

**THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION, RICHARD MOON (TORONTO: UNIVERSITY OF TORONTO PRESS, 2000)**

It is an irony of Canadian constitutional law that, while freedom of expression has been constitutionally protected for more than 20 years<sup>1</sup> and has been repeatedly identified by the Supreme Court of Canada as being one of our most critical and fundamental rights,<sup>2</sup> we are still struggling to determine exactly what freedom of expression means. Under s. 2(b) of the *Charter*, the Supreme Court of Canada has defined freedom of expression in very broad terms, finding that expression is any non-violent activity intended to convey meaning and that freedom of expression is infringed by any law that, either by purpose or in effect, restricts that meaning.<sup>3</sup> Owing to this sweeping definition, freedom of expression challenges have been increasingly forced to the second stage of *Charter* analysis,<sup>4</sup> which involves determining whether a given restriction on freedom of expression should be upheld as a reasonable limit “demonstrably justified in a free and democratic society” under s. 1 of the *Charter*.<sup>5</sup> The s. 1 analysis requires a balancing between the interests of society at large and the value of freedom of expression, an exercise that again necessarily raises the question of what freedom of expression means in our society. The broad definition of freedom of expression under s. 2(b) of the *Charter* is of limited use in the s. 1 analysis, where the courts are forced to redefine the scope of freedom of expression in terms of the values or purposes served by free expression and the context in which the right is restricted.

The challenge of constructing a rational and useful constitutional definition of freedom of expression is the subject of Richard Moon’s book, *The Constitutional Protection of Freedom*

<sup>1</sup> Freedom of Expression became an entrenched constitutional right in 1982 with the passage of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 2(b) of the *Charter* provides that: “Everyone has the following fundamental freedoms ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

<sup>2</sup> For example, in the recent case of *R. v. Guignard*, [2002] 1 S.C.R. 472 at para. 19 [*Guignard*], the Supreme Court of Canada commented on the Court’s recognition of the “fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy” and stated: “This Court attaches great weight to freedom of expression. Since the *Charter* came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law.”

<sup>3</sup> *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 at 969-70, 978-79 [*Irwin Toy*]. According to the test established in *Irwin Toy*, a law that has the purpose of restricting expression will contravene s. 2(b) of the *Charter*. As stated by the Court, *ibid.* at 977, a law that has a different purpose but that has the effect of restricting expression contravenes s. 2(b) of the *Charter* only if the expression in question reflects the core values of the “pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.”

<sup>4</sup> This is because the broad definition of freedom of expression results in a challenged law easily being found by the courts to violate the s. 2(b) right or because the likelihood of such a finding in the face of the broad definition of freedom of expression causes the government to concede such a violation.

<sup>5</sup> Whenever legislation is challenged on the basis of an alleged *Charter* violation, at minimum a two-step analysis must be undertaken. The first step is to determine if the law in question violates a substantive *Charter* right. If a *Charter* right is not infringed, the legislation is constitutionally valid. If a *Charter* right is infringed, however, the court moves on to the second step of the analysis, which is to determine whether the violation is “saved” by s. 1 of the *Charter*, which provides that: “[t]he *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.”

of Expression.<sup>6</sup> Published in 2000, the book has received many complimentary reviews<sup>7</sup> and has been lauded as “objective, interesting, and enjoyable”<sup>8</sup> and as an “insightful and comprehensive study of the right to freedom of expression in Canadian constitutional law.”<sup>9</sup> While the depth of Moon’s analysis places this book more in the category of an advanced (as opposed to an introductory) study of Canada’s constitutional protection of freedom of expression, the book is written in a very clear, readable, and engaging manner, offering valuable information and insights for all scholars of Canadian constitutional law. Moon challenges his readers to think outside of the parameters that have been set by the courts to date and to define freedom of expression in a purposeful manner that acknowledges the overall value of communication in society and that recognizes the fact that effective communication is frequently resource dependent.

Moon’s central thesis is that the constitutional protection of freedom of expression in Canada has been improperly focused on freedom of expression as an individual experience, an approach which fails to recognize the inherently social nature of expression. According to Moon, Canadian courts have failed to protect freedom of expression in a consistent, meaningful, rational, and predictable way because the courts have conceptualized this right in individualistic terms. Moon points out that the court’s treatment of freedom of expression as an individual right has restricted the constitutional protection of this right to a freedom from state interference rather than developing the right as a robust guarantee of the opportunity and ability to communicate and exchange ideas with other people. Moon also suggests that the court’s failure to give due recognition to the social aspects of the right to free expression is responsible for incongruence and irrationality in the court’s reasoning when applying the two steps of *Charter* analysis. According to Moon, when applying s. 2(b) of the *Charter*, the court adopts a broad definition of expression that “rests on a conception of the individual as a free and rational being,”<sup>10</sup> but when applying s. 1 of the *Charter* the court focuses on whether harm is caused by the restricted expression, an analysis that leads the court to conceive of the individual as “irrational, manipulable, and directed by unchosen preferences or desires.”<sup>11</sup> Moon suggests that more reasonable limits for acceptable restrictions on freedom of expression could be established if the courts recognized and addressed the social circumstances of communication rather than focusing primarily on the clashing of individual and state interests.

Moon is very methodical in making his case. The first two chapters of the book are essays that summarize and lay the theoretical foundation for Moon’s thesis. In Chapter 1, “Truth, Democracy and Autonomy,” Moon discusses the values of truth, democracy, and autonomy, which the courts have traditionally relied upon to justify freedom of expression. Moon argues that these individualistic values in fact “rest on a common recognition that human agency

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<sup>6</sup> *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000).

<sup>7</sup> See e.g. Stefan Gruskza, “Book Review” (2002) 65 Sask. L. Rev. 275; Colin Farrelly, “The Social Character of Freedom of Expression” (2001) 14 Can. J.L. & Jur. 261; Denise Meyerson, “Review Article: The Legitimate Extent of Freedom of Expression” (2002) 52 U.T.L.J. 331; and Brad J. Wallace, “Book Review: Richard Moon, Constitutional Protection of Freedom of Expression” (2002) 13 Windsor Rev. Legal & Soc. Issues 173.

<sup>8</sup> Gruskza, *ibid.* at 275.

<sup>9</sup> Farrelly, *supra* note 7 at 261.

<sup>10</sup> *Supra* note 6 at 54.

<sup>11</sup> *Ibid.* at 55.

emerges in communicative interaction”<sup>12</sup> and that each of the identified values “represents a particular perspective on, or dimension of, the constitution of human agency in community life.”<sup>13</sup> In Chapter 2, “The Constitutional Adjudication of Freedom of Expression” Moon generally discusses the way in which Canadian courts have applied the two step *Charter* analysis to freedom of expression cases and argues that the “suppression of the social and material character of freedom of expression makes it difficult for the courts to explain the freedom’s value and harm and to determine its proper scope and limits.”<sup>14</sup> The next five chapters of the book are devoted to particular freedom of expression issues<sup>15</sup> and an analysis of how the court’s individualistic perception of freedom of expression has failed to provide a consistently rational, predictable, and robust resolution of each of these problem areas. Finally, in Chapter 8, “Freedom of Expression and Judicial Review,” Moon briefly concludes with some comments on the scope of judicial review and freedom of expression, noting that, in the end, courts may be ill-equipped to resolve the complex concerns raised by the right to freedom of expression because “freedom of expression is not a discrete concern than can be isolated from larger questions of social/economic power”<sup>16</sup> and “[for] both structural and political reasons, the courts are not well-positioned to engage in a review of the distribution of communicative resources or to assess the relative harm or value of expression, which turns in part on social/economic conditions.”<sup>17</sup> Moon ends his analysis by expressing his concern that the limits of judicial review may result in the court obstructing legislative efforts to redistribute communicative power and narrowing our definition of freedom of expression: “As more and more of our discussion of freedom of expression is framed as constitutional argument, it may become natural to think of the freedom as an individual right against state interference.”<sup>18</sup>

Is Moon correct in his assertion that our constitutional protection of freedom of expression has been inhibited by the court’s focus on the individual, rather than the social aspects of this right? This question remains open for debate. It is arguable whether the constitutional protection of freedom of expression would be more clear or predictable if the court adopted Moon’s perception of freedom of expression. Rather than being a negative, however, the possibility of such debate is a credit to Moon’s book and to the ideas that he presents. A further credit to Moon’s book is the fact that this debate remains pertinent three years after the book’s publication and despite significant freedom of expression rulings by the Supreme Court of Canada in those years.<sup>19</sup> Moon challenges us to evaluate the court’s approach and to consider how and whether our values are actually reflected in freedom of expression jurisprudence under the *Charter*.

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<sup>12</sup> *Ibid.* at 8.

<sup>13</sup> *Ibid.* at 9.

<sup>14</sup> *Ibid.* at 33.

<sup>15</sup> The titles of each Chapter reflect the particular problem area discussed. They are: Chapter 3, “The Regulation of Commercial and Political Advertising”; Chapter 4, “The Regulation of Pornography”; Chapter 5, “The Regulation of Racist Expression”; Chapter 6, “Access to State-Owned Property”; and Chapter 7, “Compelled Expression and Freedom of the Press.”

<sup>16</sup> Moon, *supra* note 6 at 218.

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 219.

<sup>19</sup> See *e.g.* *R. v. Sharpe*, [2001] 1 S.C.R. 45; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; and *Guignard*, *supra* note 2.

One important question that is raised, but not answered by Moon's analysis is whether Canadian courts *can* properly focus on the social aspects of freedom of expression, given the construct of the *Charter* right. If the purpose of the *Charter* is to prohibit unjustified state intrusion into the activities of individuals, is the court not correct in confining its understanding of s. 2(b) to this issue? For the most part, Moon's book focuses on the actions of the courts in defining freedom of expression, hinting only occasionally at the possibility of the court's interpretations necessarily resulting from the structure of the constitutional document under consideration. The title of the book seems to encompass the possibility of addressing this point and this question is hinted at in Moon's concluding Chapter, but Moon does not directly or thoroughly address this issue. As suggested above, however, the enduring strength of Moon's book may well lie in the questions it raises rather than in the answers it provides.

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