

Landmark Case

FREEDOM OF EXPRESSION AND ADVERTISING TO CHILDREN: *IRWIN TOY LIMITED v. QUEBEC (AG)*

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Irwin Toy Ltd. v. Quebec (Attorney General) [1989]

Facts

In 1980, Irwin Toy Limited, a toy manufacturer, applied to the Superior Court of Quebec for a declaration that sections 248 and 249 of Quebec's *Consumer Protection Act*, which prohibited advertising directed at children under thirteen years of age, violated the Quebec *Charter of Human Rights and Freedoms*. The court dismissed the application. On appeal, Irwin Toy argued that sections 248 and 249 also violated their s. 2(b) rights to freedom of expression under the *Canadian Charter of Rights and Freedoms*, which had come into force after the case went to trial. The Court of Appeal found that the sections infringed s. 2(b) of the *Charter* and could not be justified under s. 1. The case was appealed to the Supreme Court of Canada.

Freedom of Expression

The *Charter* is part of the Constitution of Canada and protects citizens against actions of the government that violate our fundamental freedoms. Provincial **legislation** must comply with the *Charter*.

Canadian Charter of Rights and Freedoms

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[.]

Because the *Charter* only came into force in 1982, this case, along with two others that were heard at the same time, were the first freedom of expression cases to come before the Supreme Court of Canada. The Court had to create a model that would allow the courts in Canada to decide future cases.

Some of the questions the court considered were:

- What is "expression"?
- Is all "expression" protected by s. 2(b), or are some forms of expression or information excluded from *Charter* protection?

- What if the government didn't *intend* to infringe on the freedom of expression, but its actions had the *effect* of limiting expression?

Justifying a *Charter* Infringement

Even if a government act is found to **infringe** a freedom guaranteed under the *Charter*, that does not automatically make the act unconstitutional. After a court has found that an act violates a *Charter* right, the government has the opportunity to justify the limit by applying s. 1 of the *Charter*.

Canadian Charter of Rights and Freedoms

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.

When arguing that a government act infringes the *Charter*, the **burden of proof** (or "onus") is on the party claiming an infringement to prove on a balance of probabilities that their freedom has been violated. If they are successful, then the onus shifts to the government to justify the limitation under s. 1.

The Supreme Court of Canada created a test to determine a limitation of a *Charter* guarantee. This test is known as the **Oakes Test** because it was developed in the case of *R. v. Oakes*. The courts apply the Oakes Test using the following steps:

1. Is the objective of the legislation pressing and substantial enough (of sufficient importance) in a free and democratic society to justify a limit on a constitutionally guaranteed right or freedom?
2. Are the means chosen by the government to fulfill this objective reasonable (proportional)
 - a. Is there a rational connection between the measures adopted and the objective?
 - b. Do the measures impair the right or freedom as little as possible?
 - c. Are the positive effects of the limit (given the objective) proportional to the negative effects?

If the infringement is justified, then the action will remain constitutionally valid even though it limits a right or freedom.

Appeal to the Quebec Court of Appeal

Irwin Toy disagreed with the trial judge's decision and appealed it to the Quebec Court of Appeal. Since the appeal took place after the *Charter* had come into force, Irwin Toy advanced an entirely new argument in the appeal: that the Quebec law infringed the protection of freedom of expression guaranteed by the *Charter* and was therefore **unconstitutional** and of **no force or effect**.

A majority of the Court of Appeal accepted this argument, allowed the appeal, and struck down the sections of the *Consumer Protection Act* that prevented advertising to children. All three of the Court of Appeal judges agreed that the *Consumer Protection Act* infringed the freedom of

expression guarantee, however one judge thought the infringement was **justifiable** while the other two did not. Since the majority had held that sections 248 and 249 of the law were unconstitutional, the law was **struck down**.

The Majority Opinion of the Supreme Court of Canada

Three out of the five judges agreed with the dissenting judge from the Court of Appeal that sections 248 and 249 of the *Consumer Protection Act* did violate Irwin Toy's s. 2(b) freedom of expression guarantee, but that the infringement could be justified under s. 1 of the *Charter*.

The majority decision began by considering how to determine if the activity in question falls within the scope of the constitutional guarantee. The majority decided that s. 2(b) applies to all activity that 1) conveys a meaning and that 2) does not convey its meaning through a violent form of expression (which is not protected by the *Charter*). If the activity meets this low threshold, then it is expression protected by the *Charter*. The activity in this case met this threshold because advertising conveyed meaning, and did not involve acts of violence.

The next question to consider is whether the government, by its actions, intended to limit protected expression or whether its act had the effect of limiting protected expression. At this stage, the majority made a distinction between **intentional limits**, where the government deliberately sets out to restrict expression or expression-related activities, and **effects-based limits**, where a government policy limits both expressive and non-expressive activity.

The majority found that if the government purpose limited specific content or forms of expression linked to content, then the government had infringed s. 2(b), without further analysis. However, if the government act only led to an effects-based limitation, then the court must decide whether the content that is being restricted relates to the core reasons for protecting expression in a free and democratic society.

The majority identified the three core reasons for protecting expression as:

1. the pursuit of truth;
2. participation in the community; and
3. individual self-fulfillment.

In an effects-based limitation situation, the complainant must prove to the court that the expression falls within one or more of these three categories in order to prove that the government has infringed s. 2(b). If the complainant cannot prove that the content of its expression falls within one of these categories, the s. 2(b) of the *Charter* has not been infringed.

In this case, since the *Consumer Protection Act* deliberately set out to restrict particular content (advertising directed at children under thirteen), it was easy for the majority to decide that the legislation infringed s. 2(b), and there was no need to consider whether the content fit within the three core reasons for protecting expression.

The majority then decided whether the infringement could be justified under s. 1 of the *Charter* by applying the Oakes Test.

1. The first question in the Oakes Test was whether the purpose for passing sections 248 and 249 of the *Consumer Protection Act* qualified as a “pressing and substantial” objective. The majority found that the purpose of the sections was to protect children from the seduction and manipulation by advertisers because children under the age of thirteen are unable to differentiate between reality and fiction or to grasp the goal of advertising. This objective of the legislature was found to be “pressing and substantial.”
2. The court then considered whether the legislation was proportional to the objective.
 - a. The majority stated that there was “no doubt” that there was a rational connection between the objective of preventing advertising directed at children and banning such advertising. The majority noted that the law did not ban advertising of children’s products, just advertising directed at children. It was still legal to advertise children’s products to adults. Therefore, the law is a rational way of avoiding exposing children to manipulative advertisements without preventing any advertising related to children.
 - b. When considering if the legislation was a **minimal impairment** of the right, the majority noted that the court cannot insist on the absolute least, or minimum, limitation of a guaranteed right. Because the government of Quebec was trying to balance the interests of different groups (advertisers and children), the majority held that the court should be deferential to the government. In this case, the majority held that the government’s decision to draw the line at children under the age of thirteen was a minimal impairment, supported by studies that showed that twelve-year-old children can be vulnerable to advertising.
 - c. The majority moved on to consider the final question of the Oakes Test. It held that since advertisers were still able to direct their advertising to adults, who ultimately decide what products to buy for their children, the negative effect of banning advertising to children did not outweigh the positive effect of protecting children from manipulation by those advertisements.

The majority concluded that the government had proven that the limitations on free expression could be reasonably justified in a free and democratic society. As a result, it held that the law did not violate the *Charter* and should be upheld.

The Dissenting Opinion of the Supreme Court of Canada

Two of the five judges disagreed with the views of the majority on the s. 1 analysis.

The judges found that the government did not prove that advertisements caused children any harm and therefore the objective of protecting children from advertising was not pressing and substantial. The dissent noted that the right to free expression is so fundamental in a free and democratic society that any limit on that right must address a proven harm, not just a theoretical harm. The risk posed by advertising to children was not substantial enough to justify limiting free expression. The **dissent** would have struck down the *Consumer Protection Act*.

The Result

The Supreme Court of Canada reversed the decision of the Quebec Court of Appeal and held that sections 248 and 249 of the *Consumer Protection Act* did not violate the *Charter* and were therefore valid.



Classroom Discussion Questions

1. What section of the Canadian *Charter of Rights and Freedoms* protects freedom of expression? Is the *Charter* an ordinary piece of legislation, or does it have special status?
2. In your opinion, why does the *Charter* apply to government actions? Do you agree?
3. Do you think that commercial content (content that has to do with businesses, such as advertising) should be protected by the *Charter*? Is protecting commercial content as important as protecting ideas about politics, religion or society?
4. Why do you think the majority excluded content that involved an act of violence from *Charter* protection?
5. Do you agree with the majority's distinction between a government act that targets content and one that doesn't? Why does one automatically infringe s. 2(b) while the other requires further investigation?
6. Do you agree with the majority's list of the three "core reasons" for protecting free expression? Can you think of other reasons for protecting free speech that aren't listed? Do you think any of the reasons shouldn't be included?
7. Do you think commercials aimed at children fall within any of the three core reasons for protecting expression? Do you think that advertising can fall within the three core reasons?
8. Do you agree that advertising is potentially harmful to children? Or do you agree with the dissent who did not think that advertising was proven to be harmful and could not justify a total ban on such advertising to children aged thirteen and under?
9. Do you think that children under the age of thirteen have a hard time distinguishing between what's real and what's imagined in advertisements? Do you think that adults might have a hard time distinguishing between what's real and what's imagined in advertisements?
10. Who do you think arrived at the right answer: the majority or the dissent



Irwin Toy Ltd. v. Quebec (AG): Worksheet 1

Using your textbook, a dictionary, the *Charter* or any other resources available, define the following terms. They are in **bold** typeface in the case summary.

Application

Appeal

Legislation

Infringe

Burden of Proof

Oakes Test

Unconstitutional

No Force or Effect

Justifiable

Struck Down

Minimal Impairment

Dissent



Irwin Toy Ltd. v. Quebec (AG): Worksheet 2

THE TEST FOR LIMITING FREEDOM OF EXPRESSION: A SUMMARY

In this case, Irwin Toy Ltd. claimed that the *Consumer Protection Act* was unconstitutional and violated citizens' guarantee to freedom of expression. When it is alleged that a certain government action violates one's guarantee to freedom of expression, the court proceeds as follows:

1. The court must determine if the activity in questions falls within expression that is protected by the Charter.

Section 2(b) applies to all activity that:

- a. conveys a meaning
 - b. does not convey its meaning through a violent form of expression
2. If the activity falls within the sphere of protected expression, the court must consider whether the government, by its action, intended to limit protected expression or whether the government action had the effect of limiting protected expression.

Intentional Limit: where the government deliberately sets out to restrict expression or expression-related activities. These limits can be related to content or expression-related activity.

- a. **Content-Based** – when the government deliberately restricts a specific type of expression related to the content of the message. An example of a deliberate content-based limit is a government ban on violent cartoons. The content of the cartoon is the reason for the limitation of expression.
- b. **Expression-Related Activity** – when the government deliberately restricts an action or activity that is related to expression. An example of a limit on expression-related activity would be a ban on handing out flyers. The content of the flyers is not important; it is the action of handing out flyers that is restricted. The activity is directly linked to expression because the main reason to hand out flyers is to communicate with others.

Effects-Based Limit: where a government policy has the effect of limiting both expressive and non-expressive activity. An example of an effects-based limit is a neighbourhood noise restriction. This policy has the effect of limiting activities that do not convey meaning, such as construction work or yard work, but it also has the effect of limiting activities that do convey meaning, such as advertisements from loud speakers.

1. If the court determines that the government action intentionally limits specific content or expression-related activities, then the government has infringed the complainant's s. 2(b) freedom of expression guarantee.

2. If the court determines that the government actions led to an effects-based limitation, then the complainant must prove that the expression being restricted relates to the core reasons for protecting expression, in order to prove the government infringed s. 2(b) of the *Charter*. The three core reasons for protecting expression are:
 - a. the pursuit of truth;
 - b. participation in the community; and
 - c. individual self-fulfillment.
3. If the court determines that there has been an infringement of s. 2(b), the final step is to determine if the infringement is justified under s. 1 of the *Charter*. The court does so by applying the Oakes test.

ACTIVITY

Apply the structures of reasoning set out by the Supreme Court of Canada to the following scenarios. For each scenario, follow the steps outlined above and be prepared to give reasons for the following:

1. Is the expression protected by the *Charter*?
2. If the expression is protected, is the government action placing an intentional or an effects-based limit on it?
3. Has the government infringed the s. 2(b) guarantee to freedom of expression?
4. If so, is the infringement justified under s. 1 of the *Charter*?

Scenario One: A man is arrested and charged with spreading false news after he publishes a pamphlet entitled *Did Six Million Really Die?* In it he suggests that the Holocaust is a myth perpetuated by a worldwide Jewish conspiracy. He is charged under s. 181 of the *Criminal Code of Canada*, which states "[e]very one who wilfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment . . ." The accused claims that s. 181 of the *Criminal Code* infringes the guarantee of freedom of expression in s. 2(b) of the *Canadian Charter of Rights and Freedoms* (see *R. v. Zundel*, [1992] 2 S.C.R. 731 - <http://scc.lexum.umontreal.ca/en/1992/1992rcs2-731/1992rcs2-731.html>)

Scenario Two: On two occasions, a man places posters on hydro poles to advertise upcoming performances of his band. On both occasions he is charged under a city by-law that prohibits poster on public property. The stated purpose of the by-law was that poster on utility poles can be a safety hazard to workers climbing them, a traffic hazard if placed facing traffic, and a visual and aesthetic eyesore, contributing to litter if left too long. The accused claims that an absolute ban on such poster on infringes his *Charter* guarantee to freedom of expression. (see *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084 - <http://scc.lexum.umontreal.ca/en/1993/1993rcs2-1084/1993rcs2-1084.html>)

Scenario Three: A man is stopped after Canadian Customs officers find a collection of computer discs entitled 'boyabuse' in his belongings. A subsequent search of his apartment reveals a photo collection of nude teenage boys, some engaged in sexual acts. He is charged with two counts of possession of child pornography under s. 163.1(4) of the *Criminal Code of Canada* and two counts of possession of child pornography for the purposes of distribution or sale under s. 163.1(3). The accused challenged the constitutionality of s. 163.1(4) of the *Code*, alleging a violation of his constitutional guarantee of freedom of expression. (see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 - <http://scc.lexum.umontreal.ca/en/2001/2001scc2/2001scc2.html>)

Scenario Four: A leading newspaper company brings forth an application to declare that s. 322.1 of the *Canada Elections Act* violates freedom of expression guaranteed by s. 2(b) of the *Charter*. Section 322.1 prohibits the broadcasting, publication or dissemination of opinion survey results during the final three days of a federal election campaign. (see *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 - <http://scc.lexum.umontreal.ca/en/1998/1998rcs1-877/1998rcs1-877.html>)



Irwin Toy Ltd. v. Quebec (AG): Worksheet 3

PART A – WHAT DO YOU THINK ABOUT ADVERTISING?

Read each of the following statements aloud and have students form a line in the classroom with one end representing *Strongly Agree* and the other representing *Strongly Disagree*. Give students time to discuss their reasons for their points of view with their neighbours. Then, fold the line in half so that students can discuss their opinions with those of opposing viewpoints. Have a group discussion afterwards to hear different points of view.

1. Advertisements influence what I buy.
2. Advertisements have a negative effect on children.
3. Children under the age of thirteen can tell the difference between something that is real and something that is imaginary.
4. Children influence how their parents spend their money.
5. The government should ban advertising to children under thirteen years old.
6. The risks of advertising to children under thirteen justify a limit on freedom of expression.

PART B – A CLOSER LOOK AT ADVERTISEMENTS

- i) Discuss how advertisers target particular demographic groups with their advertisements, and what differences exist between ads targeted towards adults versus children. Have students examine some of the differences between child- and adult-directed ads by choosing four advertisements to examine in greater detail. Two ads should target children and two should target adults. Students should choose one print ad and one television ad for each demographic.

Answer the following questions for each advertisement.

What product is being advertised?

Who is the target audience and how do you know?

What are the physical characteristics of the ad (i.e. colours, setting, location, people)?

What advertising strategies are being used (i.e. celebrities, cartoons, sex appeal, size, “cool” factor)?

What message is being conveyed?

Share your advertisements with a group of three or four classmates. Together, create a comprehensive list of the similarities and differences between adult- and child-directed advertisements. Include details about advertising techniques, physical features and the messages being conveyed.

- ii) Choose a product for which you will create two different print advertisements. One ad will target adults and the other will target children. You must use the same product for each ad campaign so try to choose something that could potentially appeal to both adults and children,

depending on how it is marketed. Once finished, present both of your ad campaigns to the class and explain the differences between the adult- and child-directed ads. Be prepared to justify your reasons for choosing different advertising techniques and messages.

iii) Follow-up questions

1. What advertising techniques are used to target adults? Children?
2. What changes did you make in your ad campaigns when switching from an adult-directed ad to a child-directed ad? Did these change the message(s) conveyed?
3. Do you think children need to be protected from advertisements? Why or why not? Are there particular types of ads that are more harmful than others?
4. Should protecting children from advertising be a responsibility of parents or the courts?
5. Imagine that you work for the provincial government and you're drafting a new law to regulate advertising directed at children. What restrictions/guidelines would you include?
6. Do you think that a limit to advertisers' freedom of expression is justified in the case of banning advertisements to children under thirteen? Why or why not?

PART C – DRAWING A CONCLUSION

Read the following two statements:

The right to free expression is so fundamental in a free and democratic society that any limit on that right must address a proven harm, not just a theoretical harm. The risk posed by advertising to children is not substantial enough to justify limiting free expression.

Restricting advertisers' constitutional guarantee to freedom of expression is justified under s. 1 of the *Charter* because the negative effect of banning advertising to children does not outweigh the positive effect of protecting children from manipulation by those advertisements.

1. Choose which statement best reflects your views and write a one-two page response identifying your position and giving supporting arguments for it.
2. Find a partner who has the opposite view. Debate the merits of your position with your partner.