with the scrutiny of public institutions and the electoral process are not the only kinds of expression that the Court has seen fit to link to the self-government rationale. Discussion of matters of public interest has also been linked to it. In *Grant v. Torstar*,<sup>128</sup> in which the Court introduced the defence of responsible communication on matters of public interest to the law of defamation, McLachlin C.J.C. said that “respect for vigorous debate on matters of public interest [has] long been seen as fundamental to Canadian democracy”,<sup>129</sup> citing in support Rand J.’s assertion in 1957 in *Switzman v. Elbling*<sup>130</sup> to the effect that “government by the free public opinion of an open society ... demands the condition of a virtually unobstructed access to a diffusion of ideas”.<sup>131</sup> Whether or not expression relating to such matters fits within McLachlin J.’s conception of “the political process” as she used that term in *Keegstra*, when she said that the democratic self-government rationale protected a limited range of expressive activities, cannot be known. It seems clear, however, that including all such expression under that rubric does have the effect of bringing a potentially very broad range of expressive activities under its protective mantle.

Chief Justice McLachlin made it clear in *Grant v. Torstar* that communications on matters of public interest that contain “false imputations” about other people — the basis of the claim for damages in that case — are entitled to the benefit of the link to democratic self-government.<sup>132</sup> Her statement to that effect, it should be noted, is difficult to reconcile with earlier pronouncements made by Cory J. in two other cases involving defamatory speech. In *Hill*,<sup>133</sup> in which, as noted above, the Court was asked — but refused — to refashion the defence of qualified privilege to better protect freedom of expression, Cory J., speaking for the Court, said that “false and injurious statements” cannot be said to “lead to healthy participation in the affairs of the community”.<sup>134</sup> He repeated that statement in his reasons for judgment in *R. v. Lucas*,<sup>135</sup> in which the Court rejected a challenge to the defamatory libel offence in the *Criminal*

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<sup>128</sup> *Supra*, note 90.

<sup>129</sup> *Id.*, at para. 42.

<sup>130</sup> [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.).

<sup>131</sup> *Id.*, at 306.

<sup>132</sup> *Supra*, note 90, at para. 52.

<sup>133</sup> *Supra*, note 89.

<sup>134</sup> *Id.*, at para. 106.

<sup>135</sup> [1998] S.C.J. No. 28, [1998] 1 S.C.R. 439 (S.C.C.) [hereinafter “*Lucas*”].

*Code*.<sup>136</sup> The implication of that statement appeared to be that defamatory falsehoods cannot be connected to the self-government rationale. If that was the implication, it now has to be understood to come with a significant qualification: defamatory falsehoods that form part of a communication on a matter of public interest can claim the benefit of that connection. Only those defamatory falsehoods that do not form part of such a communication remain excluded.

That McLachlin C.J.C. should have extended the reach of the self-government rationale to include communications on matters of public interest that contain “false imputations” is not surprising, given her holding in *Zundel*<sup>137</sup> that the ability to use deliberate falsehoods in the course of a political debate is protected by that rationale. The reasoning she relied on in support of that holding was as follows:

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.

All of this expression arguably has intrinsic value in fostering political participation and individual self-fulfillment. ...<sup>138</sup>

Justice McLachlin also referred in support of her conclusion on this point in *Zundel* to two previous prosecutions under the false news provision, both of which she said involved expression that served the self-government rationale by promoting political debate on matters of public interest. One of these prosecutions was unsuccessful,<sup>139</sup> but the

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<sup>136</sup> *Id.*, at para. 92. The defamatory libel offence is found in ss. 298, 299 and 300 of the *Criminal Code*, R.S.C. 1985, c. C-46.

<sup>137</sup> *Supra*, note 58.

<sup>138</sup> *Id.*, at paras. 28-29.

<sup>139</sup> *R. v. Kirby* (1971), 1 C.C.C. (2d) 286 (Que. C.A.).

other — for a publication containing the statement “Americans not wanted in Canada” — resulted in a conviction.<sup>140</sup>

The Court has not shed a great deal of light on the important question of what counts as a “matter of public interest” for this purpose, but the light it has shed suggests that it has an exceedingly broad understanding of the term. In *Grant v. Torstar*, McLachlin C.J.C. said the following:

To be of public interest, the subject matter “must be shown to be one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached”: ... The case law on fair comment “is replete with successful fair comment defences on matters ranging from politics to restaurant and book reviews”: ... Public interest may be a function of the prominence of the person referred to in the communication, but mere curiosity or prurient interest is not enough. Some segment of the public must have a genuine stake in knowing about the matter published.

Public interest is not confined to publications on government and political matters, as it is in Australia and New Zealand. Nor is it necessary that the plaintiff be a “public figure”, as in the American jurisprudence since *Sullivan*. Both qualifications cast the public interest too narrowly. The public has a genuine stake in knowing about many matters, ranging from science and the arts to the environment, religion, and morality. The democratic interest in such wide-ranging public debate must be reflected in the jurisprudence.<sup>141</sup>

One suspects that the breadth of the understanding of “matter of public interest” articulated in this passage reflects the fact that the Chief Justice’s primary interest when she crafted it was in defining the reach of the new defence to defamation claims that the Court was creating rather than in defining the reach of the democratic self-government rationale for freedom of expression, and that the Court might wish to reconsider that understanding if and when it is called upon to undertake the latter task. It is difficult, for example, to see how reviews of restaurants, which the Court sees as potentially falling within the reach of that new defence, could possibly be said to be relevant to self-government (unless, of course, the reviews related to concerns about a failure on the part of government to properly regulate the industry). It is also difficult to see how such a broad conception of “matter of public interest” can be

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<sup>140</sup> *R. v. Hoaglin*, [1907] N.W.T.J. No. 3, [1907] 12 C.C.C. 226 (N.W.T.S.C.).

<sup>141</sup> *Supra*, note 90, at paras. 105-106.

reconciled with the view expressed by McLachlin J. in *Keegstra* that the self-government rationale only protects expressive activities relating to the political process; that understanding of “matter of public interest” aligns more closely with the understanding given to it in the law of defamation applied in Australia and New Zealand. This is another area in which, it would appear, the Court has more explanatory work to do.

In *Grant v. Torstar* itself, it should be noted, the subject matter of the communication that formed the basis of the claim in defamation was opposition to a plan to construct a private golf course on lakefront property owned by the plaintiff, and in particular suggestions that the plaintiff might have been using his political connections with the provincial government of the day to get the necessary approvals. That subject matter would clearly have satisfied even the narrow understanding of “matter of public interest” that holds sway in Australia and New Zealand, since it related to “government and political matters”.

*(d) Lessons from Access to Public Property Cases*

Apart from one short passage, the five judgments rendered by the Court in the area of access to public property for expressive purposes add little of any significance to our understanding of its conception of democratic self-government. In fact, the only other contribution they make is to add to the list of protected interests the ability to hold up political placards and distribute political leaflets, hardly a surprising addition. That contribution was made in the reasons for judgment of McLachlin J. (as she then was) in the *Committee for the Commonwealth* case.<sup>142</sup>

It was in that same set of reasons that the noteworthy passage, which contains *obiter* comments about the implications of her analytical approach in other contexts, is found. Justice McLachlin made these comments in the course of justifying that approach as the reasonable middle ground between what she perceived to be the overly restrictive approach adopted by Lamer C.J.C. and the overly generous approach preferred by L’Heureux-Dubé J. After noting, in keeping with the cautious views expressed by the majority in *Irwin Toy*, that the reach of the rationales (in her terms, “purposes”) would be worked out over time on a case by case basis, she asserted that:

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<sup>142</sup> *Supra*, note 59, at paras. 105-106.

It would be difficult to contend that these purposes are served by “public” expression in the sanctum of the Prime Minister’s office, an airport control tower, a prison cell or a judge’s private chambers, to return to examples where it seems self-evident that the guarantee of free expression has no place. These are not places of public debate aimed at promoting either the truth or a better understanding of social and political issues. Nor is expression in these places related to the open and welcoming environment essential to maximization of individual fulfillment and human flourishing.<sup>143</sup>

She suggested, by contrast, that “the use of places which have by tradition or designation been dedicated to public expression for purposes of discussing political or social or artistic issues” would clearly seem to be linked to the values underlying the guarantee of free speech.<sup>144</sup>

*(e) Lessons from Section 1: Democracy and Equality*

The Court’s understanding of democratic self-government is also reflected in its application of section 1 in a number of section 2(b) cases, particularly those in which the government has relied on the principle of equality to justify a limitation on freedom of expression. When, in *Keegstra*,<sup>145</sup> Dickson C.J.C. came to measure hate speech against the self-government rationale at the section 1 stage, he identified two aspects of the link between the two. One was explicitly functional, and bears a close resemblance to the advancement of knowledge and truth rationale, as applied to the political sphere — freedom of expression, he said, “permits the best policies to be chosen from among a wide array of proffered options”.<sup>146</sup> The other was tied to the democratic commitment to equal participation in public decision-making. Freedom of expression, he said, “helps to ensure that participation in the political process is open to all persons”, because it is fundamental to democracy that “all persons are equally deserving of respect and dignity”.<sup>147</sup>

Chief Justice Dickson acknowledged that the hate propaganda provisions of the *Criminal Code* operate to limit the participation of some — “a few individuals” — in the political process, but said that that limitation

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<sup>143</sup> *Id.*, at para. 249.

<sup>144</sup> *Id.*, at para. 250.

<sup>145</sup> *Supra*, note 9, at 734-95.

<sup>146</sup> *Id.*, at 764.

<sup>147</sup> *Id.*

“is not substantial”.<sup>148</sup> He also acknowledged that hate propaganda can fairly be described as “political speech” and therefore to lie at or near the core of the expression protected by section 2(b). But, he contended, hate propaganda, by “arguing ... for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial and religious characteristics”, operates “to undermine our commitment to democracy”.<sup>149</sup> He concluded by observing that, while he was “very reluctant to attach anything but the highest importance to expression relevant to political matters ... given the unparalleled vigour with which hate propaganda repudiates and undermines democratic values, and in particular its condemnation of the view that all citizens need be treated with equal respect and dignity so as to make participation in the political process meaningful”, he was “unable to see the protection of such expression as integral to the democratic ideal so central to the s. 2(b) rationale”.<sup>150</sup> Justice La Forest, speaking for the Court, used similar language in *Ross v. New Brunswick School District No. 15*<sup>151</sup> in assessing the freedom of expression interest of a teacher who had lost his job because of his extracurricular anti-Semitic writings: “The respondent’s expression is expression that undermines democratic values in its condemnation of Jews and the Jewish faith. It impedes meaningful participation in social and political decision-making by Jews, an end wholly antithetical to the democratic process.”<sup>152</sup>

The Court has adopted a similarly egalitarian conception of freedom of expression’s contribution to democracy in evaluating the justifiability of limits on expressive activities related to the conduct of referenda and elections. In this context, the concern has been with equality of access on economic and geographic rather than racial and religious grounds. Hence, while the Court struck down the spending restrictions in *Libman*, it made it clear that it considered the purpose underlying those restrictions, which it said was “to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting”,<sup>153</sup> to be a very important one, and one that would have justified a more carefully drawn set of restrictions. “Freedom of political expression”, the Court

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*, at 765.

<sup>151</sup> [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter “*Ross*”].

<sup>152</sup> *Id.*, at para. 93.

<sup>153</sup> *Supra*, note 123, at para. 40.

said, "... would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices".<sup>154</sup> And the spending restrictions at issue in *Harper*,<sup>155</sup> as well as the prohibition against publishing election results before all polls were closed at issue in *Bryan*,<sup>156</sup> were upheld, in whole or in part, on the basis of that same principle.

In effect, what the Court has done in the cases in which it has employed egalitarian principles to justify infringements on "political speech" is make an assessment that, on balance, those infringements serve to enhance rather than detract from the proper functioning of our system of government. While on one level, the conflict in such cases can be understood to be between liberty and equality, on another it can be understood to be between two different conceptions of democracy, at least at the level of process. Under one, the state plays a limited role in seeking to compensate for real and potential inequalities in access to the political marketplace of ideas and other relevant knowledge; under the other, the state plays an active role in seeking to address those inequalities. Neither of the competing conceptions of democracy discounts the merits of the other in their entirety — as the result in *Libman* shows, if the Court is of the view that the government has gone too far in seeking to impose its preferred conception on the electorate, it will strike the legislation down. However, it is fair to say that, at least to this point, the Court has demonstrated a strong commitment to the latter, egalitarian version.<sup>157</sup>

(f) *What Is Not Included*

The Court's conception of democratic self-government has also been shaped by decisions that certain kinds of expressive activities are *not* connected to it. Commercial expression appears to fall into that category. While the Court in *Ford*<sup>158</sup> held that commercial expression is protected by section 2(b), it did so on the basis of the relationship between that

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<sup>154</sup> *Id.*, at para. 84.

<sup>155</sup> *Supra*, note 110.

<sup>156</sup> *Supra*, note 120.

<sup>157</sup> A number of scholars have noted the very high value the Court places on equality in its freedom of expression jurisprudence; see, e.g., Grant Huscroft, "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" (2006) 25 U.Q.L.J. 181, at 194-95.

<sup>158</sup> *Supra*, note 22.

kind of expression and the self-realization rationale. And while the Court made no explicit holding that commercial expression does not further the democratic self-government rationale, the failure to mention it suggested that the Court did not see it as being engaged by commercial expression. In later cases, at the section 1 stage, members of the Court have explicitly addressed the question of whether or not commercial expression does further that rationale, and have held that it does not. For example, in *Rocket*, McLachlin J. had this to say about the negative consequences to dentists of the prohibition against advertising that was at issue: “their loss ... is merely loss of profit, and not loss of opportunity to participate in the political process. ...”<sup>159</sup> And in *RJR*, La Forest J. (in his dissenting reasons for judgment, but not dissenting on this point) said of the tobacco advertising there at issue, that it “[does not] promote participation in the political process”.<sup>160</sup>

Obscenity also appears to fall into this category. Prohibitions against obscene speech have been before the Court in two cases, *Butler*<sup>161</sup> and *Little Sisters*.<sup>162</sup> In *Butler*, a unanimous Court upheld the critical components of the *Criminal Code* provisions relating to obscenity (albeit in two different sets of reasons).<sup>163</sup> As it had done two years previously in *Keegstra*, the Court integrated into its section 1 analysis a consideration of the relationship between the kind of expression proscribed by these provisions and the rationales for protecting freedom of expression. After reciting the rationales, Sopinka J. noted the contention by one of the intervening provincial attorneys-general that “only ‘individual self-fulfillment’, and only in its most base aspect, that of physical arousal, is engaged by pornography”.<sup>164</sup> He then adverted to a submission from an intervening civil liberties organization to the effect that “pornography forces us to question conventional notions of sexuality and thereby launches us into an inherently political discourse”.<sup>165</sup> It seems clear from the conclusion at which he eventually arrived that he rejected the latter submission, but his reasons for doing so are far from clear. He said that

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<sup>159</sup> *Supra*, note 82, at para. 29.

<sup>160</sup> *Supra*, note 7, at para. 75.

<sup>161</sup> *Supra*, note 8.

<sup>162</sup> *Supra*, note 8.

<sup>163</sup> The provisions are found in s. 163 of the *Criminal Code*. Justice Sopinka authored the reasons for judgment of seven members of the Court, and Gonthier J. those of the other two. Justice Gonthier agreed with Sopinka J.’s application of s. 1 in this case; for that reason, Sopinka J. can be said to have been speaking for the Court on that issue.

<sup>164</sup> *Supra*, note 8, at para. 95.

<sup>165</sup> *Id.*, at para. 95.



the Code provision, properly understood, does not catch “good pornography,” and that its purpose “is not to inhibit the celebration of human sexuality”.<sup>166</sup> He then noted that “the realities of the pornography industry are far from the picture [suggested by this submission]” — those realities, he said, involve the depiction of human beings, especially women, in dehumanizing and degrading sexual behaviour.<sup>167</sup> Such expression, he argued, “does not stand on an equal footing with other kinds of expression which directly engage the ‘core’ of the freedom of expression values”, an assessment that “is further buttressed by the fact that the targeted material is expression which is motivated, in the overwhelming majority of cases, by economic profit”.<sup>168</sup> Then, further on in his reasons — and it is here that we are given his ultimate conclusion, both with respect to the civil liberties organization’s submission and with respect to the contention of the provincial attorney-general — he said, “this kind of expression lies far from the core of the guarantee of freedom of expression. It appeals only to the most base aspect of individual fulfillment, and it is primarily economically motivated.”<sup>169</sup>

Child pornography can probably also be added to this list. In *Sharpe*,<sup>170</sup> McLachlin C.J.C. noted that that kind of expression “does not generally contribute to ... Canadian social and political discourse”.<sup>171</sup> In their concurring reasons in that case, L’Heureux-Dubé, Gonthier and Bastarache JJ. were more categorical on the issue, asserting that “there is no link between the possession of ‘child pornography’ (as defined in section 163.1(1)) and participation in the political process”.<sup>172</sup> They drew on Dickson C.J.C.’s judgment in *Keegstra* in support of their position that “messages of degradation, which undermine the dignity and equality of members of identifiable groups, subvert the democratic aspirations of the expression guarantee by undermining the participation of those groups in the political process”.<sup>173</sup>

Finally, and to repeat the analysis provided above in relation to the status of defamatory speech in this context, it would appear from the

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<sup>166</sup> *Id.*, at para. 96.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*, at paras. 97-98.

<sup>169</sup> *Id.*, at para. 120.

<sup>170</sup> *Supra*, note 10.

<sup>171</sup> *Id.*, at para. 24.

<sup>172</sup> *Id.*, at para. 184.

<sup>173</sup> *Id.*

reasons for judgment of Cory J. in *Hill*<sup>174</sup> and *Lucas*,<sup>175</sup> as qualified by those of McLachlin C.J.C. in *Grant v. Torstar*,<sup>176</sup> that defamatory falsehoods that do not form part of a communication on a matter of public interest are also to be excluded.

(g) *Varying Degrees of Importance*

The decision in *Edmonton Journal*<sup>177</sup> did more than expand the meaning of democratic self-government to include all governmental institutions. It also suggested that not all expressive activities that can be said to further that value — hence, not all “political speech” — will be considered by the Court to be of equal importance. It will be recalled that the expressive activity at issue in that case was the ability of the media to cover the resolution by courts of matrimonial disputes. While Cory J. and the three other members of the Court who concurred with his judgment showed no interest in distinguishing between media coverage of matrimonial disputes and media coverage of other kinds of disputes, the three dissenting judges did. They suggested that media coverage of matrimonial disputes was less important because there was little to be gained in terms of the broader public interest from the disclosure by the media of the highly personal and often sensitive evidence given by the parties to such disputes. It is fair to say, moreover, that the differing approaches the two groups of judges took to that issue played a role in the differing results at which they arrived on the ultimate question the case raised; the majority voted to strike the impugned legislation down, while the dissenting judges voted to uphold it.

Importantly for our purposes, the minority view on that issue in *Edmonton Journal* — that the importance of public scrutiny of court proceedings can vary depending on the type of dispute being scrutinized — was subsequently adopted by the full Court in *Sierra Club*.<sup>178</sup> It will be recalled that the Court had been asked in that case — and agreed — to issue a confidentiality order in respect of certain documentary evidence in a judicial review application. The ability of the public to scrutinize court proceedings, which was seen, as it was in *Edmonton Journal*, to be connected to the self-government rationale, was one of the factors taken into

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<sup>174</sup> *Supra*, note 89.

<sup>175</sup> *Supra*, note 135.

<sup>176</sup> *Supra*, note 90.

<sup>177</sup> *Supra*, note 80.

<sup>178</sup> *Supra*, note 93.

account by the Court when it decided whether or not to issue the confidentiality order. In the course of considering that factor, Iacobucci J. said:

It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase.<sup>179</sup>

And, he then added:

... by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, ... the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.<sup>180</sup>

Finally, it is worth noting that L'Heureux-Dubé J., in her concurring reasons in *Committee for the Commonwealth*, took pains to point out that “political expression” is not a distinct category of expression, subject to its own set of tests. As she put it, “the political nature of the speech at issue merely focuses on the competing interests that must be balanced on the constitutional scales”.<sup>181</sup> While that proposition does not require drawing the kinds of distinctions that the dissenting judges drew in *Edmonton Journal* and that Iacobucci J. drew in *Sierra Club*, it certainly permits doing so.

#### (h) *The Role of Rationality*

The Court has paid little attention to the question of whether or not evidence that people will not respond rationally to “political speech” should have a bearing on the weight to be given it in the balancing process. In *Thomson Newspapers*, Bastarache J. said that “The presumption in this Court should be that the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information.”<sup>182</sup> The implication of that statement might be taken to be that, if that presumption can be rebutted by reliable evidence (which Bastarache J. found not to have

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<sup>179</sup> *Id.*, at para. 83.

<sup>180</sup> *Id.*, at para. 84.

<sup>181</sup> *Supra*, note 59, at para. 81.

<sup>182</sup> *Supra*, note 117, at para. 112.

occurred in that case), the value of the speech in question will diminish. But that may be to read too much into the statement. However, as we will soon see, the Court has acted on concerns about rationality when assessing the weight to be given to expressive activities linked to the advancement of truth and knowledge. If it is going to act on those concerns in that context, it would be surprising if it did not also do so in this one.

(i) *Summary*

The Court has yet to provide a comprehensive theory of democratic self-government to ground its understanding of the reach of the self-government rationale. The absence of such a theory has not, however, prevented it from bringing a range of different kinds of expression within its reach, including expression relating to the functioning of all public institutions, the electoral process, and “matters of public interest”. Nor has the absence of such a theory prevented the Court from holding that this rationale does *not* capture a range of other kinds of expression, in particular, commercial expression, obscenity, child pornography and deliberate falsehoods that do not form part of a communication on a matter of public interest. The Court has also indicated that not all of the expressive activities captured by this rationale are entitled to the same degree of protection. The factors relevant to determining the appropriate degree of protection to give particular kinds of such expression appear to include the extent to which the expressive activity in question is consistent with equality of access to the political process, the importance to the general public of the subject matter of the communication in question, and (probably) the extent to which it is likely that the communication will elicit a rational response from those who read or hear it. Finally, there is support within the Court’s jurisprudence for the proposition that the protection afforded by this rationale may be lost if the claimant engages in the protected expressive activity in question in or on certain kinds of public property.

## **2. Advancement of Truth and Knowledge**

This value raises a somewhat different set of questions than the other two because the meanings of truth and knowledge are not at issue in the same way that the meanings of democracy and self-realization are. What is at issue in relation to this value is (1) the kinds of expressive activities

that can be said to contribute in a meaningful way to the advancement of truth and knowledge; and (2) whether or not reliance on the advancement of truth and knowledge rationale is weakened if the Court concludes that, in the particular context in question, the “marketplace of ideas” cannot for some reason be trusted to generate truth and enhance knowledge. In relation to the second of these questions, it will be recalled that McLachlin J. in *Keegstra* acknowledged that “freedom of expression provides no guarantee that the truth will always prevail”.<sup>183</sup> The only explanation she proffered for that acknowledgement was the lessons that history has taught us: as she put it, “Indeed, as history attests, it is quite possible that dangerous, destructive and inherently untrue ideas may prevail, at least in the short run.”<sup>184</sup> But if one understands this rationale to be premised on the assumptions (a) that the “marketplace of ideas” will be equally open to all who wish to participate in it and (b) that most if not all of the participants will adopt a rational approach to the issues under discussion, it is not difficult to propose other explanations for doubting that truth will always prevail. Courts should clearly be dubious about the ability of that marketplace to advance the cause of enhancing truth and knowledge in circumstances in which one or other of those assumptions can be said not to hold true.

(a) *What Is Included*

The Court has said little to this point about what kinds of expression it believes make a useful contribution to the attainment of truth and knowledge. Chief Justice McLachlin made it clear in *Grant v. Torstar* that, on a general level, participation in “any area of debate where truth is sought through the exchange of information and ideas”<sup>185</sup> does so. That clearly casts the net very broadly, bringing within the protected sphere debates about everything from the hard sciences to art appreciation, and business management to religion.

On a much narrower level, the Court has also suggested that “consumer advertising” — criticism by consumers of goods and services available in the marketplace — contributes to the attainment of truth and knowledge. Justice LeBel, speaking for the Court in *R. v. Guignard*,<sup>186</sup> said

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<sup>183</sup> *Supra*, note 9, at para. 174 (and see text accompanying notes 39-41).

<sup>184</sup> *Id.*, at para. 173.

<sup>185</sup> *Supra*, note 90, at para. 49.

<sup>186</sup> [2002] S.C.J. No. 16, [2002] 1 S.C.R. 472 (S.C.C.) [hereinafter “*Guignard*”].

of such criticism that “it is a form of the expression of opinion that has an important effect on the social and economic life of a society”.<sup>187</sup> I say “suggested” because LeBel J. does not mention truth and knowledge in that part of his judgment; however, the language he used to describe the benefit to society of such criticism makes it reasonable to infer that he had that value in mind. And there is abundant authority supporting the proposition that restrictions on the ability of the parties to court proceedings to adduce relevant *viva voce* and documentary evidence will adversely affect the search for truth within the narrow confines of such proceedings. For example, Iacobucci J. noted in *Sierra Club* that, “by facilitating access to relevant documents in a judicial proceeding, the [confidentiality] order sought [by the respondent in that case] would assist in the search for truth, a core value underlying freedom of expression”.<sup>188</sup> And, finally, the Court in *Keegstra*<sup>189</sup> was unanimous in holding that hate speech also qualifies under this rubric, albeit, as we will soon see, only barely in the minds of Dickson C.J.C. and the other majority judges.

(b) *What Is Not Included*

If the Court has shed little light on what kinds of expression do contribute to the attainment of truth and knowledge, it has shed a fair bit of light on the kinds of expression that it believes do *not* do so. Commercial expression, obscenity and child pornography have all been held to fall within this excluded category. In the case of commercial expression, this was left to inference in *Ford*,<sup>190</sup> but it has been made explicit in later cases. Hence in *Rocket*, McLachlin J. said that advertising by dentists made no contribution to the “marketplace of ideas”,<sup>191</sup> and in his dissenting reasons in *RJR* (but not on this point), La Forest J. said of tobacco advertising that it “serves no ... scientific or artistic ends”.<sup>192</sup> Obscene speech and child pornography have been dealt with in much the same way. In *Butler*, Sopinka J. held that the only rationale to which obscene speech is connected is individual self-realization.<sup>193</sup> In *Sharpe*, McLachlin C.J.C. said in her majority reasons that “Child pornography does not generally contribute

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<sup>187</sup> *Id.*, at para. 24.

<sup>188</sup> *Supra*, note 93, at para. 72.

<sup>189</sup> *Supra*, note 9.

<sup>190</sup> *Supra*, note 22.

<sup>191</sup> *Supra*, note 82, at para. 29.

<sup>192</sup> *Supra*, note 7, at para. 75.

<sup>193</sup> *Supra*, note 8, at para. 120.

to the search for truth ...”<sup>194</sup> and L’Heureux-Dubé, Gonthier and Bastarache JJ. in their concurring reasons expressed the view that “child pornography contributes nothing to the search for truth ... [because] it perpetuates lies about children’s humanity ... [and] promotes the false view that children are appropriate sexual partners [for adults]”.<sup>195</sup> (It is worth noting that, in his dissenting reasons (but not on this point) in *Little Sisters*, Iacobucci J. accepted that sexual material that falls short of being obscene can serve the goal of challenging “the dominant society and culture”,<sup>196</sup> which suggests that he saw such material as arguably furthering the cause of enhanced truth and knowledge.)

It appeared from *Zundel* that deliberate lies were not seen by the Court as furthering the attainment of truth and knowledge. Justices Cory and Iacobucci, in their dissenting reasons for judgment in that case, were explicit about this, saying that “The publication of deliberate lies is obviously the antithesis of the truth,” and that the need to protect speech in order to avoid losing even a kernel of truth is insufficient when “there is no possibility that speech may be true because even its source has knowledge of its falsity”.<sup>197</sup> Justice McLachlin, for the majority, was not explicit on the question, but implied that that was also her position, because, as we saw above, her holding that deliberate lies were protected by section 2(b) was based on the conviction that they had the potential to further the democratic self-government and self-realization rationales; she made no reference to the advancement of truth and knowledge.<sup>198</sup> However, given the recent decision in *Grant v. Torstar*,<sup>199</sup> in which, as just noted, the Court accepted that defamatory communications on matters of public interest can contribute to the attainment of truth and knowledge, the status of deliberate lies in relation to that rationale has become clouded. If a media outlet deliberately lies about a public figure in the course of defaming him or her, must we now assume that that lie will be seen to further the cause of truth and knowledge (as well as furthering the cause of democratic self-government)? Or do deliberate lies remain outside the sphere of expression protected by that rationale?

This means that the status of defamatory falsehoods — a category of expression that overlaps but is not co-terminous with deliberate lies —

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<sup>194</sup> *Supra*, note 10, at para. 24.

<sup>195</sup> *Id.*, at para. 183.

<sup>196</sup> *Supra*, note 8, at para. 274.

<sup>197</sup> *Supra*, note 58, at paras. 206, 199.

<sup>198</sup> *Id.* (see text accompanying note 139).

<sup>199</sup> *Supra*, note 90.

has also become somewhat clouded in this regard. *Hill* and *Lucas* placed them clearly in the excluded category: they were said by Cory J. in the former — an assessment he repeated in the latter — to be “inimical to the search for truth”.<sup>200</sup> Again, however, *Grant v. Torstar* tells us that at least some defamatory falsehoods, those communicated on matters of public interest, are to be seen as furthering the cause of enhanced truth and knowledge.<sup>201</sup> It remains to be seen whether all defamatory falsehoods are now to be seen in the same light, thereby overriding the earlier pronouncements in *Hill* and *Lucas*, or whether those that were not the focus of the Court’s attention in that case remain excluded.

(c) *Varying Degrees of Truthfulness*

Chief Justice Dickson in *Keegstra* did not have to address the question of whether or not deliberate lies could be said to further the advancement of truth and knowledge rationale. However, his analysis of the connection between hate propaganda and that rationale strongly suggests that, from his standpoint, the less likely it is that a particular message is truthful, the less useful it will be in furthering truth and knowledge, and on that basis, he held that “the argument from truth does not provide convincing support for the protection of hate propaganda.”<sup>202</sup> While recognizing that “truth and the ideal form of political and social organization can rarely, if at all, be identified with absolute certainty”, and hence that “it is difficult to prohibit expression without impeding the free exchange of potentially valuable information”,<sup>203</sup> he refused to accept that governments must therefore be barred from imposing any constraints whatsoever on expressive activity. That is in part, he argued, because we can be more certain about some things than others, and to the extent that we can be reasonably certain that speech — an assertion of fact or the expression of an opinion — will not lead us closer to the truth or a better world, we risk little in suppressing it; and, he said, we can be reasonably certain that “statements intended to promote hatred against an identifiable group” are neither true nor likely to lead to a better world.<sup>204</sup> Similar reasoning is found in La Forest J.’s reasons for judgment in *Ross*, another case in which hate speech was at

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<sup>200</sup> *Supra*, note 89, at para. 106, 1174 S.C.R., and *supra*, note 135, at para. 92.

<sup>201</sup> *Supra*, note 90.

<sup>202</sup> *Supra*, note 9, at para. 87.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*



issue. In that case, however, the focus was on the silencing effect that hate speech can have on members of the target group. In his words, “to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth”.<sup>205</sup>

(d) *The Role of Rationality*

The Court’s position on the question of whether or not the advancement of truth and knowledge depends upon the exercise of human rationality by the participants in the “marketplace of ideas” appears to be that it does, at least to the extent that expressive activities that elicit irrational responses will be given less weight in the balancing process than those that elicit rational ones. In *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*,<sup>206</sup> McLachlin C.J.C. and LeBel J., speaking for the Court, stated in very explicit terms that “freedom of expression is not confined to ‘rational’ speech”, but then, in the very next sentence, acknowledged that “[i]rrationality may support according less protection to particular kinds of speech”.<sup>207</sup>

The importance of rational discussion and debate to the achievement of truth and knowledge is perhaps most clearly acknowledged by Cory J., speaking for the Court in *United Food and Commercial Workers, Local 1518 v. KMart Canada Ltd.*,<sup>208</sup> which dealt with the constitutionality of legislation restricting the ability of workers to pass out leaflets in support of their cause in an employment dispute. Characterizing “informed and rational discourse” as “the very essence of freedom of expression”, he distinguished picketing, which “uses coercion and obedience to a picket line to impede public access to an enterprise”, and which is therefore entitled to limited protection under section 2(b), from consumer leafletting, which “attempts to rationally persuade consumers to take their business elsewhere”, and which is therefore entitled to a much higher degree of protection.<sup>209</sup> That distinction, which was again noted in *Pepsi-Cola*, played a significant role in his decision to strike down the impugned legislation in *KMart*.

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<sup>205</sup> *Supra*, note 151, at para. 91.

<sup>206</sup> [2002] S.C.J. No. 7, [2002] 1 S.C.R. 156 (S.C.C.) [hereinafter “*Pepsi-Cola*”].

<sup>207</sup> *Id.*, at para. 97.

<sup>208</sup> [1999] S.C.J. No. 44, [1999] 2 S.C.R. 1083 (S.C.C.) [hereinafter “*KMart*”].

<sup>209</sup> *Id.*, at paras. 43-47.

The notion that the presence or absence of rationality can have a bearing on the degree of protection afforded to a particular kind of expressive activity has been a feature of the Court's approach to section 2(b) since at least *Keegstra*. We have already noted that, when Dickson C.J.C. addressed the relationship between hate propaganda and the advancement of truth and knowledge, he expressed the view that the less likely it was that a particular message was true, the less likely it was that that message would contribute to the attainment of truth. He also thought it important to note that we cannot assume that all who hear hate propaganda will respond rationally to it. As he put it, in more general terms, "neither should we overplay the view that rationality will overcome all falsehoods in the unregulated marketplace of ideas"<sup>210</sup> The clear implication of that statement is that, if the Court finds that the response to a particular message is unlikely to be a rational one, the connection between that message and the advancement of truth and knowledge will become a tenuous one, and the importance of protecting the right to convey — and be the recipient of — that message will diminish.<sup>211</sup>

That same thinking is reflected in *Sierra Club*<sup>212</sup> When Iacobucci J. came to assess the damage that would result from issuing the confidentiality order sought by one of the parties to the cause of advancing truth and knowledge that comes from the ability of the public to scrutinize court proceedings, he concluded that it would be minimal because of the highly technical nature of the evidence in question. As he put it:

[I]t is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case.<sup>213</sup>

The implication seems clearly to be that, to the extent that a particular audience is unlikely to be able to understand the contents of a particular message, and hence to respond to it rationally, the courts are entitled to conclude that the benefit to the public in terms of enhanced truth and

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<sup>210</sup> *Supra*, note 9, at para. 87.

<sup>211</sup> Richard Moon has subjected this feature of Dickson C.J.C.'s reasoning in *Keegstra* to critical analysis in his extended comment on that case, "Drawing Lines in a Culture of Prejudice: *R. v. Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C. L. Rev. 99, at 131-43.

<sup>212</sup> *Supra*, note 93.

<sup>213</sup> *Id.*, at para. 78.

knowledge flowing from the communication of that message will be extremely limited.

Justice Gonthier's dissent in *Thomson Newspapers*<sup>214</sup> contains another interesting application of the assumption of rationality. In his assessment of the justifiability of the prohibition against publishing poll results immediately before an election that was at issue in that case, he suggested that it was the prohibition rather than the publication of those results that would better serve the cause of truth. In his words, "by allowing timely discussion of all published poll results, s. 322.1 aims at fostering truth..."<sup>215</sup> In response to the majority reasons of Bastarache J., which argued for relying on other polls rather than state action to address concerns about the effect on the electorate of misleading poll results, Justice Gonthier said, "To say that truth most reliably emerges by means of correction through more polls is to assume an ongoing debate. In elections, the debate ends with the vote."<sup>216</sup> Both judges clearly assumed that rational discussion and debate play an important role in generating truth and knowledge; in Justice Gonthier's case, the fact that, in his view, no such discussion and debate could take place in the circumstances in question was reason enough to allow the state to intervene in the marketplace.

(e) *Inequality of Access to the "Marketplace of Ideas"*

I have not been able to find a case in which the Court has addressed the question of whether or not inequality of access to a particular "marketplace of ideas" will affect the weight given to an expressive activity to which the advancement of truth and knowledge is said to be relevant. However, the fact that, as we have seen above, the Court has adopted a highly egalitarian conception of democracy in cases like *Libman* and *Harper* suggests that it would be sympathetic to an argument that it should.<sup>217</sup> Justice LeBel's sensitivity in *Guignard* to "the importance of signs as an effective and inexpensive means of communication for individuals and groups that do not have sufficient economic resources"<sup>218</sup> would also support doing so, as would Cory J.'s assessment in *KMart* of leafleting and postering on the part of workers as serving as "particularly important means of providing information and seeking support by the

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<sup>214</sup> *Supra*, note 117.

<sup>215</sup> *Id.*, at para. 25.

<sup>216</sup> *Id.*, at para. 28.

<sup>217</sup> See text accompanying notes 145-156.

<sup>218</sup> *Supra*, note 186, at para. 25.

vulnerable and less powerful members of society”.<sup>219</sup> And while it addresses the problem of inequality within the marketplace from a different perspective — focusing on outcome rather than access — so, too, arguably, does the following passage from the dissenting judgment of Cory and Iacobucci JJ. in *Zundel*:

We are warned quite properly that history has many lessons to teach. One is that the marketplace of ideas is an inadequate model; another is that minorities are vulnerable to censure as speakers. ... But history also teaches us that minorities have more often been the objects of speech than its subjects. To protect only the abstract right of minorities to speak without addressing the majoritarian background noise which makes it impossible for them to be heard is to engage in a partial analysis. This position ignores inequality among speakers and the inclination of listeners to believe messages which are already part of the dominant culture.<sup>220</sup>

(f) *Summary*

The understanding that the Court is in the process of developing of the advancement of truth and knowledge rationale is one that includes protection at a general level for participation in “any area of debate where truth is sought through the exchange of information and ideas”, and at a more focused level, consumer expression, the adducing of evidence in court proceedings and hate propaganda, while denying protection to commercial expression, obscenity and child pornography, and leaving the status of the closely related categories of deliberate lies and defamatory falsehoods unclear. As with the self-government rationale, the Court seems clearly to be of the view that not all expression protected by this rationale is entitled to the same degree of protection, with the factors it considers to be relevant to determining the appropriate degree of protection to be afforded to a particular expressive activity including the extent to which the content of the message communicated can be said to be truthful, the likelihood that that activity will elicit rational responses and (possibly) the extent to which the particular marketplace to which that activity contributes can be said to be open to all.

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<sup>219</sup> *Supra*, note 208, at para. 28.

<sup>220</sup> *Supra*, note 58, at paras. 202-203.

### 3. Individual Self-Realization

The premise underlying the inclusion of self-realization as one of the values served by freedom of expression is that participating in communicative activities with others, both as speakers and as listeners, serves to enhance the ability of people to realize their potential as human beings. As Cory and Iacobucci JJ. put it in their dissenting reasons for judgment (but not on this point) in *Zundel*:

Liberal theory proposes that the state does not exist to designate and impose a single vision of the good life but to provide a forum in which opposing interests can engage in peaceful and reasoned struggle to articulate social and individual projects. We enshrine freedom of speech because *it is an essential feature of humanity to reason and to choose and in order to allow our knowledge and our vision of the good to evolve.*<sup>221</sup>

But what is meant by terms like “potential as human beings” and “our vision of the good” in this context? Should it be taken to mean our potential or vision of the good in each and every aspect of our lives, or should it be limited to our potential in certain prescribed spheres? The intellectual sphere would seem to be a given, and the citizenship, spiritual, artistic, health and social spheres would seem to be very strong candidates, but what about the financial, emotional and sexual spheres? Do we value freedom of expression because it assists human beings to make decisions about how to spend their money, to find emotional fulfillment and to satisfy their sexual proclivities? If we do, do we value it to the same degree as we do when it assists human beings in those other spheres? And again here, is it only enhancement through the exercise of our rational powers that counts, as Cory and Iacobucci JJ. suggest? Or does it matter how the enhancement is or might be achieved? Is an expressive activity that is likely to produce a purely emotional or instinctive response to be protected?

It will be recalled that McLachlin J. expressed two concerns about the self-realization rationale in *Keegstra* in the course of her general discussion of the three values underlying freedom of expression. One was that it “is arguably too broad and amorphous to found constitutional principle”, and the other that “it does not answer the question of why expression should be deserving of special constitutional status, while

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<sup>221</sup> *Id.*, at para. 199.

other self-fulfilling activities are not”.<sup>222</sup> At least to this point, neither she nor any of her colleagues has acted on, or explored further, either of these concerns. In fact, apart from McLachlin J.’s invocation in that same case of Thomas Emerson’s description of expression as “an integral part of the development of ideas, of mental exploration and of the affirmation of self”,<sup>223</sup> and the brief statement from Cory and Iacobucci JJ. in *Zundel*, we have been given very little in the way of general guidance on the Court’s understanding of self-realization in this context. To be fair to the Court, unlike in the case of democratic self-government, a value upon which, as we saw above, the Court has had occasion to comment at some length in other contexts, sources of guidance on the appropriate meaning to give self-realization within existing Canadian jurisprudence have been few and far between. To the best of my knowledge, self-realization as an independent value or principle has not been the subject of any meaningful discussion by the Court in any other context. That said, the Court has discussed related concepts such as human dignity and liberty in other contexts, the former most notably in some of its judgments under section 15 of the Charter<sup>224</sup> and the latter in some of its judgments under section 7.<sup>225</sup> It has also addressed at some length the meaning of the more general concept of freedom in its freedom of religion jurisprudence.<sup>226</sup>

To this point at least, however, the Court has not seen fit to draw on its treatment of those concepts in those other contexts for guidance in this one. All that we have from the Court is a collection of *ad hoc* assertions about the connection, or lack thereof, between particular kinds of expressive activities and self-realization. And, as we will see, the Court has on the whole shown itself to be willing to protect virtually any interest an individual speaker or listener might wish to advance under the self-realization rubric. However, as we will also see, the Court has evidenced a willingness to see some such interests as being more important than others, and hence to view certain kinds of expressive activity as being more helpful in the service of self-realization than others and therefore more deserving of protection. It has also shown itself to be attentive to

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<sup>222</sup> *Supra*, note 9, at para. 177 (see text accompanying notes 47-50).

<sup>223</sup> *Id.*, at para. 176.

<sup>224</sup> See, e.g., *Law v. Canada (Minister of Employment and Immigration)*, [1999] S.C.J. No. 12, [1999] 1 S.C.R. 497, at para. 53 (S.C.C.) (*per* Iacobucci J.).

<sup>225</sup> See, e.g., *Godbout v. Longueuil (City)*, [1997] S.C.J. No. 95, [1997] 3 S.C.R. 844, at paras. 63-66 (S.C.C.) (*per* La Forest J.). It is worth noting that La Forest J. draws on the concepts of human dignity and autonomy in support of the conception of liberty that he adopts.

<sup>226</sup> See in particular, *Big M Drug Mart, supra*, note 14, at 336-37, 344-47 (*per* Dickson C.J.C.).

the question of whether or not the expressive activity in question in a given case is likely to produce a rational response on the part of the listener, and to offer less protection to that activity if the Court concludes that it is not.

(a) *Commercial Expression*

Individual self-realization has played a particularly important role in the area of commercial expression, and it therefore makes sense to start this overview there. The focus of the Court's attention in that area has been on the self-realization of members of the audience at which such expression has been directed — existing and potential consumers — rather than that of the speakers — the entities, usually corporations, doing the advertising. As noted above, the Court decided early on in *Ford* that commercial expression furthered the self-realization rationale because “[it] plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy”.<sup>227</sup> That the Court should have interpreted the self-realization rationale to cover the making of informed economic choices was, of course, by no means inevitable. Regrettably, no explanation for that interpretation of it was given. One is left to presume that the Court saw merit in the U.S. Supreme Court's 1978 decision in *Virginia State Pharmacy Board v. Virginia Citizens Consumer Council*,<sup>228</sup> to which reference had earlier been made in its reasons, to reverse its previous position on the matter and give First Amendment protection to commercial expression, and do so on the same basis that our Court did. The fact that the First Amendment is found in a very different document than the Charter insofar as the protection of economic interests is concerned, was ignored. Nor was any meaningful consideration given to the question of what striving to reach one's potential as a member of a self-governing society might, and perhaps should — at least in the context of the Charter — mean.

The holding was made in *Ford* at the definitional rather than section 1 stage, but it meant that, when the Court came in later cases to rule on the permissibility of particular infringements on commercial expression at the section 1 stage, there was no need for it to consider whether or not commercial expression furthered the individual self-realization rationale;

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<sup>227</sup> *Supra*, note 22, at 716-17 S.C.R.

<sup>228</sup> 425 U.S. 748 (1976).

that decision had already been made. Hence, in *Rocket*, McLachlin J. cited *Ford* in support of recognizing “advertising’s intrinsic value as expression, ... and the importance of fostering informed economic choices to individual fulfillment and autonomy”.<sup>229</sup> Since *Ford*, the Court has taken it as a given that the ability of consumers to make informed decisions about how to spend their money in the commercial marketplace is relevant to the achievement by them of their potential as human beings, and the evolution of their “vision of the good”. The only question for the Court in *Rocket* and the other later cases was the extent to which the specific kind of commercial expression at issue could be said to further those goals.

The fact that the Court has focused on the self-realization interest of the listener in commercial expression cases can be explained in large part on the basis that, in most such cases, the speaker has been a corporation, an entity without the capacity to “self-realize”. However, in *Rocket*, the speakers were individual dentists, who clearly do have that capacity. Surprisingly, McLachlin J. still managed to dismiss their self-realization interest, on the basis that the impugned prohibition against advertising not only resulted in no “loss of opportunity to participate in the political process or the ‘marketplace of ideas’”, but also resulted in “[no loss of opportunity] to realize one’s spiritual or artistic self-fulfillment”.<sup>230</sup> To the best of my knowledge, that is the only instance we have of the Court suggesting that its conception of self-realization might be constrained to certain spheres — here, the political, intellectual, spiritual and artistic spheres (on the assumption that the references to the political process and “marketplace of ideas” were intended to be aspects of the self-realization rationale). I am also unaware of any subsequent case in which this passage has been cited.

It is worth noting that there is one case involving commercial expression in which the interests of the speaker were considered, and in fact, given greater weight than those of potential consumers. That case is the *Prostitution Reference*,<sup>231</sup> in which the Court was asked to rule on the

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<sup>229</sup> *Supra*, note 82, at para. 14. A number of scholars have taken issue with the Court’s willingness to connect commercial expression to the self-realization interests of consumers; see, e.g., Lorraine Weinrib, “Does Money Talk? Commercial Expression in the Canadian Context” in David Schneiderman, ed., *Freedom of Expression and the Charter* (Scarborough, ON: Thomson Professional Publishing Canada, 1991), at 336, and Andrew Wilson, “Advertising and the Charter: Just Do It? An Analysis of the Constitutional Recognition of Commercial Expression” (2000) 9 Dal. J. L. Stud. 302.

<sup>230</sup> *Rocket, id.*, at para. 29.

<sup>231</sup> *Supra*, note 101.



validity *inter alia* of the prohibition against “communicating in a public place for the purpose of prostitution”. Chief Justice Dickson, who held the offence to be valid in spite of the limit it imposed on freedom of expression, did not, when he applied section 1, measure the speech at issue against all three of the rationales, as he had done in *Keegstra*, but he acknowledged that that speech did further the self-realization interest of the prostitute seeking customers, albeit to a limited extent: “It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.”<sup>232</sup>

One of the issues with which the Court has grappled in the context of commercial expression (among others) is whether or not, and, if so, to what extent, the fact that commercial expression is motivated by profit should affect the weight it is given in the balancing process under section 1. The Court’s initial position was that it should, and that it should reduce the weight given it. That position was articulated in simple terms by McLachlin J. in *Rocket* when she addressed the question of how much weight to give to the interest of the dentist in being able to advertise his or her services: “[the dentist’s] loss, if prevented from [advertising], is merely loss of profit. ...”.<sup>233</sup> Justice Sopinka affirmed that position in *Butler*, when he said in support of assigning minimal weight to the freedom of expression interest of the producer of obscene material that “[the producer] is primarily economically motivated”.<sup>234</sup> In *RJR*, however, the waters became muddied. Justice La Forest, in his dissenting reasons, adopted the position taken by McLachlin and Sopinka JJ. in the earlier cases and included the fact that “[t]he main, if not sole, motivation for [tobacco] advertising is, of course, profit” among the reasons for locating such advertising “far from the ‘core’ of freedom of expression values” and hence entitled to a very low degree of protection under section 1.<sup>235</sup> Justice McLachlin, however, now objected to that view. After acknowledging that “this Court has stated that restrictions on commercial speech may be easier to justify than other infringements”, she then said that “no link between the claimant’s motivation and the degree of protection has been recognized”.<sup>236</sup> She noted that “[b]ook sellers, newspaper owners, toy sellers — all are linked by their share-

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<sup>232</sup> *Id.*, at para. 5.

<sup>233</sup> *Supra*, note 82, at para. 29.

<sup>234</sup> *Supra*, note 8, at para. 120.

<sup>235</sup> *Supra*, note 157, at para. 75.

<sup>236</sup> *Id.*, at para. 171.

holders' desire to profit from the corporation's business activity ...", and then concluded that "motivation to profit is irrelevant"<sup>237</sup> to the section 1 analysis in section 2(b) cases.

*(b) Hate Speech*

I turn now to the treatment accorded by the Court to the self-realization rationale in areas outside the realm of commercial expression. The first of these is hate speech, in which the leading case remains *Keegstra*. Chief Justice Dickson was quick to acknowledge in that case that the hate propaganda provision of the *Criminal Code* inhibits the ability of those whose expression it suppresses "to gain self-fulfillment by developing and articulating thoughts and ideas as they see fit",<sup>238</sup> and that to that extent that provision can be said to be inconsistent with this rationale for freedom of speech. But he was little troubled by that aspect of the provision because of the nature of the message being conveyed by such people, which he characterized as an assault on the interest in self-fulfillment of the members of the target groups. His reasoning ran as follows:

On the other hand, such self-autonomy stems in large part from one's ability to articulate and nurture an identity derived from membership in a cultural or religious group. The message put forth by individuals who fall within the ambit of s. 319(2) represents a most extreme opposition to the idea that members of identifiable groups should enjoy this aspect of the section 2(b) benefit. The extent to which the unhindered promotion of this message furthers free expression values must therefore be tempered insofar as it advocates with inordinate vitriol and intolerance and prejudice which view as execrable the process of individual self-development and human flourishing among all members of society.<sup>239</sup>

It is unclear from this passage whether it is the likely or possible impact of the message that concerns Dickson C.J.C., or the content of the message alone. The wording of the two concluding sentences would seem to suggest that it is the latter, while the implication of the first sentence suggests that it is the former. The distinction is obviously an important one. The suppression of speech is much easier to justify, at least insofar as this rationale is concerned, if those seeking to justify it

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<sup>237</sup> *Id.*

<sup>238</sup> *Supra*, note 9, at para. 88.

<sup>239</sup> *Id.*

need only show that the message being communicated can be said to challenge the right to self-development of the members of a particular group rather than being required to show that the impact of the message is likely to be that that right will in fact be impaired.

Even with that issue left open, however, this application of the self-fulfillment rationale fleshes out in important ways the Court's understanding of its scope and meaning. It makes it clear that, at least in some contexts, the self-realization interest of parties other than the speaker and the listener — those about whom the speaker speaks — will be a relevant consideration. As Dickson C.J.C.'s analysis reveals, the protection of this interest is likely to argue *for* rather than, as in the case of the self-realization interest of speakers and listeners, *against* the suppression of speech when the speech in question is held to harm the self-realization interest of those other parties. In that sense its inclusion not only expands but complicates the analysis, and does so in a way that, if *Keegstra* is to serve as a guide, obliges the Court in effect to prefer the interest in self-realization of one group (the targets of the speech) over that of others (the speakers and listeners). On what basis that calculation is to be justified is not explained by Dickson C.J.C.

But the significance of this passage in Dickson C.J.C.'s judgment goes beyond its impact on the analysis; it reaches into the Court's understanding of the conditions under which the process of self-realization can best take place and, more generally, of the relationship between the individual and the group. At least for members of minority cultural and religious groups, Dickson C.J.C. implies, the ability to develop one's potential as an individual is a function in part of the sense of identity, security and confidence that one is able to draw from one's membership in those groups. To the extent that these groups are the targets of hatred, derision and prejudice, at the hands particularly of members of dominant groups, one is less likely to be able to rely on one's membership in them for support, and to that extent the process of self-realization is made more difficult. The possibility of self-realization that freedom promises can be frustrated, therefore, not only by state-imposed constraints on that freedom but by the absence of a strong and reliable base within the community in which one lives from which to embark.

That same concern is evident in another case involving hate speech, *Ross*.<sup>240</sup> Drawing on the above passage from Dickson C.J.C.’s judgment in *Keegstra*, La Forest J. said in reference to the self-realization rationale in the context of such speech that “expression that incites contempt for Jewish people on the basis of an ‘international Jewish conspiracy’ hinders the ability of Jewish people to develop a sense of self-identity and belonging”.<sup>241</sup> Interestingly, in that case, no mention was made of the self-realization interest of either the speaker or his listeners.

(c) *Obscenity*

The self-realization rationale has been important in the context of obscene speech, if only because, as we saw above in our discussion of the democratic self-government rationale, Sopinka J. held in *Butler* that it is the only rationale engaged by such speech. As he put it, such speech “appeals only to the most base aspect of individual fulfillment ...”.<sup>242</sup> No explanation was given for including the satisfaction of one’s sexual proclivities — even if it results in physical harm being caused to the other participants — in the list of activities covered under the self-realization rubric. Moreover, the Court has said very little apart from that one observation about the value in that context. The only reference to self-realization in *Little Sisters* occurred in the context of Binnie J.’s summary of the argument of the challengers to the legislation there at issue, the provision in the *Customs Tariff* prohibiting the entry into Canada of obscene material, to the effect that homosexual erotica was linked to the self-fulfillment of gays and lesbians.<sup>243</sup> (Justice Iacobucci invoked Voltaire’s description of “liberty of thought” as being “the life of the soul” in his dissent in that case,<sup>244</sup> but he did not link that description directly to sexual material.)

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<sup>240</sup> *Supra*, note 151. *Taylor*, *supra*, note 9, a companion case to *Keegstra* in which the Court, again with Dickson C.J.C. writing for the majority, upheld s. 13 of the *Canadian Human Rights Act*, S.C. 1976-77, c. 33, provides further evidence of this concern.

<sup>241</sup> *Keegstra*, *id.*, at para. 92.

<sup>242</sup> *Supra*, note 8, at para. 120.

<sup>243</sup> *Supra*, note 8, at para. 59.

<sup>244</sup> *Id.*, at para. 272.

(d) *Child Pornography*

While self-realization was given some attention in *Sharpe*, the comments on it were limited in scope. In her majority reasons for judgment in that case, McLachlin C.J.C. said simply that “self-fulfillment” was the only one of the rationales engaged by the possession of child pornography by adults, and added that “[s]ome question whether it engages even the value of self-fulfillment, beyond the base aspect of sexual exploitation”.<sup>245</sup> Later in her reasons, she gave more weight to the self-fulfillment rationale in the narrow context of young persons creating and possessing written and visual material satisfying the definition of child pornography and intended for their own personal use:

Personal journals and writings, drawings and other forms of visual expression may well be of importance to self-fulfillment. Indeed, for young people grappling with issues of sexual identity and self-awareness, private expression of a sexual nature may be crucial to personal growth and sexual maturation.<sup>246</sup>

Justices L’Heureux-Dubé, Gonthier and Bastarache agreed in their concurring reasons that “self-fulfillment” was the only value engaged by child pornography, but said that it was only engaged “in a limited sense since s. 163.1(4) of the *Criminal Code* in no way impedes positive self-fulfillment” and, moreover, engages with it “at its most base and prurient level”.<sup>247</sup> They also said that child pornography “hinders children’s own self-fulfillment and autonomous development by eroticizing their inferior social, economic and sexual status”.<sup>248</sup> As occurred in *Keegstra*, one sees again in the latter statement the self-realization interest of persons other than the speaker and the listener (which, given the nature of the criminal prohibition in that case, could be said to be one and the same) coming to the fore, and providing a significant counterweight to that of the speaker and listener.

(e) *Promotion of Leisure Activities*

In *City of Montreal*,<sup>249</sup> the case in which the Court adopted an approach to access to public property claims in which the values underlying

<sup>245</sup> *Supra*, note 10, at para. 24.

<sup>246</sup> *Id.*, at para. 107. Similar language is found in para. 109.

<sup>247</sup> *Id.*, at paras. 185, 212.

<sup>248</sup> *Id.*, at para. 185.

<sup>249</sup> *Supra*, note 62.

freedom of expression play an important role, McLachlin C.J.C. and Deschamps J. held that music emanating from an exotic dancing club furthered the self-realization rationale. The reasoning relied upon to support that holding was as follows:

Generally speaking, engaging in lawful leisure activities promotes such values as individual self-fulfillment and human flourishing. The disputed value of particular expressions of self-fulfillment, like exotic dancing, does not negate this general proposition.<sup>250</sup>

The implication of this reasoning is that any and all expressive activities that can be said to encourage people to pursue a lawful leisure activity will be found to further the self-realization rationale, on the theory, one has to presume, that all lawful leisure activities will further that goal. Whether or not the Court will decide at some point that some leisure activities are more likely to further that goal than others, in the same way in which it has decided that some decisions made by consumers are more important to their self-realization than others, remains to be seen. The fact that McLachlin C.J.C. and Deschamps J. hedge the first of the propositions a bit by introducing it with “generally speaking” suggests that the Court might be open to doing that; so too, possibly, does their acknowledgement that the self-realization value of exotic dancing is contested.

*(f) Employment-Related Speech*

Expressive activities related to a person’s employment have also been held to engage the self-realization rationale. Hence in *KMart*, which dealt with a ban on leafleting, Cory J. for the Court noted that, “for workers, a form of expression which deals with their working conditions and treatment by their employer is a statement about their working environment. Thus it relates to their well-being and dignity in their workplace”.<sup>251</sup> Statements to the same effect can be found in the joint reasons for judgment for the Court of McLachlin C.J.C. and LeBel J. in a later case dealing with secondary picketing, *Pepsi-Cola*: “labour speech”, they said, “engages the core values of freedom of expression, and is fundamental ... to ... the identity and self-worth of individual workers”.<sup>252</sup>

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<sup>250</sup> *Id.*, at para. 84.

<sup>251</sup> *Supra*, note 208, at para. 29.

<sup>252</sup> *Supra*, note 206, at para. 69.

(g) *Consumer Expression*

In *Guignard*,<sup>253</sup> the Court struck down a municipal by-law that prohibited the use of advertising signs outside areas of the city zoned industrial. It did so in circumstances in which the by-law was being enforced against a consumer of insurance who was unhappy with the manner in which his insurer was handling an indemnity claim he had made on his policy and who expressed his unhappiness on a sign he placed on one of the commercial buildings that he owned in the city. While LeBel J. characterized the sign as a form of commercial expression, he clearly saw it as a special kind of such expression, which he labelled “counter-advertising”.<sup>254</sup> And while he focused his discussion of the importance of such expression on the advancement of truth and knowledge rationale, he did say that it was “closely connected to the values underlying the protection of freedom of expression”,<sup>255</sup> suggesting that it also furthers the self-realization rationale.

(h) *The Political Process*

Participation in the political process can also safely be added to the list of expressive activities included in the Court’s conception of individual self-realization. Justice L’Heureux-Dubé was quite explicit about the connection between the two in her concurring reasons for judgment in the *Committee for the Commonwealth* case, in which the expressive activity involved holding up placards and distributing leaflets promoting a community-based political organization: “political participation is valuable in part because it enhances personal growth and self-realization.”<sup>256</sup> And Gonthier J., in his dissenting reasons (but not on this point) in *Thomson Newspapers*,<sup>257</sup> clearly saw participation in the political process to be connected to this value. In the course of his application of section 1 to the legislation under attack in that case, which prohibited the publication of polls in the immediate run-up to an election, he said, “by allowing for full scrutiny of the information carried by poll results late in the election campaign, [the legislation] promotes voters’ self-fulfillment by ensuring that the intention voters really want to convey in

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<sup>253</sup> *Supra*, note 186.

<sup>254</sup> *Id.*, at para. 27.

<sup>255</sup> *Id.*, at para. 31.

<sup>256</sup> *Supra*, note 59, at para. 62.

<sup>257</sup> *Supra*, note 117.

casting their vote is actually expressed”<sup>258</sup> While these appear to be the only examples we have of members of the Court explicitly acknowledging the connection to this point, it is safe to assume that it would be accepted by all of them; to deny its inclusion when the consumption of commercial advertising and obscene material has been accepted would hardly make sense.

(i) *What Is Not Included*

My research uncovered only two kinds of expressive activity that have been held not to further the cause of self-realization, and one of those holdings was made in a dissenting judgment (although not on this point). In *Hill*, and later again in *Lucas*, in both of which the Court was dealing with defamatory speech, Cory J. said that “[f]alse and injurious statements cannot enhance self-development”.<sup>259</sup> That same view was expressed, albeit somewhat more equivocally, by McLachlin C.J.C. in *Grant v. Torstar*: she said that self-realization is of “dubious relevance” to defamatory speech “because the plaintiff’s interest in reputation may be just as worthy of protection as the defendant’s interest in self-realization through unfettered expression”.<sup>260</sup> Interestingly, she added that “*Charter* principles do not provide a licence to damage another person’s reputation simply to fulfill one’s atavistic desire to express oneself.”<sup>261</sup> In their dissent in *Zundel*, which dealt with the “spreading false news” offence, Cory and Iacobucci JJ. expressed the view that

[s]elf-fulfilment and human flourishing can never be achieved by the publication of statements known to be false. Rather the damaging false statements that are prohibited under s. 181 serve only to impede, in a most despicable and demeaning manner, the enjoyment of these values by members of society who are the subject of these lies.<sup>262</sup>

Again, in both areas, we see evidence of the Court’s willingness to consider the self-realization interest of the targets of the speech complained of. In fact, it is clear that in *Zundel* the analysis focused *solely* on the self-realization interest of those targets and ignored entirely that of the speaker and that of the listeners. No reason was given by Cory and

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<sup>258</sup> *Id.*, at para. 25.

<sup>259</sup> *Supra*, note 89, at para. 106 and *supra*, note 135, at para. 92.

<sup>260</sup> *Supra*, note 90, at para. 51.

<sup>261</sup> *Id.*

<sup>262</sup> *Supra*, note 58, at para. 207.



Iacobucci JJ. for ignoring the self-realization interest of the speaker and listeners, and, it has to be said, it is difficult to fashion one that would justify doing so. It is also difficult to see how, once the self-realization interest of the speaker is taken into account, speech of the nature considered in these cases could not be said to further at least that interest.<sup>263</sup> The status of speech of this nature in relation to this rationale must therefore be said to be unclear.

(j) *The Role of Rationality*

The role of rationality in the Court's assessment of restrictions on expressive activities furthering the self-realization rationale first became evident in *Irwin Toy*,<sup>264</sup> which followed closely on the heels of *Ford*. Unlike in many of the later section 2(b) cases, the Court did not measure the commercial expression at issue in that case — the advertising of products to children — against the three rationales, but it did shed some indirect light on its thinking about the self-realization rationale when in the course of its section 1 analysis it examined the objective that the government of Quebec had been seeking to further when it enacted the impugned legislation. That purpose, the Court said, was to protect young children from “[their] particular susceptibility ... to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message”, as well as to minimize “the secondary effects of exterior influences on the family and parental authority”.<sup>265</sup> What is significant for current purposes about this aspect of the Court's section 1 analysis is the willingness it evidenced to accept both that much commercial advertising is manipulative — at one point the decision speaks of “the techniques of seduction and manipulation abundant in advertising”<sup>266</sup> — and that many of those at whom such advertising is aimed, particularly but not only children, fall prey to such techniques. By accepting that commercial advertising can manipulate people, the Court was acknowledging that human beings do not always respond to speech in a rational — in the sense of thoughtful and deliberative — manner. At the same time, the Court appeared to be questioning

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<sup>263</sup> One could make the same point in respect of the exclusion of violent expression from s. 2(b)'s reach (see, in this regard, R. Elliot, “Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression”, *supra*, note 57, at 213-14).

<sup>264</sup> *Supra*, note 7.

<sup>265</sup> *Id.*, at para. 71.

<sup>266</sup> *Id.*

the co-relation between commercial advertising and the self-realization of those at whom it is aimed. In *Ford*, it will be recalled, commercial speech was said to deserve constitutional protection because it “plays a significant role in enabling individuals to make *informed* economic choices ...”,<sup>267</sup> clearly implying that the choices would be rational ones. The decision in *Irwin Toy* suggests not only that that connection presumes that the choices being made are rational ones — and not choices induced by “seduction and manipulation” — but also that the applicability and strength of the connection can vary from context to context depending on the extent to which the assumption of rationality can be said to be valid.

That theme is also evident in *Rocket*.<sup>268</sup> There, McLachlin J. repeated the concern about manipulation in the context of advertising by dentists: “Consumers of dental services”, she said, “would be highly vulnerable to unregulated advertising. As non-specialists, they would lack the ability to evaluate competing claims as to the quality of different dentists.”<sup>269</sup> And that concern, it should be noted, played an important role in the fashioning of the Court’s decision in that case. The Court held that the impugned regulation failed the proportionality test because it prohibited advertising about hours of operation and languages spoken, matters in respect of which the concern about manipulation would not apply and the assumption of rationality would be valid.

*RJR*<sup>270</sup> provides further evidence of this kind of thinking, although more obliquely. Of the informational and brand preference advertising caught by the federal *Tobacco Products Control Act*,<sup>271</sup> McLachlin J. said that it provided consumers of tobacco products with “an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health”.<sup>272</sup> That assessment of the character of such advertising, and its likely effect, was clearly based on the assumption that consumers would respond rationally to it, and I think it is reasonable to suggest that that assumption played into her conclusion that the ban was unlikely to have any effect on the overall consumption of tobacco products, and hence was unconstitutional. She was not prepared to make the same assump-

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<sup>267</sup> *Supra*, note 22, at 716.

<sup>268</sup> *Supra*, note 82.

<sup>269</sup> *Id.*, at para. 33.

<sup>270</sup> *Supra*, note 7.

<sup>271</sup> S.C. 1988, c. 20.

<sup>272</sup> *RJR*, *supra*, note 7, at para. 162.

tion, however, when she came to deal with lifestyle advertising and advertising aimed at children, which were also caught by the ban. These she willingly accepted were likely to increase consumption, and hence were fair game for a government prohibition.

Finally in this regard, mention should be made of *Canada v. JTI-Macdonald*,<sup>273</sup> the case in which the Court was asked to review the legislation that Parliament had enacted in response to its decision in *RJR*. Chief Justice McLachlin, writing for the Court, upheld all of the impugned prohibitions — against false promotion, advertising and promotion appealing to young persons, lifestyle advertising and sponsorships — and her reasons in support of doing so made frequent reference to the vulnerability of consumers to manipulation at the hands of tobacco manufacturers. Hence, in her assessment of the prohibition against advertising to young persons, she said that “the vulnerability of the young may justify measures that privilege them over adults in matters of free expression”,<sup>274</sup> and in reviewing the prohibition against lifestyle advertising, she referred to the “subtle subliminal evocations” that the manufacturers sought to convey in their commercials.<sup>275</sup> It seems clear that, from the Court’s standpoint, the greater the likelihood that consumers will be manipulated by the advertiser, the more tenuous the connection between the advertising in question and the self-realization rationale will be, and the easier it will be for the government to justify its infringing legislation.<sup>276</sup>

I am not aware of any case in which the Court has addressed the question of whether or not expression that cannot be said to be manipulative but that elicits an emotional rather than rational response should, on that basis, receive a lower level of protection. *Butler* could have raised that question, but there is nothing in either Sopinka J. or Gonthier J.’s reasons for judgment in that case to suggest that they saw it as having done so. The question — clearly an important one from the standpoint of both practice and theory — therefore remains very much an open one.

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<sup>273</sup> *Supra*, note 7.

<sup>274</sup> *Id.*, at para. 94.

<sup>275</sup> *Id.*, at para. 115.

<sup>276</sup> For a general critique of the Court’s handling of the role of rationality in its application of s. 1 in s. 2(b) cases, see Richard Moon, “The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication” (1995) 45 U.T.L.J. 419.

(k) *Varying Contributions to Self-Realization*

*Rocket*<sup>277</sup> is important for another reason as well. Justice McLachlin made it clear that in her view the weight to be given to the freedom of expression interest in that case had to be greater than the weight given to it in *Irwin Toy* because the interest of patients in being able to make an informed choice about who their dentist is going to be is more important than the interest of children in knowing about which toys are available for purchase. Putting it in the language of self-realization, advertising by dentists, at least about such matters as hours of operation and languages spoken, was seen to promote that self-realization to a greater degree than advertising by toy manufacturers. She repeated that line of argument in *RJR*<sup>278</sup> when she discussed the weight to be given to what she there termed informational advertising by the manufacturers of tobacco products. Referring back to her reasons in *Rocket*, she noted that informational advertising by dentists “might have benefited consumers and contributed to their health”, and then added, “The same may be said here.”<sup>279</sup> The implication of that reasoning is clearly that not all choices affected by the advertising of goods and services will be considered to be of equal importance. Some choices will be considered to be of greater importance than others, and hence some kinds of advertising will be given greater protection than others. It is worth noting that no justification for the distinctions made by McLachlin J. in *Rocket* and *RJR* was offered; they were simply asserted.

The fact that the Court in cases like *Butler*<sup>280</sup> and *Sharpe*<sup>281</sup> has described the value to consumers of obscene speech and child pornography in terms of “the most base aspect of self-fulfillment” evidences a similar willingness to attach more weight to some self-realizing interests than others. In neither case did the Court seek to compare the indulgence of a person’s sexual proclivities with any other such interests, so we have no guidance as to exactly where on the scale that interest falls. But the language of “most base” suggests that the Court sees it as ranking very low on the list of self-realizing activities. Again, no basis was provided for assigning such a low ranking to this kind of expression; it was simply asserted.

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<sup>277</sup> *Supra*, note 82.

<sup>278</sup> *Supra*, note 7.

<sup>279</sup> *Id.*, at para. 170.

<sup>280</sup> *Supra*, note 8.

<sup>281</sup> *Supra*, note 10.

How a court would go about the difficult task of rationalizing such distinctions if it decided to tackle that task is far from clear. Presumably the justification would have to be expressed in terms of the differing contributions particular kinds of choices make to human well-being, with choices that have a bearing on critically important interests such as physical security, health and intellectual development ranking at or near the top and those that relate to hedonistic leisure activities at or near the bottom. Whatever the justification proffered, these distinctions are bound to be controversial.

*(l) Summary*

The Court has declined to offer a comprehensive conception of the goal of individual self-realization that it has included as one of the three rationales underlying section 2(b) of the Charter. It seems clear, however, that the conception on the basis of which it appears to be operating is a very generous one: it has held that the rationale protects commercial expression, hate speech, obscenity, child pornography, promotion of leisure activities, employment-related speech, consumer expression and participation in the political process. It has also made it clear that this rationale is concerned with the self-realization interest not only of speakers and listeners, but also of those about whom the speaker speaks. The only kinds of expression that can be said to be of dubious status in relation to this rationale reflect this feature of the Court's understanding — false defamatory statements and other falsehoods that harm the self-realization interests of third parties. As with the other two rationales, not all expression protected by this one is entitled to the same degree of protection; the factors the Court considers relevant to determining the appropriate degree of protection for a particular expressive activity include the extent to which that activity can be expected to elicit a rational response from listeners and the extent to which that activity can be said to contribute to the self-realization interest of the speaker and others.

## V. CONCLUSION

While the Supreme Court of Canada could have provided a much more considered basis than it has done for selecting democratic self-government, the advancement of truth and knowledge and individual

self-realization as the philosophical rationales for freedom of expression in the Charter, it is clear that these values have now taken firm root in the Supreme Court of Canada's approach to section 2(b). It is also clear that they have been assigned a broad range of doctrinal roles by the Court, and that they have therefore become one of the mix of factors that courts have to take into account in the resolution of many if not most cases in which freedom of expression is invoked.

To this point, the Court has shown no interest in exploring the meaning of any of these values in a careful and considered manner. It has preferred instead to proceed on an *ad hoc*, case by case basis, saying as little as it feels it can about the connection between each of them and the particular kind of expressive activity at issue in each case in order to ensure that the doctrinal role in question has been adequately fulfilled — and that has often been very little. That preference has obviously detracted from the Court's ability to explore the existence and nature of such connections in a conceptually coherent and systematic manner, and therefore to provide a theoretically convincing foundation for the conclusions it reaches. It has not, however, prevented the Court from shedding important light on what it understands each of the values to mean. In fact, given the large number of section 2(b) cases the Court has already been called upon to decide, it is possible to extract a reasonably detailed picture of the Court's understanding of each of them. And, as we have seen, those pictures suggest that the Court understands all three of them to be quite extensive in reach, and therefore to catch a very broad range of expressive activities. That is particularly true of the third, individual self-realization, which may well have no limits. But those pictures also suggest that those understandings are quite nuanced, with the strength of the connection between particular expressive activities and each of the values varying from context to context. The factors relevant to making such assessments are themselves varied, and can include considerations such as whether the expressive activity is likely to elicit a rational or non-rational response, whether the expressive activity threatens the value of equality, whether the expressive activity is integral or only loosely related to the value, and where the expressive activity takes place.

The next step in the process is, of course, to subject the Court's understanding of these values to critical scrutiny. An important part of that second step will be to examine the values from a broader perspective than the Court has so far been willing to do. The starting point for that examination will be the approach taken to them by one of the leading American free speech scholars, Frederick Schauer, in his book *Free Speech: A*

*Philosophical Enquiry*, not because that approach is necessarily the right one, but because it provides a useful vantage point from which to assess the Court's approach. But all of that awaits a second paper.