

# Freedom of Expression 101

*Canadian Charter of Rights and Freedoms*

2. Everyone has the following fundamental freedoms:

(a) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

## What does it mean?

In Canada, we have a broad definition of what is protected as “expression” under s. 2(b) of the *Charter*.

*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927 is an important Supreme Court of Canada case that established several key principles that guide our understanding of freedom of expression in Canada.

“Expression” has both a **content** and a **form**.

- **Content** is the meaning that is being portrayed by any expressive activity.
- Expressive activities can come in many **forms**. In other words, expression isn’t just limited to the things we say; it can come in many forms, from the written word, to music, or physical gestures. Even the act of being silent can convey meaning! As long as an activity is performed to convey meaning, it can be considered expression under the *Charter*.

Example: I wear a rainbow pin on my jacket. Wearing this accessory is my chosen **form** of expression. The meaning or **content** I wish to convey when I wear this pin is that I support LGBTQ+ rights.

## Why is it important?

Freedom of expression is protected in our Constitution to ensure that everyone can share their thoughts, opinions, and beliefs, no matter how unpopular they may seem. Such protection is, in the words of the *Charter*, “fundamental” because in a free and democratic society, both individuals and communities benefit from access to a diversity of ideas and opinions.

The *Irwin Toy* case also identified the **values underlying freedom of expression**:

- 1) individual self-fulfillment;
- 2) finding the truth through the open exchange of ideas (sometimes called the “marketplace of ideas”);
- 3) enabling political discourse fundamental to democracy (allowing for conversations and communication about laws and government so that we can live in a democratic country in which everyone gets to participate, share information and their opinions about what the government is doing, and make choices about government and law);

## Limits to Freedom of Expression

Because we give broad protection to freedom of expression under s. 2(b) of the *Charter*, in most cases where freedom of expression is at issue, the real “work” is done in the courts under s. 1 in deciding what limits on freedom of expression are reasonable (see section 1 and the Acorn Test).

The following are some general exclusions to protection under s. 2(b) of the *Charter*:

- conveying meaning through a violent form of expression is not protected expression under the *Charter*;
- threats of violence are not protected;
- The location from which a message is conveyed might also exclude it from s. 2(b) protection if it would conflict with the values underlying freedom of expression (noted above)
  - For example, staging a protest *inside* a Cabinet meeting could interfere with the way our government functions to such a degree that it prevents important political discourse from taking place, even though that same protest would likely be protected *outside* the Parliament building.

### What about hate speech?

Legal restrictions on hate speech is a controversial topic in Canada. The question of whether there should be restrictions on hate speech presents a difficult dilemma because the answer may depend on how you define hate speech.

If we define “hate speech” too generally, then we could be in danger of silencing opinions that might be valuable to consider in a free and democratic society. For example, should there be a law that prevents you from saying that you “hate” the owner of a zoo that is cruel to animals? Could sharing this information and your feelings benefit the public?

On the other hand, if we have no protections against hateful speech, we could be exposing some individuals and vulnerable groups to real harm and discrimination. Certain types of expression can potentially dehumanize a group or encourage others to have extremely negative feelings towards members of that group. Should we have laws to protect people from these types of harms?

As of 2018, the most recent Supreme Court of Canada case on the issue of hate speech is ***Saskatchewan (Human Rights Commission v. Whatcott, 2013 SCC 11)***.

- The Court found that provincial rules against hate speech did limit freedom of expression under s. 2(b) of the *Charter*;
- It also found that those limitations were reasonable and demonstrably justified in a free and democratic society within the meaning of s. 1 of the *Charter*;
- In conducting its Oakes test analysis, the Court established the following:
  - Objective of restricting hate speech is to reduce discrimination, further equality and recognize inherent human dignity of all people – this is accepted as pressing and substantial objective;

- Restriction is accepted as proportional because Court interprets hate speech as referring to most extreme forms of speech that are objectively seen to expose protected groups to hatred (para 99);
- Even though there may be other ways to deal with the problem of discrimination, it is reasonable for a government to choose to do so through restricting hate speech (para 106);
- The Court finds that it is easier to justify restrictions on hate speech because it is expression that is far from the core values that s. 2(b) is meant to protect (it seeks to undermine the self-fulfillment of some people based on their identity).

It's important to note that not everyone agrees with the Supreme Court's decision in Whatcott. Some people argue that rather than silencing hateful speech, it is safer and healthier to know who is perpetuating hate speech and how they are doing it, so that everyone in society can make strategic choices about when and how to respond to hate speech, for example through education, counter-protests or counter-speech.