

FREEDOMS FACE-OFF: EXPRESSION VS. DISCRIMINATION

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*This column does not contain legal advice, but rather merely legal information.
Always consult with a lawyer to discuss your situation and to review a contract for you.*

Writers are naturally inclined to support Freedom to Read Week (February 20–26, 2022). It is obvious we must (in the words of the Freedom to Read Week website) “challenge the covert nature of censorship... and allow Canadians to actively defend their right to publish, read and write freely.”

Freedom of expression is closely linked to censorship, but how does it relate to the right to dignity and freedom from discrimination? The Anne Frank Society says this: “Freedom of expression is an important human right, but so is the right not to be discriminated against. ... What if you discriminate against someone by making a certain remark in public? You should be able to say whatever you want, but where do we draw the line between freedom of expression and the ban on discrimination?”

To analyze this, let’s look first at Canadian law. The Government of Canada website states: “Canada believes freedom of expression is at the core of human individuality and is one of the essential foundations of a safe and prosperous society.” Freedom of expression is protected as “fundamental” by the 1982 *Canadian Charter of Rights and Freedoms*, specifically in Section 2(b):

2. Everyone has the following fundamental freedoms: ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

However, the fundamental freedoms listed in Section 2 are subject to reasonable limits, as prescribed in Section 1 of the *Charter*. Here is that section:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Thus, Section 1 effects a balance between the rights of the individual and the interests of society by permitting limits to be placed on guaranteed rights and freedoms.

A famous case in which the principles of freedom of expression and censorship collided with government legislation is the 1962 *Lady Chatterley’s Lover* decision, which tested the federal Criminal Code’s obscenity laws. The Code’s anti-obscenity provision was ostensibly aimed at “newsstand trash,” but its first real challenge related, ironically, to the work of a serious and respected writer, D. H. Lawrence. The Crown argued the book fell into the definition of obscenity, referring to its many “four-letter words.” It said the book would corrupt and degrade readers. The Supreme Court of Canada (SCC) was deeply divided, 5–4, but ruled the book was not obscene.

In a 1989 SCC case, the first to interpret Section 2(b) of the *Charter*, the court held freedom of expression encompasses “all expressions of the heart and mind, no



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matter how unpopular, distasteful or contrary to the mainstream.” That case involved consumer advertisement legislation.

A contemporary discussion over how government legislation may interfere with the fundamental right to freedom of expression surfaced in the 2021 debate over Bill C-10. That bill proposed to change the *Broadcasting Act*, which hasn’t been updated since 1991, to require greater Canadian content—arguably a boon to Canadian creators and therefore welcomed by many—and to impose rules on social media platforms such as YouTube and Facebook. Critics warned that regulating the industry would disrupt individual freedom of expression, but most experts realized that if Bill C-10 became law, it would primarily affect the social media platforms themselves. Interestingly, Facebook Canada publicly stated it welcomes increased regulation by the Canadian government, including rules for what content should be prohibited on

social media platforms. “Public rules by Parliament would help clarify [content regulation] and apply across the Internet.”

Difficult questions arise in communications by private citizens adversely affecting others. In October 2021, the SCC ruled on an appeal from the Quebec human rights tribunal in the context of expressive freedom. Teenaged singer J r my Gabriel complained that stand-up comedian Mike Ward had, in 230 performances reaching live audiences of over 100,000 and vastly more via the internet, mocked Gabriel’s genetic deformities. The Quebec tribunal concluded that Ward’s repeated derision of Gabriel’s facial appearance was discriminatory and contravened the Quebec charter’s safeguard to dignity. Evidence showed Ward’s comedic act prompted Gabriel’s peers to taunt him, to the point the 13-year-old contemplated suicide. Yet the SCC, in another deeply divided 5–4 decision, ruled that where the right to safeguard dignity conflicts with freedom of expression, the complainant must demonstrate that the expression incites others to vilify them or to detest their humanity, and is likely to result in discriminatory treatment of them. According to the majority, Ward’s comments “did not incite the audience to treat Mr. Gabriel as subhuman.” They ruled in Ward’s favour. The dissent of four justices vehemently supported the Quebec tribunal’s ruling against Ward.

Where freedom of expression faces off against discrimination, it appears freedom of expression wins. Do hard facts make bad law, as the adage goes?

Ward defended himself on Twitter. “In a ‘free’ country, it shouldn’t be up to a judge to decide what constitutes a joke on stage.” His lawyer said, “Speech—even controversial or repugnant speech—has social value and should be protected from unjustified state intrusion.”

The Canadian Civil Liberties Association welcomed the decision. It had argued as an intervener in the SCC case that any limits on expressive freedom should be as narrow and precise as possible.

Gabriel, now in his 20s, says although the legal process is over, the societal debate is not. One of his missions will be to inspire people to be themselves, accept themselves, and defend themselves if they are going through unacceptable situations. “Equality is for everyone,” he says. “I still firmly believe that.” ■

References

Freedom to Read Week website: freedomtoread.ca/freedom-to-read-week

Anne Frank Society website: annefrank.org/en/topics/discrimination-and-equal-rights/where-do-we-draw-line-between-freedom-expression-and-discriminat

The Government of Canada website: international.gc.ca/world-monde/issues_

development-enjeux_developpement/human_rights-droits_homme/freedom_expression_media-liberte_expression_medias.aspx?lang=eng

Irwin Toy case: canlii.org/en/ca/scc/doc/1989/1989canlii87/1989canlii87.html

Facebook: [cbc.ca/news/politics/facebook-parliament-tweets-canada-1.5892592](https://www.facebook.com/parliament-tweets-canada-1.5892592)

Mike Ward case: thelawyersdaily.ca/articles/30855/comic-s-ridicule-of-well-known-child-singer-with-a-disability-was-not-illegal-discrimination-scc

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Jeananne Kirwin, Q.C., a lawyer in Edmonton, practices in the areas of intellectual property and corporate/commercial law with an emphasis on trademark and copyright registration and enforcement (kirwinllp.com).

LETTER TO THE EDITOR

Writers’ Block and Rejection

WestWord, October–December 2021

I wanted to take a moment to send you and the *WestWord* team a note of thanks and congratulations on the latest issue. The content was rich and amazing and I love the layout. As a (hopefully) mid-career writer, I personally appreciated the honest exploration of the complex topic of rejection and writer’s block. The subject gets a passing interest (mostly complaining) on social media, but I found these pieces very thoughtful and it made me feel less alone as I pull ahead out of a couple of years of being “creatively blocked.”

As a former journalist and publication editor, I appreciate the hard work that goes into creating and publishing a periodical like *WestWord*. Well done—keep the words flowing and I hope to receive many more copies to come.

Chris Forrest
Calgary

How to submit a letter to the editor

Letters to the editor are welcomed as a way to encourage an exchange of ideas and opinions among members.

- Email enquiries to editor@writersguild.ab.ca with the subject: “*WestWord* Letter to the Editor.”
- The body of your email should contain your name and contact information.