

Section 2(b) and Oakes Analysis

ISSUE:

Whether _____ person's freedom of expression under s. 2(b) has been infringed?

Whether the infringement of freedom of expression is justified under s. 1?

RULE:

Section 2(b), Charter

Irwin Toy Ltd v Quebec (AG) (The Test)

Montréal (City) v 2952-1366 Québec Inc

Section 1 of the Charter

R v Oakes

ANALYSIS:

Section 2(b) of the Canadian Charter of Rights and Freedoms protects freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

To establish an infringement of s. 2(b), it must first be determined whether the activity constitutes expression within the meaning of s. 2(b), and secondly whether the purpose or effect of the government measure restricts that expression.

The application of the Irwin Toy framework is as follows:

Step 1: Does the activity fall within the scope of s. 2(b)?

(a) Does the activity convey or attempt to convey meaning?

Expression is interpreted broadly and protection is generally content-neutral. Political, commercial, artistic, symbolic and other forms of communication may therefore fall within s. 2(b), even where the message is unpopular or offensive. Here, _____ person is conveying or attempting to convey the meaning of _____ through _____ (advertisement, newspaper, sign, drawing, speech, etc.). Therefore, the activity does / does not constitute expression.

(b) Is the expression conveyed through violence?

Expression conveyed through violence is excluded from the protection of s. 2(b). However, expression concerning violence or offensive ideas is not excluded merely because of its content. Here, _____ person conveys the message by _____. The expression itself does / does not involve violence and therefore is / is not within the protection of s. 2(b).

(c) Expression on government property

Where expression occurs on government property, the court considers whether protecting expression at that location is consistent with the historical or actual function of the place and

with the values underlying s. 2(b), including truth-seeking, democratic participation and individual self-fulfilment. Here, the expression occurred at _____. The location has traditionally/actually been used for _____ and permitting expression there would / would not be consistent with the purposes underlying s. 2(b).

Therefore, the activity falls / does not fall within the protected scope of s. 2(b).

Step 2: Does the purpose or effect of the government measure restrict expression?

A law directly aimed at controlling the content or meaning of expression will ordinarily establish an infringement by purpose. Here, the impugned law has the purpose of prohibiting/restricting _____ expression. Therefore, its purpose directly limits _____ person's expression and s. 2(b) is infringed.

OR

Where the law is content-neutral and restricts expression only through its **effects**, the claimant must identify the meaning being conveyed and demonstrate its connection with the values protected by s. 2(b). Here, although the law is aimed at _____, its effect is to restrict _____ person from communicating _____. This expression relates to _____ (truth-seeking, democratic participation or individual self-fulfilment). Therefore, the effect of the law infringes s. 2(b).

Accordingly, _____ person's freedom of expression under s. 2(b) has / has not been infringed.

Since an infringement has been established, it must next be determined whether the infringement is justified under s. 1 and R v Oakes. The government bears the burden of justification under the Oakes test.

EVEN IF THE GOVERNMENT FAILS AT ONE STAGE, ANALYSE ALL STAGES FOR EXAM PURPOSES.

Step 1 – Prescribed by Law and Pressing and Substantial Objective

The limitation must be authorized by law and sufficiently precise. The government must then establish that the objective of the impugned measure is pressing and substantial. Here, the limitation is contained in _____ (e.g., a statute restricting hate propaganda, a by-law regulating signs, an advertising restriction, or a rule limiting expression in a particular public place) and seeks to achieve _____ (e.g., protect vulnerable groups, prevent harassment, preserve public safety, regulate traffic hazards, protect children, or maintain the proper functioning of a public institution). This objective is / is not sufficiently important because _____ (e.g., it addresses a serious and demonstrated social harm / the asserted concern is speculative, minor, or unsupported by evidence). Therefore, this requirement is / is not satisfied.

Step 2 – Rational Connection

The government must establish that the measure is rationally connected to its objective and is

not arbitrary or irrational. Here, the law seeks to achieve _____ (e.g., prevent hate-related harm / protect public safety / reduce dangerous roadside distractions) by restricting/requiring _____ (e.g., prohibiting extreme hate expression, limiting the size or placement of signs, restricting commercial advertising to children, or regulating demonstrations in sensitive locations). This is / is not logically connected to the objective because _____ (e.g., the restricted expression contributes directly to the identified harm / the restriction captures expression that has little or no connection to the stated concern). Therefore, the rational connection requirement is / is not satisfied.

Step 3 – Minimal Impairment

The government must demonstrate that the measure impairs freedom of expression no more than reasonably necessary. The government need not adopt the least imaginable impairment, but the measure must fall within a range of reasonably available alternatives. Here, the law restricts _____ person from _____ (e.g., displaying political signs, publishing certain advertisements, protesting at a particular location, or communicating a controversial message). A less impairing alternative may be _____ (e.g., limiting only threatening or hateful expression, regulating time/place/manner rather than banning expression entirely, restricting only larger signs, or creating narrow exceptions for political or public-interest expression). Since such an alternative could achieve the government's objective while interfering less with expression, the measure is / is not minimally impairing.

OR

The government has limited the restriction by _____ (e.g., targeting only a narrow category of harmful expression, restricting expression only in specified locations or times, or preserving alternative means of communication), and there does not appear to be an equally effective, substantially less impairing alternative. Therefore, the measure is minimally impairing.

Step 4 – Proportionality of Effects

The government must establish that the beneficial effects of the measure justify its actual and foreseeable harmful effects on freedom of expression. Here, the benefits of the law are _____ (e.g., reducing hate-related harm, protecting children, improving public safety, preventing harassment, or preserving access to public facilities), while its harmful effects on _____ person's expression are _____ (e.g., preventing political criticism, restricting participation in public debate, limiting commercial communication, or excluding the claimant from an important forum for expression). The harmful effects outweigh the benefits because _____ (e.g., the restriction suppresses high-value political or public-interest expression while producing only limited additional benefit). Therefore, the limitation is disproportionate.

OR

The benefits outweigh the harmful effects because _____ (e.g., the restriction targets low-value or particularly harmful expression, is narrow in scope, and produces substantial public benefits while leaving meaningful alternative avenues of expression available). Therefore, the limitation is proportionate.

If the government fails to satisfy the applicable requirements of the Oakes test, the infringement cannot be justified under s. 1.

CONCLUSION:

On the basis of the above analysis, _____ person's right to freedom of expression under s. 2(b) has / has not been infringed.

The government has / has not satisfied the requirements of the Oakes test and, therefore, the infringement is / is not justified under s. 1.