Committee for the Commonwealth of Canada v. Canada
EXPRESSION ON PUBLIC PROPERTY

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In *Committee for the Commonwealth of Canada* v. *Canada*[1] seven justices of the Supreme Court of Canada unanimously agreed that a prohibition by airport authorities of the distribution of political pamphlets in the public areas of an airport violated the respondent's freedom of expression and could not be saved under section 1 of the *Charter*. The similarities stop almost at that point. If further common ground can be found in the six judgments, or in at least five of the six judgments, it is perhaps best summarized in the brief reasons of La Forest J.:

> I agree with the Chief Justice and McLachlin J. that freedom [of expression] does not encompass the right to use any and all government property for purposes of disseminating one's views on public matters, but I have no doubt that it does include the right to use for that purpose streets and parks which are dedicated to the use of the public, subject no doubt to reasonable regulation to ensure their continued use for the purposes to which they are dedicated. I see no reason why this should not include areas of airports frequented by travellers and by members of the public. The blanket prohibition against the use of such areas for the purpose of the expression of views thus violated the freedom of expression guaranteed by section 2(b) of the *Charter*, a prohibition which my colleagues have been at pains to demonstrate is not justifiable in a free and democratic society.[2]

As indicated by La Forest J., this is all that was necessary to dispose of the appeal. However, all of the justices, including to a limited extent La Forest J., went on to attempt to provide some guidelines for future cases as to the applicability of section 2(b) of the *Charter* to restrictions on the use of government property by the public for expressive purposes. These guidelines are seriously limited in their usefulness in that three different tests are proposed, none receiving majority approval. However, to the extent the tests rely on the same considerations and give rise to the same results, although involving different rhetoric, the decision does provide real guidance. This comment will outline the tests and demonstrate that there is a large degree of overlap in them, and that they generally appear to be quite sensitive to free expression interests. The comment will not deal with the other issues raised in the case, relating to whether the government action in the case was in regulatory form or not, whether the regulation or other action was "prescribed by law", and the application of the *Oakes* test. The latter point was not controversial.[3] On the other hand, the discussion of the "prescribed by law" issues was so divided as to lack virtually any precedential force, and merely reviewed concepts previously explored in the case law without introducing new ones.[4]

On March 22, 1984, Messrs. Lepine and Deland, the Secretary and Vice-President of the Committee for the Commonwealth of Canada, went to the Montreal International Airport at Dorval armed with placards, leaflets and magazines, seeking to promote their organization and its cause and to solicit members. They started to approach the public for this purpose, but were soon told to stop by first an R.C.M.P. officer, and then the assistant manager of the airport.

The Committee and others commenced an action in the Federal Court, seeking declarations that the defendant had not observed their fundamental freedom of expression and that the areas open to the public at the Airport constituted a "public forum". The term is borrowed from the American doctrine developed in cases applying the first amendment to restrictions on the use of public property for expressive purposes. Dubé J., after reviewing American case law, agreed that airports are "contemporary extensions of the streets and public places of yesterday", and granted the declarations.[5]

A majority in the Court of Appeal affirmed this decision,[6] but granted only the first of the requested declarations, holding that it was unnecessary and inappropriate to adopt the American doctrine in the form of relief granted. Pratte J., in dissent, accepted the government's argument that it, as owner of the property, was entitled to deny permission to use the airport property for anything other than its intended function, the service of the travelling public.

In the Supreme Court all of the justices agreed that the government acting as property owner was still subject to *Charter* limits. Freedom of expression, as held by Lamer C.J., "necessarily implies the use of physical space in order to meet its underlying objectives."[7] To confine free expression to private property would deny the foundation of the freedom. L'Heureux-Dubé J. and McLachlin J., in the other two major judgments in the case, made similar points relating to the importance of allowing public property to be used for expression, particularly to communicators whose means are limited. All three of the judgments referred to the following passage from the United States Supreme Court decision in *Hague* v. *Committee for Industrial Organization*:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[8]

Agreeing, therefore, that at least some government property must be available for expressive purposes, subject to reasonable regulation, the justices then addressed the question of what government property is so available. Must restrictions on such use of government property always be subject to review under section 1 of the *Charter*, or are there definitional limits on the scope of freedom of expression in this context? Only L'Heureux-Dubé J. took the position that section 2(b) is always engaged when government restricts the use of any of its property for expression. The other six justices all agreed that there are some definitional limits. This is, in itself, somewhat unusual, as other decisions of the court have been unwilling to imply definitional limits into section 2(b) and have kept such limits within narrow bounds.[9] In the recent *Osborne* v. *Canada (Treasury Board)*[10] the court dismissed out of hand the suggestion that the scope of freedom of expression should be limited "because of the particular status of the holder of the right, i.e., a public servant". Yet the location of the exercise of the right, i.e., on public property, does limit the scope of the freedom. The reason appears to be primarily a "floodgates" fear; that otherwise there would be a potential for too many clearly unjustified claims requiring review under section 1. Arguably this could result in a weakening of the section 1 test.[11]

McLachlin J., on the need for internal limitations, stated:

> There is no historical precedent for extending freedom of expression to purely private areas merely because they happen to be on government-owned property. Freedom of expression has not traditionally been recognized to apply to such places or means of communication as internal government offices, air traffic control towers, publicly-owned broadcasting facilities, prison cells and judges' private chambers. To say that the guarantee of free speech extends to such arenas is to surpass anything the framers of the *Charter* could have intended.[12]

Of course, one can say the same regarding a number of accepted and uncontroversial restrictions of expression; for example, laws prohibiting criminal conspiracies, or secrecy oaths required of government officials. In other contexts, the fact that some limitations are obviously justified has not persuaded the court to abandon its general position that all limits of expression that involve any balancing of interests should be assessed under section 1. Thus, implicitly, it seems to be the potential for a particularly large number of clearly justified limitations that motivated the six justices who opted for an internal limitations approach.

L'Heureux-Dubé J., who advocated that considerations relating to the location of expression be reviewed under section 1, was also aware of the potential for unjustified claims. While she declined to exclude completely such claims from section 1 review, she did propose a contextual approach to section 1 under which it would be differentially applied depending on whether or not a "public arena" was involved. "Restrictions on expression in particular places will be harder to defend than in others. In some places the justifiability of restrictions is immediately apparent."[13] "Public arenas" should be characterized by factors such as traditional openness, ordinary admission of the public, compatibility of the property's purpose with expressive activities, and symbolic significance or other factors that make access to the property important for communication. While L'Heureux-Dubé J. asserted that, since the review of these factors occurs under section 1, the onus will be on the government to justify restrictions, she also contemplated that in some circumstances no evidence would be required, because of the self-evident justifiability of restrictions on expression. She too referred to internal government offices, air traffic control towers, prison cells and Judge's Chambers as clearly inappropriate locales for leafleting or demonstrations.

This kind of a contextual approach to section 1, in which the relevant parameters of the context are set in advance, and the resulting section 1 application may vary from a standard under which no evidence need be called to a much stricter standard, is in practical effect identical to an approach that requires a review of the same factors as definitional limits of section 2(b). In either case, before any significant onus is placed on government to justify restrictions on expressive activity, the court will consider whether the place is one that is suited to communication or that is important to the communication of certain messages.

Two methods for providing definitional limits were provided: one by Lamer C.J., with Sopinka J. and Cory J. concurring, and a second by McLachlin J., with Gonthier J. concurring and La Forest J. indicating that he would tend to approach future cases in the manner suggested by her. Lamer C.J. proposed that individual interests in free expression should be balanced with government interests in preserving property for other uses through a "compatibility with function" test to determine whether section 2(b) has been violated:

> [T]he freedom which an individual may have to communicate in a place owned by government must necessarily be circumscribed by the interests of the latter and of the citizens as a whole: the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.[14]

It is not necessary that the place be compatible with any or even most forms of communication, only with the specific form in issue. For example, in a library, shouting a political slogan would be incompatible with its primary purpose, but wearing a t-shirt with a political message would not be. Lamer C.J. related the compatibility with function test to the court's earlier holding in *Irwin Toy Ltd.* v. *Quebec (Attorney General)*[15] that while all content of expression is protected, not all forms of expression are. Previously the court had declared that violence as a form of expression was without section 2(b) protection; similarly forms of expression that are incompatible with the

primary purposes of government property on which they are employed are without such protection.

Lamer C.J.'s approach involves a straightforward balancing test under section 2(b) rather than under section 1. This leaves only a circumscribed role for section 1, to deal with government purposes that are not specifically related to the function of the property.[16] The approach also places the onus on the individual to demonstrate that the form of expression is compatible with the function of the public property in question, which may be criticized in that government, not the individual, has the greater familiarity with that function and the greater ability to provide evidence on this issue. But showing that a peaceful form of expression that does not interfere with other activities is contemplated may be sufficient to create a *prima facie* case of compatibility to be met by the government, so that this problem may be more apparent than real. One aspect of the test that does cause some concern, though, is the somewhat narrow way in which the balancing test is defined. In introducing the test, Lamer C.J. comments on the need to balance the individual's interest in free expression against the government's interest in using its property for other purposes. The compatibility test will capture the government's interest in the property *per se*, and other government interests can be subsequently dealt with under section 1. But the individual's interests may not be adequately dealt with by this test. Other factors relevant to the individual's interest, such as the availability or lack of alternative channels of communication or the symbolic significance of a location, are not considered. It would seem that a strong individual interest as demonstrated by such factors might merit the imposition of a greater degree of interference with other government uses of property. The compatibility test may cause such claims to be excluded at the section 2(b) stage, without a full consideration of all relevant factors at the section 1 stage.[17]

McLachlin J. also based her proposed test on the *Irwin Toy* decision. She, however, did not turn to the exclusion of certain forms of expression, but instead to the categorization of government laws or actions as violating section 2(b) in either purpose or effect. Regulations that are "tied to content" violate section 2(b) in their purpose. Regulations that are aimed solely at the physical consequences of an activity do not violate section 2(b) in their purpose, but may in their effect. To demonstrate this effect the court held in *Irwin Toy* that regard must be had to the values of truth-seeking, social and political participation, and individual self-fulfilment, that underlay the guarantee of freedom of expression. The meaning sought to be expressed must reflect those values.

Pursuing this point, McLachlin J. held that where a content-neutral regulation of government property has the alleged effect of inhibiting expression, a claimant must establish a link between the use of the forum in question and at least one of the purposes of free expression. Places that by tradition or by designation have been dedicated to public expression of political or social or artistic issues are related to free expression values by that dedication. Where places are unrelated to public debate, again using the examples of internal government offices, airport control towers, judges' chambers and prison cells, "public expression" therein would not promote these values.

McLachlin J. does not indicate how she would deal with more controversial locations. However, to contrast her position with that of Lamer C.J., the essential difference appears to be that she would, at the section 2(b) stage, attempt to look at the issue from the perspective of the individual's interest in expression only, rather than balancing that interest against the government's interest in using its property for the purposes to which it has been dedicated. Her primary criticism of Lamer C.J.'s approach is that it does require such balancing under section 2(b) rather than following the court's usual approach of reserving the balancing of individual versus public interests to be assessed under section 1. But, except in the extreme cases that she refers to, it is hard to see how balancing can be avoided. The interest in using traditional or designated public forums for free expression is compelling; the interest in using the particularly private areas referred to is trivial. But in many areas, such as libraries, school grounds, or prison driveways, the interest in the expressive use of these properties can only be defined in relative terms. If McLachlin J.'s test excludes only trivial cases, these hard cases will be balanced under section 1 as L'Heureux-Dubé J. would have it. If McLachlin J.'s test excludes everything except compelling cases, it would seriously circumscribe access to public property for section 2(b) purposes. If some middle ground is to be adopted, allowing some forms of expressive use of some other properties, surely this must be determined by means of balancing. McLachlin J. does indicate that her desire is to exclude at the section 2(b) stage "[c]laims which *clearly* do not raise the concerns central to the guarantee" [emphasis added].[18] It seems she intended the test to be used to eliminate trivial cases, with any of the more difficult cases calling for balancing under section 1.

One point in common in the three decisions is that they all seem to assume that content-based decisions will always be subject to section 1 review. Clearly, L'Heureux-Dubé J. would not deny or restrict review of content-based regulations. McLachlin J. was careful to note that any government action "tied to content" violates section 2(b), and that only regarding content-neutral regulations would claimants be subject to the additional requirement that she described.[19] Although Lamer C.J. was not as explicit on this point, it appears that he too intended to restrict the scope of section 2(b) only with regard to content-neutral regulations. He described his compatibility test as a restriction of the scope of the guaranteed forms of expression, and referred to the *Irwin Toy* distinction between content of expression which is always protected by section 2(b) and forms of expression which are subject to some inherent limitations.

All of the decisions attempt to achieve flexibility and seem to be generous to expressive interests. All three allow a straightforward consideration of the values and interests truly at stake. The balancing of individual versus government interests may be done either under section 2(b) or under section 1. Given

the contextual approach to section 1 as described by L'Heureux-Dubé J., I would not attach much importance to this distinction. However, it is important that the more controversial types of claims not be screened out prior to balancing either under section 2(b) or section 1. Lamer C.J.'s test has the potential to do this. So does McLachlin J.'s test unless, as indicated above, it is used only to exclude clearly unjustified claims. In the result it would seem that either the approach of L'Heureux-Dubé J. or that of McLachlin J. as qualified here, best achieves the goal of flexibility and protects expressive interests where they can be reasonably accommodated. Alternatively, Lamer C.J.'s test, expanded to allow for a more generalized balancing, would do as well, except for the occasional advantage that may follow from the presumptive onus when balancing is pursued under section 1. Even taken in its restrictive form, Lamer C.J.'s test should be adequate in a large number of cases. The only approach with the potential to rule out the expressive use of most government property is McLachlin J.'s, but this would be contrary to the result she intended and so would seem to be a misapplication of her approach.

Generally, all of the decisions in *Committee for the Commonwealth of Canada* demonstrate a commendable sensitivity to the need to provide access to government property for expressive purposes, so that free expression will be practically as well as legally accessible. Much of the debate in the decision relates to the question of definitional or section 1 limits on rights. This debate is lessening in significance as section 1 is being treated more flexibly. Perhaps it is time to shift the debate from such structural concerns to more result-oriented concerns. Looked at in that way, *Committee for the Commonwealth of Canada* has opened up airports throughout the country and presumably other modern "crossroads" to public debate. This significant step was unanimously adopted, and for that reason alone the case should be considered a landmark.

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[1] (1991) 77 D.L.R. (4th) 385 (S.C.C.).

[2] *Ibid.*, at 402.

[3] All of the justices who reached the point (5 of 7) agreed that the total exclusion of expressive activity was overbroad in its relation to the government objective of preserving the airport for travel purposes.

[4] Lamer C.J., with Sopinka and La Forest JJ. concurring, held that the Government Airport Concession Operations Regulations, SOR/79-373, ss. 6-20 did not apply to non-commercial solicitation, including the respondents' activities. Lamer C.J. and Sopinka J. held that the government's actions in excluding the respondents was accordingly not prescribed by law. The remaining justices held that the regulations applied, and McLachlin J., with Gonthier and La Forest JJ., held that even if the government were acting only pursuant to its common law authority as an owner of property, its actions would be prescribed by law. L'Heureux-Dubé J. held, in an alternative ground for her decision, that the regulations were too vague to constitute a limit prescribed by law.

[5] (1985) 25 D.L.R. (4th) 460 (Fed. Ct., T.D.).

[6] (1987) 36 D.L.R. (4th) 501 (Fed. C.A.).

[7] *Supra*, note 1, at 394.

[8] 307 U.S. 496 (1939), at 515-16.

[9] E.g., *Irwin Toy Ltd.* v. *Quebec (Attorney General)* (1989), 58 D.L.R. (4th) 577 (S.C.C.) held that all content of expression is protected, and all forms of expression excepting only violence or threats of violence. *R.* v. *Keegstra*, [1991] 2 W.W.R. 1 (S.C.C.) maintained this position in regard to content, and the majority indicated that only actual violence as a form of expression should be unprotected. Even threats of violence should prima facie be protected, subject to section 1.

[10] Supreme Court of Canada, June 6, 1991, unreported.

[11] This reasoning was in part responsible for the Court's adoption of internal limitations pertaining to section 15: *Andrews* v. *Law Society of British Columbia*, (1989) 56 D.L.R. (4th) 1 (S.C.C.).

[12] *Supra*, note 1, at 450.

[13] *Ibid.* at 426.

[14] *Ibid.* at 394-395.

[15] *Supra*, note 9.

[16] Lamer C.J. gives the example of a government objective of maintaining law and order as one that would be considered under section 1.

[17] Both L'Heureux-Dubé J. and McLachlin J. note the need to consider other factors; *supra*, note 1, at 429-430 and 452 respectively.

[18] *Supra*, note 1, at 458. McLachlin J. also characterized her approach as "between" that of L'Heureux-Dubé J. and Lamer C.J., and stated that the latter test had a potential to forestall legitimate claims (at 447 and 453). It would seem that she felt her own approach would exclude fewer claims than that of Lamer C.J.

[19] McLachlin J. characterized the exclusion of soliciting at the airport as content-neutral because the "stated policy was to prohibit all political propaganda" and there was "no intention to favour one philosophy or idea over another" (*supra*, note 1, at 459). She and the other justices seem to have dismissed as insignificant the exclusion from this policy of poppy-vendors.