The 2019 Judicial Freedom Index

An analysis of Supreme Court of Canada rulings on *Charter* section 2 fundamental freedoms, 1982-2018

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INTRODUCTION

The *Canadian Charter of Rights and Freedoms* ("*Charter*") is a document of paramount importance in Canada. The *Charter* delineates the rights and freedoms of individuals, but also authorizes all levels of Canadian government to restrict those same rights and freedoms.

Section 2 of the *Charter* states:

> Everyone has the following fundamental freedoms:
> a) freedom of conscience and religion;
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> c) freedom of peaceful assembly; and
> d) freedom of association.

These freedoms are identified as "fundamental" because they form the very foundation of our free society. However, section 1 of the *Charter* states:

> 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.

There are several ways a fundamental freedom can be infringed by the government. One is through the creation and implementation of a law, regulation or policy. Another is through a decision made by government, or by a governmental body that exercises delegated authority.

The Supreme Court of Canada (hereafter "the Court" or "SCC") is the ultimate authority on how the fundamental freedoms protected in section 2 of the *Charter* are interpreted.

When, how and why the government restricts Canadians' fundamental freedoms has a profound effect on how free Canada's society remains. The Judicial Freedom Index analyzes how frequently, and in what ways, the Court has allowed the federal and provincial governments and governmental authorities to limit the *Charter* section 2 freedoms of Canadians.

Prior to 2012, all laws and all government decisions that impacted *Charter* rights were analyzed using a single legal test known as the "*Oakes* test." This rigorous, multi-step test required government to meet several requirements before a law or government decision could be considered justified under section 1 of the *Charter* as a reasonable limitation on a fundamental freedom in a free and democratic society. Using the *Oakes* test, Canadian courts will uphold laws that infringe freedoms if the court is sufficiently convinced by the government's claim that there is a pressing and substantial social concern underpinning the law, that the violation of freedom caused by the means used to achieve the legislative goal is rationally connected to that goal and is narrowly tailored to achieve the goal and that the severity of the violation of the freedom is proportionate to the claimed benefit.

Currently, however, the *Oakes* test is used only when laws and regulations are evaluated for their constitutionality. For government decisions, as opposed to laws and regulations, the Supreme Court of Canada has adopted a slightly lower standard that makes it easier to justify violating citizens' freedoms.

In *Doré v. Barreau du Québec*, 2012 SCC 12, the Court ruled that a more relaxed analysis than that of the Oakes test should be used in the context of decisions made by administrative decision-makers such as human rights tribunals and government regulatory bodies such as law societies. Instead of justifying limitations of fundamental *Charter* freedoms by conforming to the multi-step and specific *Oakes* test, government decision-makers now need only demonstrate that their *Charter*-freedom-infringing decision is within a range of "reasonable" outcomes. A government decision will be considered "reasonable" if it "proportionately balances" the *Charter* "values" engaged by the decision with the government's legislative objectives.

The replacement of the *Oakes* test by the *Doré* test, in regard to many governmental decisions, represents a significant set-back for the protection of Canadians' fundamental *Charter* freedoms.

EXECUTIVE SUMMARY

When it comes to defending the fundamental freedoms of Canadians, some judges are more likely to approve of government violations of *Charter* freedoms than others. The *Judicial Freedom Index* reviews 63 Supreme Court of Canada judgments, rendered from 1982 to 2018, in respect of the *Charter* section 2 freedoms of conscience, religion, thought, belief, opinion, expression and association. The Court sided with government in 38 of these cases, roughly three fifths of the time, by holding that no *Charter* freedom had been limited, or by justifying the limitation. The challenger, asserting that one or more *Charter* freedoms had been infringed by a government law, policy or decision, was vindicated in 25 of the 63 cases.

In some judgments, the Court's rulings on *Charter* freedoms are unanimous, and therefore do not reveal any differences in the attitudes of judges, or the paradigms they use. When all judges rule unanimously to accept or reject the claims of a *Charter* litigant, it is possible to assume that the judges are simply relying on legal texts and precedents, regardless of their personal beliefs, values and assumptions.

But the Court's split decisions reveal a tendency on the part of some judges to rule in favour of the individuals whose *Charter* freedoms have been infringed, while other judges clearly tend to justify government encroachment on citizens' freedoms.

For example, in 23 decisions where the Court was divided between a majority and a dissent, Chief Justice Beverley McLachlin ruled for the challenger 14 times, and for the government 10 times. This is quite different from the Court as a whole, which in split decisions ruled for the challenger less than one third of the time. Likewise, former Justices John Major and Louise Arbour displayed an even stronger tendency to rule against the government, deciding for the challenger in two thirds of the cases where the court was split. Former Justice Frank Iacobucci ruled for the challenger in seven of ten split decisions. The voting records of these four judges show a significant departure from the Court as a whole, and from judges who ruled in favour of the government in split decisions.

In contrast to Justices McLachlin, Major, Arbour and Iacobucci, other judges have a track record of justifying the government's limitations of fundamental *Charter* freedoms. In split rulings on whether to restrict freedom of expression and freedom of religion, Justices Marie Deschamps, Louise Charron and Marshall Rothstein sided with the government 100% of the time. In similar

fashion, Justice Charles Gonthier voted to uphold freedom-diminishing laws and policies 90% of the time, former Chief Justice Brian Dickson 83% of the time and Justice Claire L'Heureux-Dube 78% of the time.

For every case which the Supreme Court chooses to hear, all of the judges are presented with the same facts, the same arguments and the same precedents (legal authorities). Apart from the personal beliefs, values, and philosophical assumptions of individual judges, what accounts for these different tendencies to rule for the *Charter* claimant, or for the government?

The attitudes and paradigms (underlying beliefs) of individual judges are also revealed in cases where unions have challenged government laws and decisions as infringing the union's *Charter* freedom of association. In split decisions, the Court's majority ruled for the union half of the time; governments won the other half of the cases. Yet in these cases Justices Rosalie Abella and Bertha Wilson have ruled in favour of unions 100% of the time, whereas Justices Gérard La Forest and Marshall Rothstein have ruled in favour of the government 100% of the time.

The central purpose of the *Charter* is to protect unpopular minorities from the tyranny of the majority, even—or especially—when the majority has the best of intentions. When interpreted by judges who cherish the free society, the *Charter* can protect people who express opinions which the majority sees as wrong, false or extreme; and protect people who practice religious beliefs that are out of favour with secular elites.

Canadians who wish to preserve the core freedoms on which our society is based would be well served by understanding the track records of our Supreme Court judges on fundamental *Charter* freedoms, and understanding what influences judicial decision-making at the Supreme Court of Canada.

ATTITUDINAL DECISION-MAKING

One of the purposes of the *Judicial Freedom Index* is to demonstrate the decision-making tendencies of Supreme Court justices in cases concerning fundamental *Charter* freedoms. In this respect, this study finds itself within the corpus of previous research outlining theories and predictions of judicial behaviour. Particularly, this study attempts to use statistical data to highlight the "Attitudinal Decision-Making" of judges.

Professors Jeffrey Segal and Harold Spaeth argue that the "attitudinal" theory is the greatest model for predicting the judicial behaviour of justices of the U.S. Supreme Court.[1] The attitudinal model uses an interdisciplinary framework, drawing from other academic disciplines, such as political science, to argue that the primary motivator in judicial decision-making is the "attitude" of a judge.[2] In other words, judges' beliefs, values, and political ideologies play a crucial role in their decision-making.[3] Therefore, the political leanings and policy goals of a given judge, combined with the specific facts of the dispute, can predict the outcome of a judicial decision, or at least contribute to explaining the decision after the fact.

[1] Harold Spaeth and Jeffrey Segal, *The Supreme Court and the Attitudinal Model Revisited*, (New York: Cambridge University Press, 2002).
[2] *Ibid* at 86.
[3] *Ibid* at 92-96.

This theory rejects as "pervasive myth" the notion that "judges simply rely on legal texts, precedents, the intent of the framers of the Constitution and the toolbox of law school training to guide their judgments and written opinions."[4] According to certain commentators, this is particularly true in the context of Supreme Court decision-making, where judges have the benefit of precedent "on both sides of the legal issue" and are therefore "free to simply select precedents that reflect their own point of view".[5]

Understanding what influences judicial decision-making at the Supreme Court of Canada is important, particularly with regard to *Charter* issues. As commentators Ostberg and Wetstein note: "The *Charter* has clearly placed the Court centre-stage in some of the most dramatic policy debates pertaining to issues such as gay rights, Aboriginal territorial claims, abortion, health care, and minority language rights."[6] Indeed, in 2007, Ostberg and Wetstein concluded that their findings "suggest that the attitudinal model provides a persuasive account of judicial decision making in Canada"[7] and that "this model could play a central role in explaining judicial conflict within the post-*Charter* Canadian Court."[8]

Attitudinal decision-making has been explored by numerous academics in an attempt to more thoroughly understand and predict future Supreme Court Decisions. C.L. Ostberg, Matthew Wetstein and Craig Ducat's article titled *Attitudinal Dimensions of Supreme Court Decision Making in Canada: The Lamer Court, 1991-1995* examines the voting behavior of Canadian Supreme Court Justices in non-unanimous post-*Charter* cases that were decided during the first five years of the Lamer Court (when Justice Lamer was the Chief Justice of the Court, 1991-1995 inclusive). This article was later published in 2007 by UBC Press.

In 2004, C.L. Ostberg, Susan Johnson, Donald Songer and Matthew Wetstein published a similar article called *Attitudinal Decision Making in the Supreme Court of Canada*. This study sought to add to the current understanding of the ideological nature of the Supreme Court of Canada, analyzing a data set consisting of all non-unanimous published Supreme Court decisions for the period 1949 to 2000. In 2007, the *Canadian Journal of Political Science* published this journal article, under the title *Judicial Decision Making on the Supreme Court of Canada: Updating the Personal Attribute Model*.

In 2012, McGill-Queen's University Press published the book *Law, Ideology, and Collegiality – Judicial behaviour in the Supreme Court of Canada* by Donald Songer, Susan Johnson, C.L. Ostberg and Matthew Wetstein. This study taps into the justices' perceived ideological tendencies and provides a critical examination of the ideological roots of judicial decision-making, uncovering the complexity of contemporary judicial behaviour.

In light of this, and with the departure of Chief Justice Beverly McLachlin from the Supreme Court of Canada in June of 2018, this study tracks relevant patterns and trends of Canada's highest court in cases that deal with the fundamental freedoms of conscience and religion, expression and association.

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[4] CL Ostberg and Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada*, (Vancouver: UBC Press, 2007) at 5-6.
[5] *Ibid* at 9 citing Harold Spaeth and Jeffrey Segal, *Majority Rule or Minority Will: Adherence to precedence on the U.S. Supreme Court*, (New York: Cambridge University Press, 1999) at 290.
[6] CL Ostberg and Matthew E Wetstein, *ibid* at 1.
[7] *Ibid* at 7.
[8] *Ibid* at 10.

METHODOLOGY

This study reviews all of the decisions by the Supreme Court of Canada ("SCC") that have substantially involved the *Charter* section 2 fundamental freedoms, from 1982 to 2018.

Certain SCC judgments have been excluded from this study, despite containing some reference to section 2 of the *Charter*. We exclude these cases because they lack significant analysis or discussion of fundamental freedoms; or because there is no "government versus challenger" fact pattern; or because the *Charter* section 2 fundamental freedom competes not against government action (a government's law, policy or decision), but rather against a competing individual liberty interest, such as the right to a fair trial. These excluded cases, as well as a brief explanation as to why they were excluded, can be found at Appendix "A" to this study.

The SCC cases on which this study is based have been divided into three parts that correspond with the fundamental freedoms identified in the *Charter*: section 2(a) freedom of conscience and religion, section 2(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication, and section 2(d) freedom of association. To date, the Court has not ruled on cases primarily involving *Charter* 2(c) freedom of expression. A fourth segment considers a small but different group of cases in which the challenger is a union that asserts rights or powers of the union as part of *Charter* section 2(d) freedom of association. For each of these four parts, the relevant cases will be listed chronologically, with a brief description of the facts and legal issues. Cases in the first three parts will be classified as either "pro-government" or "pro-challenger," whereas cases in the fourth part will be classified as either "pro-government" or "pro-union."

Also listed will be the particular justices that participated in each decision and, in the case of a split decision, whether they were part of a majority judgement, a minority concurring decision, or a dissent. The Supreme Court normally consists of nine members, but some cases are decided by fewer judges. In some cases, the justices have opposing opinions and produce a majority judgment along with a dissent. Other times the justices agree on the outcome of a particular case, but differ in their reasons as to why that outcome is preferred, resulting in a majority judgement accompanied by one or more minority concurring opinions. For example, in *Loyola High School v Quebec (Attorney General)*[9], the court agreed unanimously that *Charter* section 2(a) freedom of religion and conscience had been infringed unjustifiably by the government, but the concurring minority opinion was more forceful in its defence of this fundamental freedom.

The goal of the Judicial Freedom Index is to identify to what degree individual justices have upheld and supported *Charter* freedoms or narrowed and restricted them.

ANALYSIS OF CANADA'S SUPREME COURT JUSTICES IN 2019

OVERVIEW

Of the nine current justices, all but three were appointed by Prime Minister Stephen Harper. Justices Rowe and Martin were appointed by Prime Minister Justin Trudeau in 2016 and 2017, respectively, while Justice Abella was appointed in 2004 by Prime Minister Paul Martin. Justice

[9] *Ibid* at 10.

Abella is, by far, the longest serving justice of the Supreme Court at this time, having served almost twice as long as any other current justice.

The average age of the current Supreme Court bench is 63 years old. Supreme Court Justices are required by the *Supreme Court Act* to retire upon reaching the age of 75. As the youngest of the current judges, Justice Brown has the possibility of remaining on the bench for approximately 22 more years, not being required to retire until the year 2040.

As the longest sitting judge, Justice Abella has ruled on 23 *Charter* section 2 cases, more than double that of the second and third longest sitting justices, Justices Karakatsanis and Moldaver, who have both ruled on nine *Charter* Section 2 cases since their appointments in 2011.

As explained in the methodology above, when all judges rule unanimously to accept (or reject) the claims of a *Charter* litigant, it is possible to assume that the judges are simply relying on legal texts and precedents, regardless of their personal beliefs, values and assumptions. But the Court's split decisions reveal a tendency on the part of particular judges to rule in favour of the individuals whose *Charter* freedoms have been infringed, while other judges clearly tend to justify government encroachment on citizens' rights. An analysis of the current nine justices, when ruling in split decisions, reveal some noteworthy patterns.

THREE GROUPS, THREE DIFFERING APPROACHES

In split decisions, the Court can be sharply divided into three distinct groups: consistently pro-government (Justices Gascon, Karakatsanis and Rowe); consistently pro-challenger (Justices Brown and Côté); and pro-challenger in freedom of expression challenges, but pro-government in freedom of conscience and religion challenges (Justices Abella, Moldaver and Wagner). At this time, Justice Martin has not yet rendered a sufficiently large number of decisions to ascertain which of these three groups (if any) she might belong to.

There is an interesting correlation between ruling tendencies among judges in "union versus government" cases and in "*Charter* challenger versus government" cases. In split decisions, Justices Brown and Côté rule for challengers in "challenger versus government" cases, and rule for governments in "union versus government" cases. In the recent section 2(d) union case of *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, the seven judges who ruled in favour of the union, are unsympathetic, to varying degrees, to individual *Charter* litigants asserting their freedoms under Charter section 2(a) conscience and religion and/or Charter section 2(b) freedom of expression.

INDIVIDUAL ANALYSIS

Justice ABELLA

During her 14 years on the Supreme Court, Justice Abella has ruled in favour of challengers in 50% of split decisions involving *Charter* section 2 freedoms. However, for split rulings in cases regarding freedom of conscience and religion, Justice Abella has justified the government's limitations on freedom of religion and conscience in 75% of decisions, compared to siding with the government in only 33% of split decisions involving freedom of expression. This suggests a more positive attitude toward freedom of expression than toward freedom of conscience and religion. In

the five split decisions where a union challenged government, Justice Abella has ruled in favour of unions 100% of the time.

Justice BROWN
In the approximately three years that Justice Brown has been on the bench, in split decisions he has ruled in favour of challengers 100% of the time. In the single split decision in which the challenger was a union, Justice Brown ruled for the government.

Justice CÔTÉ
Like Justice Brown, Justice Côté has thus far ruled in favour of individual challengers 100% of the time in split decisions, and against unions 100% of the time in split decisions where a union challenged government. In fact, in all split decisions in which both Justice Brown and Justice Côté participated, they have ruled exactly the same, the Trinity Western University cases being prominent examples. Unlike some members of the bench, Justice Brown and Justice Côté have not displayed a different attitude as between section 2(b) freedom of expression and section 2(a) freedom of conscience and religion.

Justice GASCON
Justice Gascon has participated in eight of the Supreme Court's rulings involving section 2 freedoms, excluding section 2(d) union cases. In stark contrast to Justices Brown and Côté, in split decisions Justice Gascon has never ruled in favour of challengers. He has only ruled in one split section 2(d) union case, but, as is consistent with the attitudinal decision making of justices who rule against individual challengers, he ruled in favour of the union.

Justice KARAKATSANIS
Like Justice Gascon, Justice Karakatsanis has ruled in favour of government in 100% of split decisions involving section 2 freedoms, excluding section 2(d) union cases. Justice Karakatsanis, who has been on the Court eight years, has ruled in favour of unions 75% of the time in the four split decisions where a union challenged government.

Justice MARTIN
Justice Martin is the most recent Supreme Court Justice, having been appointed by Prime Minister Justin Trudeau in December 2017. As of the end of 2018, Justice Martin has only ruled on one freedom of expression case, a unanimous decision, and one section 2(d) union case, a split decision where she found in favour of the union. Ruling in favour of unions in split decisions is typically an indication that a Justice will tend to rule against individual challengers in freedom of expression and freedom of conscience and religion cases, but only time will tell if this becomes true of Justice Martin.

Justice MOLDAVER
Justice Moldaver has ruled in favour of government 67% of the time, in split decisions involving section 2 freedoms, excluding union cases. Like Justice Abella, he tends to rule against challengers in split decisions involving freedom of conscience and religion, but rules in favour of challengers in split decisions involving freedom of expression. In keeping with most other members of the bench who do not have a strong record of finding in favour of challengers, Justice Moldaver ruled in favour of the union in the single split section 2(d) union case he has participated in.

Justice ROWE

Justice Rowe, like Justices Gascon and Karakatsanis, has never ruled in favour of challengers in split decisions. He has also only ruled in one split section 2(d) union case, and ruled in favour of the union. Justice Rowe has ruled on fewer section 2 cases than Justice Gascon, but his record to date suggests a similar attitude.

Chief Justice WAGNER

Chief Justice Wagner was appointed to the Supreme Court of Canada in 2012 by former Prime Minister Stephen Harper, and appointed Chief Justice in December 2017 by Prime Minister Justin Trudeau, replacing the retiring Chief Justice McLachlin. So far, Chief Justice Wagner has been the least predictable justice in split decisions involving section 2 freedoms, and has a mixed record. In split decisions involving a union as challenger, he has ruled in favour of unions 50% of the time. This suggests that Chief Justice Wagner is the only Justice who, in comparison with other judges, is neither pro-union nor anti-union. He does, however, appear to share a similar attitude toward the freedoms of conscience and religion and expression as Justices Abella and Moldaver, expressing greater sympathy for freedom of expression than for freedom of conscience and religion.

CHARTS

CURRENT NINE JUDGES – 2019

SECTION 2(A) FREEDOM OF CONSCIENCE AND RELIGION

Name of Justice	Total no. of 2(a) Cases	Total no. of 2(a) Split Cases	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Abella	**10**	**4**	**1**	**3**
Brown	**3**	**2**	**2**	**0**
Côté	**3**	**2**	**2**	**0**
Gascon	**4**	**2**	**0**	**2**
Karakatsanis	**5**	**2**	**0**	**2**
Martin	**0**	**0**	**0**	**0**
Moldaver	**5**	**2**	**0**	**2**
Rowe	**3**	**2**	**0**	**2**
Wagner	**4**	**2**	**0**	**2**

SECTION 2(B) FREEDOM OF EXPRESSION

Name of Justice	Total no. of 2(b) Cases	Total no. of 2(b) Split Cases	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Abella	**13**	**6**	**4**	**2**
Brown	**3**	**1**	**1**	**0**
Côté	**3**	**1**	**1**	**0**
Gascon	**3**	**1**	**0**	**1**
Karakatsanis	**4**	**1**	**0**	**1**
Martin	**1**	**0**	**0**	**0**
Moldaver	**4**	**1**	**1**	**0**
Rowe	**2**	**1**	**0**	**1**
Wagner	**4**	**1**	**1**	**0**

TOTAL SECTION 2 CASES

(Excluding s. 2(d) union cases)

Name of Justice	Total no. of Section 2 Cases	Total no. of Section 2 Split Cases	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Abella	**23**	**10**	**5**	**5**
Brown	**6**	**3**	**3**	**0**
Côté	**6**	**3**	**3**	**0**
Gascon	**7**	**3**	**0**	**3**
Karakatsanis	**9**	**3**	**0**	**3**
Martin	**1**	**0**	**0**	**0**
Moldaver	**9**	**3**	**1**	**2**
Rowe	**5**	**3**	**0**	**3**
Wagner	**8**	**3**	**1**	**2**

SECTION 2(D) FREEDOM OF ASSOCIATION – UNION CASES

Name of Justice	Total no. of 2(d) Union Cases	Total no. of 2(d) Union Split Cases	No. of Pro-Union in Split Rulings	No. of Pro-Government in Split Rulings
Abella	**5**	**5**	**5**	**0**
Brown	**1**	**1**	**0**	**1**
Côté	**1**	**1**	**0**	**1**
Gascon	**1**	**1**	**1**	**0**
Karakatsanis	**4**	**4**	**3**	**1**
Martin	**1**	**1**	**1**	**0**
Moldaver	**1**	**1**	**1**	**0**
Rowe	**1**	**1**	**1**	**0**
Wagner	**4**	**4**	**2**	**2**

OVERVIEW OF 2018

Our analysis of Supreme Court rulings on *Charter* section 2 fundamental freedoms includes five cases from 2018; four cases where an individual challenged a law or government policy and one case where a union challenged government policy or law. Full descriptions of these cases can be found in the Case Summaries section. Below is commentary on the most important decisions impacting *Charter* section 2 fundamental freedoms, including one case that was not included in our analysis because it did not involve the government as a party.

SECTION 2(A) FREEDOM OF CONSCIENCE AND RELIGION

In 2018, the Supreme Court significantly narrowed the scope of *Charter* section 2(a) freedom of conscience and religion by way of two decisions involving Trinity Western University, arising out of Ontario and BC.

Trinity Western University (TWU) is a Christian University in BC that wanted to open Canada's first law school at a private, faith-based post-secondary institution. Like all universities and colleges, TWU has a code of conduct that students are required to adhere to. TWU's code of conduct prohibited behaviour considered immoral by the institution's animating faith tradition, such as drunkenness, dishonesty and "sexual intimacy that violates the sacredness of marriage between a man and a woman". The law societies of Ontario and BC decided to refuse accreditation to TWU's proposed law school, effectively disallowing law graduates from TWU from becoming lawyers in those provinces.

The law societies argued that it is inconsistent with the law societies' objectives of protecting the public interest and promoting "diversity and inclusion" in the legal profession to accredit TWU's proposed law school, because TWU's code of conduct was "discriminatory" toward LGBT individuals. TWU argued that it should have the right to define the parameters of its religious community, even if that community includes a law school, as protected by freedom of religion and freedom of association. Although a majority if the Supreme Court found that the law societies' decisions infringed the freedom of religion of both TWU and its future law graduates, the Court ruled that the infringement was "proportionate" to the law societies' objectives. The Court upheld as "reasonable" the law societies' decisions to refuse accreditation. Dissenting Justices Brown and Côté found that the infringement on freedom of religion was "profound", that the public interest is not harmed by accommodating differences in beliefs, and that the majority's decision was more concerned with public perception than with protecting rights-holders against forced conformity with the values of the majority of Canadian society.

Although the Ontario and BC TWU cases had slightly different facts and issues, the nine justices who heard the two cases ruled the same way in both. In both cases, Justices Abella, Moldaver, Karakatsanis, Wagner, Gascon, McLachlin and Rowe ruled in favour of the government bodies. Notwithstanding her ruling in TWU's favour in 2001 (a similar case involving a teacher education program), Chief Justice McLachlin ruled in favour of the law societies in 2018. Likewise, Justice Abella also ruled in favour of the law societies, which is consistent with her record of ruling in favour of government in split decisions involving freedom of conscience and religion. Interestingly, both of these long-time justices have a record of ruling in favor of challengers, not government, in cases involving freedom of expression, suggesting a more positive attitude toward freedom of expression than freedom of conscience and religion.

In both TWU cases, Justice Brown and Justice Côté held in favour of the *Charter* litigants, consistent with their pro-challenger rulings in all other split decisions involving section 2 freedoms.

The implications of the majority's decisions in the TWU cases will not be fully known for years to come. However, it appears that practicing religious adherents will enjoy less freedom to define their religious communities in accordance with their beliefs, if they wish to participate actively in the public and political life of the country.

The other 2018 Supreme Court decision on freedom of religion concerned a private dispute between Randy Wall and the congregation of Jehovah's Witness who had removed him from their fellowship, claiming that he had been insufficiently repentant about his sinful behaviour. Mr. Wall sought judicial review of his church's decision to disfellowship him, requesting that the courts compel his congregation to reinstate his membership. The Supreme Court declined to interfere with the church's disfellowship decision, upholding the long-standing principle that courts lack the jurisdiction and competence to interfere in matters of religious doctrine and the internal affairs of religious institutions. With this unanimous decision, the Supreme Court protected the scope of religious freedom by upholding the right of churches to define their own criteria for membership in their congregations. This decision is excluded from the Judicial Freedom Index because it involves a dispute between a private individual and private organization and is therefore not a "challenger versus government" case.

SECTION 2(B) FREEDOM OF EXPRESSION

The Court in 2018 rendered two decisions involving freedom of expression. The first was a unanimous decision regarding the current legal test to determine when the state ought to have access to the identity of an informant of the media. The second, discussed below, was a split decision regarding the scope of a lawyer's freedom of expression in the courtroom.

In *Groia v. Law Society of Upper Canada*, a majority of the Supreme Court upheld lawyers' expressive rights in the courtroom. The Law Society of Upper Canada (LSUC) disciplined Mr. Groia for professional misconduct in the courtroom, based on the LSUC's assessment that he had been too "uncivil" during a trial. A majority of the judges found that the LSUC's objective of promoting civility within the legal profession is disproportionate to the importance of closely guarding the ability of lawyers to zealously advocate for their clients, which requires lawyers to have full expressive freedom in the courtroom.

Justices Karakatsanis, Gascon and Rowe found in favour of government (in this case the Law Society), as they did in the TWU cases. Justices Brown and Côté found for the *Charter* challenger, as they did in the TWU cases.

Departing from their pro-government ruling in the TWU cases, Justices Moldaver, McLachlin and Abella joined Justices Côté and Brown in ruling for the challenger, Mr. Groia. This suggests the presence of a different attitude towards freedom of conscience and religion than towards freedom of expression, the latter apparently enjoying greater favour than the former. It will be interesting to note in forthcoming split decisions involving section 2 freedoms if the trend continues on the part

of Justices Abella, Moldaver and Wagner to favour challengers relying on freedom of expression over challengers relying on freedom of conscience and religion.

SECTION 2(D): FREEDOM OF ASSOCIATION UNION CASES

In 2018, the Court ruled in one section 2(d) case in which the challenger was a union. In *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, three security guards employed by the Quebec provincial legislature were dismissed for cause. The employees were members of a trade union, which argued for their reinstatement. The legislature argued that the decision to dismiss was immune from review by the courts, because it was protected by parliamentary privilege.

A majority of the Court ruled that parliamentary privilege did not extend to the security guards and therefore did not justify infringing their section 2(d) rights to associate with a trade union. The dissent held that parliamentary privilege protects the legislature's decisions regarding its employees, including security guards, and are immune from the review of the courts.

Justices who tend to rule in favour of individual challengers in cases involving the individual's freedoms of conscience, religion, expression, and association (non-union), tend to rule for the government in cases where union challengers argue that section 2(d) freedom of association serves to expand union power. The Court split along familiar attitudinal lines in this case, with Justices Brown and Côté ruling against the union in this case, while Justices Abella, Karakatsanis, Wagner, Rowe, Moldaver, Gascon, and Martin ruled in favour of the union.

RECENT TREND: 2014-2018

OVERVIEW OF TRENDS IN DECISIONS INVOLVING SECTION 2 FREEDOMS

For 36 years (1982-2018), the *Canadian Charter of Rights and Freedoms* has constitutionalized the individual freedoms of Canadians, which clearly also existed prior to 1982. During these 36 years, 46% of the Supreme Court's decisions involving section 2 freedoms[10] have been split decisions: majority and dissent. The Court ruled in favour of the individual *Charter* claimant in 31% of split decisions during these 35 years. This has not changed much in the past five years (2014-2018), with the Court ruling for the *Charter* challenger in 33% of split decisions.

However, what has changed is the percentage of split decisions, which in the past five years has declined from 46% to 38%. This change is caused exclusively by the Court rendering fewer split decisions concerning freedom of expression. The percentage of split decisions involving freedom of religion has remained virtually constant around 40%.

Notwithstanding a tendency to render fewer split decisions in section 2 cases, several justices of the Supreme Court over the last five years appear to have strong, and differing, attitudes regarding unions and freedom of association. All four decisions from the last five years involving unions and section 2(d) freedom of association have been split.

[10] Excluding cases where the *Charter* claimant was a union

As mentioned above, justices who tend to reject individuals' claims of religious and expressive freedom are sympathetic to unions, ruling against the government when the challenger is a union rather than an individual. In similar fashion, justices who have ruled against unions in the last five years have ruled in favour of individual challengers relying on the freedoms of conscience, religion and expression.

For example, Justices McLachlin, Abella and Karakatsanis have ruled in favour of unions in two thirds or more of split decisions, while also ruling against individual challengers in two thirds of split decisions involving either freedom of expression or freedom of conscience and religion. In like manner, recently-appointed Justices Brown and Côté have ruled against government 100% of the time in split decisions involving freedom of expression and freedom of conscience and religion, and have also ruled in favour of government and against unions where the union was the challenger.

DEVELOPMENTS IN THE JURISPRUDENCE

There have been some noteworthy developments regarding decisions from the Supreme Court of Canada over the last five years involving the fundamental freedoms protected by section 2 of the *Canadian Charter of Rights and Freedoms*. From the inception of the *Charter* in 1982 through to 2013, there were 40 cases ruling on freedom of expression compared to 12 cases on freedom of conscience and religion, and only three cases on freedom of association where the challenger was not a union. Not so from 2014-2018. Over the last five years there have only been three section 2(b) freedom of expression cases, in contrast to five section 2(a) cases involving freedom of conscience and religion, and no cases where an individual asserted freedom of association under section 2(d). Regarding section 2(d) freedom of association cases where the *Charter* claimant was a union, there were only three such cases from 1982 to 2013, yet four cases in the past five years.

The Supreme Court has significantly reshaped freedom of conscience and religion jurisprudence over the last five years, such as strengthening the legal doctrine of the duty of state neutrality in matters of belief in the 2015 case of *Mouvement laïque québécois v Saguenay (City)*, and implicitly lowering the threshold for the justification of government limitations on freedom of conscience and religion in the two *Trinity Western University* cases.

The Court has also significantly added to the jurisprudence regarding freedom of association in the context of unions. The Supreme Court has only ruled on seven cases since the advent of the *Charter* that could be classified as "union versus government," two in the first 10 years of the *Charter*, then only one case over the span of 25 years, and then four cases during the 2014-2018 time-frame. All four of the recent rulings involving unions and freedom of association have been split decisions, indicating a high degree of attitudinal differences in how to interpret and apply freedom of association in the context of union claims that freedom of association empowers unions vis-à-vis government.

There were no cases involving section 2(c) freedom of peaceful assembly or freedom of association over the last five years, or since 1982. This particular freedom remains undefined by the Supreme Court, which has never in all the years since the inception of the *Charter* ruled on freedom of peaceful assembly. Moreover, outside of the context of a union claiming *Charter* section 2(d) freedom of association rights in relation to government, the Court has not ruled on a case involving freedom of association claims brought by an individual since 2001, and only on three such cases prior to that.

CHARTS **5-YEAR REPORT: 2014-2018**

SECTION 2(A) FREEDOM OF ASSOCIATION AND RELIGION

Name of Justice	Total no. of 2(a) Cases (2014-2018)	Total no. of 2(a) Split Cases (2014-2018)	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Supreme Court of Canada	**5**	**2**	**0**	**2**
Abella	**5**	**2**	**0**	**2**
Brown	**3**	**2**	**2**	**0**
Côté	**3**	**2**	**2**	**0**
Cromwell	**2**	**0**	**0**	**0**
Gascon	**5**	**2**	**0**	**2**
Karakatsanis	**5**	**2**	**0**	**2**
LeBel	**2**	**0**	**0**	**0**
McLachlin	**5**	**2**	**0**	**2**
Moldaver	**5**	**2**	**0**	**2**
Rothstein	**2**	**0**	**0**	**0**
Rowe	**5**	**2**	**0**	**2**
Wagner	**5**	**2**	**0**	**2**

SECTION 2(B) – FREEDOM OF EXPRESSION

Name of Justice	Total no. of 2(b) Cases (2014-2018)	Total no. of 2(b) Split Cases (2014-2018)	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Supreme Court of Canada	**3**	**1**	**1**	**0**
Abella	**2**	**1**	**1**	**0**
Brown	**3**	**1**	**1**	**0**
Côté	**3**	**1**	**1**	**0**
Gascon	**3**	**1**	**0**	**1**
Karakatsanis	**3**	**1**	**0**	**1**
Martin	**1**	**0**	**0**	**0**
McLachlin	**2**	**1**	**1**	**0**
Moldaver	**3**	**1**	**1**	**0**
Rowe	**2**	**1**	**0**	**1**
Wagner	**3**	**1**	**1**	**0**

TOTAL SECTION 2 CASES
(Excluding s. 2(d) union cases)

Name of Justice	Total no. of Section 2 Cases (Excluding Union Cases) (2014-2018)	Total no. of Section 2 Split Cases (Excluding Union Cases) (2014-2018)	No. of Pro-Challenger in Split Rulings	No. of Pro-Government in Split Rulings
Supreme Court of Canada	**8**	**3**	**1**	**2**
Abella	**7**	**3**	**1**	**2**
Brown	**6**	**3**	**3**	**0**
Côté	**6**	**3**	**3**	**0**
Cromwell	**2**	**0**	**0**	**0**
Gascon	**8**	**0**	**0**	**3**
Karakatsanis	**8**	**0**	**0**	**3**
LeBel	**2**	**0**	**0**	**0**
Martin	**1**	**0**	**0**	**0**
McLachlin	**7**	**3**	**1**	**2**
Moldaver	**8**	**3**	**1**	**2**
Rothstein	**2**	**0**	**0**	**0**
Rowe	**7**	**3**	**0**	**3**
Wagner	**8**	**3**	**1**	**2**

SECTION 2(D) FREEDOM OF ASSOCIATION – UNION CASES

Name of Justice	Total no. of 2(d) Union Cases	Total no. of 2(d) Union Split Cases	No. of Pro-Union in Split Rulings	No. of Pro-Government in Split Rulings
Supreme Court of Canada	**4**	**4**	**3**	**1**
Abella	**4**	**4**	**4**	**0**
Brown	**1**	**1**	**0**	**1**
Côté	**1**	**1**	**0**	**1**
Cromwell	**3**	**3**	**2**	**1**
Gascon	**1**	**1**	**1**	**0**
Karakatsanis	**4**	**4**	**3**	**1**
LeBel	**3**	**3**	**2**	**1**
Martin	**1**	**1**	**1**	**0**
McLachlin	**3**	**3**	**2**	**1**
Moldaver	**1**	**1**	**1**	**0**
Rothstein	**3**	**3**	**0**	**3**
Rowe	**1**	**1**	**1**	**0**
Wagner	**4**	**4**	**2**	**2**

FULL ANALYSIS OF 1982 - 2018

The purpose of the *Judicial Freedom Index* is to analyze the rulings of SCC justices in regard to the fundamental freedoms protected by section 2 of the *Charter*. Upon thorough research, summary, and categorization, the cases included in the study have been tabled in the graphs that immediately follow this analysis. These charts track how many times a justice has ruled in favour of an individual challenger, the government, or a union challenger, in section 2 cases. In addition, the final two columns of each chart track decisions in non-unanimous cases. Data from these "split" decisions sheds light on the attitude (beliefs, assumptions, philosophy, political ideology, etc.) of each judge.

Of course, numbers fail to tell the whole story. Yet, given the broad scope of the study (63 cases, spanning 36 years, involving three different fundamental freedoms) the *Judicial Freedom Index* makes an important contribution towards understanding judicial behaviour at the highest level in Canada. In the analysis section, particular attention will be paid to noticeable trends and patterns.

SECTION 2(A) FREEDOM OF CONSCIENCE AND RELIGION

The freedom of conscience and religion chart included analysis of 33 justices, ruling in 18 different cases. Of these 18 judgments, seven were split decisions. With her tenure on the Court spanning 28 years, from 1989 to 2017, Chief Justice Beverley McLachlin has taken part in more section 2(a) cases than any other justice. Indeed, Chief Justice McLachlin has ruled on 15 freedom of conscience and religion cases, with five Pro-Challenger and nine Pro- Government decisions. In split cases, Chief Justice McLachlin ruled twice in favour of the challenger, and four times in favour of the government.

Former Justice Ian Binnie ruled in favour of freedom of conscience and religion in 75% of split decisions. Supporting religious freedom even more strongly, former Justices Morris Fish, Louise Arbour, and Frank Iacobucci all ruled in favour of the challenger in 100% of split decisions involving section 2(a).

Conversely, Justices who have consistently ruled in favour of government in section 2(a) cases include Justices Marie Deschamps and Marshall Rothstein, who ruled against the *Charter* claimant 100% of the time, in decisions where the Court was split.

SECTION 2(B) FREEDOM OF EXPRESSION

Freedom of expression under section 2(b) of the *Charter* has been the most litigated fundamental freedom before the Supreme Court of Canada. The *Judicial Freedom Index* analyzes 43 freedom of expression cases. This is unsurprising, given that freedom of expression has been described by the Supreme Court itself as perhaps the most important right in a democratic society.[11] The Supreme Court of Canada has ruled in favour of challengers in only 42% of freedom of expression cases, and in only 30% of split decisions involving section 2(b).

Chief Justice Beverley McLachlin, who formally retired in June 2018, has ruled in favour of freedom of expression on 59% of occasions, spanning 34 cases. Chief Justice McLachlin has also sided with

[11] *Edmonton Journal* v. *Alberta (Attorney General,* [1989] 2 SCR 1326 at 1336.

the challenger on section 2(b) matters in 65% of split decisions, including several dissenting opinions, notably in *R v Keegstra* and *Canada (Human Rights Commission) v Taylor*. Three other justices have been even more strongly supportive of freedom of expression. Former Justices Frank Iacobucci and John Major have ruled pro-challenger in 71% and 67% of split freedom of expression decisions, respectively.

In contrast, former Justices Louise Charron, Marie Deschamps, and Charles Gonthier have systematically ruled in favour of the government in freedom of expression cases, at 89%, 90%, and 69%, respectively. However, analysed through the lens of split decisions, those numbers spike to 100% for Justices Charron, Deschamps and Gonthier. Not too far behind is former Chief Justice Brian Dickson, who ruled in favour of the government in 67% of section 2(b) cases, and in favour of the government in 80% of split decisions.

SECTION 2(D) FREEDOM OF ASSOCIATION (INDIVIDUAL CLAIMANTS)

With only four decisions analyzed, there is a paucity of data on freedom of association rulings. However, suffice it to say that otherwise pro-challenger justices, such as former Justices John Major and Ian Binnie, ruled in favour of challengers in 100% of section 2(d) cases. Conversely, justices who are generally more inclined to side with government, such as former Justices Claire L'Heureux-Dubé and Charles Gonthier, ruled in favour of the government in 100% of split 2(d) cases.

SECTION 2(D): FREEDOM OF ASSOCIATION UNION CASES

Of the 2(d) cases included, more are analyzed from a "Union v Government" perspective rather than "Challenger v Government".

Here, justices who decided favourably vis-à-vis union 2(d) rights include Justice Rosalie Abella and former Justice Bertha Wilson, who have ruled in favour of unions in 100% of their decisions. Other pro-union judges include Chief Justice Beverley McLachlin and former Justice Louis LeBel, who have both ruled for the union in 75% of these cases.

On the other end of the spectrum, former Justices Marshall Rothstein and Gérard La Forest have ruled in favour of the government in 100% of their 2(d) cases involving unions. Similarly, Justice Richard Wagner has ruled in favour of the government in 67% of his union decisions.

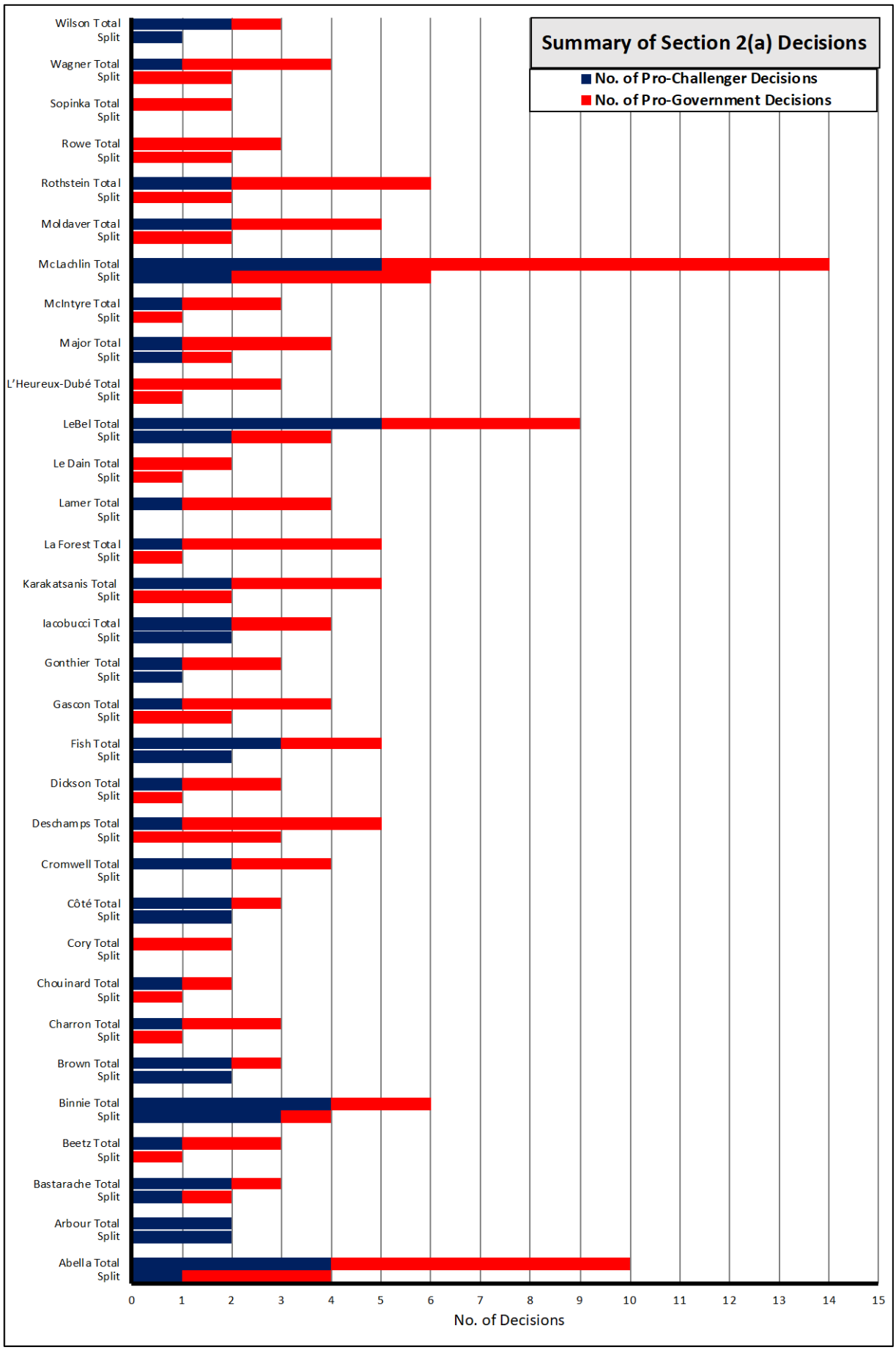
TOTAL SECTION 2 CASES (1982-2018)

The final chart, which includes all the data from the previous tables, reiterates many of the same patterns and trends on a macro level.

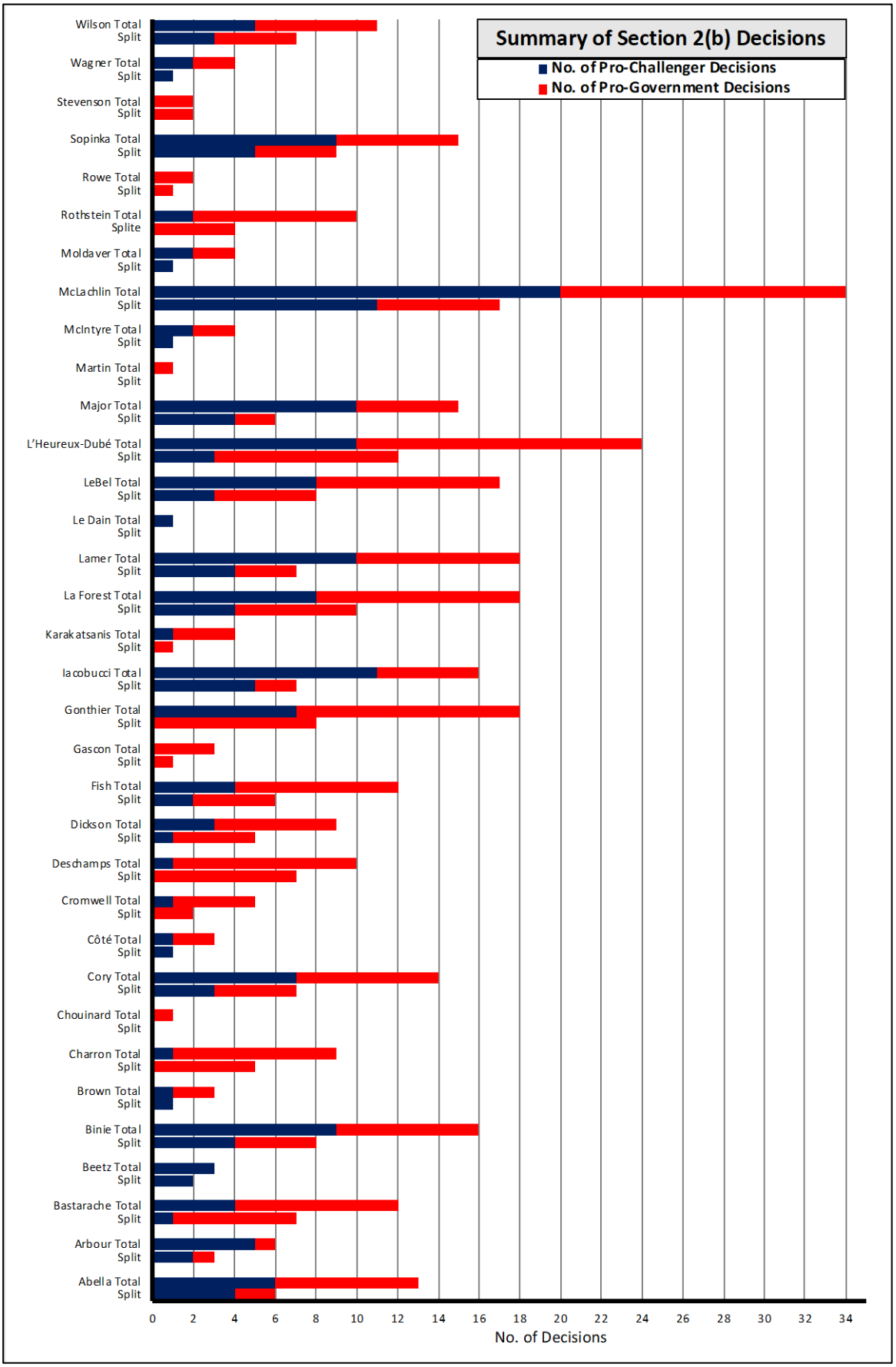
Former Justices Frank Iacobucci (70%), John Major (67%), Louise Arbour (67%) and Ian Binnie (62%) have consistently ruled in favour of a challenger in split decisions involving fundamental freedoms, well above the Supreme Court average (16%). Chief Justice Beverley McLachlin ruled to protect the challenger's fundamental freedoms 51% of the time.

In contrast, Justices who often ruled in favour of the government in section 2 split decisions include former Justices Marie Deschamps (100%), Louise Charron (100%), Marshall Rothstein (100%), Charles Gonthier (90%), Brian Dickson (83%), and Claire L'Heureux-Dubé (79%).

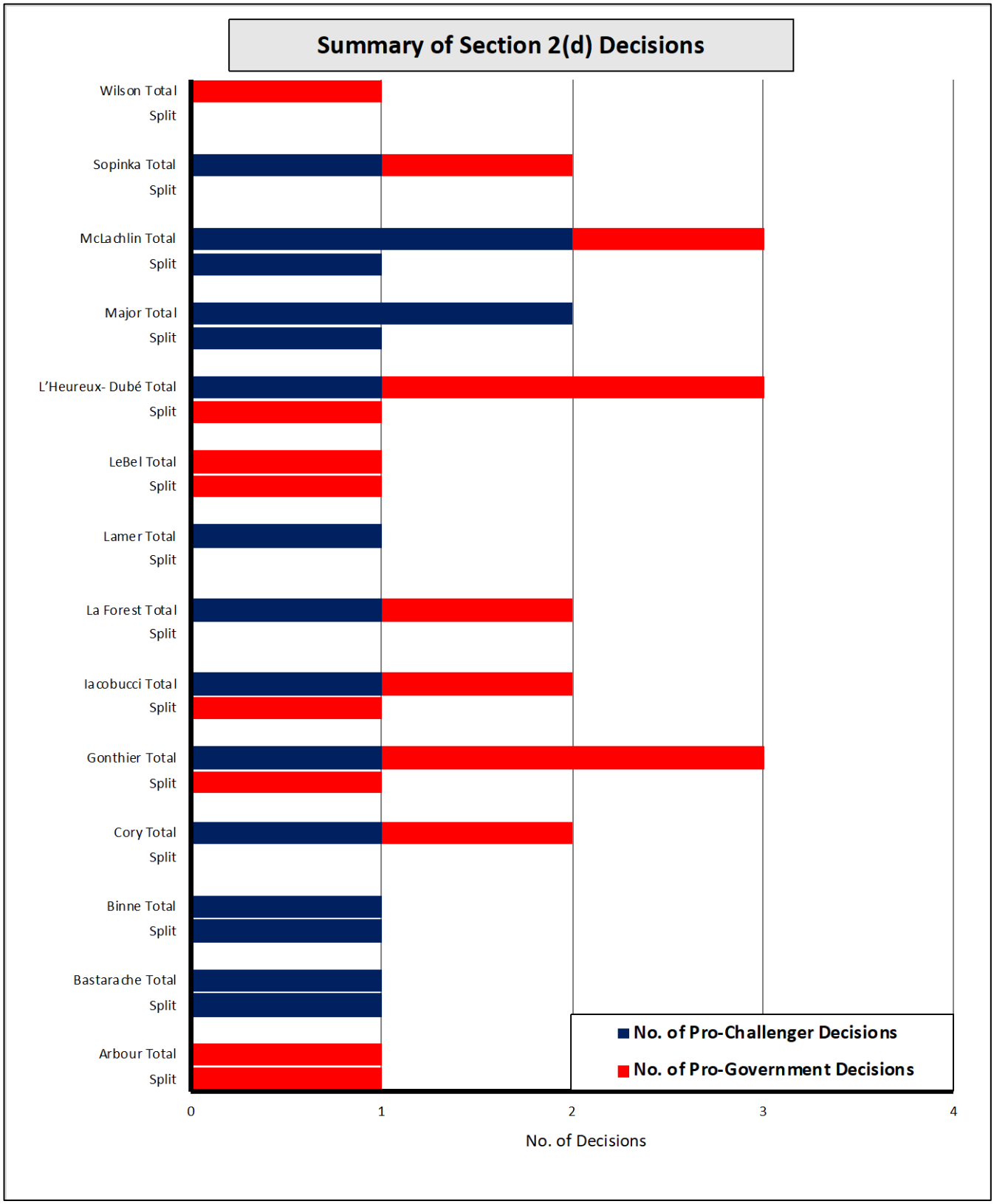
1982-2018 JUDGES' RULINGS ON FREEDOM OF RELIGION AND CONSCIENCE



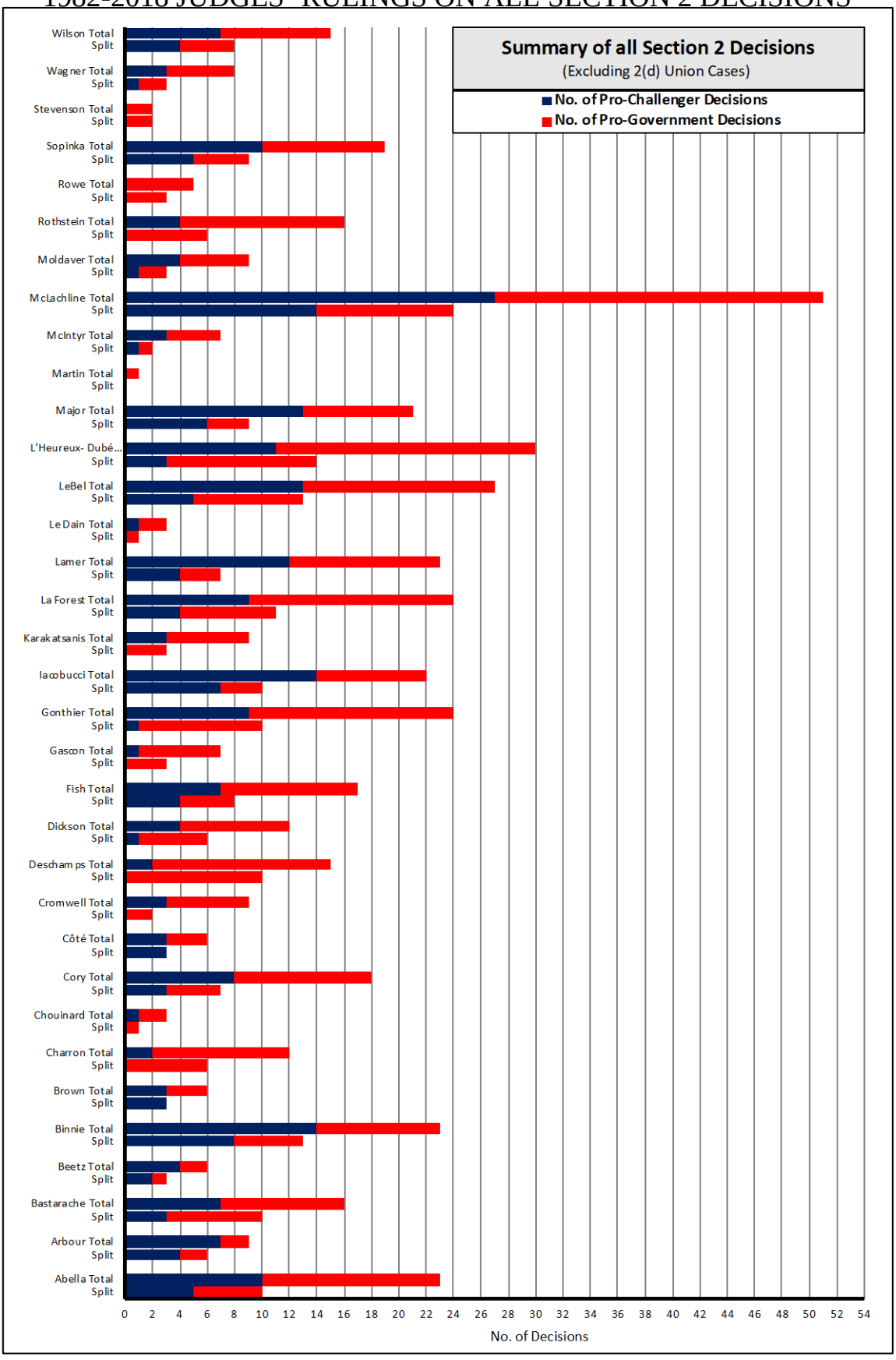
1982-2018 JUDGES' RULINGS ON FREEDOM OF EXPRESSION



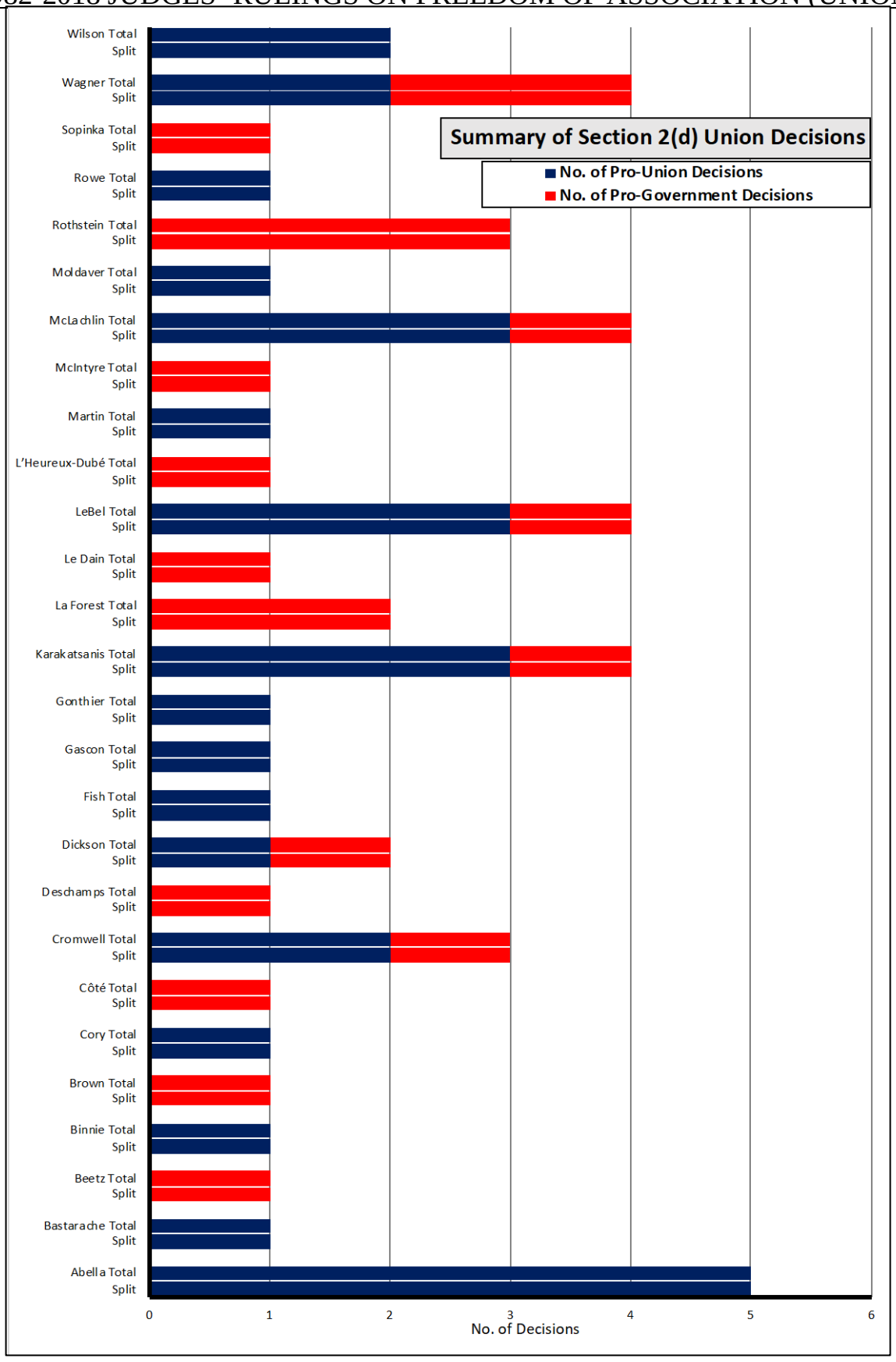
1982-2018 JUDGES' RULINGS ON FREEDOM OF ASSOCIATION (NON-UNION)



1982-2018 JUDGES' RULINGS ON ALL SECTION 2 DECISIONS



1982-2018 JUDGES' RULINGS ON FREEDOM OF ASSOCIATION (UNION)



FULL REPORT: CASE SUMMARIES

SECTION 2(A) FREEDOM OF CONSCIENCE AND RELIGION

R v Big M Drug Mart Ltd, [1985] 1 SCR 295

Court: Dickson, Beetz, McIntyre, Chouinard, Lamer, and Wilson
Result: Pro-Challenger
Decision: Unanimous 6-0

FACTS:

Big M Drug Mart was charged with violating the federal *Lord's Day Act*, which prohibited businesses from operating on Sundays. Big M Drug Mart challenged the constitutionality of the legislation, arguing that it violated section 2(a) of the *Charter*.

ISSUE:

Did the *Lord's Day Act* violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

If either the purpose or effect of legislation is to compel religious observance, it violates section 2(a) of the *Charter*. The purpose of the legislation is to make compulsory the observance of a Christian ideal, and as such violates section 2(a) of the *Charter*.

R v Jones, [1986] 2 SCR 284

Court: Dickson, Beetz, McIntyre, Lamer, Wilson, Le Dain, La Forest.
Result: Pro-Government
Decision: 3-3-1 Majority Judgement, Minority Concurring Opinion
Majority: Dickson, Lamer, La Forest
Concurring: Beets, McIntyre, Le Dain
Dissent: Wilson

FACTS:

Mr. Jones, a church pastor, refused to send his children to school, or to seek an exemption under Alberta's *School Act*. Using the legal exemption would have allowed Mr. Jones to home school his children, so long as a Department of Education inspector or a Superintendent of Schools certified that the children were receiving adequate instruction. Instead, Mr. Jones schooled his children himself, without an exemption, and was subsequently charged for violating Alberta's *School Act*. Mr. Jones did not believe that he needed to submit to the approval of the government, because to do so would be to violate his religious belief in the authority of God.

ISSUE:

Did Alberta's *School Act*, which required that children be sent to public school or be schooled via a government-approved method, violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Dickson, Lamer, La Forest):

Although the effect of the *School Act* constitutes some interference with appellant's freedom of religion, the impugned provisions of the *Act* do not offend section 2(a) of the *Charter*. The Act does not give the government absolute control over the education of children. The *Act* provides alternatives so long as that instruction is certified to be efficient. Such a requirement constitutes a reasonable limit on a parent's religious convictions concerning the upbringing of his children.

Minority Concurring Opinion (Beets, McIntyre, Le Dain):
The *School Act* does not infringe freedom of religion. The effect of the section is to foster religious freedom rather than to curtail it because it offers parents maximum choice, including homeschooling, as long as it is certified.
Dissent (Wilson):
The legislation did not violate section 2(a) of the *Charter*. If it was found to have violated section 2(a), it would not have been a justified violation. It would have been disproportionate, as the government failed to provide any evidence that the exemption process built into the *School Act* was easiest and least cumbersome method of accommodating parents.

R v Edwards Books and Art Ltd, [1986] 2 SCR 713

Court: Dickson, Beetz, McIntyre, Chouinard, La Forest, Le Dain, and Wilson
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 3-2-1-1 Majority Judgement, Minority Concurring Opinions, Dissent
Majority: Dickson, Chouinard, Le Dain
Concurring: Beetz, McIntyre, La Forest
Dissent: Wilson

FACTS:
A number of businesses were charged for violating Ontario's *Retail Business Holiday Act* by having stores open on Sunday, or by exceeding the statutory limits placed on stores that had exemptions from the legislation. The businesses argued that this law, like the *Lord's Day Act*, violated religious freedom by imposing a law that has a religious purpose or effect..
ISSUE:
Did the *Retail Business Holidays Act*, which placed limits on the operations of retail businesses based on a common day of rest, violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Dickson, Chouinard, and Le Dain):
Although the Act abridges the freedom of religion of some Saturday-observers, it is justifiable as a reasonable limit under section 1 of the *Charter* because of the overriding purpose of the legislation: to provide a consistent day off for retail workers
Minority Concurring Opinion (Beetz and McIntyre):
The impugned legislation does not violate the freedom of conscience and religion. The economic burden experienced by Saturday observers exists independently of the impugned legislation and results from the deliberate choice of the Saturday observer to give priority to his religious tenets over financial benefit.
Minority Concurring Opinion (La Forest):
Section 2(a) of the *Charter* does not require the legislature to provide a Sabbatarian exemption in order to relieve those who worship on Saturday from the burden they may suffer because of the *Act*. While section 2(a) protects the individual against both direct and indirect legislative coercion and while some might suffer an indirect burden from the *Act* sufficient to constitute an infringement of religion, the Act is demonstrably justified as a reasonable limit under section 1 of the *Charter*. The objective of the Act is of sufficient importance to warrant some intrusion on the freedom set forth in section 2(a).
Dissent (Wilson):
The *Act* infringes the freedom of religion of those who close on Saturdays for religious reasons, because it attaches an economic penalty to their religious observance. A limit on freedom of religion which recognizes the freedom of some members of the group but not of other members of

the same group cannot be reasonable and justified in a free and democratic society.

B (R) v Children's Aid Society of Metropolitan Toronto, [1995] 1 SCR 315

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Government
Decision: 5-4 Majority Judgment, Minority Concurring Opinion
Majority: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin
Minority concurring: Lamer, Cory, Iacobucci, Major

FACTS:
S.B., a child, was born prematurely and suffered from a number of related medical conditions. Her parents were both Jehovah's Witnesses and had a religious objection to the use of blood transfusions. S.B.'s doctors believed that her life was at risk, and that surgery was necessary, which required a blood transfusion. After a Provincial Court (Family Division) hearing, the Children's Aid Society was granted custody of the child over a 21-day period so that the doctors could perform a blood transfusion if it became necessary.
ISSUE:
Did the provisions of the provincial *Child Welfare Act* that allowed the state to take custody of a "child in need of danger" violate section 2(a) of the *Charter* by denying parents the right to choose medical treatments for their young children? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Decision (La Forest, L'Heureux-Dubé , Sopinka, Gonthier, and McLachlin):
The right of parents to rear their children according to their religious beliefs, including that of choosing medical and other treatments, is a fundamental aspect of freedom of religion, guaranteed by section 2 (a) of the *Charter*. This infringement was justified, however, under section 1 of the *Charter*. The state interest in protecting children at risk is a pressing and substantial objective.
Minority Concurring Opinion (Lamer, Cory, Iacobucci, Major):
A parent's freedom of religion, guaranteed under section 2(a) of the *Charter*, does not include the imposition of religious practices which threaten the safety, health or life of the child. Although the freedom of belief may be broad, the freedom to act upon those beliefs is considerably narrower, as it is subject to such limitations as are necessary to protect the fundamental rights and freedoms of others.

Ross v New Brunswick School District No 15, [1996] 1 SCR 825

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Government
Decision: 9-0 Unanimous

FACTS:
Mr. Ross was a school teacher in New Brunswick who distributed anti-Semitic publications outside of the classroom, but not in his capacity as a teacher. A parent filed a complaint with the New Brunswick Human Rights Commission ("NBHRC"). The NBHRC ordered the school district to (1) place Mr. Ross on a leave of absence for 18 months, (2) place Mr. Ross in a non-teaching position at the school if one was or became available, (3) terminate Mr. Ross's employment if no non-teaching job was found, and (4) terminate Mr. Ross's employment if he published or wrote any more anti-Semitic materials, or sold any of his previously published anti-Semitic materials. Mr. Ross argued that the NBHRC ruling violated his *Charter* rights under section 2(a) freedom of

conscience and religion as well as 2(b) freedom of expression.
ISSUE:
Did the NBHRC Board ruling violate Mr. Ross's section 2(a) *Charter* right? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
The order infringes Mr. Ross' freedom of religion. This freedom ensures that every individual must be free to hold and to manifest without state interference those beliefs and opinions dictated by one's conscience. Assuming the sincerity of the beliefs and opinions, it is not open to the courts to question their validity.
However, many of the clauses were found to be justified limits to freedom of religion. Clauses (1), (2) and (3) of the order, which deal with Mr. Ross' removal from his teaching position, are rationally connected to the objective of fostering an environment free from discrimination. They were also carefully tailored to accomplish this objective and minimally impair Mr. Ross' constitutional freedoms. The objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on Mr. Ross produced by these clauses, and therefore clauses (1), (2) and (3) are justified under section 1. Clause (4), which imposes a permanent ban, does not meet the minimal impairment test and is not justified under section 1 of the *Charter*.

***Trinity Western University v British Columbia College of Teachers, [2001] 1 SCR 772 (TWU v BCCT*)**

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Result: Majority: Pro-Challenger
Dissent: Pro-Government

Decision: 8-1 Majority Judgment, Dissent
Majority: McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Dissent: L'Heureux-Dubé

FACTS:
TWU established a teacher training program offering baccalaureate degrees in education upon completion of a five-year curriculum, four years of which were spent at TWU, the fifth year being under the aegis of Simon Fraser University ("SFU"). TWU applied to the B.C. College of Teachers ("BCCT") for permission to assume full responsibility for the teacher education program. The BCCT refused to approve the application due to concerns that the TWU Community Standards, applicable to all students, faculty and staff, embodied discrimination against homosexuals because all sex outside of marriage between one man and one women is labelled as "sin" and prohibited conduct under the Community Standards. Students choosing to attend TWU are required to sign the Community Standards document, agreeing to refrain from all prohibited conduct contained within the document.
ISSUE:
Did the BBCT's decision to deny accreditation of TWU's education program violate TWU's section 2(a) rights? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel):
At the heart of the appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system. TWU is a private

institution that is exempted, in part, from the B.C. human rights legislation and the *Charter* does not apply to TWU. There is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. By not taking into account the impact of its decision on the right to freedom of religion of the members of TWU, the BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU.

Dissent (L'Heureux-Dubé):

TWU's *Charter* claims should be dismissed. Assuming without deciding that TWU can advance a section 2(a) claim, the impugned state action does not offend religious freedom. The extent of the violation's deleterious effects on TWU and its students is more than offset by the salutary gains that will plausibly accrue in classrooms.

Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village), [2004] 2 SCR 650

Court Composition: McLachlin, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish

Classification:
Majority: Pro-Challenger
Dissent: Pro-Government

Nature of Decision: 5-3-1 Majority Judgement, two Dissenting Opinions
Majority: McLachlin, Iacobucci, Binnie, Arbour, Fish
Dissent: Bastarache, LeBel, Deschamps
Dissent: Major

FACTS:

Jehovah's Witnesses were looking for land to build a place of worship. Their first conditional offer for a parcel of land required a change in municipal zoning, which was denied by the municipality. A second lot was purchased in a commercial zone but two separate applications for a zoning change were denied by the municipality. No reasons were given for the denied request.

ISSUE:

Was the municipality's denial of the Congregation's rezoning permit lawful?

DECISION:

Majority (McLachlin, Iacobucci, Binnie, Arbour, Fish):

The majority ruled in favour of the Congregation, finding that the municipality violated its duty of procedural fairness vis-à-vis two of the Congregation's rezoning applications by failing to provide reasons for its refusal. In determining what specific obligations were owed by the municipality under the principles of administrative law, the majority noted that given the importance of the decision on the Congregation's ability to practice its religion, as guaranteed by the *Charter*, the decision required more stringent procedural protections.

Dissent (Bastarache, LeBel, Deschamps):

The dissent found that "neither the purpose nor the effect of the zoning by-law has been to infringe the appellants' freedom of religion." The dissent noted that the Congregation had opportunities to purchase land within a community zone where construction of churches was permitted. The State must remain neutral, but does not have any positive obligations to provide the Congregation with a lot of their choice.

Dissent (Major):

Major J agreed with the dissenting judgment of the other justices, in relation to findings of fact, and to the extent that no infringement of freedom of religion occurred.

Multani v Commission scolaire Marguerite-Bourgeoys, [2006] 1 SCR 256 Court:

McLachlin, Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron

Result: Pro-Challenger

Decision: 5-2-1 Majority Judgment, two Minority Concurring Opinions

Majority: McLachlin, Bastarache, Binnie, Fish, Charron
Minority: Deschamps, Abella
Minority: LeBel

FACTS:

Mr. Multani and his son, Gurbaj, are orthodox Sikhs and their religion requires that they wear a metal kirpan (a religious ceremonial dagger) at all times. The school board refused to allow Gurbaj to wear a kirpan to school, because it violated the school's prohibition on carrying weapons. The school board offered to allow Gurbaj to wear a kirpan made of plastic or wood, but Mr. Multani refused.

ISSUE:

Did the school board's decision to prohibit Gurbaj from wearing a metal kirpan to school violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Major, Bastarache, Binnie, Fish, LeBel and Charron): Gurbaj's section 2(a) rights were violated. While the school had a pressing and substantial objective with ensuring school safety, the prohibition did not impair Gurbaj's rights in the least obtrusive and obstructive way. The school's outright prohibition was not a reasonable accommodation for Gurbaj's sincere and deeply held religious belief, particularly when that belief could be accommodated by regulating how Gurbaj could wear the kirpan at school.

Concurring Minority Opinion (*Deschamps and Abella):

Whereas a constitutional justification analysis must be carried out when reviewing the validity or enforceability of a norm such as a law, regulation or other similar rule of general application, the administrative law approach is preferred for reviewing decisions and orders made by administrative bodies relating to human rights. The decision by the school board's council of commissioners was unreasonable, as it failed to sufficiently take into account the right to freedom of religion.

Concurring Minority Opinion (LeBel):

It is not always necessary to resort to the Canadian *Charter* when a decision can be reached by applying general administrative law principles or the specific rules governing the exercise of a delegated power. However, the dispute as presented makes a constitutional analysis unavoidable.

AC v Manitoba (Director of Child and Family Services), [2009] 2 SCR 181

Court: McLachlin, Binnie, LeBel, Deschamps, Abella, Charron, Rothstein

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 4-2-1 Majority Judgment, Minority Concurring Opinion, Dissent

Majority: LeBel, Deschamps, Abella, Charron
Minority: McLachlin, Rothstein
Dissent: Binnie

FACTS:

AC, 14 years old and a devout Jehovah's Witness, was hospitalized with gastrointestinal bleeding. AC had signed an advance medical directive that contained instructions not to be given blood under any circumstances, based on her religious belief against blood transfusions. AC's doctor believed the bleeding had created a situation of immense risk to her health and her life, and wished to give her

blood, which she refused. After her refusal, a psychiatric assessment took place. On the night following her admission, the Director of Child and Family Services apprehended her as a child in need of protection, and requested a treatment order from the court via the powers outlined in the Manitoba *Child and Family Services Act*. The request was granted and then subsequently challenged by AC.

ISSUE:

Did these provisions of the *Child and Family Services Act*, which allow the Director of Child and Family Services to assume control over a child deemed to be in need of protection, violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Decision (LeBel, Deschamps, Abella, Charron):

The legislation, when interpreted properly, did not violate section 2(a) of the *Charter*. It is not arbitrary or discriminatory and it did not infringe on religious freedom. The request for the treatment, ordered by the Court, was not made in error. Given the urgency of the situation, the request was a reasonable and prudent one.

Minority Concurring Opinion (McLachlin, Rothstein):

The multi-faceted "best interests of the child" approach, outlined in the *Child and Family Services Act*, did not operate unconstitutionally. While the approach did violate section 2(a) of the *Charter*, it is justified because the objective of ensuring health and safety is pressing and substantial. The court-ordered treatment, as prescribed by the legislation, was a proportionate limit on freedom of religion.

Dissent (Binnie):

The rights under section 2(a) of the *Charter* are given to everyone, including individuals under 16 years old. If a mature minor does in fact understand the nature and seriousness of her medical condition and is mature enough to appreciate the consequences of refusing consent to treatment, then the state's only justification for taking away the autonomy of that young person in such important matters disappears. The infringement is not justified under section 1.

Alberta v Hutterian Brethren of Wilson Colony, [2009] 2 SCR 567

Court: McLachlin, Binnie, LeBel, Deschamps, Fish, Abella, Rothstein

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 4-3 Majority Judgment, Dissent
Majority: McLachlin, Binnie, Deschamps, Rothstein
Dissent: Abella, LeBel, Fish

FACTS:

Since 1974, Albertans who objected on religious grounds to having their photo taken for their driver's license were granted a non-photo license. In 2003, the province changed the regulations and made the photos mandatory on driver's licenses. The Hutterian Brethren of Wilson Colony hold religious beliefs that prohibit photos from being taken of them. The Hutterian Brethren colonies challenged the photo requirements, alleging it violated section 2(a) of the *Charter*.

ISSUE:

Did the universal photo requirement for an Albertan driver's license violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Binnie, Deschamps, Rothstein):

The universal photo requirement did violate section 2(a), but was a proportional and minimally

impairing requirement and was therefore justified. The government has a pressing and substantial goal of maintaining the integrity of the driver's licensing system for numerous reasons, including fraud prevention.

Dissent (Abella):

The violation of section 2(a) of the *Charter* was not justified. The exemption used by the Hutterites was in place for 29 years, and no evidence was brought forward to show that the integrity of the licensing system was harmed during that time. Therefore, the security and fraud reasons used to justify the new license requirements were not enough to justify the *Charter* violation. While the salutary effects of the mandatory photo requirement are therefore slight and largely hypothetical, the mandatory photo requirement seriously harms the religious rights of the Hutterites and threatens their autonomous ability to maintain their communal way of life.

Dissent (LeBel, Fish):

The Government of Alberta has failed to demonstrate that the regulation is a proportionate response to the identified societal problem of identity theft. A driver's licence is often of critical importance in daily life and is certainly so in rural Alberta. A balance cannot be obtained by belittling the impact of the measures on the beliefs and religious practices of the Hutterites and by asking them to rely on transportation services to operate their farms and to preserve their way of life.

S.L. v Commission scolaire des Chênes, [2012] 1 SCR 235

Court: McLachlin, Binnie, Deschamps, Abella, Charron, Rothstein, Cromwell, LeBel, Fish

Result: Pro-Government

Decision: 7-2 Majority Judgement, Minority Concurring Opinion

Majority: McLachlin, Binnie, Deschamps, Abella, Charron, Rothstein, Cromwell

Minority: LeBel and Fish

FACTS:

In 2008, the government of Quebec made the Ethics and Religious Culture ("ERC") program mandatory in all Quebec schools. After failing to obtain an exemption from the public school board for their children in public schools, S.L. and D.J. took court action, alleging that the ERC program infringed section 2(a) of the *Charter*.

ISSUE:

Did the Ethics and Religious Culture program, which replaced existing religious and secular programs, infringe section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Binnie, Deschamps, Abella, Charron, Rothstein, Cromwell): In order to show that there is a violation of section 2(a) rights, S.L. and D.J. must show that, objectively, the ERC program interferes with their ability to pass on their faith to their children. S.L. and D.J. did not prove that the ERC program, or the school board's refusal to grant an exemption, infringed their section 2(a) rights.

Concurring Minority Opinion (LeBel and Fish):

The violation claimed by L and J to their right to freedom of religion concerned the obligations of parents relating to the religious upbringing of their children and the passing on of their faith. It was not enough to express disagreement with the program and its objectives. The documentary evidence does not make it possible to find a violation of the *Charter*.

Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467

Court: McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell
Result: Pro-Government
Decision: 6-0 Unanimous Judgment

FACTS:

Mr. Whatcott published and distributed four different flyers that were critical of homosexuals and homosexual activity. Complaints to the Saskatchewan Human Rights Commission accused Mr. Whatcott of promoting hatred against individuals on the basis of their sexual orientation. Section 14 of the *Saskatchewan Human Rights Code* prohibits the publication or display of any representation "that 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." Mr. Whatcott challenged Section 14 for violating section 2(a) of the *Charter*.

ISSUE:

Did the prohibition against hate speech contained within the *Saskatchewan Human Rights Code* violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The prohibition against hate speech in the *Code*, encompassing Mr. Whatcott's criticism of same-sex sexual activity, violates freedom of religion under section 2(a) of the *Charter*. The SCC found that Mr. Whatcott sincerely believed that his religion required that he "proselytize homosexuals". However, this limit was justified under section 1 of the *Charter*, in part. While the Court struck down part of the *Code*, which criminalized expression that "ridicules, belittles or otherwise affronts the dignity of", it upheld the rest of the provision as being demonstrably justified in a free and democratic society in order to address "systemic discrimination of protected groups".

Loyola High School v Quebec (Attorney General), [2015] 1 SCR 613

Court: McLachlin, LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis
Result: Pro-Challenger
Decision: 4-3 Majority Judgment, Minority Concurring Opinion
Majority: LeBel, Abella, Cromwell, Karakatsanis
Minority: McLachlin, Rothstein, Moldaver

FACTS:

In 2008, the government of Quebec made the Ethics and Religious Culture ("ERC") program mandatory in all Quebec schools, including private schools. This program purports to teach about beliefs and ethics of different world religions from a neutral and objective perspective. The goal of the program is the "recognition of others" and the "pursuit of common good." Loyola High School, a private Catholic school, asked the Minister to be exempted from the program. Loyola offered to continue teaching its own program on ethics and world religions, which was taught from a Catholic perspective. The Minister refused this request, claiming that the alternative course did not qualify as an equivalent to the ERC course.

ISSUE:

Did the Minister's refusal to allow Loyola High School's proposed alternative course violate section 2(a) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (LeBel, Abella, Cromwell, Karakatsanis):

The requirement that a Catholic school must teach Catholicism from a "neutral and objective" standpoint violated section 2(a) of the *Charter*. Requiring Loyola High School to teach Catholicism on terms defined by the state, and not by its own understanding, interfered with Loyola's ability to

teach its students about the Catholic faith. However, the Minister is not required to allow Loyola to teach about other religions from a Catholic perspective.

Minority Concurring Opinion (McLachlin, Moldaver, Rothstein):

The freedom of religion protected by section 2(a) of the *Charter* is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. It is evident that the Minister's denial of an exemption from the ERC Program—which has the effect of requiring Loyola to teach its entire ethics and religion program from a neutral, secular perspective—infringes Loyola's freedom of religion. In the context of the present case, Loyola's teachers must be permitted to describe and explain Catholic doctrine and ethical beliefs from the Catholic perspective.

Mouvement laïque québécois v Saguenay (City), [2015] 2 SCR 3

Court: McLachlin, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Abella

Result: Pro-Challenger

Decision: 8-1 Majority Judgment, Minority Concurring Opinion

Majority: McLachlin, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon

Minority: Abella

FACTS:

Mr. Simoneau regularly attended the public meetings of the municipal council of the City of Saguenay. At the start of each meeting, the mayor would recite a prayer after making the sign of the cross while saying "in the name of the Father, the Son and the Holy Spirit". The prayer also ended with the sign of the cross and the same words. Other councillors and City officials would cross themselves at the beginning and end of the prayer as well. Mr. Simoneau, who considers himself an atheist, felt uncomfortable with this display, which he considered religious, and asked the mayor to stop the practice. When the mayor refused, Mr. Simoneau complained to the Quebec human rights commission, which submitted the dispute to the Human Rights Tribunal. The City then adopted a by-law whose purpose was to regulate the recitation of the prayer, and that also changed the wording of the prayer and provided for a two-minute delay between the end of the prayer and the official opening of council meetings. The mayor and the councillors continued to act in the same way as described above, however, and Mr. Simoneau amended his motion to ask the Tribunal to declare the by-law to be inoperative and of no force or effect.

ISSUE:

Did the actions of the mayor and city councillors of the City of Saguenay, and the prayer by-law violate sections 3 and 10 of the *Quebec Charter*? If yes, was this violation justified under section 9.1 of the *Quebec Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, LeBel, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon):

The evolution of Canadian society has given rise to a concept of neutrality according to which the state must not interfere in religion and beliefs. The state must instead remain neutral in this regard, which means that it must neither favour nor hinder any particular belief, and the same holds true for non-belief. A neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. In this respect, the Supreme Court concluded that the by-law and the City's practice violated religious neutrality, and therefore, a violation of freedom of religion under the *Quebec Charter* that was unjustifiable.

Minority Concurring Opinion (Abella):

The majority's approach in using different standards of review for different state acts is problematic. Since state neutrality is about what the role of the state is in protecting freedom of religion, part of the inquiry into freedom of religion necessarily engages the question of state religious neutrality. But, to extricate state neutrality from the discrimination analysis as being of singular significance to the legal system elevates it from its contextual status into a defining one.

Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resources), 2017 SCC 54

Court: McLachlin, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Brown, Côté, Rowe
Result: Majority/Concurring: Pro-Government
Decision: 7-2 Majority Judgment, Concurring
Majority: McLachlin, Abella, Karakatsanis, Wagner, Gascon, Brown, Rowe
Concurring: Moldaver, Côté

FACTS:

The Ktunaxa Nation challenged the decision of the BC Minister of Forests, Lands and Natural Resource Operations, which approved a ski resort development despite the claims made by the Ktunaxa that such development would violate their *Charter* right to freedom of religion, as the development would drive the Grizzly Bear Spirit away from Qat'muk.

ISSUE:

Did the decision to approve a ski resort development violate the freedom of religion rights of the Ktunaxa people under section 2(a) of the *Charter*? If so, can the infringement be justified under principles of administrative law?

DECISION:

Majority judgment (McLachlin, Abella, Karakatsanis, Wagner, Gascon, Brown, Rowe):

The majority dismissed the Appeal, as the found that no violation of freedom of conscience and religion under section 2(a) of the *Charter* occurred as the second part of the section 2(a) analysis was not met: "[t]he Ktunaxa's claim does not fall within the scope of section 2(a) because neither the Ktunaxa's freedom to hold their beliefs nor their freedom to manifest those beliefs is infringed by the Minister's decision to approve the project." Approving the ski resort did not impact their right to belief or manifest their belief about the Grizzly Bear Spirit. Section 2(a) does not protect the presence of Grizzly Bear Spirit in Qat'muk.

Concurring opinion (Moldaver, Côté):

A "broad and purposive" interpretation is necessary for all *Charter* rights. Using an interpretation guided by the purpose of section 2(a) of the *Charter*, which is to "ensure that society does not interfere with profoundly personal beliefs" (*R v Edwards Book and Art Ltd*.), the decision of the Minister does interfere with the Appellants' freedom of religion right, and falls within the scope of section 2(a) of the *Charter*: "[u]nlike in Judeo-Christian faiths […] the spiritual realm in the Indigenous context is inextricably linked to the physical world." However, the decision of the Minister was reasonable under the *Doré* framework, as it reflected a proportionate balance between *Charter* protections and the relevant statutory objectives.

Moreover, reasonable accommodations were offered to the Ktunaxa to lessen the effect of the developed on the Grizzly bear population.

Law Society of British Columbia v. Trinity Western University, 2018 SCC 32

Court: McLachlin, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe
Result: Majority: Pro-Government

Dissent: Pro-Challenger

Decision: 5-1-1-2 Majority Judgement, Two Minority Concurring Opinions, Dissent

Majority: Abella, Moldaver, Karakatsanis, Wagner, Gascon
Concurring: McLachlin
Concurring: Rowe
Dissent: Côté, Brown

FACTS:

Trinity Western University (TWU) is a Christian University in BC that wanted to open Canada's first private, faith-based law school. Like most religious universities and colleges, TWU required its students to adhere to a code of conduct (the Community Covenant Agreement (the "Covenant")) which prohibited practices and behaviour considered immoral by the institution's animating faith tradition, such as drunkenness, dishonesty and "sexual intimacy that violates the sacredness of marriage between a man and a woman". The Law Society of British Columbia (LSBC) denied approval of TWU's proposed law school because, according to the LSBC, the Covenant effectively bars many LGBT people from attending and is therefore discriminatory.

ISSUE:

Can the LSBC deny students from a law school, with a religious code of conduct, the right to practise law, on the basis that the school ostensibly discriminates against LGBT individuals by requiring students to sign the Covenant prohibiting sexual intimacy except between married heterosexual couples?

DECISION:

Majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon):

It was reasonable for the LSBC to conclude that promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty: upholding and maintaining the public interest in the administration of justice. The public confidence in the administration of justice may be undermined if the LSBC was seen to approve a law school that effectively bars many LGBTQ people from attending. Given the significant benefits to the relevant statutory objectives of promoting diversity and inclusion within the legal profession and the minor significance of the limitation on the *Charter* rights at issue, the LSBC's decision to refuse the approval of TWU's proposed law school represented a proportionate balance under the existing framework.

Minority Concurring (McLachlin):

As the majority concluded, LSBC's decision was minimally impairing, but its impact on the freedom of religion of members of the TWU community was not of minor significance. It precluded members of the TWU community from engaging in the practice of providing legal education in an environment that conformed to their religious beliefs, deprived them of the ability to express those beliefs in institutional form, and prevented them from associating in the manner they believed their faith required.

As the collective face of a profession bound to respect the law and the values that underpin it, the LSBC was entitled to refuse to condone practices that treat certain groups as less worthy than others.

Minority Concurring in Result (Rowe):

Rather than accepting the infringement as alleged at face value and proceeding to the balancing analysis, a review of the jurisprudence concludes that s. 2(a) of the *Charter* is not infringed in this case. Given the absence of a *Charter* infringement, the decision of the LSBC must be reviewed under the usual principles of judicial review rather than the framework set out in *Doré* and *Loyola*. In this case, the standard of review is reasonableness. The decision of the LSBC was reasonable.

Dissent (Côté, Brown):
The LSBC's mandate does not extend to the governance of law schools, which lie outside its statutory authority. The LSBC violated its statutory duty by adopting the results of a referendum affecting *Charter* rights without engaging in the process of balancing *Charter* rights and statutory objectives.
The LSBC's decision represented a profound interference with religious freedom by preventing the TWU community from expressing their religious beliefs through the Covenant and from associating with one another in order to study law in an educational community which reflects their religious beliefs. The purpose of TWU's admissions policy was not to exclude LGBT persons, but to establish a code of conduct that ensured the vitality of its religious community. Approving the proposed law school was not contrary to the public interest objectives of maintaining equal access and diversity in the legal profession nor did it condone discrimination against LGBT persons.
The LSBC has — on this Court's own jurisprudence — profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices. While the LSBC has purported to act in the cause of ensuring equal access to the profession, it has effectively denied that access to a segment of Canadian society, solely on religious grounds. This state of affairs merits judicial intervention, not affirmation.
A court of law ought not to be concerned, as the majority is explicitly concerned, with the public perception of what freedom of religion entails. The role of courts in these cases is not to produce social consensus, but to protect the democratic commitment to live together in peace.

Trinity Western University v Law Society of Upper Canada, 2018 SCC 33

Court:	McLachlin, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe
Result:	Majority: Pro-Government Dissent: Pro-Challenger
Decision:	5-1-1-2 Majority Judgement, Minority Concurring Opinion, Minority Concurring Opinion, Dissent
Majority:	Abella, Moldaver, Karakatsanis, Wagner, Gascon
Concurring:	McLachlin
Concurring:	Rowe
Dissent:	Côté, Brown

FACTS:
Trinity Western University (TWU) is a Christian University in BC that wanted to open Canada's first private, faith-based law school. Like most religious universities and colleges, TWU required its students to adhere to a code of conduct (the Community Covenant Agreement (the "Covenant")) which prohibited practices and behaviour considered immoral by the institution's animating faith tradition, such as drunkenness, dishonesty and "sexual intimacy that violates the sacredness of marriage between a man and a woman". The Law Society of Upper Canada (LSUC), denied accreditation to TWU's proposed law school because, according to the LSUC, the Covenant ostensibly negatively affect equitable access to and diversity within the legal profession and would harm LGBT individuals, which would be inconsistent with the public interests of diversity and inclusivity.
ISSUE:
Can the LSUC deny accreditation to a law school, with a religious code of conduct, on the basis

that the law school ostensibly discriminates against LGBT couples by requiring students to sign a code of conduct prohibiting sexual intimacy except between married heterosexual couples?
DECISION:
Majority (Abella, Moldaver, Karakatsanis, Wagner and Gascon):
The [Ontario] Court of Appeal accepted that the religious rights of the claimants were engaged. However, in light of the LSUC's obligation to govern the legal profession in accordance with the public interest, and its statutory mandate to promote a diverse profession without inequitable barriers, it was held that the LSUC's decision represented a proportionate balance between its statutory objectives and the limit on religious freedom. An administrative decision that engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate. Given the LSUC's interpretation of the public interest, accrediting TWU's proposed school would not have advanced the relevant statutory objectives, and therefore was not a reasonable possibility that would give effect to *Charter* protections more fully in light of the statutory objectives.
Minority Concurring (McLachlin):
The LSUC's decision was minimally impairing, but its impact on the freedom of religion of members of the TWU community was not of minor significance. It precluded members of the TWU community from engaging in the practice of providing legal education in an environment that conformed to their religious beliefs, deprived them of the ability to express those beliefs in institutional form, and prevented them from associating in the manner they believed their faith required. As the collective face of a profession bound to respect the law and the values that underpin it, the LSUC was entitled to refuse to condone practices that treat certain groups as less worthy than others.
Minority Concurring (Rowe):
The LSUC interpreted its mandate as precluding the approval of the proposed law school at TWU because of the effect of the mandatory Covenant on prospective law students. For the Benchers who voted against accreditation, the Covenant imposed a discriminatory barrier to legal education by effectively precluding LGBT students from studying law at TWU. Given the deference to which the LSUC is entitled, the majority correctly found that in taking its decision to deny accreditation, the LSUC did not err in considering the effect of the TWU Covenant.
Dissent (Côté, Brown):
The only proper purpose of a LSUC accreditation decision is to ensure that individual applicants who are graduates of the applicant institution are fit for licensing. As a consequence, the only defensible exercise of the LSUC's statutory discretion would have been to accredit TWU's proposed law school. The decision not to accredit TWU's proposed law school is, moreover, a profound interference with the TWU community's freedom of religion. Further, even were the public interest to be understood broadly as the LSUC and the majority contend, accreditation of TWU's law school would not be inconsistent with the LSUC's statutory mandate. In a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference.
The unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom. Equating recognition of a private actor as condonation of its beliefs turns the protective shield of the *Charter* into a sword. Where *Charter* rights are involved, a court of law ought not to be concerned with public perception — such rights exist to protect rights-holders from majoritarian values, not to force conformance to those values. Only a decision to accredit TWU's proposed law school would reflect a proportionate balancing of *Charter* rights and the statutory objectives which the LSUC sought to pursue. The LSUC exercised its discretion for an improper purpose and relied on irrelevant considerations. The LSUC's decision is therefore invalid.

SECTION 2(B) FREEDOM OF EXPRESSION

Canadian Newspapers Co. v Canada (Attorney General), [1988] 2 SCR 122

Court: Dickson, McIntyre, Lamer, Wilson, La Forest, L'Heureux-Dubé
Result: Pro-Government
Decision: 6-0 Unanimous

FACTS:

The wife of a man accused of sexual assault applied for a court order, as per section 442(3) of the *Criminal Code*, to prevent her identity, or any information that could reveal it, from being published or broadcasted. The order was granted and the underlying *Criminal Code* provision was promptly challenged for violating section 2(b) freedom of the press.

ISSUE:

Is the infringement of the freedom of the press under section 2(b) of the *Charter* caused by 442(3) of the *Criminal Code*, which allows publication bans regarding sexual assault complainants, justified as a reasonable limit under section 1 of the *Charter*?

DECISION:

Freedom of the press is an important and essential attribute of a free and democratic society, and measures which prohibit the media from publishing information deemed of interest obviously restrict that freedom. The limit imposed by section 442(3) on the freedom of the press is justifiable under section 1 of the *Charter* because it fosters complaints by victims of sexual assault by protecting them from the trauma of wide-spread publication resulting in embarrassment and humiliation. Nothing prevents the media from being present at the hearing and reporting the facts of the case and the conduct of the trial. Only information likely to reveal the complainant's identity is concealed from the public.

B.C.G.E.U. v British Columbia (Attorney General), [1988] 2 SCR 214

Court: Dickson, Lamer, Wilson, La Forest and L'Heureux-Dubé, McIntyre
Result: Pro-Government
Decision: 5-1 Majority Judgment, Minority Concurring Opinion
Majority: Dickson, Lamer, Wilson, La Forest and L'Heureux-Dubé
Minority: McIntyre

FACTS:

The British Columbia Government Employees' Union ("BCGEU"), whose members included employees of the superior courts, were picketing courts during a labour dispute, in hopes of limiting court activities. A BC judge issued an injunction against the picketing and other activities that interfered with the court's operations.

ISSUE:

Did the injunction, prohibiting picketing and other activities designed to disrupt the courts, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Dickson, Lamer, Wilson, La Forest, L'Heureux-Dubé):

Peaceful picketing in the context of a labour dispute contains an element of expression protected by section 2(b). But, assuring unimpeded access to the courts is plainly an objective of sufficient importance to warrant overriding a constitutionally protected right or freedom and relates to a concern which is pressing and substantial in a free and democratic society. The injunction was to

maintain access to the courts and to ensure that the courts remained in operation in order that the legal and *Charter* rights of all citizens of the province would be respected, satisfying the proportionality test. Therefore, although a violation under section 2(b) of the *Charter*, the injunction was justifiable under section 1 of the *Charter*.

Minority Concurring Opinion (McIntyre):

The injunction did not infringe the freedom of expression due to the unlawful nature of the picketing and the effects the picketing had on the operation of the courts.

Ford v Quebec (Attorney General), [1988] 2 SCR 712

Court: Dickson, Beetz, McIntyre, Lamer, Wilson, Le Dain
Result: Pro-Challenger
Decision: 6-0 Unanimous Judgment

FACTS:

In February 1984, the challengers sought a declaration that sections of the *Charter of the French Language* violated section 2(b) of the *Charter*. The impugned sections mandated that only the French language could be displayed on signs and only the French name of a business could be used.

ISSUE:

Do the sections of the *Charter of the French Language* that restrict the use of any other language but French violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The freedom of expression guaranteed by section 2(b) of the *Charter* includes the freedom to express oneself in the language of one's choice. Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Commercial expression, like political expression, is one of the forms of expression that is deserving of constitutional protection because it serves individual and societal values in a free and democratic society. Indeed, over and above its intrinsic value as expression, commercial expression, which protects listeners as well as speakers, plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The material adduced in this Court did not justify the limit imposed on freedom of expression by the *Charter of the French Language*. Whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "*visage linguistique*" in Quebec and therefore justified under section 1 of the *Charter*, requiring the exclusive use of French is not so justified.

Edmonton Journal v Alberta (Attorney General), [1989] 2 SCR 1326

Court: Dickson, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory
Result: Majority/Minority: Pro-Challenger
Dissent: Pro-Government
Decision: 3-1-3 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Dickson, Lamer, Cory
Minority: Wilson
Dissent: La Forest, L'Heureux-Dubé, Sopinka

FACTS:

Section 30 of the provincial *Judicature Act* regulated what could and could not be published from court proceedings. Section 30(1) of the *Act* prohibited the publication of any details pertaining to matrimonial proceedings, with some limited exceptions. Section 30(2) of the *Act* prohibited the

publication of any details from the pleadings of civil proceedings before trial, with the exception of the names of the parties and the general nature of the claim and the defence. The Edmonton Journal challenged the constitutionality of sections 30(1) and 30(2), arguing that they violated section 2(b) of the *Charter*.

ISSUE:

Did the provisions of the *Judicature Act*, which prevented certain information from matrimonial-related court proceedings from being published, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Dickson, Lamer, Cory):

Freedom of expression is of fundamental importance to a democratic society and should only be restricted in the clearest of circumstances. The press must thus be free to comment and report upon court proceedings. There is no doubt that the provisions of sections 30(1) and (2) of the Act contravene section 2(b) of the *Charter*. The limits imposed are not justifiable under section 1 of the *Charter* because the provisions do not minimally impair the freedom of the press and the benefits of the legislation do not outweigh the negative impact on the freedom.

Minority Concurring Opinion (Wilson):

The values in conflict in the context of this particular case are the right of the public to an open court process, which includes the right of the press to publish what goes on in the courtroom, and the right of litigants to the protection of their privacy. Section 30(1) of the *Act* does not constitute a reasonable limit on the freedom of the press which can be justified by section 1 of the *Charter* because the limitation is not proportional to the benefit.

Dissenting in part (La Forest, L'Heureux-Dubé, Sopinka):

The freedom of expression, which includes the freedom of the press and other media, is subject to such limits prescribed by law as can be demonstrably justified in a free and democratic society. While section 30(1) did violate section 2(b) of the *Charter*, the violation is a justified limit under section 1, due to the goal of protecting individuals from the irreparable harm that would result from personal and private details being published by mass media. There would be negative effects not only on individuals involved in court proceedings, but additionally on those who would be discouraged from seeking resolution through the courts. Section 30(2) of the *Act* violated section 2(b) of the *Charter*, and is too broad in its publication restrictions and prohibitions to be justified.

Slaight Communications Inc. v. Davidson, [1989] 1 SCR 1038

Court: Dickson, Beetz, Lamer, Wilson, La Forest, L'Heureux-Dubé

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 4-1-1 Majority Judgment, Dissent
Majority: Dickson, Wilson, La Forest, L'Heureux-Dubé
Dissent: Lamer, Beetz

FACTS:

Mr. Davidson was employed by Slaight Communications as a radio time salesman but was fired after three and a half years for poor performance. Mr. Davidson filed a complaint under the *Canadian Labour Code*. The adjudicator, appointed by the Minister of Labour, ruled that the dismissal was unjust. The adjudicator ordered Slaight Communications to write Mr. Davidson a letter that explained his employment, his sales targets and performance, and that the adjudicator had held that he was unjustly dismissed. Slaight Communications was ordered not to respond to any further inquiries from employers about Mr. Davidson. Slaight Communications argued that the ruling violated section 2(b) of the *Charter*.

FACTS:
Did the adjudicator's orders violate Slaight Communications section 2(b) *Charter* rights? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Dickson, Wilson, La Forest, L'Heureux-Dubé):
Both of the adjudicator's orders violated section 2(b) of the *Charter* but were justified because of the adjudicator's goal of balancing an unequal relationship and correcting a wrong. The objective of the orders was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. Slaight Communications was not forced to state opinions which were not its own.
Dissent in part (Lamer):
The adjudicator exceeded his authority by preventing Slaight Communications from responding to requests for further information about Mr. Davidson. This portion of the order violated section 2(b) and is not justified due to the extent of the violation. Preventing Slaight Communications from expressing any opinion or responding to further requests for information could lead other employers to incorrect conclusions about the opinion Slaight Communications has of Mr. Davidson. By limiting what Slaight Communications can communicate to only the objective facts of Mr. Davidson's employment, those facts could be mistaken for Slaight Communications opinion of Mr. Davidson.
Dissent in part (Beetz):
The order violated section 2(b) and was not justified because it required Slaight Communications to communicate to prospective employers things which it did not believe to be true. The order also prevented Slaight Communications from stating anything in addition to the letter of facts, which could lead one to believe that Slaight Communications had little or no additional comments to add. In both of these cases, the order required Slaight Communications to lie either implicitly or explicitly, making the order totalitarian in nature and an unjustified violation of *Charter* rights.

Irwin Toy Ltd v Quebec (Attorney General), [1989] 1 SCR 927

Court: Dickson, Beetz, McIntyre, Lamer, Wilson

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 3-2 Majority Judgment, Dissent
Majority: Dickson, Lamer, Wilson
Dissent: Beetz, McIntyre

FACTS:
Irwin Toy Ltd sought to have provisions of Quebec's *Consumer Protection Act*, which prohibited advertising directed at individuals under the age of 13, declared outside of their provincial powers. On appeal Irwin Toy Ltd also argued that the *Consumer Protection Act* violated section 2(b) of the *Charter*.
ISSUE:
Did the provisions of Quebec's *Consumer Protection Act*, which prohibited advertising towards children, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Dickson, Lamer, Wilson):
The government's purpose in enacting the relevant sections of the *Consumer Protection Act* was to prohibit the expression's particular content (advertising) in the name of protecting children. These provisions therefore constitute limitations to section 2(b) of the *Charter*. The limitations are justified

because they are proportional to the important objective of protecting children from commercial manipulation.

Dissent (Beetz, McIntyre):

The provisions violate section 2(b) and are not justified because it was not proven that the welfare of children was at substantial risk due to advertising being directed at them. Furthermore, a total prohibition on television advertising aimed at individuals under an arbitrarily chosen age is disproportionate. Freedom of expression is too important a principle to be lightly cast aside or limited. Whether political, religious, artistic or commercial, freedom of expression should not be suppressed except where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.

Canada (Human Rights Commission) v Taylor, [1990] 3 SCR 892

Court: Dickson, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 4-3 Majority Judgment, Dissent
Majority: Dickson, Wilson, L'Heureux-Dubé, Gonthier
Dissent: La Forest, Sopinka, McLachlin

FACTS:

Mr. Taylor distributed cards that invited individuals to call a phone number. The phone number contained an answering machine that broadcasted recorded messages that included anti-Semitic sentiments. A complaint about the recordings was made to the Canadian Human Rights Commission, who investigated and ruled that the recordings were a prohibited discriminatory practice under section 13(1) of the *Canadian Human Rights* Act. The Canadian Human Rights Commission ordered Mr. Taylor to cease his activities. Mr. Taylor challenged this provision of the *Canadian Human Rights Act* as violating his section 2(b) rights.

ISSUE:

Does section 13(1) of the *Canadian Human Rights Act*[12] violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society? Section 13(1) of the Canadian Human Rights Act states:

> It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

DECISION:

Majority Judgment (Dickson, Wilson, L'Heureux-Dubé, Gonthier):

Section 2(b) of the *Charter* protects all content of expression that has meaning; the type of meaning conveyed is irrelevant. Section 13(1) seeks to restrict expression by singling out for censure particular conveyances of meaning and therefore represents an infringement of section 2(b). Section 13(1) of the Act, which is sufficiently precise to constitute a limit prescribed by law under section 1 of the *Charter*, constitutes a reasonable limit upon freedom of expression because it is proportionate to the goals of ensuring equality and tolerance within Canadian society.

Dissent (La Forest, Sopinka, McLachlin):

Section 13(1) of the Act does not constitute a reasonable limit upon freedom of expression. While the legislative objectives of preventing discrimination and of promoting social harmony and

[12] It should be noted that section 13(1) of the *Canadian Human Rights Act* has since been repealed.

individual dignity are of sufficient importance in our multicultural society to warrant overriding a constitutional freedom, section 13(1) fails to meet the proportionality test. The use of the words "hatred" and "contempt", which are vague, subjective and susceptible of a wide range of meanings, extends the scope of section 13(1) to cover expression presenting little threat of fostering hatred or discrimination. Section 13(1) does not interfere as little as possible with freedom of expression. The limitation touches expression which may be relevant to social and political issues. Free expression on such matters has long been regarded as fundamental to the working of a free democracy and to the maintenance and preservation of our most fundamental freedoms.

***R. v. Keegstra*, [1990] 3 SCR 697** (Companion Case: ***R v Andrews*, [1990] 3 SCR 870**)

Court: Dickson, Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 4-3 Majority Judgment, Dissent
Majority: Dickson, Wilson, L'Heureux-Dubé, Gonthier
Dissent: La Forest, Sopinka, McLachlin

FACTS:
Mr. Keegstra was a school teacher who made anti-Semitic statements to his students. Mr. Keegstra was charged under a provision of the *Criminal Code* that prohibited willfully promoting hatred against an identifiable group. Mr. Keegstra argued that this *Criminal Code* provision violated section 2(b) of the *Charter*.
ISSUE:

Did the *Criminal Code* provisions, which prohibited willful promotion of hatred against an identifiable group, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society? Section 319(2) of the *Criminal Code* reads:

> Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of [an offence]

DECISION:
Majority Judgment (Dickson, Wilson, L'Heureux-Dubé, Gonthier):
Mr. Keegstra's speech is protected by section 2(b) of the *Charter*. However, the Criminal Code provision represents a reasonable limit on a *Charter* freedom. Parliament enacted the provision to prevent hate propaganda, a valid objective given the societal harms that can result from an abundance of hate propaganda. The means used to pursue the objective are proportionate and did not unduly violate freedom of expression due to the narrow wording and application of the statute.
Dissent (La Forest, Sopinka, McLachlin):
The *Criminal Code* provision violated section 2(b) of the *Charter*, and this violation was not justified. The provision was disproportionate, vague, and likely to ensnare speech that is innocuous. The term "hatred" itself is a highly emotional one that is quite subjective, which makes it uncertain what type of speech is acceptable and what is not. The provisions also apply to all types of expression except private expressions, which has the effect of making the provision too broad in what could run afoul of it.

***Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232**

Court: Dickson, Lamer, Wilson, La Forest, Sopinka, Gonthier, McLachlin
Result: Pro-Challenger
Decision: 7-0 Unanimous Decision
FACTS:

Mr. Rocket and Mr. Price were dentists who paid for an advertising campaign. They were both charged under the provincial *Health Disciplines Act* for violating the restrictions placed on dental advertising. Mr. Rocket and Mr. Price challenged the provision prohibiting dentists from advertising, arguing that it violated section 2(b) of the *Charter*.

ISSUE:

Does section 37(39) of the provincial *Health Disciplines Act*, which prohibits dentists from advertising violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The provision violates freedom of expression because section 2(b) of the *Charter* protects commercial speech, which is what the dentists in question were engaging in. The violation is not justified by section 1 because it is too broad and does not limit expression in the smallest way possible. The prohibition that existed was a blanket one, applying to any advertisements made by dentists.

***Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123** (Companion Case: ***R v Skinner*, [1990] 1 SCR 1235**)

Court: Dickson, Lamer, Wilson, La Forest, L'Heureux-Dubé, Sopinka

Result: Majority/Minority: Pro-Government

Dissent: Pro-Challenger

Decision: 3-1-2 Majority Judgment, Minority Concurring Opinion, Dissent

Majority: Dickson, La Forest, Sopinka

Minority: Lamer

Dissent: Wilson, L'Heureux-Dubé

FACTS:

The Manitoba government referred to the Manitoba Court of Appeal several questions pertaining to the constitutionality of two provisions of the *Criminal Code*. The *Criminal Code* provisions prohibited various activities associated with prostitution, including keeping a common bawdy house (section 193) and communication for the purposes of prostitution (section 195.1(1)).

ISSUE:

Does section 195.1(1)(c) of the *Criminal Code*, which prohibits communicating or attempting to communicate with any person for the purpose of prostitution, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Dickson, La Forest, Sopinka):

The scope of the freedom of expression does extend to the activity of communication for the purpose of engaging in prostitution, but communications regarding an economic transaction of sex for money do not lie at, or even near, the core of the guarantee of freedom of expression. Considering the nature of the expression and the nature of the infringing legislation, the means embodied in section 195.1(1)(c) of the *Criminal Code* are appropriately tailored to meet the government's objective. The limits on freedom of expression imposed by section 195.1(1)(c) of the *Code* are justifiable under section 1 of the *Charter*. The elimination of street solicitation and the social nuisance which it creates is a government objective of sufficient importance to justify a limitation on the freedom of expression guaranteed by section 2(b) of the *Charter*.

Minority Concurring Opinion (Lamer):

Section 2(b) protects all content of expression irrespective of the meaning or message sought to be conveyed. Most forms of expression are protected as well and the mere fact that a form has been

criminalized does not take it beyond the reach of *Charter* protection. But, section 195.1(1)(c) of the *Criminal Code* constitutes a reasonable limit upon the freedom of expression.

Dissent (Wilson, L'Heureux-Dubé):

Commercial expression is protected by section 2(b) and section 195.1(1) (c) prohibits persons from communicating for an economic purpose—namely, the sale of sexual services. Section 195.1(1)(c) of the *Code* is not justifiable under section 1 of the *Charter*. While the legislative objective is sufficiently important to warrant overriding a constitutional freedom, section 195.1(1) (c) fails to meet the proportionality test and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. The broad scope of the phrase "in any manner communicate or attempt to communicate" seems to encompass every conceivable method of human expression. To render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support.

Osborne v Canada (Treasury Board), [1991] 2 SCR 69

Court: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin, Stevenson

Result: Majority: Pro-Challenger

Dissent: Pro-Government

Decision: 6-1 Majority Judgment, Dissent

Majority: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin

Dissent: Stevenson

FACTS:

Mr. Osborne and others who were public servants challenged the constitutionality of a provision of the federal *Public Service Employment Act* which prohibited public servants from working for or against candidates or political parties.

ISSUE:

Did the provisions, which prohibited public servants from campaigning for or against political candidates or parties, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Wilson, La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin):

The provision violated section 2(b) of the *Charter*. While the government's goal of maintaining a neutral public service is important, the prohibition in place bans any and all partisan-related work undertaken by public servants, with no distinctions or exceptions. The result is a provision that is too broad to justify the violation of a *Charter* right.

Dissent (Stevenson):

The provision violated section 2(b) but is justified because it is a proportional response to the vital goal of maintaining a neutral public sector. The provision does not deny freedom of expression. It imposes a limitation on that freedom in the context of partisan political activities by civil servants. An effective civil service is essential to modern day democratic society and a measure of neutrality is necessary in order to preserve that effectiveness.

Committee for the Commonwealth of Canada v Canada, [1991] 1 SCR 139

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin

Result: Pro-Challenger

Decision: 2-1-1-1-1-1 Majority Judgment, Minority Concurring Opinions

Majority: Lamer, Sopinka

Minority: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin

FACTS:
Mr. Lepine and Ms. Deland were at an airport telling passers-by about their committee and its goals and recruiting members when they were asked by an RCMP officer to cease their activities. The airport's assistant manager confirmed to them that such political propaganda activities were not permitted, as sections 7(a) and 7(b) of the federal *Government Airport Concession Operations Regulations* prohibited the conducting of any business or undertaking, commercial or otherwise, and any advertising or soliciting at an airport, except as authorized in writing by the Minister.
ISSUE:
Are sections 7(a) and 7(b) of the Regulations inconsistent with the freedom of expression guaranteed in section 2 (b) of the *Charter*? If so, are the provisions justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Justices Gonthier and Cory concurred in the result, but each favoured a different combination of the approaches discussed by the other Justices.
Majority Judgment (Lamer, Sopinka):

Government ownership of property, by itself, is not enough to justify violating *Charter* freedoms. An individual will be free to communicate on government property if the form of expression he uses is compatible with the function or purpose of the place and does not negatively impact the effective operation of government. The distributions of pamphlets and discussion with certain members of the public are in no way incompatible with the airport's primary function. Section 2(b) was infringed, but by the actions of government officials, not the law in question. The infringement was not justified under section 1.
Minority Concurring Opinion (La Forest):
Freedom of expression, while it does not encompass the right to use any and all government property for purposes of disseminating views, does include the right to use streets, parks, and other areas frequented by members of the public, such as airports. The blanket prohibition, in section 7 of the Regulations, against the use of such areas for the purpose of the expression of views violated the freedom of expression guaranteed by section 2(b) of the *Charter*, and is not justifiable under section 1.
Minority Concurring Opinion (L'Heureux-Dubé):
Section 7 of the Regulations has the effect of restricting political expression and thus breaches section 2(b) of the *Charter*. If members of the public had no right whatsoever to engage in expressive activity on government-owned property, little opportunity would exist to exercise their freedom of expression. While section 2(b) of the *Charter* does not provide a right of access to all government property, some property will be constitutionally open to the public. Section 7 of the Regulations is too vague and does not constitute a limit "prescribed by law" and thus cannot be saved under section 1 of the *Charter*.
Minority Concurring Opinion (McLachlin):
The test for the constitutional right to use government property for public expression should be based on the values and interests at stake and should not be confined to the characteristics of particular types of government property. This test should reflect the concepts traditionally associated with free expression and should extend constitutional protection to expression on some but not all government property. The government's action constituted a limitation on expression, and the expression in question promoted one of the purposes of the guarantee of free expression, namely participation in political or social issues in the community. The limitation of respondents' rights is not justifiable under section 1 of the *Charter*.

***Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421** (Companion Case: ***Canadian Broadcasting Corp v New Brunswick*, [1991] 3 SCR 459)**

Court: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson
Result: Majority/Minority: Pro-Government
Dissent: Pro-Challenger
Decision: 4-1-1-1 Majority Judgment, Minority Concurring Opinions, Dissent
Majority: Sopinka, Gonthier, Cory, Stevenson
Minority: L'Heureux-Dubé, La Forest
Dissent: McLachlin

FACTS:

In two similar circumstances, CBC camera crews videotaped groups of people engaging in the illegal destruction of property and aired portions of the footage. In both cases police authorities sought and were granted warrants to enter search and seize the relevant videotapes from CBC offices. Several tapes were seized and, at the request of CBC officials, were placed in a sealed envelope while the validity of the warrants were contested.

ISSUE:

Did the seizure of the videotapes violate section 2(b) freedom of the press?

DECISION:

The case was decided by the majority and minority on grounds other than the section 2(b) freedom of the press issue. Justice L'Heureux-Dubé did not discuss section 2(b) at all and only Justice McLachlin determined that section 2(b) was engaged.

Majority Judgment (Sopinka, Gonthier, Cory, Stevenson):

Freedom of expression, protected by section 2(b) of the *Charter*, does not import any new or additional requirements for the issuance of search warrants. It provides a backdrop against which the reasonableness of the search may be evaluated and requires that careful consideration be given not only to whether a warrant should issue but also to the conditions which might properly be imposed upon any search of media premises.

Minority Concurring Obiter Opinion (La Forest):

Freedom of the press is vital to a free society and comprises the right to disseminate news, information and beliefs. The gathering of information could in many circumstances be seriously inhibited, if government had too ready access to information in the hands of the media. The press should not be turned into an investigative arm of the police. Thus, the fear that the police can easily gain access to a reporter's notes could well hamper the ability of the press to gather information. Barring exigent circumstances, the seizure of a reporter's handwritten notes and "contact book" and items of this nature should only be permitted when it is clear that all reasonable alternative sources have been exhausted.

There was no violation of section 2(b) in the specific circumstances of this case, and it was not necessary to speculate about possible infringements resulting from a search in other circumstances.

Dissent (McLachlin):

Freedom of the press under the *Charter* must be interpreted in a generous and liberal fashion having regard to the history of the guarantee and focusing on the purpose of the guarantee. The *Charter* guarantee is to protect the values underlying freedom of the press, like freedom of expression, and includes the pursuit of truth. Freedom of the press, like freedom of expression, is important to the pursuit of truth, to participation in the community and to individual self- fulfillment. In achieving these means, an effective and free press is dependent on its ability to gather, analyze and disseminate information, independent from any state imposed restrictions on content, form or perspective except those justified under section 1 of the *Charter*.

The ways in which police search and seizure may impinge on the values underlying freedom of the press are manifest and can adversely affect the role of the media in furthering the search for truth, community participation and self-fulfillment. It is not every state restriction on the press, however, which infringes section 2(b). Press activities which are not related to the values fundamental to

freedom of the press may not merit *Charter* protection. The press activity at issue here - gathering and disseminating information about a labour demonstration - was directly related to the furtherance of the values underlying the guarantee of free expression. Such search and seizure accordingly infringes freedom of the press as guaranteed by section 2(b) of the *Charter*.

R v Zundel, [1992] 2 SCR 731

Court: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci
Result: Majority: Pro-Challenger
Dissent: Pro-Government
Decision: 4-3 Majority Judgment, Dissent
Majority: La Forest, L'Heureux-Dubé, Sopinka, McLachlin
Dissent: Gonthier, Cory, Iacobucci

FACTS:
Mr. Zundel published a pamphlet that questioned whether six million Jews died during the Holocaust and was charged with "spreading false news" under a provision of the *Criminal Code*. Mr. Zundel argued that this provision of the *Criminal Code* violated section 2(b) of the *Charter*.
ISSUE:
Does section 181 of the *Code* infringe the guarantee of freedom of expression in section 2(b) of the *Charter* and, if so, is the infringement justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgement (La Forest, L'Heureux-Dubé, Sopinka, McLachlin):
All communications which convey or attempt to convey meaning are protected by section 2(b), unless the physical form by which the communication is made (for example, a violent act) excludes protection. The content of the communication is irrelevant. Before a person is denied the protection of section 2(b), it must be certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity.
Section 181 of the *Criminal Code*, which may subject a person to criminal conviction and potential imprisonment because of words he published, has undeniably the effect of limiting freedom of expression. Section 181 of the *Criminal Code* is not justifiable under section 1 of the *Charter*. It is too broad and vague, there is no identifiable harm that constitutes a pressing and substantial objective, and whatever social benefits may arise from section 181, they are disproportionate to the negative effects on the freedom of expression.
Dissent (Gonthier, Cory, Iacobucci):
Section 181 of the *Criminal Code* is justifiable under section 1 of the *Charter*, which, at best, limits only that expression which is peripheral to the core values protected by section 2(b) of the *Charter*. Parliament's objective of preventing the harm caused by the wilful publication of injurious lies is sufficiently pressing and substantial to justify a limited restriction on freedom of expression. Where racial and social intolerance is fomented through the deliberate manipulation of people of good faith by unscrupulous fabrications, a limitation on the expression of such speech is rationally connected to its eradication. The prohibition of the wilful publication of what are known to be deliberate lies is proportional to the importance of protecting the public interest in preventing the harms caused by false speech and thereby promoting racial and social tolerance in a multicultural democracy.

Haig v. Canada; Haig v. Canada (Chief Electoral Officer), [1993] 2 SCR 995

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin,

Iacobucci, Major
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 7-2 Majority Judgment, Dissent
Majority: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Major,McLachlin, Cory
Dissent: Iacobucci, Lamer

FACTS:
In September 1992, the federal government decided that a federal referendum, pertaining to issues relating to Canada's Constitution, was to be held on October 26, 1992. The referendum was to be held across the country in all provinces and territories except Quebec, which would hold a separate referendum asking the same questions on the same date. Mr. Haig had recently moved back to Quebec from Ontario. He was unable to vote in either referendum due to the residency requirements for both.
ISSUE:
Were Mr. Haig's section 2(b) rights violated by the residency requirements for the referendums that prevented him from participating in them? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Major, McLachlin, Cory):
Though a referendum is undoubtedly a platform for expression, section 2(b) of the *Charter* does not impose upon a government any positive obligation to consult its citizens through the particular mechanism of a referendum, nor does it confer upon all citizens the right to express their opinions in a referendum.
Dissent (Iacobucci, Lamer):
Mr. Haig's right to express his political views by participating in a national referendum is guaranteed by section 2(b) of the *Charter*. The right to express opinions in social and political decision-making is clearly protected by section 2(b). The effect of the federal *Referendum Act*, however, was to deprive the appellant and other recently arrived in Quebec of their rights to participate in the referendum. Accordingly, their section 2(b) rights were violated. The violation is not justified under section 1.

Ramsden v Peterborough (City), [1993] 2 SCR 1084

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Challenger
Decision: 9-0 Unanimous Decision
FACTS:
Mr. Ramsden advertised for his band on two occasions by putting up posters on hydro poles which were located on public property. Both times he was charged with violating a by-law that prohibited putting up posters on public property.
ISSUE:
Did the by-law, which prohibited posters from being erected on public property, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
The by-law violated section 2(b). While the purpose for the by-law (the prevention of litter; worker safety) had some merit, the violation was not justified because the ban was an outright prohibition on all posters being placed on not just utility poles, but also trees, all types of poles, and other

public property. This made the by-law disproportionate to the problems it sought to prevent, and therefore it could not be justified under section 1 of the *Charter*.

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major

Result: Majority: Pro- Challenger
Dissent: Pro-Government

Decision: 5-4 Majority Judgment, Dissent
Majority: Lamer, Sopinka, McLachlin, Iacobucci, Major
Dissent: La Forest, L'Heureux Dubé, Gonthier, Cory

FACTS:

The federal *Tobacco Products Control Act* prohibited all advertising and promotion of tobacco products. Additionally, it prohibited the sale of tobacco products unless the packaging included health warnings and lists of toxic chemicals contained in tobacco products.

ISSUE:

Did the provisions of the *Tobacco Products Control Act* violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The majority found that the impugned provisions of the *Tobacco Products Control Act* violated section 2(b) of the *Charter*and were not saved under section 1 of the *Charter*. Justices La Forest, L'Heureux-Dubé, Gonthier, and Cory agreed that there was a section 2(b) breach, but found that this was a justifiable limit through section 1 analysis.

Majority Judgment (Lamer, Sopinka, McLachlin, Iacobucci, Major):

Since freedom of expression necessarily entails the right not to say certain things, the requirement that tobacco manufacturers place an unattributed health warning on tobacco packages combined with the labelling restrictions violated section 2(b) of the *Charter*.

The impugned provisions mandating a complete ban and unattributed package warnings do not minimally impair the right to free expression. Several less intrusive alternative measures would be a reasonable impairment of the right to free expression, given the important objective and the legislative context. The total prohibition on advertising is only constitutionally acceptable if information is provided that such a total prohibition is necessary in order for the legislation to achieve a pressing and substantial goal.

Dissent (La Forest, L'Heureux-Dubé, Gonthier, Cory):

Compelling the tobacco companies to place unattributed health messages on tobacco packages does not infringe their freedom of expression. Even if they may infringe a form of expression protected by section 2(b), they were fully justifiable under section 1. Protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is a pressing and substantial objective. Freedom of expression claims must be weighed in light of their relative connection to a set of even more fundamental or core values which include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. Where the expression in question is farther from the "core" of freedom of expression values, a lower standard of justification may be applied. The harm engendered by tobacco and the profit motive underlying its promotion place this form of expression as far from the "core" of freedom of expression values as prostitution, hate-mongering and pornography. This form of expression must then be accorded a very low degree of protection under section 1 and an attenuated level of justification is appropriate.

Ross v New Brunswick School District No 15, [1996] 1 SCR 825

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Government
Decision: 9-0 Unanimous
FACTS:
Mr. Ross was a school teacher in New Brunswick who distributed anti-Semitic publications outside of the classroom, but not in his capacity as a teacher. A parent filed a complaint with the New Brunswick Human Rights Commission ("NBHRC"). The NBHRC ordered the school district to (1) place Mr. Ross on a leave of absence for 18 months, (2) place Mr. Ross in a non-teaching position at the school if one was or became available, (3) terminate Mr. Ross's employment if no non-teaching job was found, and (4) to terminate Mr. Ross's employment if he published or wrote any more anti-Semitic materials, or sold any of his previously published anti-Semitic materials. Mr. Ross argued that the NBHRC ruling violated his *Charter* rights under section 2(a) freedom of religion and conscience as well as 2(b) freedom of expression.
ISSUE:
Did the NBHRC Board ruling violate Mr. Ross's section 2(b) *Charter* rights? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
The Board's order infringes Mr. Ross' freedom of expression. Mr. Ross' writings and statements clearly convey meaning and are protected by section 2(b) of the *Charter*. The truth or popularity of their contents is not relevant to this determination.

However, many of the clauses were found to be justified limits to freedom of expression. Clauses (1), (2) and (3) of the order, which deal with Mr. Ross' removal from his teaching position, are rationally connected to objective of fostering an environment free from discrimination. They were also carefully tailored to accomplish this objective and minimally impair Mr. Ross' constitutional freedoms. The objectives of preventing and remedying the discrimination in the provision of educational services to the public outweigh any negative effects on Mr. Ross produced by these clauses, and therefore clauses (1), (2) and (3) are justified under section 1. Clause (4), which imposes a permanent ban, does not meet the minimal impairment test and is not justified under section 1 of the *Charter*.

Canadian Broadcasting Corporation v New Brunswick (Attorney General), [1996] 3 SCR 480

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Government
Decision: Unanimous 9-0 Judgment
FACTS:
During a sexual assault and sexual interference trial, the Crown made a motion to exclude the public and media from portions of the sentencing proceedings dealing with the specific acts that the accused committed. The motion was granted. The CBC challenged provisions of the *Criminal Code* which permitted the exclusion of the media.
ISSUE:
Did the provisions, which had the effect of excluding the public and media from aspects of a trial, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter*

as a reasonable limit in a free and democratic society?
DECISION:
The impugned *Criminal Code* provisions violate section 2(b) of the *Charter*, but are a reasonable limit because of the purpose of protecting the innocent and safeguarding privacy interests. Section 486(1) exists to allow the proper administration of justice to continue when it is in conflict with the principle of open courts. The purpose of ensuring a fair trial and the proper administration of justice is enough to justify the violation of a *Charter* right.

Libman v Quebec (Attorney General), [1997] 3 SCR 569

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Challenger
Decision: Unanimous 9-0 Judgment
FACTS:
Mr. Libman mounted a constitutional challenge against various provisions of Quebec's *Referendum Act* which regulated the expenses by third parties in referendum campaigns. The regulations had the effect of prohibiting third party expenses for those who did not wish to belong to one of the two national committees (the "Yes" committee and the "No" committee), or to a group affiliated with one of the committees.
ISSUE:
Did the provisions, which regulated expenses by third parties during referendum campaigns, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
The freedom of expression protected by section 2(b) of the *Charter* must be interpreted broadly. This is a form of political expression that is clearly protected by section 2(b) -- political expression is at the very heart of the values sought to be protected by freedom of expression -- and the impugned provisions restrict that freedom. The limits imposed cannot meet the minimal impairment test in the case of individuals and groups who can neither join nor affiliate themselves with the national committees and can therefore express their views only by means of unregulated expenses. The forms of expression provided for in that section are so restrictive that they come close to being a total ban and are not justified under section 1 of the *Charter*.

Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877

Court: Lamer, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache
Result: Majority: Pro-Challenger
Dissent: Pro-Government
Decision: 5-3 Majority Judgment, Dissent
Majority: Cory, McLachlin, Iacobucci, Major, Bastarache
Dissent: Lamer, L'Heureux-Dubé, Gonthier
FACTS:
The *Canada Elections Act* banned publishing or broadcasting polling data in the final three days of federal election campaigns. Thomson Newspapers challenged this provision as violating freedom of expression.
ISSUE:
Did the provision, which banned publishing or broadcasting polling data in the final three days of federal election campaigns, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Cory, McLachlin, Iacobucci, Major, Bastarache):

The impugned provisions of the *Canada Elections Act,* which applies only to "new" poll results, infringes section 2(b) of the *Charter*. By prohibiting the broadcasting, publication or dissemination of opinion survey results during the final three days of an election campaign, the *Canada Elections Act* infringes freedom of expression and is not justified under section 1 of the *Charter*. The doubtful benefits of the ban are outweighed by its deleterious effects. The impact on freedom of expression is profound. The section imposes a complete ban on political information at a crucial time in the electoral process. The ban sends the general message that the media can be constrained by government not to publish factual information.

Dissent (Lamer, L'Heureux-Dubé, Gonthier):

While the impugned provisions of the *Canada Elections Act* limits freedom of expression within the meaning of section 2(b) of the *Charter,* it constitutes a reasonable limit demonstrably justified in a free and democratic society under section 1 of the *Charter*. By providing for timely publication of poll results to allow scrutiny and criticism, the *Act* improves information to the public during election campaigns, enhances the electoral process and strikes a balance between the right to vote and freedom of expression. The *Charter* should not become an impediment to social and democratic progress. As to the effects of the measure on freedom of expression, the *Act* has a positive impact, promoting debate and truth in political discussion since it gives voters the opportunity to be informed about the existence of misleading factual information.

R v Lucas, [1998] 1 SCR 439

Court: Lamer, Gonthier, Cory, Iacobucci, Bastarache, L'Heureux-Dubé, Major, McLachlin

Result: Pro-Government

Decision: 7-1 Majority Judgment, Dissent in part

Majority: Lamer, Gonthier, Cory, Iacobucci, Bastarache, L'Heureux-Dubé, Major

Dissent: McLachlin

FACTS:

Mr. and Mrs. Lucas were both arrested for defamatory libel under the *Criminal Code,* after protesting in front of the provincial courts and the police headquarters. Both individuals had signs that expressed their opinion that a police officer, by not intervening in a specific case involving a foster home that he had investigated, had helped bring about the rape and sodomy of an eight-year-old girl.

ISSUE:

Did the *Criminal Code* prohibition on defamatory libel violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Lamer, Gonthier, Cory, Iacobucci, Bastarache, L'Heureux-Dubé, Major):

The very purpose of these sections of the *Criminal Code* is to prohibit a particular type of expression and therefore contravene the guarantee of freedom of expression provided by section 2(b) of the *Charter,* but the relevant sections are justified under section 1 of the *Charter*. The objective of the impugned provisions, which is the protection of the reputation of individuals, is a pressing and substantial one in our society. The negligible value of defamatory expression significantly reduces the burden on the Crown to demonstrate that the provision is minimally impairing. The further a particular form of expression departs from the values underlying freedom of expression, the lower will be the level of constitutional protection afforded to it. Defamatory

libel is so far removed from the core values of freedom of expression that it merits but scant protection.

Dissenting in part (McLachlin):

The content of the expression and its value fall for consideration only at the final stage of the proportionality analysis. To allow the perceived low value of the expression to lower the bar of government justification from the outset is to run the risk that a judge's subjective conclusion that the expression at issue is of little worth may undermine the test. Justice is better served if the government is required to justify the limitation independent of the perception that the content of the expressive activity is offensive or without value. Legislative limits on expression that falls far from the core values underlying section 2(b) of the *Charter* are easier to justify, not because the standard of justification is lowered, but rather because the beneficial effects of the limitation more easily outweigh any negative effects flowing from the limitation. The limitation in this case is justified under section 1.

UFCW, Local 1518 v KMart Canada Ltd, [1999] 2 SCR 1083

Court: Lamer, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Major, Binnie,
Result: Pro-Challenger
Decision: 7-0 Unanimous Judgment

FACTS:

During a labor dispute involving two KMart stores, members of the UFCW, Local 1518 distributed leaflets, "information picketing," at other KMart stores not party to the labour dispute, alleging unfair labour practices. While this did not interfere with the employees or customers at the stores, the union was ordered by the Industrial Relations Council (later the Labour Relations Board) to cease their picketing at secondary sites. The union challenged this, alleging that the definition of picketing as per the provincial *Labour Relations Code* was unconstitutional in light of section 2(b) of the *Charter*.

ISSUE:

Did the definition of picketing, as per the *Labour Relations Code*, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The definition of "picketing" contained in the *Code* is overly broad and infringes the guarantee of freedom of expression contained in section 2(b) of the *Charter*. The *Code* has the effect of restricting consumer leafleting and thus infringes the union's freedom of expression. The infringement of freedom of expression cannot be justified under section 1 of the *Charter*. Consumer leafleting seeks to persuade members of the public to take a certain course of action through informed and rational discourse, which is the very essence of freedom of expression. A total prohibition is clearly not proportional to the objective of minimizing the harmful effects to third parties which would result from others impeding access to premises or encouraging employees to break their contract of employment

R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd. , [2002] 1 SCR 156

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Pro-Challenger
Decision: 9-0 Unanimous Judgment

FACTS:

The union engaged in a variety of protest and picketing activities during a lawful strike and lockout at one of the appellant's plants. These activities eventually spread to "secondary" locations, where union members and supporters picketed retail outlets. An interlocutory injunction was granted which effectively prohibited the union from engaging in picketing activities at secondary locations.
ISSUE:
Does the injunction preventing secondary location picketing violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Secondary picketing is generally lawful unless it involves tortious or criminal conduct. Both primary and secondary picketing engage freedom of expression, a value enshrined in section 2(b) of the *Charter*. While protection from economic harm is an important value capable of justifying limitations on freedom of expression, it is an error to accord this value absolute or pre-eminent importance over all other values, including free expression. Picketing which breaches the criminal law or one of the specific torts will be impermissible, regardless of where it occurs. In particular, the breadth of the torts of nuisance and defamation should permit control of most coercive picketing. Legislatures must respect the *Charter* value of free expression and be prepared to justify limiting it. The Supreme Court concluded that the conduct of the Union, in secondary picketing, provided no basis for inferring any tort, as it was "peaceful informational picketing […] aimed at supporting the strike and harming the business of Pepsi-Cola by discouraging people from trading or buying Pepsi-Cola's products." However, picketing outside the homes of Pepsi-Cola's management personnel was tortious and therefore, the injunction on that picketing was well-founded.

***R. v. Guignard*, [2002] 1 SCR 472**

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Pro-Challenger
Decision: 9-0 Unanimous Judgment
FACTS:
Mr. Guignard had put up a sign, protesting the poor service of an insurance company, on one of his buildings that was not located in an industrial zone. After he refused to take down the sign, the City of Saint-Hyacinthe charged him for violating a municipal by-law that prohibited displaying advertising signs outside of an industrial zone.
ISSUE:
Did the by-law prohibiting advertising signs in non-industrial zones violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society
DECISION:
Freedom of expression is fundamental to the life of every individual and plays a critical role in the development of our society. Because commercial expression is protected by section 2(b) of the *Charter*, consumers have the freedom of expression, which sometimes takes the form of "counter-advertising", to criticize a product or make negative comments about the services supplied. By restricting the right to use this form of expression to certain designated places, the impugned by-law directly infringes freedom of expression. The impugned by-law is not justifiable under section 1 of the *Charter*. The by-law severely curtails Mr. Guignard's freedom to express his dissatisfaction with the practices of his insurance company publicly. The impact of the by-law on the freedom of expression is disproportionate to any benefit that it secures.

Ruby v. Canada (Solicitor General), [2002] 4 SCR 3

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Pro-Challenger
Decision: 9-0 Unanimous Judgment

FACTS:

Mr. Ruby requested to know what personal information about him was held in an information bank maintained by the Canadian Security Intelligence Service (CSIS). CSIS, without confirming or denying whether such information existed, refused the request, citing exemptions under provisions of the federal *Privacy Act*. Mr. Ruby challenged provisions of the *Privacy Act*, alleging that they violated his freedom of expression as well as other *Charter* rights. The provisions Mr. Ruby challenged stated that when the government claimed "foreign confidences" or the "national security" exemption under the *Privacy Act*, the reviewing court must hold the application *in camera* in secret, and only accept submissions from the government.

ISSUE:

Did the challenged sections of the *Privacy Act*, which in certain situations provided for *in camera* hearings with submissions solely from the government, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society

DECISION:

To the extent that the *in camera* provisions exclude both Mr. Ruby and the public from the proceedings, it is clear that the provision violates section 2(b) of the *Charter*. The provision cannot be saved by section 1 of the *Charter* because it does not minimally impair freedom of expression and its benefits are not proportional to the negative effect on section 2(b). The requirement that the entire hearing of the relevant application or appeal be heard *in camera* is too stringent.

Harper v Canada (Attorney General), [2004] 1 SCR 827

Court: McLachlin, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish
Result: Majority: Pro-Government
Dissent: Pro-Challenger (in part)
Decision: 6-3 Majority Judgment, Dissent in part
Majority: Bastarache, Iacobucci, Arbour, LeBel, Deschamps, Fish
Minority: McLachlin, Major, and Binnie

FACTS:

Stephen Harper challenged provisions of the *Canada Elections Act*, arguing that they violated freedom of expression, freedom of association, and the right to vote. The challenged sections placed limits on citizen groups' advertising expenses, prohibited advertising by citizen groups on election day, and the general financial accountability and transparency framework, which among other things limited donation amounts.

ISSUES:

Did the *Canada Elections Act* limits on spending by citizen groups, prohibition on advertising by citizen groups on election day, and the transparency framework, which contained rules and regulations governing citizen groups, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society

DECISION:

Majority Judgment (Bastarache, Iacobucci, Arbour, LeBel, Deschamps, Fish):

The challenged provisions violated freedom of expression, but did so justifiably, to achieve the goal of "electoral fairness." The sections mandating spending restrictions on citizens' groups exist

to promote equality in the political discourse, protect the integrity of the financing regime applicable to candidates and parties, and ensure the confidence of voters in the electoral process. While the ban on election day advertising violated freedom of expression, it is justified due to the pressing and substantial goal of providing the opportunity to respond to potentially misleading election advertising.

Dissent in part (McLachlin, Major, Binnie):

The spending restrictions of the *Elections Act* violated section 2(b) of the *Charter* and are not justified. The limits imposed on citizens effectively bar individuals from communicating their opinions on election issues to a wide audience, thus granting political parties a monopoly on effective expression during an election.

Vancouver Sun (Re), [2004] 2 SCR 332

Court: McLachlin, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish

Result: Majority: Pro-Challenger
Dissent: Pro-Government

Decision: 7-2 Majority Judgment, Dissent
Majority: McLachlin, Iacobucci, Major, Binnie, Arbour, LeBel, Fish
Dissent: Bastarache, Deschamps

FACTS:

Certain individuals were jointly charged with several offences in relation to the terrorist-caused explosion of Air India Flight 182, and the intended explosion of Air India Flight 301. Shortly after the beginning of their criminal trial, the Crown brought an *ex parte* application seeking an order that a Named Person, a potential Crown witness at the Air India trial, attend a judicial investigative hearing for examination. The hearing was to be conducted in secret, with no public or media access. The Vancouver Sun sought an order that the court proceedings be open to the public, and that journalists be allowed to be present.

ISSUE:

Did the order for a closed hearing, with no public or media access, violate the *Charter* section 2(b) freedom of expression? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Iacobucci, Major, Binnie, Arbour, Fish, LeBel):

The open court principle, a hallmark of democracy and a cornerstone of the common law, guarantees the integrity of the judiciary and is inextricably linked to the freedom of expression guaranteed by section 2(b) of the *Charter*. This principle, which should not be presumptively displaced in favour of an *in camera* process, extends to all judicial proceedings. In this case, the level of secrecy was unnecessary.

Dissent in part (Bastarache, Deschamps):

Although openness of judicial proceedings is the rule and covertness the exception, where the rights of third parties would be unduly harmed and the administration of justice rendered unworkable by the presence of the public, a court may sit closed off to the public and the media. There is a legitimate law enforcement interest in maintaining the confidentiality of a witness's identity and testimony, since the premature disclosure of information about a terrorism offence would compromise and impede the very investigation of the information gathered at the hearing and would normally render the proceedings ineffective as an investigative tool.

Montreal (City) v 2952-1366 Quebec Inc, [2005] 3 SCR 141

Court: McLachlin, Deschamps, Bastarache, LeBel, Abella, Charron, Binnie

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 6-1 Majority Judgment, Dissent
Majority: McLachlin, Deschamps, Bastarache, LeBel, Abella, Charron
Dissent: Binnie

FACTS:
A strip club in downtown Montreal violated a municipal noise by-law by using a loudspeaker, located by its entrance, to amplify the music and commentary that accompanied the show inside. The by-law specifically prohibited noise produced by sound equipment that could be heard outside.
ISSUE:
Did the by-law prohibiting amplified sounds outside violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society
DECISION:
Majority Judgment (McLachlin, Deschamps, Bastarache, LeBel, Abella, Charron):

The noise by-law infringes section 2(b) of the *Charter*. The noise emitted by a loudspeaker onto the public street had expressive content, and the method and location of the expression did not exclude it from the scope of section 2(b). The by-law had the effect of restricting expression which promotes the value of self-fulfilment and human flourishing. The by-law is justified under section 1 of the *Charter*. The prejudicial effects on free expression flowing from the regulation of noise produced by sound equipment that interferes with the peaceful use and enjoyment of the urban environment are proportionate to the beneficial effects of reducing noise pollution on the street and in the neighbourhood.

Dissent (Binnie):
The noise by-law infringes freedom of expression under section 2(b) of the *Charter* and this infringement is not justified under section 1. The law is too broad. Noise is not by nature a nuisance, there must therefore be a specification of abuse. The by-law is a disproportionate response to the legitimate problem of noise pollution because it goes beyond what could be considered minimal impairment of the expressive rights of Montrealers.

Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 SCR 1120

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel

Result: Majority: Pro-Government
Dissent: Pro-Challenger

Decision: 6-3 Majority Judgment, Dissent
Majority: McLachlin, L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie
Dissent: Iacobucci, Arbour, LeBel

FACTS:
Little Sisters, of which the individual challengers are the directors and controlling shareholders, carried a specialized inventory, mostly books, catering to gays and lesbians. Since its establishment in 1983, the store has imported 80 to 90 percent of its erotica from the United States. Little Sisters challenged the provision of the federal *Customs Act* that allowed customs officials to disallow the entry into Canada of materials that are deemed to be "obscene" and the actions of customs officials in interpreting and applying the provision.
ISSUE:
Does the provision in the *Customs Act* that allows customs officials to refuse the entry of "obscene" materials violate section 2(b) of the *Charter*. Further, did the actions of customs officials in

classifying the relevant materials as obscene violate section 2(b) of the *Charter*? If yes, were either or both of these violations justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:

Majority Judgment (McLachlin, L'Heureux-Dubé, Gonthier, Major, Bastarache, Binnie):
The *Charter* protects the right to receive expressive material as much as it does the right to create it; section 2(b) "protects listeners as well as speakers." The *Customs Act* infringes section 2(b) of the *Charter*, but is justified as a reasonable limit prescribed by law under section 1 of the *Charter*. The basic statutory scheme set forth in the Customs legislation, properly implemented by the government within the powers granted by Parliament, was capable of being administered with minimal impairment of the section 2(b) rights of importers.
Dissent in part (Iacobucci, Arbour, LeBel):

The protection of expressive freedom is central to the social and political discourse in our country. If such a fundamental right is to be restricted, it must be done with care. The *Customs Act* violates section 2(b) of the *Charter*. These wrongfully detained items clearly engaged the values underlying the guarantee of free expression in section 2(b). In light of the Customs legislation's failure to acknowledge effectively the unique *Charter* concerns raised by expressive materials it is not minimally intrusive.

R v Bryan, [2007] 1 SCR 527

Court: Bastarache, Fish, Deschamps, Charron, Rothstein, Abella, McLachlin, Binnie, LeBel
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 5-4 Majority Judgment, Dissent
Majority: Bastarache, Fish, Deschamps, Charron, Rothstein
Dissent: Abella, McLachlin, Binnie, LeBel

FACTS:
Mr. Bryan was charged with violating the *Canada Elections Act* for posting the election results for the Atlantic ridings on his website on election night, while polling stations were still open in the western half of the country.
ISSUE:
Did the *Canada Elections Act* temporary prohibition on disseminating election results violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Bastarache, Fish, Deschamps, Charron, Rothstein):
Although the impugned section of the *Canada Elections Act* infringes freedom of expression, this infringement is justified under section 1 of the *Charter*. While political expression lies at the core of the guarantee of free expression, the right at issue is the putative right to receive election results before the polls close; restricting access to such information before polls close carries less weight than after they close. The impugned section by virtue of its objective of ensuring informational equality among voters, is a reasonable limit on section 2(b) of the *Charter* because it minimally impairs freedom of expression and the negative impact is proportional to the benefits of informational equality during elections.
Dissent (Abella, McLachlin, Binnie, LeBel):
The poll publication ban is an excessive response to an insufficiently proven harm and a violation of section 2(b) of the *Charter* that cannot be justified under section 1. The government's section 1

justification falters fatally in its submission that the benefits of the limitation on the freedom of expression are proportional to its harmful effects. At issue are the core democratic rights of the media to publish and of Canadians to receive election results in a timely fashion. The ban impairs the right both to disseminate and receive election results at a crucial time in the electoral process.

Canada (Attorney General) v JTI-Macdonald Corp, [2007] 2 SCR 610

Court: McLachlin, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein

Result: Pro-Government

Decision: 9-0 Unanimous

FACTS:

After provisions of the *Tobacco Products Control Act* were declared unconstitutional in the 1995 case of *RJR-Macdonald v. Canada*, the federal government enacted the *Tobacco Act* and the *Tobacco Products Information Regulations*, which imposed new restrictions and rules on tobacco product packaging and advertising. The restrictions included a ban on lifestyle advertising, sponsorship promotion, funding scientific publications, and false promotion. Additionally, the restrictions also required that tobacco manufacturers place health warning labels on the packaging of their tobacco products. JTI-Macdonald Corporation challenged the constitutionality of all of these provisions, arguing that they violated section 2(b) of the *Charter*.

ISSUE:

Did the provisions of the *Tobacco Act* and the *Tobacco Products Information Regulations*, which imposed restrictions and requirements on tobacco product advertising and packaging, infringe section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

All of the impugned provisions violate section 2(b), but are justified under section 1 of the *Charter*. The objective of the relevant sections is of great importance, nothing less than a matter of life or death for millions of people who could be affected. The proportionality of the effects is clear. The suppressed expression is of low value compared with the significant benefits in lower rates of consumption and addiction that the restrictions may yield.

Baier v Alberta, [2007] 2 SCR 673

Court: McLachlin, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein

Result: Majority/Minority: Pro-Government
Dissent: Pro-Challenger

Decision: 5-3-1 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Rothstein, McLachlin, Binnie, Deschamps, Charron
Minority: LeBel, Bastarache, Abella
Dissent: Fish

FACTS:

Mr. Baier and others challenged provisions of the provincial *Local Authorities Election Act*, which governs municipal council and school board elections. Previously, the law prohibited school employees from running for election as school trustees, but only in the jurisdiction in which they were employed. In 2004, the *Act* was amended to prohibit school employees from running for election anywhere in the province, unless they took a leave of absence and resigned upon being elected.

ISSUE:

Did the restrictions on school board employees running for office violate section 2(b) of the

Charter? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Rothstein, McLachlin, Binnie, Deschamps, Charron):

Section 2(b) is not violated by the law. The limited right of Mr. Baier and others to run for office, which was enjoyed before the law was changed in 2004, is not a constitutional right that can be used to strike down the new law.
Minority Concurring Opinion (LeBel, Bastarache, Abella):
Freedom of expression does not protect the right to run for office. The claim by Mr. Baier and the others alleges a violation of a right that the *Charter* does not protect, and thus falls outside the scope of the *Charter*.
Dissent (Fish):
The new law violates freedom of expression without adequate justification, by deliberately suppressing political expression. The Court has traditionally interpreted *Charter* section 2(b) broadly, and should do so in this case. The amendments substantially restrict the rights of school employees to a particular channel of expression.

Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component, [2009] 2 SCR 295

Court: McLachlin, Binnie, LeBel, Deschamps, Abella, Charron, Rothstein, Fish
Result: Pro-Challenger
Decision: 7-1 Majority Judgment, Minority Concurring Opinion
Majority: McLachlin, Binnie, LeBel, Deschamps, Abella, Charron, Rothstein
Minority: Fish
FACTS:
TransLink and BC Transit operate the public transit systems in the greater Vancouver area. They refused to post political advertisements from the Canadian Federation of Students, due to their policy which allows only commercial, not political, advertising on their buses.
ISSUE:
Did Translink's advertising policy, which prohibited non-commercial advertising on city buses, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (McLachlin, Binnie, LeBel, Deschamps, Abella, Charron, Rothstein):
Both BC Transit and TransLink are "government" and therefore the *Charter* applies. The challengers are not requesting that the government support or enable their expressive activity by providing them with a particular means of expression. Rather, they seek the freedom to express themselves by means of an existing platform which they are entitled to use, without undue state interference with the content of their expression. The proposed advertisements have expressive content that brings them within the prima facie protection of section 2(b), and the location of this expression, the sides of buses, does not remove that protection. The purpose of the advertising restrictions was to provide "a safe, welcoming public transit system", but it is difficult to see how an advertisement on the side of a bus that constitutes political speech might create a safety risk or an unwelcoming environment for transit users. The policies amount to a blanket exclusion of a highly valued form of expression in a public location that serves as an important place for public discourse.
Minority Concurring Opinion (Fish):
Expressive activity will not normally be protected where it imposes on the government a

significant burden of assistance, for example, in the form of expenditure of public funds. The challenger's request would not impose a significant burden on the transit authorities. Having chosen to make the sides of buses available for expression on such a wide variety of matters, the transit authorities cannot, without infringing section 2(b) of the *Charter*, arbitrarily exclude a particular kind or category of expression that is otherwise permitted by law.

R v National Post, [2010] 1 SCR 477

Court: McLachlin, Binnie, Deschamps, Fish, Charron, Rothstein, Cromwell, Abella
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 8-1 Majority Judgment, Dissent
Majority: McLachlin, Binnie, LeBel Deschamps, Fish, Charron, Rothstein, Cromwell
Dissent: Abella

FACTS:
Mr. McIntosh, a journalist with the National Post, was investigating then Prime Minister Jean Chretien's connections to a loan that was obtained from a federally funded bank. A secret source provided Mr. McIntosh with relevant information, in return for the promise of confidentiality. The source later provided a document that, if genuine, showed unethical conduct on the part of Prime Minister Chretien. Mr. McIntosh faxed the document to the Prime Minister's office, the Prime Minister's lawyer, and to the bank; all three denied the authenticity of the document. The bank complained to the RCMP. After the National Post refused to produce the document or reveal the source, the RCMP obtained a search warrant to enter and search the newspaper's offices. The National Post sought to nullify the search warrant, citing section 2(b) of the *Charter* among other reasons.
ISSUE:
Does section 2(b) of the *Charter* create a constitutionally entrenched immunity that protects journalists from having to disclose their sources? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (McLachlin, Binnie, Deschamps, Fish, Charron, Rothstein, Cromwell, LeBel):
It is well established that freedom of expression protects readers and listeners as well as writers and speakers. Unless the media can offer anonymity in situations where sources would otherwise dry-up, freedom of expression in debate on matters of public interest would be badly compromised. However, the public's interest in protecting a secret source from disclosure may be outweighed by other competing public interests, such as the investigation of crime. Freedom to publish the news necessarily involves a freedom to gather the news, but each of the many important news gathering techniques, including reliance on secret sources, should not itself be regarded as entrenched in the Constitution. In this case, the alleged offences, including forgery, are of sufficient seriousness to justify the decision of the police to investigate the criminal allegations.

Dissent (Abella):
The media's role in disseminating information is pivotal in its contribution to public debate, and the use of confidential sources can be an integral part of the responsible gathering of the news and the communication of matters of public interest. On the other side of the balancing exercise, the benefits of disclosure range from speculative to negligible. While it is undisputed that the investigation of crime is an important public objective, the evidence sought by the state is of only questionable assistance in this case.

Toronto Star Newspapers Ltd. v. Canada, [2010] 1 SCR 721

Court: Deschamps, McLachlin, Binnie, LeBel, Fish, Charron, Rothstein, Cromwell, Abella
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 8-1 Majority Judgment, Dissent
Majority: Deschamps, McLachlin, Binnie, LeBel, Fish, Charron, Rothstein, Cromwell
Dissent: Abella

FACTS:
Numerous media organizations challenged the constitutionality of certain court-ordered publication bans. A provision of the *Criminal Code* stipulates that a justice of peace is required to order a publication ban if the accused applies for one. The ban applies to the evidence and information produced, the representations made at the bail hearing, and to any additional reasons given for the order.
ISSUE:
Did the *Criminal Code* provision providing for publication bans, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Deschamps, McLachlin, Binnie, LeBel, Fish, Charron, Rothstein, Cromwell):
While the statutory mandatory publication ban limits freedom of expression, that limit can be justified in a free and democratic society. The publication ban ensures that those accused of a crime are not punished or pre-judged at a time when they should be presumed innocent. The ban is proportionate because it is temporary, and the information contained in it will eventually become public.
Dissent (Abella):
The provision is not a justified infringement on freedom of expression because it is disproportionate. The publication ban interferes with the concept of an open court and the harm is not outweighed by the benefits. Because the completion of a trial can sometimes take years to unfold, it denies vital information from being released to the public in a timely manner.

Ontario (Public Safety and Security) v. Criminal Lawyers' Association, [2010] 1 SCR 815

Court: McLachlin, Binnie, LeBel, Fish, Abella, Charron, Rothstein
Result: Pro-Government
Decision: 7-0 Unanimous Judgment
FACTS:
In a murder trial, the judge found numerous instances of abusive conduct by state officials. The Ontario Provincial Police ("OPP") investigated the allegations of police misconduct, and exonerated the police without providing reasons for this finding. The Criminal Lawyers Association ("CLA") requested, via the Ontario *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), that the Minister responsible disclose the details of the OPP investigation. The Minister refused to disclose any records, citing the law enforcement and solicitor-client privilege exemptions from disclosure under *FIPPA*. In exercising discretion whether to disclose records under other exemptions under *FIPPA*, the Minister was required to determine whether a compelling public interest in disclosure outweighed the purpose of the exemption. No such public interest

balancing was required when the Minister refused to disclose law enforcement or solicitor- client privileged records.
ISSUE:
Was the exemption of law enforcement or solicitor-client privileged records under *FIPPA* a violation of section 2(b) of the *Charter*? If yes, was this violation justified under section as a reasonable limit in a free and democratic society?
DECISION:
Section 2(b) of the *Charter* guarantees freedom of expression, but it does not guarantee access to all documents in government hands. To demonstrate that there is expressive content in accessing these documents, a claimant must establish that the denial of access effectively precludes meaningful public discussion on matters of public interest. The decision not to make documents available does not violate the right to free expression. The CLA has not demonstrated that meaningful public discussion of the handling of the investigation and prosecution of the murder cannot take place without the documents.

Canadian Broadcasting Corp. v Canada (Attorney General), [2011] 1 SCR 19

Court: Deschamps, McLachlin, Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell
Result: Pro-Government
Decision: 9-0 Unanimous Judgment
FACTS:
The Canadian Broadcasting Corporation ("CBC") and other media organizations wanted to film, take photographs, and conduct interviews in public areas inside of courthouses. These activities are limited by legislative rules in place. Additionally, they wanted to broadcast official audio recordings of court proceedings, something that the rules prohibited. The media organizations asked to have the rules struck down for infringing on section 2(b) of the *Charter*.
ISSUE:
Did the rules that limit and prohibit certain activities from taking place inside public courthouses constitute a violation of section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Although the primary purpose of a courthouse is to serve as a place to conduct trials and other judicial proceedings, the presence of journalists in the public areas of courthouses has historically been authorized, and still is. The purpose of the impugned measures is to limit filming, taking photographs and conducting interviews to certain predetermined locations. Since news gathering is an activity that forms an integral part of freedom of the press, these measures infringe section 2(b) of the *Charter*. In this case, the limits are reasonable and justified. The fair administration of justice is necessarily dependent on maintaining order and decorum in and near courtrooms, on protecting the privacy of litigants appearing before the courts, and on facilitating truth-finding by not adding to the stress on witnesses.

Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467

Court: McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell
Result: Pro-Government
Decision: 6-0 Unanimous Judgment
FACTS:
Mr. Whatcott published and distributed four different flyers that were critical of homosexuals and homosexual activity. Complaints to the Saskatchewan Human Rights Commission accused Mr. Whatcott of promoting hatred against individuals on the basis of their sexual orientation. Section

14 of the *Saskatchewan Human Rights Code* prohibits the publication or display of any representation "that 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." Mr. Whatcott challenged Section 14 for violating section 2(b) of the *Charter*.

ISSUE:

Did the prohibition against hate speech contained within the *Saskatchewan Human Rights Code* violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The prohibition against hate speech in the *Code* infringes the freedom of expression guaranteed under section 2(b) of the *Charter*. The activity described as "hate speech" has expressive content and falls within the scope of section 2(b) protection. While the Court struck down part of the *Code*, which criminalized expression that "ridicules, belittles or otherwise affronts the dignity of", as this was not minimally impairing, it upheld the rest of the provision as being demonstrably justified in a free and democratic society in order to address "systemic discrimination of protected groups". Accordingly, the SCC found that two of the four flyers constituted hate speech. The other two, while offensive, fell short of the elevated threshold required by section 14 of the *Code*.

Alberta (Information and Privacy Commissioner) v United Food and Commercial Workers, Local 401, [2013] 3 SCR 733

Court: McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner

Result: Pro-Challenger

Decision: 9-0 Unanimous Judgment

FACTS:

During a lawful strike, individuals crossing the picket line were videotaped by the union. The union posted signs stating that those who crossed may have their images posted on a website. A number of individuals who had their images put on the website complained to the *Privacy Commissioner*, who then appointed an adjudicator to determine if the union had violated the provincial *Personal Information Protection Act* ("*PIPA*"). The adjudicator concluded that the *PIPA* provisions did not allow the unions to collect and disclose the images. The union challenged these provisions as violating *Charter* section 2(b).

ISSUE:

Do the provisions of *PIPA*, which prevented the union from collecting and publishing the images of individuals who crossed the picket lines, violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The fundamental importance of freedom of expression in the context of labour disputes has long been recognized. Picketing represents a particularly crucial form of expression with strong historical roots. *PIPA* imposes restrictions on a union's ability to communicate and persuade the public of its cause. This infringement of the right to freedom of expression is disproportionate to the government's objective of providing individuals with control over the personal information that they expose by crossing a picket line. It is therefore not justified under section 1 of the *Charter*.

B.C. Freedom of Information and Privacy Association v British Columbia (Attorney General), [2017] 1 SCR 93

Court: McLachlin, Moldaver, Karakatsanis, Wagner, Gascon, Brown, Côté

Result: Pro-Government
Decision: Unanimous 7-0 Judgment

FACTS:
The Appellant, the B.C. Freedom of Information and Privacy Association sought a declaration that British Columbia's *Election Act* violated freedom of expression by requiring individuals or organization that wanted to "sponsor election advertising" to register.
ISSUE:
Does section 239 of the provincial *Election Act*, which obliges sponsors of election advertising, including those who spend less than $500, to register, violate freedom of expression under section 2(b) of the *Charter*? If so, can it be justified under section 1?
DECISION:
The SCC held that the registration obligation which requires sponsors to register as a necessary condition to engage in "election advertising" does limit the *Charter* right to freedom of expression. Indeed, political expression is a core component of section 2(b) of the *Charter*.
Yet, the legislation was not overly broad, as it did not encompass political self-expression. The legislation was not aimed at curbing individual self-expression, such as using a political bumper sticker or wearing a political t-shirt.
The Court noted that despite the violation of section 2(b), the scope of the violation was justified under section 1, given the earlier findings that the restriction did not apply to individual self-expression.

Groia v. Law Society of Upper Canada, 2018 SCC 27

Court: McLachlin, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe
Result: Majority: Pro-Challenger
Dissent: Pro-Government
Decision: 5-1-3 Majority Judgement, Minority Concurring Opinion, Dissent
Majority: Moldaver, McLachlin, Abella, Wagner, Brown
Concurring: Côté
Dissent: Karakatsanis, Gascon, Rowe

FACTS:
The Law Society of Upper Canada (LSUC) brought disciplinary proceedings against Mr. Groia, alleging professional misconduct based on his uncivil behaviour during a trial. A three-member panel of the Law Society Hearing Panel found Mr. Groia guilty of professional misconduct, suspended his licence to practice law for two months and ordered him to pay nearly $247,000 in costs. On appeal, the Law Society Appeal Panel (AP) also concluded that Mr. Groia was guilty of professional misconduct, but it reduced Mr. Groia's suspension to one month and decreased the costs award against him to $200,000.
ISSUE: Was the AP's approach to and finding of professional misconduct reasonable under the circumstances? In addition, did the LSUC's decision to discipline Mr. Groia unjustifiably restrict his expressive freedom as guaranteed under Section 2(b) of the *Charter*?
DECISION:
Majority: (Moldaver, McLachlin, Abella, Wagner and Brown):
The AP's reasonable basis standard allows for a proportionate balancing between expressive freedom and the Law Society's statutory mandate. Although the approach that it set out was appropriate, the AP's finding of professional misconduct against Mr. Groia on the basis of incivility was unreasonable. A particular professional misconduct finding that engages a lawyer's

Charter s. 2(b) freedom of expression will only be reasonable if it reflects a proportionate balancing of the law society's statutory objective with the lawyer's expressive freedom. When the impugned behaviour occurs in a courtroom, lawyers' expressive freedom takes on additional significance. In that arena, the lawyer's primary function is to resolutely advocate on his or her client's behalf. Law society tribunals must account for this unique aspect of lawyers' expressive rights when arriving at a disciplinary decision arising out of in-court behaviour. As a result, a finding of professional misconduct is more likely to represent a proportionate balance of the Law Society's statutory objective with the lawyer's expressive rights where the impugned speech lies far from the core values of lawyers' expressive freedom.

Minority Concurring: (Côté):

To protect the independence of the judiciary and the authority of judges to manage proceedings before them in a manner they saw fit, the judiciary should have the final say over the appropriateness of lawyers' conduct in court, not the law society.

Dissenting: (Per Karakatsanis, Gascon and Rowe):

The majority's approach effectively gave lawyers a novel mistake of law defence to allegations of misconduct based on subjective legal beliefs, leaving accusations grounded in honestly held legal beliefs immune from law society sanction, irrespective of how baseless that legal belief was. Setting aside the AP's decision has the potential to validate unprofessional conduct and undermine law societies' ability to sanction it.

R. v. Vice Media Canada Inc., 2018 SCC 53

Court: Wagner, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin

Result: Majority: Pro-Government
Concurring: Pro-Government

Decision: 5-4 Majority Judgement, Minority Concurring Opinion

Majority: Moldaver, Gascon, Côté, Brown, Rowe

Concurring: Wagner, Abella, Karakatsanis, Martin

FACTS:

Vice Media Canada Inc. ("Vice Media") is a company that produces stories and content on a number of multimedia platforms. In 2014, one of Vice Media's reporters began corresponding with a Canadian man suspected of having joined the Islamic State of Iraq and Syria ("ISIS"), through an instant text messaging application. Based on these exchanges, the reporter wrote three articles which Vice Media then published. The RCMP sought and obtained a Production Order, which directed the Appellants to produce screen captures of the reporter's exchanges with the suspected ISIS member.

ISSUE:

Does the existing framework still effectively balance the two competing concepts of the state's interest in the investigation and prosecution of crime, and the media's guaranteed *Charter* s. 2(b) freedom of expression and right to privacy in gathering and disseminating the news?

DECISION:

Majority: (Moldaver, Gascon, Côté, Brown, Rowe):

It is neither necessary nor appropriate in this case to formally recognize that freedom of the press enjoys distinct and independent constitutional protection under s. 2(b) of the *Charter*. The appeal can readily be disposed of without rethinking s. 2(b) and the matter was not fully argued by the parties or considered by the courts below. Based on the record, it was open to the authorizing judge in conducting the *Lessard* balancing exercise to conclude that the state's interest in the investigation and prosecution of crime outweighed the media's right to privacy in gathering and disseminating the news.

Minority Concurring: (Wagner, Abella, Karakatsanis, Martin):
Section 2(b) of the *Charter* contains a distinct constitutional press right which protects the media's core expressive functions — its right to gather and disseminate information for the public benefit without undue interference. When the state seeks access to information in the hands of the media through a production order, both the press' s. 2(b) rights and s. 8 *Charter* privacy rights are engaged. A proportionality inquiry must show that the benefit of the state's interests in obtaining the information outweighs the harmful impact on the press' constitutionally protected s. 8 and s. 2(b) rights.
The suggestion that the Production Order would interfere with Vice Media's newsgathering and publication functions shrivels in a context where the source was not a confidential one and wanted everything he said to be made public. Crucially, there is no suggestion that anything the source said was intended or understood to be off the record. The journalist's own conduct shows that the relationship was not confidential in any way. Accordingly, the benefit of the state's interest in obtaining the messages outweighs any harm to Vice Media's rights.

SECTION 2(D): FREEDOM OF ASSOCIATION
(Where the challenger is not a union)

Lavigne v Ontario Public Service Employees Union, [1991] 2 SCR 211

Court: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin
Result: Pro-Government
Decision: 3-3-1 Majority Judgment, Minority Concurring Opinions
Majority: La Forest, Sopinka, Gonthier
Minority: Wilson, L'Heureux-Dubé, Cory
Minority: McLachlin

FACTS:
Mr. Lavigne was a college teacher and paid dues to the Ontario Public Service Employees Union, as required by the check-off clause in the collective agreement in place. Mr. Lavigne objected to some of the expenditures made by the union that went beyond the stated purpose of the union, such as contributions to political parties and causes, and sought declaratory relief, arguing that such actions violated his section 2(d) rights.
ISSUE:
Did the union's political activities, undertaken in part with some of Mr. Lavigne's mandatory union dues, violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (La Forest, Sopinka, Gonthier):
The imposition on Mr. Lavigne to pay union dues is one made by government, therefore the *Charter* applies in this situation. Section 2(d) freedom of association is violated when the union uses mandatory fees collected from workers to pursue and support goals and activities that are not directly related to collective bargaining.
This violation was justified as it minimally impairs the rights of Mr. Lavigne and any other who may find themselves in the same situation as him. Allowing individuals to opt out of mandatory union dues would critically undermine unions. Regulating what unions can and cannot spend money on would result in an implication that unions are incapable of controlling their institutions. Furthermore, allowing unions to involve themselves in greater socio-political or economic debates or causes furthers and enriches democracy in the workplace and society as a whole.

Minority Concurring Opinion (Wilson, L'Heureux-Dubé, Cory):
Mr. Lavigne's section 2(d) freedom of association was not violated. Section 2(d) exists to protect the right to associate in the pursuit of common goals and should not be expanded to include the right not to associate.
Minority Concurring Opinion (McLachlin):
If the right not to associate exists under section 2(d) of the *Charter*, the purpose of it would be to protect individuals against enforced ideological conformity. However, the mandatory payment of union dues to a union which may partake in activities Mr. Lavigne disagrees with would not be protected by such a right. Therefore, section 2(d) of the *Charter* is not violated.

Libman v Quebec (Attorney General), [1997] 3 SCR 569

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Challenger
Decision: Unanimous 9-0 Judgment
FACTS:
Mr. Libman mounted a constitutional challenge against various provisions of Quebec's *Referendum Act* which regulated the expenses by third parties in referendum campaigns. The regulations had the effect of prohibiting third party expenses for those who did not wish to belong to one of the two national committees (the "Yes" committee and the "No" committee), or to a group affiliated with one of the committees.
ISSUE:
Did the provisions, which regulated expenses by third parties during referendum campaigns, violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
The provisions infringe freedom of association. The protection provided for in section 2(d) of the *Charter* includes the exercise in association of the constitutional rights and freedoms of individuals. In the present case, there are both individuals and groups whose freedom of expression is restricted by the impugned provisions. These groups therefore cannot freely exercise one of the rights protected by the *Charter*. Their freedom of association is accordingly infringed.

R v Advance Cutting and Coring Ltd, [2001] 3 SCR 209

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Court: Majority/Minority: Pro-Government
Dissent: Pro-Challenger
Decision: 3-1-1-4 Majority Judgment, Minority Concurring Opinions, Dissent
Majority: Gonthier, Arbour, LeBel
Minority: L'Heureux-Dubé, Iacobucci
Dissent: McLachlin, Major, Bastarache, Binnie

FACTS:
Advance Cutting and Coring Ltd and others were various contractors, real estate promoters, and construction workers. They were charged under Quebec's *An Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry* (the "*Construction Act*") for hiring employees who did not have the proper credentials to work on a construction project. Advance Cutting and Coring Ltd argued that the *Construction Act* was unconstitutional

because it required workers to become members of a union in order to receive the credentials they needed to work in the industry. The provisions therefore did not respect the freedom not to associate.

ISSUE:

Did the statutory provisions, requiring workers to be credentialed and therefore members of a union, violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Gonthier, Arbour, LeBel):

The legislation did not violate section 2(d) because it only requires construction workers to adhere to minimal obligations to belong to a union. As there was no evidence that Quebec unions are ideologically coercive, the requirements of the legislation were reasonable. If the legislation violated section 2(d), it would be justified because it addresses the pressing and substantial concern of economic and labour stability.

Minority Concurring Opinion (L'Heureux-Dubé):

The negative right "not to associate" was not found in the *Charter* and recognizing such right would trivialize the *Charter*.

Minority Concurring Opinion (Iacobucci):

The negative right "not to associate" was found in the *Charter* and is violated by the legislation. When evaluating whether this right is violated, a broader approach should be adopted. However, the violation was justified by the government's goal of providing social and economic stability and peace.

Dissent (McLachlin, Major, Bastarache, Binnie):

A negative right "not to associate" was implied in the *Charter*. As unions are large bodies that have significant political and economic roles in society, mandating that an individual must belong to one is ideological conformity. In order to determine if this right has been violated, a broader approach other than one of "ideological conformity" must take place which considers the proper and full roles unions have in society. The legislation violated section 2(d) of the *Charter* and this was not justified because there is no connection established between the legislation's goals of providing social and economic stability and its restrictions.

SECTION 2(D): FREEDOM OF ASSOCIATION (UNION V. GOVERNMENT)

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313

(Labour Trilogy companion cases: *PSAC v Canada*; *RWDSU v Saskatchewan*)

Court: Beetz, Le Dain, La Forest, McIntyre, Dickson, Wilson

Result: Majority/Minority: Pro-Government
Dissent: Pro-Union

Decision: 3-1-2 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Beetz, Le Dain, La Forest
Minority: McIntyre
Dissent: Dickson, Wilson

FACTS:

The Government of Alberta sought to clarify whether or not provisions from the provincial *Public Service Employee Relations Act*, the *Labour Relations Act*, and the *Police Officers Collective Bargaining Act*, which prohibited strikes and imposed arbitration to resolve labour disputes, violated the *Charter*.

ISSUE:

Did the provisions of legislation, which prohibited strikes and mandated arbitration, violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Beetz, Le Dain, La Forest):
Section 2(d) of the *Charter* did not guarantee the right to strike or the right to collective bargaining. The right to strike and the right to collective bargaining are not fundamental rights, they are rather activities taken by groups or associations in pursuit of their goals. These issues are best left to the legislatures to deal with, rather than the courts.
Minority Concurring Opinion (McIntyre):
Section 2(d) did not result in independent rights being vested within a group. Groups cannot have greater rights than those of individuals. Since there was no individual right to strike, section 2(d) did not guarantee a group or association the right to strike. The *Charter* did not include any specific reference to the right to strike, despite strikes being in common existence for many years. When this is taken into account along with the emphasis placed on individual rights within the *Charter*, it is clear that there was no implied right to strike within the *Charter*.
Dissent (Dickson, Wilson):
Section 2(d) included the freedom to form and join associations and the right to bargain collectively and strike. Constitutional protection must exist beyond simply the forming and joining of associations, as these associations would be meaningless if their activities were not protected. And while all associational activities are not protected, an attempt to preclude associational conduct because of its associational nature would be invalid under section 2(d).
This legislation violated section 2(d) and was not justified by section 1 of the *Charter*. The protection of government from political pressure enacted via a strike was not an objective that justifies the *Charter* violation, although the protection of essential services, such as a police and firefighting, was a sufficiently important objective.

Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 SCR 367

Court: Dickson, Sopinka, La Forest, L'Heureux-Dubé
Result: Majority: Pro-Government
Dissent: Pro-Union
Decision: 4-3 Majority Judgment, Dissent
Majority: Dickson, Sopinka, La Forest, L'Heureux-Dubé
Dissent: Wilson, Gonthier, Cory
FACTS:
The Professional Institute of the Public Service of Canada ("PIPSC") was a union that collectively bargained on behalf of 32 nurses employed in the Northwest Territories. In 1986, the federal government transferred healthcare responsibilities to the Northwest Territories government. In order to continue to bargain collectively and represent the nurses, PIPSC needed to become incorporated in the Northwest Territories under the territory's *Public Service Act*. The territorial government refused to incorporate PIPSC, which resulted in PIPSC challenging the constitutionality of the relevant provision in the *Public Service Act*.
ISSUE:
Did the provisions of the Public Service Act, requiring the incorporation of collective bargaining agents, violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Dickson, Sopinka, La Forest, L'Heureux-Dubé):

Section 2(d) was not violated. The activity of collective bargaining was not protected by the *Charter*. How legislatures determine which bargaining agents are chosen was beyond constitutional scrutiny. Given this fact, there was no constitutional protection granted to force government to bargain with a particular representative chosen by employees.

Dissent (Wilson, Gonthier, Cory):

Section 2(d) was violated by the provisions because it restricts the freedom of employees to form or change their association. By giving the government control over which bargaining agents were approved or allowed to be incorporated, the section 2(d) rights of employees were violated. This denial of the employees' right to select their own bargaining agent in the manner contemplated in other jurisdictions cannot be justified as a reasonable limit under section 1 of the *Charter*.

Health Services and Support – Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27

Court: McLachlin, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella

Result: Majority: Pro-Union
Dissent: Pro-Government in part

Decision: 6-1 Majority Judgment, Dissent in part
Majority: McLachlin, Bastarache, Binnie, LeBel, Fish, Abella
Dissent: Deschamps

FACTS:

The BC government passed the Health and Social Services Delivery Improvement Act, with little consultation with the healthcare unions. Part 2 of the act introduced changes that affected collective agreements, in some places invalidating provisions that were already in effect.

ISSUE:

Did Part 2 of the Health and Social Services Delivery Improvement Act, which invalidated and modified provisions of collective agreements with unions, violate section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Bastarache, Binnie, LeBel, Fish, Abella):

Section 2(d) of the *Charter* included a procedural right to collective bargaining. By dismissing past collective agreements and pre-emptively removing certain issues from future negotiations, the provisions of the legislation that affect those areas violated section 2(d) of the *Charter*. The legislation, though dealing with the pressing and substantial goals of improving healthcare delivery, did not use means that are minimally impairing and therefore the violation is not justified. **Dissent in part** (Deschamps):

To properly determine if a section 2(d) violation has occurred, state actions should be examined to ascertain if they have prevented or denied meaningful discussion and consultation between employers and employees within the context of collective bargaining. Within that framework, only state interference with prominent workplace issues is relevant to section 2(d) of the *Charter*.

In this case, section 2(d) was violated by various sections of Part 2 of the Health and Social Services Delivery Improvement Act. All violations, with the exception of section 6(4) are justified because they are both proportionate and minimally impairing responses to the severe healthcare problems facing the government. Section 6(4), which voided the requirement of consulting with the union before contracting outside of the collective agreement, was not proven to be a reasonable burden and therefore cannot be justified under section 1 of the *Charter*.

Mounted Police Association of Ontario v. Canada (Attorney General), 2015 SCC

1

Court: McLachlin, LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner

Result: Majority: Pro-Union
Dissent: Pro-Government

Decision: 6-1 Majority Judgement, Dissent
Majority: McLachlin, LeBel, Abella, Cromwell, Karakatsanis, Wagner
Dissent: Rothstein

FACTS:
Two private associations of Royal Canadian Mounted Police ("RCMP") members sought a declaration that the combined effect of the exclusion of RCMP members from the application of the *Public Service Staff Relations Act* and the imposition of the RCMP's Staff Relations Representative Program ("SRRP") as a labour relations regime unjustifiably infringed members' freedom of association.

ISSUE:
Does preventing RCMP members to unionize or engage in collective bargaining violate the members' guarantee of freedom of association in section 2(*d*) of the *Charter* and, if so, is the infringement demonstrably justifiable in a free and democratic society under section 1 of the *Charter*?

DECISION:
Majority (McLachlin, LeBel, Abella, Cromwell, Karakatsanis, Wagner):
This is a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control. The flaws in the SRRP process do not permit meaningful collective bargaining and are inconsistent, in both purpose and effect, with the section 2(d) right to join with others to meet on more equal terms the power and strength of other groups or entities.
A meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, a degree of independence from management sufficient to allow members to control the activities of the association and a regard to the industry and workplace in question. Parliament must not substantially interfere with this right unless this interference can be justified under s. 1 of the *Charter.* The government's infringement of the RCMP member's section 2(d) right is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Charter*.
Dissent (Rothstein):
Just as the government and legislature must respect the courts' expertise as judicial bodies, so too must courts appreciate that they are not best placed to make determinations as to which specific social or economic policy choice is most appropriate. The majority has departed from these core principles of constitutional law in this case and departs from this Court's recent jurisprudence on freedom of association in order to justify a particular result in this case. The majority takes freedom of association far beyond the ordinary meaning of those words and well beyond what the concept of "association" has been held to include. Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur. So long as it is not effectively impossible for employees to make collective representations on workplace issues, through individuals who are representative of their interests, and that those representations are considered by management in good faith, there is no violation of s. *2(d*) of the *Charter*. The current labour relations model permits RCMP members to exercise their freedom of association under s. 2 of the *Charter*.

Meredith v Canada (Attorney General), 2015 SCC 2

Court: McLachlin, LeBel, Abella, Rothstein, Cromwell, Karakatsanis, Wagner
Result: Majority: Pro-Government
Dissent: Pro-Union
Decision: 6-1 Majority Judgment, Dissent
Majority: McLachlin, LeBel, Cromwell, Karakatsanis, Wagner, Rothstein
Dissent: Abella

FACTS:

The Treasury Board handled the salary and compensation for members of the RCMP. In doing so, it considered recommendations from the Pay Council, an advisory board comprised of RCMP members and management. In June 2008, the Treasury Board increased the salaries of RCMP members for the years of 2008-2010 by 3.32%, 3.5%, and 2%. Following the global financial crisis, in December 2008 the Treasury Board announced that the salary increases would instead be 1.5% for each of the three years. The Pay Council approached the Treasury Board with alternative proposals but all were rejected by the Treasury Board. The federal government later enacted the Expenditure Restraint Act ("ERA") in March of 2009, which limited salary increases within the public sector to 1.5% and prohibited any other increases to compensation. The ERA contained an exception for RCMP members, which allowed the negotiation for additional allowances as part of the internal transformational initiative that was being undertaken within the RCMP. Mr. Meredith and Mr. Roach represented all members of the RCMP when they challenged the wage increase rollback and the ERA. Mr. Meredith and Mr. Roach argued that the changes violated section 2(d) of the *Charter*.

ISSUE:

Did the rollback of the wage increases via the ERA violate section 2(d) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, LeBel, Cromwell, Karakatsanis, Wagner, Rothstein):

The wage increase rollback and the ERA did not violate section 2(d) of the *Charter*. The ERA did not substantially interfere with the labour relations process, and therefore did not violate section 2(d). Additionally, the ERA included an exception that allowed further negotiations to take place for RCMP members through the existing Pay Council process.

Dissent (Abella):

The wage rollback violated section 2(d). The raise was the result of a consultation process with the RCMP. The rollback, absent any opportunity for the RCMP to make representations on the potential outcomes resulting from the rollback, effectively removed any meaningful consultation between the two parties and thus violated section 2(d). The violation was not justified because the lack of consultation with the affected party during the decision-making process for the wage rollback made the violation disproportionate.

Saskatchewan Federation of Labour v Saskatchewan, 2015 SCC 4

Court: McLachlin, LeBel, Abella, Cromwell, Karakatsanis, Rothstein, Wagner
Result: Majority: Pro-Union
Dissent: Pro-Government
Decision: 5-2 Majority Judgment, Dissent
Majority: McLachlin, LeBel, Abella, Cromwell, Karakatsanis
Dissent: Rothstein, Wagner

FACTS:

In 2007, the Saskatchewan government introduced two new laws that affected public sector workers and trade unions. The *Public Service Essential Services Act* ("*PSESA*") limited the ability of public sector employees who performed essential services to strike, and included no method for dealing with collective bargaining disputes. The *Trade Union Amendment Act* ("*TUAA*") altered the union certification process by increasing the required level of support, while at the same time reducing the time period for receiving written support from employees. Additionally, the rules governing communications between employers and employees were changed.

ISSUE:

Did either the *Public Service Essential Services Act* or the *Trade Union Amendment Act* violate section 2(d) of the *Charter*? If yes, was this violation justified as a reasonable limit on a *Charter* freedom?

Majority Judgment (McLachlin, LeBel, Abella, Cromwell, Karakatsanis):

The *PSESA* violated section 2(d) because it substantially interfered with the collective bargaining process. The right to strike is an indispensable component of the collective bargaining process, and is constitutionally protected under section 2(d) of the *Charter*, because it ensures meaningful negotiations between employers and employee representatives. This violation was not justified because the legislation does not minimally impair section 2(d) rights. Under PSESA, public employers would determine which and how essential services would be maintained during a work stoppage. The changes made via the TUAA did not violate section 2(d).

Dissent (Rothstein, Wagner):

The PSESA did not violate section 2(d) as it does not substantially interfere with collective bargaining rights. The goal of strikes is not to ensure a proper and productive collective bargaining process, but rather is a political tool used to exert pressure on one side. The courts should defer to elected representatives and not intrude by constitutionalizing a right to strike, as such action would upend the delicate balance that exists. The TUAA did not violate section 2(d).

Chagnon v. Syndicat de la fonction publique et parapublique du Québec, 2018 SCC 39

Court: Wagner, Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe, Martin

Result: Majority: Pro-Union
Dissent: Pro-Government

Decision: 6-1-2 Majority Judgement, Minority Concurring Opinion, Dissent
Majority: Karakatsanis, Wagner, Abella, Moldaver, Gascon, Martin
Minority Concurring: Rowe
Dissenting: Côté, Brown

FACTS:

Three security guards employed by the National Assembly of Québec (the "Assembly") were dismissed by Mr. Chagnon, the President of the National Assembly (the "President"), for using their employer's cameras to observe activities inside nearby hotel rooms. Grievances were filed in which the guards, represented by their union, sought reinstatement in their respective positions and reimbursement of the benefits they had lost. The President objected to the grievances on the basis that the decision to dismiss the guards was immune from review because it was protected by the parliamentary privileges. He relied on two parliamentary privileges: the privilege over the management of employees and the privilege to exclude strangers from the Assembly's precincts.

ISSUE:

Did the President's claim of parliamentary privileges over the employee's dismissal violate their section 2(d) *Charter* rights?

DECISION:

Majority: (Karakatsanis, Wagner, Abella, Moldaver, Gascon, Martin):

Legislative assemblies in Canada, including provincial legislative assemblies, receive parliamentary privileges through the common law as an inherent and necessary component of their legislative function, and by virtue of the preamble of the *Constitution Act, 1867*. Here, the privilege sought affects employees who are not members of the National Assembly. Further, the privilege claimed by the appellant may undermine the right of the security guards to meaningfully associate as guaranteed under s. 2 (*d*) of the *Charter*.

The Assembly must show that it requires unreviewable authority over the management of security guards in order to maintain its sovereignty as a legislative and deliberative assembly. This unnecessary sphere of immunity would impact persons who are not members of the legislative assembly and undermine their access to the labour regime negotiated in accordance with their s. 2 (*d*) *Charter* rights.

Minority Concurring: (Rowe):

The *Act respecting the National Assembly*, CQLR, c. A-23.1 (*ARNA*) defines how the Assembly manages its employees. Under *ARNA*, the President's dismissal of the guards is not protected by parliamentary privilege. Parliamentary privilege protects the operation of the legislature from outside interference, where such interference would impede the fulfilment of its constitutional role. Parliamentary privilege does not apply to the guards because they are employed under *ARNA*. Their s. 2(d) rights are therefore engaged and the President's dismissal of the guards may be reviewed.

Dissent: (Côté, Brown): The guards' tasks fall within the sphere of activity that is necessary to the proper functioning of the Assembly. As a result, their labour relations fall within the scope of parliamentary privilege over the management of employees and the President's dismissal is not reviewable.

ABOUT THE JUSTICE CENTRE

Founded in 2010 as a voice for freedom in Canada's courtrooms, the Justice Centre for Constitutional Freedoms defends the constitutional freedoms of Canadians through litigation and education. The Justice Centre's vision is for a Canada where:

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- all Canadians are free to express peacefully their thoughts, opinions and beliefs without fear of persecution or oppression.
- every person has the knowledge and the perseverance to control his or her own destiny as a free and responsible member of our society.
- every Canadian has the understanding and determination to recognize, protect and preserve their human rights and constitutional freedoms.
- people can enjoy individual freedom as responsible members of a free society.

ABOUT THE AUTHORS

John Carpay was born in the Netherlands and grew up in British Columbia. He earned his B.A. in Political Science at Laval University in Quebec City, and his LL.B. from the University of Calgary. Fluent in English, French, and Dutch, John served the Canadian Taxpayers Federation as Alberta Director from 2001 to 2005, advocating for lower taxes, less waste, and accountable government. Called to the Bar in 1999, he has been an advocate for freedom and the rule of law in constitutional cases across Canada. As the founder and president of the Justice Centre for Constitutional Freedoms, John has devoted his legal career to defending constitutional freedoms through litigation and education. He considers it a privilege to advocate for courageous and principled clients who take great risks – and make tremendous personal sacrifices – by resisting the unjust demands of intolerant government authorities. In 2010, John received the *Pyramid Award for Ideas and Public Policy* in recognition of his work in constitutional advocacy, and his success in building up and managing a non-profit organization to defend citizens' freedoms. He serves on the Board of Advisors of Justice, an initiative of the Centre for Civil Society, India.

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The Justice Centre acknowledges with gratitude the valuable contributions of David DiSante to the 2017 Judicial Freedom Index, which forms the basis of much of the analysis in the 2019 Judicial Freedom Index.

APPENDIX "A": CASES EXCLUDED FROM THIS STUDY

SECTION 2(A) FREEDOM OF RELIGION

Carter v Canada (Attorney General), [2015] 1 SCR 331

Court: McLachlin, LeBel, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon
Result: Pro-Challenger
Decision: Unanimous 9-0 Judgment

FACTS:
One of the Appellants, Gloria Taylor, was diagnosed with ALS, a fatal neurodegenerative disease. Wishing to die peacefully, Ms. Taylor and the other Appellants sought legal action to declare the provisions in the Criminal Code which criminalized assisting another person to end their own life.
ISSUE:
Do the prohibitions on physician-assisted dying found in sections 241 and 14 of the Criminal Code violate section 7 of the *Charter*? And if so, can these violations be justified under section 1 of the *Charter*?
DECISION:
The SCC reversed its prior jurisprudence established in *Rodriguez v British Columbia (Attorney General)* in finding that the prohibition violated the right to "life, liberty and security of the person". This violation was not in accordance with the principles of fundamental justice, and could not be justified under section 1 of the *Charter*.
In *dicta*, the Court responded to concerns expressed by certain intervening parties relating to physicians' freedom of conscience and religion vis-à-vis assisted dying. The SCC commented that "nothing in the declaration of invalidity […] would compel physicians to provide assistance in dying". The Court "underline[d] that the *Charter* rights of patients and physicians will need to be reconciled."

[Reason for exclusion: Although the Court's underlying opinion, in both its *ratio decidendi* (unconstitutionality of physician-assisted suicide prohibition) and its *obiter dictum* (freedom of conscience and religion may protect doctors from participating in assisted suicide) can be considered pro-challenger or pro-freedom, this case is not centrally focused on a fundamental freedom, but rather on section 7 of the *Charter*.]

Adler v Ontario, [1996] 3 SCR 609

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Government
Decision: 5-2-2 Majority Judgement, Minority Concurring Opinion, Dissent
Majority: Lamer, La Forest, Gonthier, Cory, and Iacobucci
Minority concurring: Sopinka and Major
Dissent: McLachlin, L'Heureux-Dubé

FACTS:
Mr. Adler and other parents sent their children to independent religious schools. They challenged the constitutionality of Ontario's policy of fully funding Catholic schools but not other independent religious schools, under the *Education Act*.
ISSUES:

Did Ontario's funding of Catholic schools, which is mandated by the constitution, but not other religious independent schools, violate section 2(a) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Decision (Lamer, La Forest, Gonthier, Cory, and Iacobucci):
The appellants, given that they cannot bring themselves within the terms of the Catholic constitutional guarantees, have no claim to public funding for their schools. To decide otherwise by accepting the appellants' claim that s. 2(a) requires public funding of their dissentient religion-based schools would be to hold one section of the Constitution violative of another.
Minority Concurring Opinion (Sopinka and Major):
The Act allows for the provision of education within a religious school or at home and does not compel the appellants to act in any way that infringes their freedom of religion. The distinction made between the Roman Catholic schools and other religious schools is constitutionally mandated and cannot be the subject of a *Charter* attack. Not providing funding for private religious education does not infringe the freedom to educate children in accordance with religious beliefs where there is no restriction on religious schooling.
Dissent (McLachlin, L'Heureux-Dubé):
The s. 2(a) *Charter* guarantee of freedom of religion was not infringed. The requirement of mandatory education does not conflict with the constitutional right of parents to educate their children as their religion dictates.
Section 93 of the *Constitution Act, 1867* is not a code ousting the operation of the *Charter* and was not intended to do more than guarantee school support for the Roman Catholic or Protestant minorities in Ontario and Quebec respectively. Provinces exercising their plenary powers to provide education services must, subject to this restriction, comply with the *Charter*.

[Reason for exclusion: The "challenger" is this case sought to establish that s. 2(a) includes a positive right to have government financially facilitate the practice of their religion. In cases where the court refuses to recognize a positive right (a claim on government, taxpayers, or other people), a "pro-government" ruling has an entirely different impact on fundamental freedoms than a "pro-government" ruling that restricts an individual's right to exercise, live and practice fundamental freedoms.]

Reference re Same-Sex Marriage, [2004] 3 SCR 698

Court: McLachlin, Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron
Result: Reference Case*
Decision: 9-0 Unanimous
FACTS:
The government of Canada asked the Supreme Court four questions in relation to the constitutionality of legalizing same-sex marriage.

ISSUE:
Does freedom of religion guaranteed by section 2(*a*) of the *Charter* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
DECISION:
Absent unique circumstances, the guarantee of religious freedom in section 2(a) of the *Charter* is broad enough to protect religious officials from being compelled by the state to perform civil or religious same-sex marriages that are contrary to their religious beliefs.

[Reason for exclusion: This case would be difficult to categorize as either pro-challenger or pro-

government.]

Syndicat Northcrest v Amselem, [2004] 2 SCR 551

Court: McLachlin, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps, Fish
Result: Pro-Challenger
Majority: Pro-Challenger
Dissent: Anti-Challenger*
Decision: 5-3-1 Majority Judgment, Dissenting Opinions
Majority: McLachlin, Iacobucci, Major, Arbour, Fish
Dissent: Bastarache, Binnie, LeBel, Deschamps

FACTS:
Mr. Amselem and other Orthodox Jews were divided co-owners of units in a building in Montreal and had set up religious "succahs" (huts) on their balconies, as part of practicing their religion. The succahs violated the condominium by-laws. They refused to remove their succahs when requested.
ISSUE:
Did the condominium by-laws, which prohibited decorations or constructions on one's balcony, infringe section 3 of the *Quebec Charter*? If yes, was this violation justified under section 9.1 of the *Quebec Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (McLachlin, Iacobucci, Major, Arbour, Fish):
Freedom of religion is triggered when a claimant demonstrates that he or she sincerely believes in a practice or belief that has a nexus with religion. Even if the claimant successfully demonstrates non-trivial interference, religious conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular *Charter* right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises. The by-laws in the declaration of co-ownership violate section 3 of the *Quebec Charter*. The by-laws infringed on the sincere and deeply held religious beliefs of Mr. Amselem and were disproportionate to the concerns over the succahs.
Dissent (Bastarache, LeBel, Deschamps):
Since a religion is a system of beliefs and practices based on certain religious precepts, a nexus between the believer's personal beliefs and the precepts of his or her religion must be established. In the case at bar, the prohibition against erecting their own succahs does not infringe the appellants' right to freedom of religion. It must be borne in mind that the erection, as proposed by the respondent, of a communal succah would have had the desired result of upholding not only the parties' contractual rights, but also of the rights guaranteed of the co-owners. Such a solution would be consistent with the principle that freedom of religion must be exercised within reasonable limits and with respect for the rights of others.
Dissent (Binnie):
The private contract that was voluntarily entered into by Mr. Amselem and others must be given proper consideration. Mr. Amselem cannot insist on his preferred solution to this issue at the loss of the legal rights of co-owners. As such, the compromise of "communal" succahs offered to Mr. Amselem and the other parties was not unreasonable, nor did it violate their religious duties.

[Reason for exclusion: This case was decided under the Quebec Charter, not the *Canadian Charter of Rights and Freedoms*, and features two private parties, without government involvement. Therefore the "challenger v. government" framework cannot be applied.]

R. v. S. (N.), [2012] 3 SCR 726

Court: McLachlin, LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell

Result: **Unclear**
Decision: 4-2-1 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: McLachlin, Deschamps, Fish, Cromwell
Minority: LeBel, Rothstein
Dissent: Abella

FACTS:
The two accused were charged with sexually assaulting N.S. She was called by the Crown as a witness. N.S., who is Muslim, indicated that for religious reasons she wished to testify wearing her niqab, which covers all of her face except for a slit over the eyes. The presiding judge found that her religious belief regarding the niqab was "not that strong" and ordered her to remove her niqab.
ISSUE:
When, if ever, can a witness who wears a niqab for religious reasons be required to remove it while testifying? Two sets of *Charter* rights are potentially engaged: the witness's freedom of religion and the accused's right to a fair trial, including the right to make full answer and defence (which can depend on the ability to observe the face of the witnesses).
DECISION:
Majority Judgment (McLachlin, Deschamps, Fish, Cromwell):
An extreme approach that would always require the witness to remove her niqab while testifying, or one that would never do so, is untenable. The answer lies in a just and proportionate balance between freedom of religion and the other *Charter* right(s) that are at issue. Reconciliation of the conflicting rights through accommodation of both rights must first be attempted. If no compromise can be found, then it must be determined if the benefits of infringing religious freedom outweigh the negative impact. The fundamental premise underlying the *Charter* is that rights should be limited only to the extent that the limits are shown to be justifiable. The need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law.
Minority Concurring Opinion (LeBel, Rothstein):
This case is not purely one of conflict and reconciliation between a religious right and the protection of the right of the accused to make full answer and defence, but engages basic values of the Canadian criminal justice system. The *Charter* protects freedom of religion in express words at section 2(a). But fundamental too are the rights of the accused to a fair trial. Wearing the niqab is incompatible with the rights of the accused, the nature of the Canadian public adversarial trials, and with the constitutional values of openness and religious neutrality in contemporary democratic, but diverse, Canada. A clear rule that niqabs may not be worn at any stage of the criminal trial would be consistent with the principle of public openness of the trial process.
Dissent (Abella):
The harmful effects of requiring a witness to remove her niqab is a significantly more harmful consequence than the accused not being able to see a witness's whole face. The niqab has no effect on the witness's verbal testimony, including the tone and inflection of her voice, the cadence of her speech, or, most significantly, the substance of the answers she gives. A witness who is not permitted to wear her niqab while testifying is prevented from being able to act in accordance with her religious beliefs. This has the effect of forcing her to choose between her religious beliefs and her ability to participate in the justice system.

[Reason for exclusion: This case involves two competing individual liberties protected under the *Charter*, freedom of religion and the right to a fair trial. Therefore the "challenger v. government" framework cannot be applied.]

Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26

Court: McLachlin, Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown, Rowe
Result: N/A
Decision: 9-0 Unanimous Decision

FACTS:
In 2014, the Judicial Committee of the Highwood Congregation of Jehovah's Witnesses disfellowshipped the Respondent, Randy Wall, after he admitted that he had engaged in sinful behaviour and was considered to be insufficiently repentant. The Judicial Committee's decision was confirmed by an Appeal Committee. Mr. Wall brought an originating application for judicial review of the decision to disfellowship him.
ISSUE:
When, if ever, do courts have jurisdiction to review the decisions of religious organizations when there are concerns about procedural fairness?
DECISION:
Judicial review is limited to public decision makers, which the Judicial Committee is not. The Congregation in no way is exercising state authority. Courts will consider only those issues that are justiciable. The ecclesiastical issues raised by Wall are not justiciable. The courts have neither legitimacy nor institutional capacity to deal with contentious matters of religious doctrine.

[Reason for exclusion: This case would be difficult to categorize as either pro-challenger or pro-government since the government was not a party.]

SECTION 2(B) FREEDOM OF EXPRESSION

RWDSU v. Dolphin Delivery Ltd., [1986] 2 SCR 573

Court: Dickson, Beetz, Estey, McIntyre, Chouinard, Wilson, Le Dain
Result: Neither Pro-Challenger nor Pro-Government – This was a private civil action
Decision: 5-1-1 Majority Judgment, Two Minority Concurring Opinions
Majority: Dickson, Estey, McIntyre, Chouinard, Le Dain
Minority: Beetz, Wilson

FACTS:
The Retail, Wholesale, and Department Store Union ("RWDSU"), in the midst of a labour dispute, tried to have Dolphin Delivery Ltd. declared an ally in the labour dispute. This would have allowed RWDSU to picket Dolphin Delivery. Dolphin Delivery successfully applied and received an injunction against any secondary picketing, which was challenged by RWDSU for violating their *Charter* rights.
ISSUE:
Did the injunction, which prevented secondary picketing from occurring, violate section 2(b) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgement (Dickson, Estey, McIntyre, Chouinard, Le Dain):
All picketing involves some form of expression and enjoys *Charter* protection unless some action on the part of the picketers alters its nature and removes it from *Charter* protection. The *Charter*

did not apply to the case at bar. This litigation was between purely private parties and did not involve any exercise of or reliance on governmental action which would invoke the *Charter*. The application for the injunction was supported in this Court solely on the basis of the common law tort of inducing a breach of contract. Had the *Charter* applied, s. 1 would have been effective to justify the granting of the injunction.

Minority Concurring Opinion (Beetz):

The picketing enjoined here would not have been a form of expression and consequently no question of infringement of s. 2(b) of the *Charter* could arise.

[Reason for exclusion: The determinative issue was the application of the *Charter*. Neither the majority nor the minority could be classified as "pro-government" or as "pro-challenger".]

R. v Butler, [1992] 1 SCR 452

Court: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci

Result: Pro-Government

Decision: 7-2 Majority Judgment, Minority Concurring Opinion

Majority: Lamer, La Forest, Sopinka, Cory, McLachlin, Stevenson, Iacobucci

Minority: L'Heureux-Dubé, Gonthier

FACTS:

Mr. Butler ran a shop that sold and rented various forms of sexual paraphernalia, including video tapes, magazines, and other items. Mr. Butler was charged under section 163(8) of the *Criminal Code* which states that "any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of… crime, horror, cruelty and violence, shall be deemed to be obscene".

ISSUE:

Does section 2(b) protect obscene materials? If not, was the prohibition against possession of obscene materials for the purposes of distribution or sale justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (Lamer, La Forest, Sopinka, Cory, McLachlin, Stevenson, Iacobucci):

Section 163 of the *Code* seeks to prohibit certain types of expressive activity and thereby infringes section 2 (b) of the *Charter*. Activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed. The infringement is justifiable under section 1 of the *Charter*. Section 163 of the *Code* minimally impairs freedom of expression. It does not proscribe sexually explicit erotica without violence that is not degrading or dehumanizing, but is designed to catch material that creates a risk of harm to society. Further, it is only the public distribution and exhibition of obscene materials which is in issue here.

Minority Concurring Opinion (L'Heureux-Dubé, Gonthier):

The subject matter of section 163 of the *Code*, obscene materials, comprises the dual elements of representation and content, and it is the combination of the two that attracts criminal liability. Explicit sex that is neither violent nor degrading or dehumanizing may also come within the definition of obscene in section 163(8). While the actual audience to which the materials are presented is not relevant, the manner of representation can greatly contribute to the deformation of sexuality, through the loss of its humanity, and make it socially harmful. Section 163 of the Code is aimed at preventing harm to society, a moral objective that is valid under section 1 of the *Charter*.

[Reason for exclusion: In *Butler*, as in *Sharpe*, the focus is on determining what level of harm is required before a limitation on either the possession or distribution of a particular type of pornography is justified. These cases contribute little to the purposes of this paper.]

New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 SCR 319

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson, Iacobucci

Result: Majority/Minority: Pro-Government
Dissent: Pro-Challenger

Decision: 7-1-1 Majority Judgment*, Minority Concurring Opinion, Dissent
Majority*: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, McLachlin, Stevenson, Iacobucci
Minority: Sopinka
Dissent: Cory

FACTS:

The New Brunswick Broadcasting Co. ("NBBC") applied to be granted the rights to record and broadcast the Nova Scotia House of Assembly proceedings. The House of Assembly, citing parliamentary privilege, prohibited the use of television cameras in the House in order to preserve the decorum and order in their proceedings.

ISSUE:

Does the *Charter* apply to the exercise of parliamentary privilege? If so, does the prohibition on the use of recording cameras by the press within the House of Assembly violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

*Justices L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Lamer, and La Forest, representing the Majority and two of the minority concurring opinions, found that the *Charter* did not apply to the exercise of parliamentary privilege because such action does not constitute "government" as required by section 32 of the *Charter* for the *Charter* to apply.

Minority Concurring Opinion (Sopinka):

The impugned rule or practice of the legislative assembly is not immune from *Charter* scrutiny. But, assuming that the restriction complained of constitutes a violation of section 2(b), it is justifiable under section 1 of the *Charter*. It is a pressing and substantial objective to maintain order and decorum and ensure the smooth functioning of the legislative assembly. Given the importance of preserving the decorum of the House of Assembly, the alleged intrusion on the freedom of the press is not out of proportion to this objective.

Dissent (Cory):

The ban on television cameras is an exercise of privilege by the legislative assembly subject to the *Charter* scrutiny. The Assembly cannot exclude television entirely by means of regulation without infringing section 2(b). A balance must be kept between efficient and dignified operation of the legislative assembly and the right of freedom of expression. The refusal to permit any television cameras contravenes section 2(b) of the *Charter* and cannot be justified under section 1.

[Reason for exclusion: The determinative issue in this case was whether or not the *Charter* applies to the situation in the first place. The Court provided no ruling in respect of a *Charter* section 2 fundamental freedom, and the "challenger v. government" framework does not apply.]

Native Women's Assn. of Canada v. Canada, [1994] 3 SCR 627

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major

Result: Pro-Government

Decision: 7-1-1 Majority Judgment, Minority Concurring Opinions
Majority: Lamer, La Forest, Sopinka, Gonthier, Cory, Iacobucci, Major
Minority: McLachlin, L'Heureux Dubé

FACTS:
During the lead up to the Charlottetown Accord, a constitutional proposal, consultation took place between the federal government and members of the Aboriginal community in Canada. Funding was provided to four national Aboriginal organizations, but the Native Woman's Association of Canada ("NWAC") did not receive any direct funds from this. Instead, they received some funding through two of the four groups that received funds and later received more funding directly from the federal government. Meetings occurred with the government and four national Aboriginal organizations, but the NWAC was not included. NWAC was concerned that the views of Aboriginal women would not be properly represented by the male-dominated Aboriginal organizations that were involved in the consultation, so the NWAC filed a challenge in a Federal Court and argued that being deprived from receiving equal funding and access to the constitutional review process violated their section 2(b) rights.

ISSUE:
Did the federal government's refusal to include NWAC in the consultation process and provide equal funding to them violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:
*McLachlin found that the *Charter* did not apply to the choice by government of which advisors they would fund.

Majority Judgment (Lamer, La Forest, Sopinka, Gonthier, Cory, Iacobucci, Major):
The federal government's decision not to provide equal funding and participation in the constitutional discussions to NWAC did not violate their rights under sections 2(b) and 28 of the *Charter*, since section 2(b) does not generally guarantee any particular means of expression or place a positive obligation upon the government to fund or consult anyone.

Minority Concurring Opinion (L'Heureux-Dubé):
While section 2(b) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion. No evidence was brought forward to establish that the government owed positive obligations to NWAC or violated section 2(b).

[Reason for exclusion: As with the *Adler v. Ontario* case, *supra*, the "challenger" is this case sought to establish that the *Charter* provides for a positive right to have government financially facilitate or assist a party in exercising a fundamental freedom. In cases where the court refuses to recognize this kind of positive right (a claim on government, taxpayers, or other people), a "pro- government" ruling has an entirely different impact on fundamental freedoms than a "pro- government" ruling that restricts an individual's right to exercise, live and practice fundamental freedoms. Therefore, the "challenger v. government" framework used in this study does not apply to this case.]

Dagenais v Canadian Broadcasting Corporation, [1994] 3 SCR 835

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Pro-Challenger
Decision: 6-1-2 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Lamer, Sopinka, Cory, Iacobucci, Major, La Forest*
Minority: McLachlin

Dissent: Gonthier, L'Heureux Dubé

FACTS:

After members of a Catholic religious order were arrested and charged with sexual assault, the Canadian Broadcasting Corporation ("CBC") produced and was set to broadcast a fictional mini-series about the sexual abuse of boys in a Catholic institution in Newfoundland. An injunction was sought to prohibit the broadcast.

ISSUE:

Did the publication ban violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

*La Forest dissented in part on a different issue, but agreed with the majority on the freedom of the press issue.

Majority Judgment (Lamer, Sopinka, Cory, Iacobucci, Major, La Forest):

When two protected rights come into conflict, *Charter* principles require a balance to be achieved that fully respects the importance of both rights. The party claiming that a publication ban is necessary to avoid a real and serious risk to the fairness of the trial bears the burden of justifying the limitation on freedom of expression. The publication ban in this case cannot be upheld. While the ban was clearly directed toward preventing a real and substantial risk to the fairness of the trial of the four respondents, the initial ban was far too broad. It prohibited broadcast throughout Canada and even banned reporting on the ban itself.

Minority Concurring Opinion (McLachlin):

The right to broadcast a fictional cinematic work falls squarely within the ambit of section 2(b) of the *Charter* and the limits on freedom of expression imposed by the ban must be justified under section 1.

It is not a question of deciding where the balance should be struck between a fair trial and freedom of expression. The right to a fair trial is fundamental and cannot be sacrificed. What is required is that the risk of an unfair trial be evaluated after taking full account of the general importance of the free dissemination of ideas and after considering measures which might offset or avoid the feared prejudice.

Dissent in part (Gonthier, L'Heureux Dubé):

Publication bans can be ordered to protect the fairness of a pending or current trial. The fact such bans restrict freedom of expression and freedom of the press means that they should be imposed only in exceptional cases. While the ban temporarily denied the appellants their freedom of expression, this impairment was very minor. However, the ban is not justified as it was overbroad; the ban should have been limited to the geographical borders of Ontario.

[Similar to *R v S.N.*, this case involves two competing individual liberties protected under the *Charter*, freedom of expression and the right to a fair trial. Therefore the "challenger v. government" framework does not apply.]

Ruffo v Conseil de la Magistrature, [1995] 4 SCR 267

Court: La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci

Result:

Decision: 6-1 Majority Judgment, Dissent

Majority: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci

Dissent: Sopinka

FACTS:

Ms. Ruffo was a judge of the Court of Quebec, Youth Division. As a result of her many public statements about resources provided to children, a complaint was brought against Ms. Ruffo,

alleging that she breached the *Judicial Code of Ethics*. The Conseil de la Magistrature ("Conseil") directed a member to examine the complaint, who recommended that the Conseil hold an inquiry to further investigate the complaint. The subsequent inquiry found that Ms. Ruffo had breached the *Judicial Code of Ethics*. Ms. Ruffo continued to her public activities and statements despite being reprimanded for them. The Chief Judge of the Court of Quebec then filed his own complaints against Ms. Ruffo, leading to further inquiries being made into Ms. Ruffo's conduct. Ms. Ruffo filed a motion in evocation with the Superior Court, which she lost. In her appeal to this court, Ms. Ruffo argued, in addition to her previous arguments made before the lower courts, that section 8 of the *Judicial Code of Ethics* violated her section 2(b) rights.
ISSUE:
Did section 8 of the *Judicial Code of Ethics*, which stated that judges should act in a reserved manner, violate section 2(b) of the *Charter*? If yes, was this violation justified as a reasonable limit on a *Charter* freedom?
DECISION:
Majority Decision: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, and Iacobucci
Since the Conseil did not have the opportunity to rule on whether section 8 of the *Judicial Code of Ethics* had violated section 2(b) of the *Charter*, nor had the lower court decisions brought forward any evidence to this issue, it was premature for the Court to rule on this matter. However, the duty to act in a reserved manner, within the context of professional standards, was a precise enough standard to not violate the *Charter* on the grounds of being too vague.
Minority Concurring/Dissenting Decision: Sopinka
Concurred with the Majority on the constitutional issue for the reasons he provided.
It was premature for the Court to rule on this issue, however section 8 of the *Judicial Code of Ethics* is not unconstitutional due to vagueness. It is preferable to know how the Conseil would interpret section 8 before determining whether it violates section 2 of the *Charter.*

[Reason for exclusion: There is almost no discussion of the relevant section 2 issue, and the case was decided on other issues.]

Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 3

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Pro-Government
Decision: 9-0 Unanimous Judgment
FACTS:
Mr. Suresh was a refugee from Sri Lanka, suspected by Canadian Security Intelligence Service (CSIS) of being a fundraiser for the Liberation Tigers of Tamil Eelam, a terrorist organization. After he had applied for landed immigrant status, the government proceeded with deportation proceedings because of his involvement with the terrorist group. Mr. Suresh challenged his deportation, alleging among other things that the *Immigration Act* infringed sections 2(b) and 2(d) of the *Charter.*
ISSUE:
Did Suresh's deportation order, resulting from a provision of the *Immigration Act* that prohibited members of terrorist organizations violate sections 2(b) or 2(d) of the *Charter*?
DECISION:
The *Charter* does not protect terrorist activities. Section 2(b) and 2(d) does not protect conduct or expression taking the form of violence or terror, or directed towards violence or terror Therefore, Mr. Suresh being deported for being a member of a terrorist organization did not violate the *Charter*.

[Reason for exclusion: This case merely reaffirms the principle that violent expression, or violence as a means of expression, is not protected by *Charter* section 2(b).]

Hill v Church of Scientology of Toronto, [1995] 2 SCR 1130

Court: La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major
Result: Unclear
Decision: 6-1 Majority Judgment, Minority Concurring Opinion*
Majority: La Forest, Gonthier, Cory, McLachlin, Iacobucci, Major
Minority: L'Heureux-Dubé*

FACTS:
The Church of Scientology brought contempt proceedings against Mr. Hill, a Crown attorney. Mr. Manning, Counsel for the Church, read from the notice of motion at a press conference on the courthouse steps and commented on the allegations contained in them. The allegations contained in the notice of motion were later found to be untrue. Mr. Hill then sued for libel.
ISSUE:
Does the current common law action of defamation violate section 2(b) of the *Charter*?
DECISION:
*Justice L'Heureux-Dubé agreed with the majority in its analysis regarding freedom of expression
Majority Judgment (Cory, La Forest, Gonthier, McLachlin, Iacobucci, Major):
The common law must be interpreted in a manner which is consistent with *Charter* principles. In its application to the parties in this action, the common law of defamation complies with the underlying values of the *Charter* and there is no need to amend or alter it. The common law strikes an appropriate balance between the twin values of reputation and freedom of expression. The protection of reputation is of vital importance, and consideration must be given to the particular significance reputation has for a lawyer. Although it is not specifically mentioned in the *Charter*, the good reputation of the individual represents and reflects the innate dignity of the individual, a concept which underlies all the *Charter* rights. Further, reputation is intimately related to the right to privacy, which has been accorded constitutional protection. The law of defamation is not unduly restrictive or inhibiting. Freedom of speech, like any other freedom, is subject to the law and must be balanced against the essential need of individuals to protect their reputation.

[Reason for exclusion: This is a private civil action that does not involve the government. As such the case would be difficult to classify as "pro-challenger" or "pro-government."]

Delisle v Canada (Deputy Attorney General), [1999] 2 SCR 989

Court: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache,
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 5-2 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Gonthier, McLachlin, Major, and Bastarache, L'Heureux-Dubé
Dissent: Cory and Iacobucci

FACTS:
The *Public Service Staff Relations Act* ("*PSSRA*") excluded RCMP members from its definition of "employee." The *Canada Labour Code* did not apply to employees of the federal government. Mr. Delisle brought a motion to ask the Court that the definition of employee in the *PSSRA* and the *Canada Labour Code* be held to be of no force or effect because they violated section 2(b) of the *Charter*.
ISSUE:

Did the provisions of the *PSSRA* and the *Canada Labour Code* violate section 2(b) or section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Having found a violation of s. 2(d), Justices Cory and Iacobucci for the Dissent did not rule on the issue of s. 2(b)
Majority Judgment (Gonthier, McLachlin, Major, Bastarache, L'Heureux-Dubé):
The exclusion of RCMP members from the *PSSRA* does not infringe the freedom of expression guaranteed by s. 2(b) of the *Charter.* Except in exceptional circumstances, freedom of expression imposes only an obligation that Parliament not interfere, and the exclusion of RCMP members from the *PSSRA* regime therefore cannot violate it. This is not one of those exceptional cases where the government has a positive obligation to act in order to give true meaning to freedom of expression.

[Reason for exclusion: This case is another example of a challenge that seeks to impose an obligation on government to provide something, rather than a claim for government to respect the right to exercise or practice the fundamental freedoms. A "pro-government" ruling in this case has an entirely different significance for, and impact on, Canada as a free society, compared to a "pro-government" ruling in one of the cases included in this study. An additional reason to exclude this case is the fact that only the majority ruled on the section 2(b) issue.]

R v Sharpe, [2001] 1 SCR 45

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Pro-Government
Decision: 6-3 Majority Judgment, Minority Concurring Opinion
Majority: McLachlin, Iacobucci, Major, Binnie, Arbour, LeBel
Minority: L'Heureux-Dubé, Gonthier, Bastarache

FACTS:
Mr. Sharpe was charged with possession of child pornography, and possession for the purpose of distribution or sale. Canada Customs officials initially seized computer discs entitled "Sam Paloc's Boyabuse - Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics." The second seizure took place at Mr. Sharpe's home, with the police finding "a collection of books, manuscripts, stories and photographs" that the Crown asserted were child pornography.
ISSUE:
Did the *Criminal Code* provision prohibiting the possession of child pornography violate section 2(b) of the *Charter*? If yes, was this violation justified under section 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (McLachlin, Iacobucci, Major, Binnie, Arbour, LeBel):
The possession of child pornography is a form of expression protected by section 2(b) of the *Charter*. The right to possess expressive material is integrally related to the development of thought, opinion, belief and expression as it allows us to understand the thought of others or consolidate our own thought. The prohibition against possessing child pornography is justified under section 1 of the *Charter* because child pornography promotes harms such cognitive distortions, fantasies that incite offenders, the grooming and seduction of victims; and the abuse of children in the production of child pornography. However, a ban on visual representations or visual recordings that do not depict unlawful sexual activity and are used exclusively for personal purposes is not justified and the relevant provisions can be only be upheld if this material is excluded from

the ban.

Minority Opinion (L'Heureux-Dubé, Gonthier, Bastarache):

Individual freedoms such as expression are not absolute and may be limited in consideration of a broader spectrum of rights, including equality and security of the person. Child pornography, as defined in the *Criminal Code*, is inherently harmful to children and to society. This harm exists independently of dissemination or any risk of dissemination and flows from the existence of the pornographic representations, which on their own violate the dignity and equality rights of children. Expression that degrades or dehumanizes is harmful in and of itself as all members of society suffer when harmful attitudes are reinforced. As a form of expression, child pornography warrants less protection since it is low value expression that is far removed from the core values underlying the protection of freedom of expression. The prohibition of the possession of child pornography that also captures visual and written works of the imagination which do not involve the participation of any actual children or youth in their production constitutes a reasonable and justified limit upon freedom of expression because harm results from the very existence of images and words which degrade and dehumanize children.

[Reason for exclusion: Similar to the *Butler* case, this case is about determining the demarcation between what types of pornography are protected by freedom of expression and what types are not. In *Sharpe*, as in *Butler*, the focus is on determining what level of harm is required before a limitation on either the possession or distribution of a particular type of pornography is justified. These cases contribute little to the purposes of the paper.]

R. v Khawaja, [2012] 3 SCR 555

Court: McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell, Karakatsanis
Result: Pro-Government
Decision: 7-0 Unanimous Judgment

FACTS:

Mr. Khawaja communicated with two individuals who were later convicted of a variety of terrorist-related charges. In his communications, Mr. Khawaja repeatedly offered support through a variety of ways, such as monetary support and recruitment of volunteers. Mr. Khawaja was charged with multiple offences under the terrorism section of the *Criminal Code*. Mr. Khawaja challenged some of the provisions he was charged under, specifically the "motive clause" which states that a terrorist activity is one that is committed in whole or in part "for a political, religious, or ideological purpose, objective, or cause." Mr. Khawaja argued that the "motive clause" on its face, violated section 2(b) of the *Charter*.

ISSUE:

Does the "motive clause" of the terrorism section of the *Criminal Code* violate section 2(b) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

The purpose of the terrorism provisions of the *Criminal Code* does not violate section 2(b) of the *Charter*. The activities that are addressed by the provisions are expressive activities, however most of the provisions concern acts or threats of violence. Threats of violence are excluded from the scope of section 2(b), and therefore there is no violation of section 2(b).

[Reason for exclusion: Like *Suresh*, this case merely reaffirms the principle that violence is not "expression" that is protected by *Charter* section 2(b).]

R v Barabash [2015] 2 SCR 522

Court: McLachlin, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté
Result:
Decision: Unanimous 9-0 Judgment

FACTS:
Two 14-year-old females with difficult pasts engaged in explicit sexual activity with the two defendant Appellants, who were significantly older than the underage girls. The females stayed at one of the Appellant's house, which was a hub for drug use and sale. The Appellants were charged with making child pornography contrary to s. 163.1(2) of the Criminal Code, and one of the Appellants was charged with possession of child pornography.
ISSUE:
The Court was asked to clarify the "private use exception", which covers visual recordings that do not depict unlawful sexual activity, and decide whether the concept of exploitation is relevant to the analysis.
DECISION:
The SCC reiterated its prior jurisprudence from *Sharpe*, that section 163.1 of the Criminal Code violated section 2(b) of the Charter, but that this infringement was, for the most part, saved under section 1. In *Sharpe*, the SCC carved out exceptions to the absolute prohibition in section 163.1, for *inter alia*, private recordings of lawful sexual activity. This balance was achieved in light of the importance of free expression, with the mitigated risk of harm given the legal and consensual nature of the sexual activity recorded.
The Court concluded that "the test articulated in Sharpe requires a determination that the sexual activity is lawful—and thus did not arise in the context of an exploitative relationship." Since this was not considered by the trial judge, the appeals were allowed and a new trial was ordered.

[Reason for exclusion: Similar to *R v Sharpe*, this case deals with child pornography, which is a low value exercise of freedom of expression. Further, and unlike *Sharpe*, freedom of expression is extremely marginal to this case. Rather this case is mainly concerned with legal defences in the criminal law.]

Morasse v Nadeau-Dubois [2016] 2 SCR 232

Court: McLachlin, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown
Result: Majority/Concurring:
Dissent:
Decision: 5-1-3 Majority Judgment, Concurring, Dissent
Majority: Abella, Gascon, McLachlin, Cromwell, Karakatsanis
Concurring: Moldaver
Dissent: Wagner, Côté, Brown

FACTS:
The Respondent, Nadeau-Dubois, was the spokesperson for a student group at Université Laval, which was involved with protests and strikes concerning proposed Quebec university tuition hikes. Picket lines were formed at several universities and CEGEPs in Quebec, preventing professors and student from entering. The Appellant obtained a provisional interlocutory injunction which provided for free access to the university building for the visual arts program classes, and ordered all persons to refrain from obstructing access, including through intimidation.

In an interview with RDI (CBC's French television news network), Nadeau-Dubois reaffirmed the importance of picket lines as a method of enforcing the vote to strike. The Appellant filed a motion

for contempt of court for these statements made by Nadeau-Dubois, and the latter was found guilty. The Court of Appeal set the conviction aside and entered an acquittal.
ISSUE:
"Whether a contempt charge brought by a private citizen against another individual, meets the strict procedural and substantive safeguards require by law to ensure that the liberty interests of those accused of contempt are fully protected."
DECISION:
Majority Judgment (Abella, Gascon, McLachlin, Cromwell, Karakatsanis)

The majority upheld the decision of the Quebec Court of Appeal, in finding the evidence could not support the claim that Nadeau-Dubois was aware of the existence of the Court order not to obstruct access to class and that in any event, the words used by Nadeau-Dubois in the interview were ambiguous in nature. The majority upheld the appellate decision dismissing the trial finding of contempt of court. The majority quoted prior SCC jurisprudence which established that "picketing is a legitimate form of expression and of exercising freedom of assembly".
Concurring Opinion (Moldaver)

Moldaver J found that Nadeau-Dubois intended to incite students at large to breach any and all court orders. However, based on how the case was fought at trial, centred around whether Nadeau-Dubois was aware of the specific order, Moldaver J found that there was no contempt of court.
Dissent (Wagner, Côté, Brown)

The dissenting justices noted the importance of the power to punish for contempt of court "as a last resort […] where doing so is necessary to protect the rule of law, freedom of expression and democracy". The dissenting justices found that proof of specific knowledge of the order of injunction is not required and therefore allowed the appeal.
In the dissent, a section was dedicated to freedom of expression. The dissenting justices agreed with the Court of Appeal "about the need to protect freedom of expression in all its forms to the fullest extent possible". However, the dissenting judges refused to associate "incitement to breach a court order with the legitimate exercise of freedom of expression". In fact, the dissent noted that "ensuring compliance with orders made by the courts has the effect of reinforcing the rule of law and, by extension, our fundamental freedoms, including freedom of expression".

[Reason for exclusion: Freedom of expression did not play an important role in this case. This case involved two private parties and a court order, but freedom of expression did apply under the Quebec Charter.]

Ernst v Alberta Energy Regulator [2017] 1 SCR 3

Court: McLachlin, Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown
Result: Majority/Concurring: Pro-Government
Dissent: Pro-Challenger
Decision: 4-1-4 Majority Judgment, Concurring, Dissent
Majority: Wagner, Gascon, Cromwell, Karakatsanis
Concurring: Abella
Joint Dissent: McLachlin, Côté, Brown, Moldaver

FACTS:
The Appellant, Jessica Ernst, claimed that the Alberta Energy Regulator breached her *Charter* right to freedom of expression by punishing her for publicly criticizing the Board and by restricting her communications with the Board for a period of 16 months. The Board struck the claim, which

sought, inter alia, *Charter* damages, based partly on section 43 of its enabling statute, which bars claims against the Board.
ISSUE:
Is an immunity clause that bars suits against a federal regulator constitutionally, including for *Charter* damages, inapplicable or inoperable?
DECISION:
Majority Judgment (Wagner, Gascon, Cromwell, Karakatsanis)

The majority found that the immunity clause barred the plaintiff's claim, and that in any event, *Charter* damages could never be an appropriate and just remedy for *Charter* breaches by the Board. The Court found that judicial review was an available alternative remedy to damages, and that the plaintiff had failed to prove the unconstitutionality of the immunity clause. Judicial review could have vindicated the plaintiff's right to freedom of expression.
Concurring Opinion (Abella)
The plaintiff did not seek to challenge the constitutionality of the immunity provision in question in lower courts, and the SCC should not exercise its discretion to examine it in this case. No notice of constitutional questions was served on the Attorney General of Alberta.
Dissent (McLachlin, Côté, Brown, Moldaver)
The dissenting justice would have allowed the appeal, as it was not evident that Charter damages could never be an appropriate and just remedy in a claim against a quasi-judicial decision-maker, nor was it evident that the plaintiff's claim was barred by the Board's enabling statute's immunity clause.

[Reason for exclusion] Although the challenger in this case alleged that freedom of expression was violated, the Court's decision is concerned with *Charter* remedies, and lacks any substantive analysis of freedom of expression.

Siemens v Manitoba (Attorney General), [2003] 1 SCR 6

Court: McLachlin, Gonthier, Iacobucci, Major, Bastarache, Binne, Arbour, LeBel, and Deschamps
Result: Pro-Government
Decision: 9-0 Unanimous Judgment
FACTS:
After the Town of Winkler held a non-binding plebiscite to prohibit VLTs, the Government of Manitoba enacted the *Video Lottery Terminal Act* that retroactively made Winkler's plebiscite legally binding. Mr. and Mrs. Siemens, who had not voted in the plebiscite, owned an inn which had several VLTs, challenged the constitutionality of part of the legislation as violating section 2(b) of the *Charter*, by denying them the right to vote in a plebiscite under the *VLT Act*.
ISSUE:
Did the provisions of the *VLT Act*, which retroactively made the Town of Winkler's referendum on VLTs binding, violate section 2(b) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society
DECISION:
The *Act* does not violate s. 2(b) of the *Charter* by effectively denying Mr. and Mrs. Siemens the right to vote. While voting is a protected form of expression, there is no constitutional right to vote in a referendum, as a referendum is a creation of legislation.

[Reason for exclusion: This case is deals with positive rights, namely, the right to vote in a referendum. The "challenger v. government" framework used in this paper does not apply readily or easily to this case.]

Sierra Club of Canada v Canada (Minister of Finance), [2002] 2 SCR 522

Court: McLachlin, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel,
Result: Pro-Governmnet
Decision: 7-0 Unanimous Judgment
FACTS:
Sierra Club is an environmental organization that sought judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. Sierra Club maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL applied for a confidentiality order in order to withhold technical information relating to the construction of the reactors in China and the Chinese-administered environmental assessment.
ISSUE:
Do the benefits of granting the confidentiality order in this case outweigh the negative impact upon the *Charter* s. 2(b) freedom of expression?
DECISION:

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. In this case, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. In the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

[Reason for exclusion: This case involves an unusual set of circumstances, where a party is challenging the government's ability to keep confidential commercial documents confidential. There is no government restriction on the freedom of expression *per se*, and if there is, it differs significantly from the "challenger v. government" framework used for cases included in the study.]

SECTION 2(D): FREEDOM OF ASSOCIATION

Black v Law Society of Alberta, [1989] 1 SCR 591

Court: Dickson, Wilson, La Forest, McIntyre, L'Heureux-Dubé
Result: Pro-Challenger
Decision: 3-2 Majority Judgment, Dissent
Majority: Dickson, Wilson, La Forest
Dissent: McIntyre, L'Heureux-Dubé
FACTS:
Mr. Black and his associates attempted to establish an interprovincial law firm by establishing a Calgary firm, comprised solely of lawyers that were members of the Law Society of Alberta. All of the partners in the firm were also members of a Toronto firm; some of the members lived in

Calgary and some in Toronto. The Law Society of Alberta created two rules in response: one which prohibited lawyers who reside and practise in Alberta from becoming partners with any lawyer who was not an active member of the Law Society of Alberta or who did not normally reside in Alberta. The second rule prohibited Albertan lawyers from being partners in more than one law firm.
ISSUE:
Did the Law Society of Alberta's rules, which prohibited lawyers from being partners at more than one firm and from being partners with lawyers who did not reside or practice in Alberta, violate section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Dickson, Wilson, and La Forest):
The Law Society of Alberta's rules unjustifiably violated section 6 of the *Charter*; whether or not they violated section 2(d) need not be answered.
Dissent (McIntyre, L'Heureux-Dubé):

Section 6 was not engaged, but rather section 2(d). Both rules violated section 2(d) of the *Charter*, however the rule which prevented lawyers from being partners at more than one firm, was justified due to the important objective of maintaining an ethics in the practice of law.

[Reason for exclusion: The majority's ruling did not focus on the application of a *Charter* fundamental freedom in a manner compatible with the "challenger v. government" framework that applies to the cases included in this study. While freedom of association was references, the majority decided the case on a different issue.]

Delisle v Canada (Deputy Attorney General), [1999] 2 SCR 989

Court: L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache,
Result: Majority: Pro-Government
Dissent: Pro-Challenger
Decision: 5-2 Majority Judgment, Minority Concurring Opinion, Dissent
Majority: Gonthier, McLachlin, Major, and Bastarache, L'Heureux-Dubé
Dissent: Cory and Iacobucci
FACTS:
The *Public Service Staff Relations Act* ("*PSSRA*") excluded RCMP members from its definition of "employee." The *Canada Labour Code* did not apply to employees of the federal government. Mr. Delisle brought a motion to ask the Court that the definition of employee in the *PSSRA* and the *Canada Labour Code* be held to be of no force or effect because they violated sections 2(b) and 2(d) the *Charter*.
ISSUE:
Did the provisions of the *PSSRA* and the *Canada Labour Code* violate section 2(b) or section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
Majority Judgment (Gonthier, McLachlin, Major, Bastarache, L'Heureux-Dubé):
The freedom of association guaranteed by s. 2(d) of the *Charter* does not include the right to establish a particular type of association defined in a particular statute. Only the establishment of an independent employee association and the exercise in association of the lawful rights of its members are protected under s. 2(d). Respect for freedom of association therefore does not require in this case that the appellant be included in either the regime of the PSSRA, or any other regime, since s. 2(d) protects RCMP members against interference by management intended to discourage the establishment of an employee association. There is no general obligation for the government

to provide a particular legislative framework for its employees to exercise their collective rights.
Dissent (Cory, Iacobucci):
The issue is whether the legislation interferes with the basic freedom of employees to associate informally in pursuance of their mutual interests as employees. Section 2(d) of the *Charter* protects this freedom. The freedom to associate is of fundamental importance in a democratic society. A statute whose purpose or effect is to interfere with the formation of employee associations will infringe s. 2(d) of the *Charter*.

[Reason for exclusion: Similar to the *Dunmore* case, below, this case is about whether 2(d) gives associations the ability to force the government to extend legislative benefits given to certain other types of associations listed in the relevant legislation. It is an attempt to impose a positive right on the government, instead of defending a negative right for government to refrain from interfering with the citizen's practice and exercise of fundamental freedoms.]

Canadian Egg Marketing Agency v Richardson, [1998] 3 SCR 157

Court: Lamer, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin*, Iacobucci, Major*
Result: Pro-Government
Decision: 7-2 Majority Judgment, Dissent
Majority: Lamer, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache, Binnie

FACTS:
Federal regulations that governed the interprovincial trade of eggs did not include any of the Territories, making it illegal for any eggs produced in the Territories to be exported or marketed interprovincially. In 1992, the Canadian Egg Marketing Agency sued Mr. Richardson over the illegal interprovincial marketing of eggs.
ISSUE:
Did the federal regulations, which prevented anyone in the Territories from marketing eggs, violate section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?
DECISION:
*Justices McLachlin and Major did not rule in regard to section 2(d). They dissented from the majority on another issue, which was dispositive of the case.
Majority Judgment (Lamer, L'Heureux-Dubé, Gonthier, Cory, Iacobucci, Bastarache, Binnie):
Section 2(d) was not violated because section 2(d) only protects group aspects of activities, but does not explicitly protect activities themselves. Just because an activity is core to an association, does not mean that the activity therefore enjoys *Charter* protection.

[Reason for exclusion: This is another case where the relevant section 2 issue was not decided upon by the whole court, and the case was decided on a different issue.]

Dunmore v Ontario (Attorney General), [2001] 3 SCR 1016

Court: McLachlin, L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel
Result: Majority: Pro-Challenger
Dissent: Pro-Government
Decision: 8-1 Majority Judgment, Dissent
Majority: McLachlin, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel, L'Heureux-Dubé

Dissent: Major

FACTS:

In 1994, the Province of Ontario passed the *Agricultural Labour Relations Act* ("ALRA"), which extended trade union and collective bargaining rights to agricultural workers. The following year, the legislature repealed the ALRA, which had the effect of terminating any certification rights of trade unions and certified collective agreements, and excluding agricultural workers from the labour relations regime set out in the *Labour Relations Act* ("LRA"). Mr. Dunmore and others challenged the repeal of the ALRA and their exclusion from the LRA.

ISSUE:

Did the repeal of the ALRA, which resulted in agricultural workers being excluded from the labour relations scheme set up in the LRA, violate section 2(d) of the *Charter*? If yes, was this violation justified under s. 1 of the *Charter* as a reasonable limit in a free and democratic society?

DECISION:

Majority Judgment (McLachlin, Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel, L'Heureux-Dubé):

The repeal of the ALRA violated the section 2(d) rights of agricultural workers. The violation was not justified because the government has a positive duty, in some instances, to take actions to protect the rights of unprotected groups. The repeal of the ALRA had the unconstitutional effect of making agricultural workers more vulnerable to exploitative labour practices, and thus violated section 2(d).

Dissent (Major):

Mr. Dunmore and others failed to show that their section 2(d) rights were breached and that the state was the source of their inability to exercise their fundamental right. In this situation, section 2(d) did not impose positive obligations on the government to protect or include agricultural workers in the LRA.

[Reason for exclusion: This case is conceptually problematic and would be difficult to classify as pro-government or pro-challenger given the nature of the positive right claims. This case involves an attempt to impose a positive right on the government, instead of defending a negative right for government to refrain from interfering with the citizen's practice and exercise of fundamental freedoms.]

Ontario (Attorney General) v Fraser, [2011] 2 SCR 3

Court: McLachlin, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein, Cromwell

Result: Pro-Government

Decision: 5-3-1 Majority Judgment, Minority Concurring Opinion, Dissent

Majority: McLachlin, LeBel, Binnie, Fish, Cromwell

Minority: Deschamps, Charron, Rothstein

Dissent: Abella

FACTS:

Following the Supreme Court of Canada decision in *Dunmore*, the Ontario Government enacted the *Agricultural Employees Protection Act* ("AEPA") and created a separate labour relations regime for agricultural workers. The AEPA gave agricultural workers, among other things, the right to form or join unions (without interference from employers), participate in union activities, and assemble. Mr. Fraser, on behalf of the United Food and Commercial Workers Union Canada, and others challenged the AEPA, after limited attempts to use the protections outlined in the legislation.

ISSUE:

Did the AEPA fail to protect the section 2(d) rights of Ontario agricultural workers? If yes, was

this violation justified as a reasonable limit on a *Charter* freedom?

DECISION:

*The majority and the minority concurred in finding that there is no positive right on the government to protect any particular type of collective bargaining. Justice Abella ruled that s. 2(d) should include positive rights, and ruled that those positive rights should be expanded.

Majority Judgment (McLachlin, LeBel, Binnie, Fish, Cromwell):

Section 2(d) was not violated. The Ontario government was not required to provide or protect a particular form of collective bargaining rights to agricultural workers. Section 2(d) protects the right of individuals to associate to achieve collective goals. The AEPA provided an adequate process that satisfies the constitutional requirement outlined by section 2(d) of the *Charter*.

Minority Concurring Opinion (Deschamps, Charron, Rothstein):

Health Services was decided wrongly; s. 2(d) protects the ability to associate, not the particular activities of an association. There is no positive right to a particular form of collective bargaining. Section 2(d) was not violated by the legislation.

Dissent (Abella):

The AEPA violated section 2(d) of the *Charter*. The Supreme Court of Canada's decision in *Health Services* expanded the scope of section 2(d) rights to include protection for the process of collective bargaining, and because of this the AEPA violated section 2(d) by failing to protect collective bargaining.

[Reason for exclusion: This case is conceptually problematic and would be difficult to classify as pro-government or pro-challenger given the nature of the positive right claims. This case involves an attempt to impose a positive right on the government, instead of defending a negative right for government to refrain from interfering with the citizen's practice and exercise of fundamental freedoms.]