

Why is Free Expression So Controversial?

Explaining the Law and Politics of a Fundamental Freedom



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A Defining Issue of Our Time?

- We are living during a moment in which free expression saturates headlines and our broader social, cultural, and political contexts
- Not just relevant in Canada (and North America), either...
 - An acute democratic deficit internationally
 - An acute democratic backsliding internationally
- A seeming paradox: we have the greatest means *ever* for expressing ourselves but expressive harms are *impossible* to ignore, both in Canada and abroad
- Our roadmap for today:
 - What is free expression and why is it important?
 - Why has it become so controversial?
 - What are some seminal legal cases in Canada?

What is Free Expression?

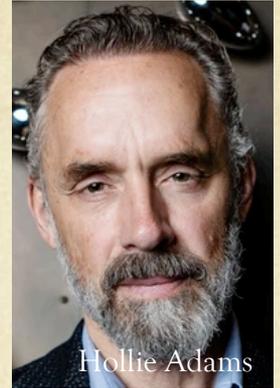
- Wikipedia: Free expression / free speech is a principle that supports the freedom of an individual or a community to articulate their opinions and ideas without fear of retaliation, censorship, or legal sanction.
- Is free expression *only* about the relationship between state and citizen?
- Is free expression *only* an individual right? What exactly constitutes an *individual*?
- Does free expression *require* a constitutional (or other legal) protection?
- What exactly constitutes *expression*?

Intro to Free Expression

- There are usually three interrelated justifications for free expression (but there are more...)
- 1) The pursuit of truth
 - Most famously argued by J.S. Mill in *On Liberty* (1859)
 - Key arguments: human infallibility and dead dogma
- 2) Individual self-development and self-realization
 - Expression allows us to create and circulate meaning
 - Self-censorship is inauthentically human
- 3) Essential for a proper functioning democracy
 - Citizens need to express policy preferences
 - A precondition for decision-making (i.e. quality control)

Why is Free Expression So Controversial?

- A raft of cases and controversies
 - Related to concepts like ‘political correctness,’ ‘microaggressions,’ ‘cancel culture,’ and ‘safe spaces’
- Gradual inclusion of more diverse voices
 - Are we witnessing a backlash to equity, diversity, and inclusion in public discourse?
- Conceptualizations of harm are changing significantly (nuanced and expansive)
 - Harm can be psychological, discursive, epistemic, and environmental
 - *Example:* hate speech as a *legal* category vs. a normative description
- Shifting ideological and political territory
 - Right-leaning embrace of free expression
 - Left-leaning skepticism of free expression

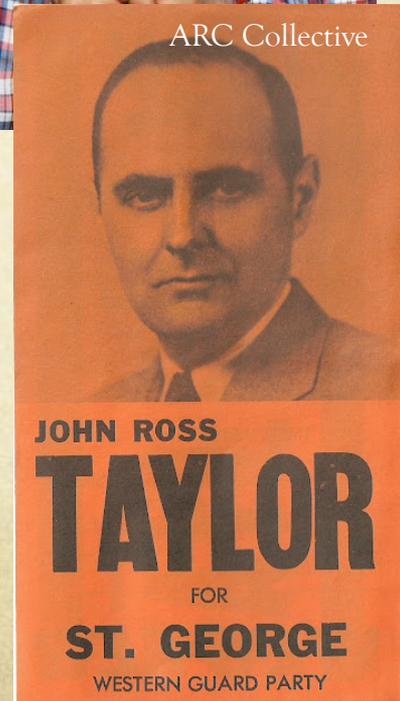
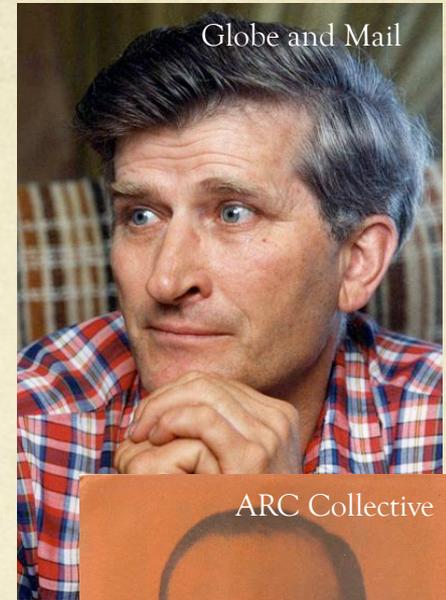


Canadian Jurisprudence

- An inheritance of the common law tradition (i.e. an ‘implied’ bill of rights that included free expression)
- More formal *Bill of Rights* eventually enacted federally (1960), but doesn’t have constitutional status
- Free expression becomes a ‘fundamental freedom’ in Section 2(b) of the *Charter of Rights* (1982)
- A specifically Canadian approach?
 - Rights are subject to reasonable limits
 - There is not a formal hierarchy of rights
- Much of the relevant debate(s) in Canada (in a legal context) has focused on the phenomenon of hate speech
 - Arguably the most important because of the centrality of *harm*

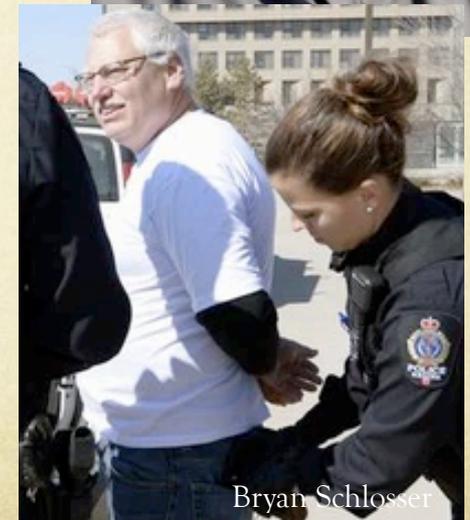
R. v. Keegstra & Canada v. Taylor

- Jim Keegstra: Holocaust denier and teacher
- Hinged on (now) s. 319(2) of the *Criminal Code*: “wilfully promotes hatred against any identifiable group”
 - Upheld by a narrow (4-3) majority
 - A violation of s. 2(b) but reasonable (s. 1)
- John Ross Taylor: notorious fascist and neo-Nazi organizer (i.e. ‘hate hotline’)
- Hinged on (since repealed) s. 13(1) of the *CHRA*: “likely to expose a person or persons to hatred or contempt”
 - Upheld by a narrow (4-3) majority
 - A violation of s. 2(b) but reasonable (s. 1)
 - Hate: “unusually strong and deep-felt emotions of detestation, calumny and vilification”



Saskatchewan (HRC) v. Whatcott

- Bill Whatcott: notorious religious extremist and pamphleteer
- Hinged on s. 14 of the SHRC: “exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground”
- A *unanimous* Court upholds the constitutionality of non-penal hate speech prohibitions
- A refined concept of *hate* and *harm*:
 - “extreme manifestations of the emotion described by the words ‘detestation’ and ‘vilification’”
 - Analysis needs to be ‘objective’ and focus on the effect of expression (rather than intention)
 - “reasonable apprehension of societal harm as a result of hate speech”



Ward v. Quebec (CDPDJ)

- Mike Ward: award winning Quebec stand-up comic (known for dark humour)
- Jérémy Gabriel: famous Quebec singer who lives with Treacher-Collins syndrome
- Hinged on s. 4 and s. 10 of the *Quebec Charter*:
 - “Every person has a right to the safeguard of his dignity, honour and reputation.”
 - “Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on [prohibited grounds].”
- Narrow majority finds that Ward’s jokes targeted Gabriel primarily due to his fame, not his disability in a discriminatory way



The Future of Free Expression?

- The question of reasonable limits for expression is a timeless one, so it's not disappearing anytime soon...
- Intense ideological and political polarization, too
- Three big developments to watch:
 - Proposed legislation that would reanimate non-penal remedies for online hate speech (i.e. Bill C-36)
 - Expansion of traditional broadcasting regulations to the Internet (i.e. Bill C-10)
 - Campus free expression cases that herald greater application of *The Charter* (i.e. in AB and ON)